WTO DISPUTE ANALYSIS*

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Report of the Panel

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

(WT/DS425/R)
(Circulated on 26 FEBRUARY 2013)[1]

Parties:

Complainant:	European Union
Respondent:	China
Third Parties:	Chile, India, Japan, Norway, Thailand and United States of America

Panelists:

Mr. Eduardo Pérez Motta (Chairperson), Ms. Andrea Marie Brown and Mr. Gilles LeBlanc (Member)

I. BACKGROUND

The dispute concerns China's measures imposing definitive anti-dumping duties on x-ray security inspection equipment from the European Union (EU) as promulgated in the Ministry of Commerce of the People's Republic of China (MOFCOM) Notice No. 1 (2011), including its annex. On 25 July 2011, the European Union requested consultations with China on its imposition of definitive anti-dumping duties. The matter concerned MOFCOM's January 2011 decision to impose anti-dumping duties on x-ray scanners from the EU, ranging from 33.5% to 71.8% for five years. The EU claimed that such anti-dumping duties were inconsistent with various procedural and substantive provisions of the Anti-Dumping Agreement (AD Agreement).

Anti-dumping Investigation

On 28 August 2009, the Chinese producer Nuctech Company Limited (Nuctech) filed an application for the imposition of anti-dumping measures on x-ray security inspection scanners from the EU. Subsequently, MOFCOM issued a notice of initiation of an anti-dumping investigation on 23 October 2009. MOFCOM fixed a 12-month Period of Investigation (POI) for dumping analysis starting from 1 January 2006 to 31 December 2008. (Para 2.1-2.2)

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**This issue can also be accessed online at http://wtocentre.iift.ac.in/DisputeAnalysis.asp . Queries and comments are most welcome and may be directed to disputes_cws@iift.ac.in.

Two EU exporters/producers namely, Smiths Heimann GmbH and Smiths Heimann SAS – responded to cooperate in MOFCOM's investigation along with the European Commission. However, only Smiths Heimann GmbH and the European Commission participated in MOFCOM's investigation. On 16 November 2009, MOFCOM issued a dumping questionnaire and the MOFCOM's Bureau of Industrial Injury Investigation (BIII) issued a domestic manufacturers questionnaire as well as a foreign manufacturers/exporters (injury) questionnaire. (Para 2.3-2.4)

Smiths Heimann GmbH (hereinafter Smiths) filed its responses to the dumping and injury questionnaires on 30 December 2009 and Nuctech submitted its response to the domestic manufacturers' questionnaire on 19 December 2009. No other exporter, producer or importer filed any questionnaire responses. On 9 June 2010, MOFCOM published a preliminary determination of dumping and injury. It also imposed provisional AD duties on the subject products. On 29 June 2010, Smiths submitted its comments on MOFCOM's preliminary determination and the European Commission submitted its comments on 25 June 2010. (Para 2.5-2.10)

Final Determination

On 23 January 2011, MOFCOM published its final determination of dumping and injury (final determination). The final determination imposed 33.5% anti-dumping duty on imports of x-ray scanners produced by Smiths and a residual rate 71.8% on imports of x-ray scanners from other sources in the EU. (Para 2.11)

II. LEGAL CLAIMS BEFORE THE WTO PANEL

Substantive claims under Article 3 of the AD agreement

(i) MOFCOM's *price effects analysis* is inconsistent under Articles 3.1 and 3.2 of the AD Agreement because it is not an objective examination based on positive evidence. MOFCOM did not take into account the considerable differences between the products covered by the investigation in particular between the "high-energy" (energy levels above 300 KeV) and "low-energy" (energy levels at or below 300 KeV) scanners.
(ii) MOFCOM's examination of the impact of the dumped imports on the domestic industry is not based upon "positive evidence" since it did not consider "all relevant economic factors and indices" having a bearing on the state of industry. MOFCOM did not properly evaluate the interaction between the "positive" and "negative" economic factors and indices and consider them in a proper context. Hence, MOFCOM violated Article 3.1 and 3.4 of the AD Agreement.
(iii) The price effects methodology employed by China under Article 3.2 invalidates MOFCOM's causation findings as the price effect analysis data which was inconsistent under Article 3.2 was used to find causation under Article 3.5. MOFCOM did not provide a reasoned and adequate explanation in attributing injury to the dumped imports, particularly in 2008 when the price of dumped imports was higher than that of the like domestic product. MOFCOM did not adequately consider other causes of injury in its non-attribution analysis. (Para 3.1-3.2)

Procedural claims under Article 6.5.1, 6.9 and 12.2.2 of the AD Agreement

(i) MOFCOM was required to ask Nuctech to properly summarize the confidential information concerning the two models in respect of which Nuctech alleged dumping in its imposition of anti-dumping application, which it did not. Hence, it violated Article 6.5.1 of the AD Agreement.
(ii) MOFCOM did not disclose the essential facts to the interested parties which violated Article 6.9 of the AD Agreement. The essential facts include underlying data and methodology for price effect analysis, affiliated distributor adjustment to export price, determination of dumping margins for Smiths and determination of the residual anti-dumping duty.
(iii) MOFCOM's investigation violated Article 12.2.2 of the AD Agreement because of alleged shortcomings in the content of MOFCOM's public notice of affirmative determination

providing for the imposition of determinative anti-dumping duties and reasons for the rejection of arguments by Smiths. (Para 3.1-3.2)

Enhanced third party rights

The third parties were invited to make written submissions and oral arguments to the panel. (Para 5.1)

III. KEY ISSUES AND THE PANEL FINDINGS

A. *Whether the MOFCOM's price effects findings were not based on an objective examination and violated Articles 3.1 and 3.2 of the AD Agreement?*

1. AD Agreement Articles 3.1 and 3.2- Price Effects (Injury)

The EU contended that MOFCOM's price effect analysis was not based on an objective examination of positive evidence and thus violates the Articles 3.1 and 3.2 of the AD Agreement. The EU claimed that MOFCOM's price effects methodology was flawed because it compared 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. The EU submitted that the "distorting effects" of MOFCOM's methodology were exacerbated by the fact that during the POI there were no exports of high-energy scanners from the EU to China. (Para 7.13, 7.30)

a) General approach of a panel under Article 3.1 of the AD Agreement

The panel delved on the claims by the EU after discussing the general approach by the WTO panel under Article 3.1 of the AD Agreement whereby it stated 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. The panel must test whether the explanation for the conclusions of the investigating authority is reasoned and adequate in the light of other plausible explanations.

b) Definition of 'Positive Evidence' and 'Objective Examination'

The panel considered the definition of 'positive evidence' in the WTO jurisprudence.

The panel cited *US-Hot Rolled Steel*[2] wherein the Appellate Body has held that:

The term "positive evidence" relates… to the quality of the evidence that authorities may rely upon in making a determination. The word 'positive' means…that the evidence must be of an affirmative, objective and verifiable character and that it must be credible. The Appellate Body also held that "positive evidence" refers to *evidence that is relevant and pertinent with respect to the issue being decided and that has the characteristic of being inherently reliable and trustworthy*.

The panel also referred to the Appellate Body's jurisprudence on an objective examination as conducted by an investigating authority. The Appellate Body held that an objective examination of the evidence requires that an examination conforms to the *dictates of the basic principles of good faith and fundamental fairness*. The investigation must occur in an *unbiased* and *even-handed manner and must not favor a particular interested party over another*. (Para 7.31-33)

c) MOFCOM's price effects analysis

The EU contended that MOFCOM did not request or use the domestic price data on a model-by-model basis from the Nuctech to calculate the average unit price per year of the domestic product (Nuctech's products) with that of the subject import (Smiths' imports to China) as a whole. In the

[2] 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

questionnaire, Nuctech provided that it divided the total domestic sales value of the domestic like product for each year of the POI by the quantity sold during the corresponding year. China confirmed that neither did MOFCOM know nor did it consider that the differences in energy levels were relevant for the price effects analysis under Article 3.2 of the AD Agreement and therefore it did not take such differences into account. China also clarified that MOFCOM did not take data for individual shipments during a given year of the subject product for each year 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. (Para 7.37)

China clarified to the panel that Smiths did not refer to the alleged differences between the products in the context of price effects analysis conducted by MOFCOM. Consequently, it was not an essential task for MOFCOM to make a price analysis separately for 'low-energy' and 'high-energy' scanners. The panel did not agree with China's clarification and held that it is well established that a member bringing a complaint before a WTO panel is not restricted to only those claims which were made during the domestic investigation. The panel cited *US-Lamb*[3], wherein the Appellate Body held 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.

Therefore, the panel held that the EU's claim under Article 3.1 and 3.2 of the AD Agreement is not affected by the fact that Smiths did not raise such argument during the investigation. (Para 7.39-40)

(***Key Question:*** *Whether the investigating authority should consider price comparability under price undercutting and price suppression analysis?*)

The panel considered whether the issue of price comparability has been considered under Article 3.1 and 3.2 of the AD Agreement by other panels or the Appellate Body. The panel cited Appellate Body's holding in *EC-Bed Linen* (*Article 21.5-India*[4]*)* wherein it was held that:

> Although Articles 3.1 and 3.2 of the AD Agreement do not prescribe any particular methodology for examining the price effects of dumped imports, the investigation authorities do not have unfettered discretion in this regard.

The Appellate Body held that irrespective of the methodology chosen to examine price effects, the investigating authority must conduct an objective examination of positive evidence. (Para 7.41)

The panel cited *China-GOES*[5] wherein the panel and the Appellate Body considered 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.

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[3] 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

[4] 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

[5] 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 Also see 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

The panel concluded that an investigating authority must ensure that the prices it is using for its comparison are properly comparable. The panel also held that as soon as price comparisons are made, price comparability necessarily arises as an issue. The Appellate Body in C*hina-GOES* agreed with the panel that:

> Although there is no explicit requirement in Article 3.2 to ensure price comparability…however failure to consider price comparability is inconsistent under Article 3.1…as if the subject imports and the domestic prices were not comparable, it would defeat the explanatory force that subject import prices might have for the depression or suppression of domestic prices. (Para 7.41)

The panel cited *EC-Tube or Pipe Fittings*[6] *and the EC-Fastners (China)*[7] whereby the panels in the dispute did not consider the need to transpose all the obligation of price comparability as provided under Article 2 of the AD Agreement concerning dumping into Article 3 of the AD Agreement concerning injury analysis. (Para 7.41)

d) The obligation under Article 3.2 of AD Agreement

China submitted to the panel that the obligations under Article 3.2 of the AD Agreement requires an investigating authority to only 'consider' and not to make a 'determination' as to whether there has been a significant price undercutting/price suppression by the dumped imports. (Para 7.45)

The panel in this dispute held that:

> The requirement to 'consider' price effects does not require a definitive determination regarding the existence of price undercutting, price suppression or price depression. Although, an investigating authority may be required to only 'consider' price effects, the consideration must involve an objective examination of positive evidence. The panel cited China-GOES where the Panel has stated that the word 'consider' is an obligation on the decision-maker to take something into account in reaching its decision. However, Article 3.2 does not impose an obligation on an investigating authority to make a definitive determination on the volume of such imports and its effect on domestic prices. Nonetheless such consideration is subject to the overarching principles under Article 3.1 which provides that the decision shall be based on positive evidence and involve and objective examination…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, rather than to make a final determination, does not change the subject matter that requires consideration under Article 3.2…which includes whether the effect of the subject imports is to depress prices or prevent price increases to a significant degree.[8]

The panel held that the obligation to 'consider' 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 AD Agreement. (Para 7.46)

[6] 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

[7] 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

[8] Appellate Body Report, *China- GOES*, paras 130-131

e) Price-undercutting analysis: Obligation to consider product difference

The panel considered whether in conducting price-undercutting analysis it is necessary to take into account differences in the products being compared. The panel noted that in relation to price undercutting, Article 3.2 of the AD Agreement by its very nature involves a comparison of prices, in particular the prices of dumped imports with the prices of the like domestic product. The panel cited *China-GOES*[9] wherein the Appellate Body noted that:

> An 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…establishes a link between the price of subject products and that of like domestic products by requiring a comparison be made between the two. (Para 7.47)

Price comparability should be consistent under Article 3.1 which provides that a determination of injury be based on 'positive evidence' and involve an 'objective examination' of the effect of subject imports on the prices of domestic like products. Thereby, the panel in this dispute held that *as soon as price comparisons are made, price comparability necessarily arises as an issue*. (Para 7.47)

> The panel agreed with the decision in China-GOES and held that it is necessary to ensure that prices being considered are actually comparable under Article 3.2 of the AD Agreement. The panel also cited a holding from China-GOES wherein the Appellate Body stated that there is a logical progression of inquiry which leads to an investigating authority's ultimate injury and causation determination. As per Article 3.5, it must be demonstrated that dumped imports are causing injury through the effects of dumping as set forth in paragraphs 2 and 4. Thus, the injury 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 outcome of these inquiries form the basis for overall causation analysis contemplated in Article 3.5…the interpretation of Article 3.2…should be consistent with the role it plays in the overall framework of an injury determination under Article 3.(Para 7.49)

The panel held that the reasoning of the Appellate Body in *China-GOES* is important for this dispute as it provides the relationship between the provisions of Article 3 of the AD Agreement which culminates in the definitive causation analysis under Article 3.5 of the AD Agreement. As the price undercutting analysis shall be used to assess whether the dumped imports 'through the effects of dumping (as set forth in paragraphs 2 and 4)' are causing injury to the domestic industry, it is necessary to ensure the prices that are the subject of an undercutting analysis are comparable. If the two products are not comparable it will be difficult to conceive that the outcome of such an analysis should 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 differences in the prices of the products. (Para 7.50)

The panel noted that price undercutting analysis under Article 3.2 of the AD Agreement does not mandate a specific methodology by which to ensure price comparability. According to the panel, when the issue relates to lack of comparability due to product differences, including due to differences in market perceptions of the products, the investigating authority has multiple options in determining how to proceed. (Para 7.51)

[9] 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

The panel stated that it does not transpose detailed methodology under Article 2.4 of the AD Agreement wholly into Article 3.2 as there are other ways to ensure price comparability under Article 3.2 apart from making adjustments. The kind of adjustments required in comparing prices for the purposes of establishing a dumping margin under Article 2.4 might be different from those required in order to ensure an objective examination of price undercutting in the context of the injury and causation analysis as under Article 3.2. However, in many instances relevant adjustments will effectively ensure price comparability under Article 3.2 of the AD Agreement. (Para 7.51)

f) MOFCOM's findings on price suppression/ depression

The panel was asked to decide whether MOFCOM found price suppression or price depression as there were disagreements between the parties. The panel declined to decide upon this issue raised by the EU concerning the way MOFCOM compared prices in reaching its conclusion under Article 3.1 and 3.2 of the AD Agreement.

g) Comparability of prices in price suppression

The next issue that the panel considered was whether MOFCOM compared prices in making its price suppression finding. The EU contested that MOFCOM did not consider the price comparison in its price suppression analysis. China submitted to the panel that price comparability could not arise as an issue when considering price suppression. As 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. However, the panel found that MOFCOM relied upon price comparisons in its price suppression under the following two contexts:

(i) Although 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.
(ii) MOFCOM relied upon its price undercutting findings to conclude that the prices were suppressed due to the dumped imports. Its undercutting findings were based upon comparison between the dumped imports and the like domestic product. (Para 7.55)

h) Decline in domestic prices

The panel noted that MOFCOM concluded and relied upon the fact that domestic prices decreased by 72.68% over the course of POI in reaching its price suppression findings. This intermediate step involved a comparison of prices of domestic like product over time. The EU stated 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. (Para 7.56)

Thereby, the panel agrees with the EU that when comparing domestic prices over time, MOFCOM was obliged to ensure that the domestic prices being compared were actually comparable. When comparing the price of a basket of goods over time, it is necessary to ensure comparability by considering any changes in the proportion of the product types making up the basket each year. As without ensuring price 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 than due to a genuine change in domestic prices. (Para 7.57)

i) Reliance upon undercutting findings

China argued that the price suppression analysis under Article 3.2 of the AD Agreement does not involve comparison between domestic prices and the prices of the imported product as it only requires a consideration of the existence of price suppression per se. China argued that it does not involve a consideration whether there is a causal relationship between the price suppression found to exist and the dumped imports. The panel noted China's argument and suggested from the evidence that, it did

in fact draw a link between imports and the price suppression. The panel stated that MOFCOM relied upon its findings of price undercutting to conclude that the prices were suppressed. (Para 7.58)

The panel held MOFCOM's approach to be inconsistent with the panel's finding in *China-GOES* as it is important to consider whether the dumped imports have *explanatory force* for the occurrence of suppression of domestic prices. The panel held that due to the reliance of price undercutting findings in the price suppression, the failure to ensure price comparability will also render MOFCOM's price suppression findings inconsistent with Article 3.1 and 3.2 of the AD Agreement. (Para 7.60)

j) Importance of price comparability in the price suppression and undercutting analyses under Article 3.2 of the AD Agreement

The EU argued that Smiths had stated during the investigation that there are differences between the 'low-energy' and 'high-energy' scanners when considering the product scope of investigation, but MOFCOM did not agree. China clarified that MOFCOM had considered the product scope under investigation but found that the products were '*like*' or *'price comparable'* the subject imports. China submitted that MOFCOM compared the prices of *like* products in its price effects analysis and it was sufficient to ensure price comparability. (Para 7.62-65)

The panel held that China's argument is not convincing due to the fact that MOFCOM had defined the product under consideration very broadly**.**

> The panel cited EC-Salmon (Norway) where the panel held that: Where a broad basket of goods under consideration 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.

Therefore, the panel stated that even if the domestic product was found to be 'like' product under Article 2.6 of the AD Agreement, it does not necessarily mean that a Smiths product used for scanning hand-baggage at airports is necessarily 'like' Nuctech product used for scanning rail carriages, trucks or marine cargo containers. Apart from the China's argument of the continuum of scanners, the evidence provided that there were significant differences between the subject scanners from Smiths and Nuctech. MOFCOM did not take adequate steps from the initiation of the investigation to analyze whether the products it was comparing in the price undercutting and suppression analysis were actually comparable.

The panel noted the pictures of the scanner provided by Smiths to consider the physical difference between the products and held it to be very evident.

NUCTECH SCANNERS USED TO SCAN RAILWAYS AND TRUCKS

SMITHS SCANNER USED TO SCAN LUGGAGES

Hence, MOFCOM's analysis is inconsistent with the notion *as soon as price comparisons are made price comparability necessarily arises as an issue*. Thus, MOFCOM did not ensure that its price undercutting and suppression analysis constituted an objective examination based on positive evidence. The panel held that price comparability has to be considered in all price effects analyses to ensure that the injury determination involves an objective examination on positive evidence. **The panel held that MOFCOM did not fulfill with its obligation to ensure price comparability under Article 3.2 of the AD Agreement while conducting the price effects analysis. (Para 7.65-68)**

Overall conclusion

The panel held that China acted inconsistently under Articles 3.1 and 3.2 by not ensuring that the prices it was comparing as a part of its price effects analysis were actually comparable. In particular, MOFCOM's price undercutting and price suppression analyses were inconsistent with Article 3.1 and 3.2 of the AD Agreement because they were not based on an objective examination of positive evidence. (Para 7.97)

B. Whether the MOFCOM's examination of dumped imports on the domestic industry was inconsistent under Articles 3.1 and 3.4 of the AD Agreement?

1. AD Agreement Articles 3.1 and 3.4- State of the Domestic Industry (Injury)

a) Discrepancy between the MOFCOM's data and the data available in public record and provided by Nuctech

The EU argued that there was discrepancy between the data used by MOFCOM in its preliminary and final determination as compared to the data supplied by Nuctech as well as that available in the public domain (annual reports and the data filed under the administration for Industry and Commerce) which demonstrates that MOFCOM's determination was not based on positive evidence. (Para 7.141)

The EU contended that MOFCOM did not inform the parties to the investigation that the data forming the part of the on-site verification by the MOFCOM was modified. The panel held that the EU has blurred the difference between a requirement that an injury determination shall be based upon positive evidence and the disclosure of evidence under the AD Agreement. The panel held that the question whether evidence is positive in the sense of being *affirmative, objective and verifiable* is different from whether an investigating authority has explained or disclosed the way in which it derived the data. (Para 7.146-148)

The panel clarified that Article 3.1 of the AD Agreement provides substantive adequacy of the evidence relied upon by the investigating authority and does not impose procedural obligations in relation to the disclosure of the reasoning or method by which investigating authority derived evidence. The panel cited *Thailand-H-Beams* where the Appellate Body has held that the positive evidence requirement under Article 3.1 is concerned with the nature of evidence than with the procedural obligations. The panel held that the EU's argument with respect to the modification of data by MOFCOM which was not communicated to the parties under investigation as well as the issue with respect to clarity of questionnaire does not bear upon the substantive question of positive

evidence. The panel held that it is a procedural matter and not a substantive question. (Para 7.146-148)

The EU argued that it was not clear from the public record as to whether the MOFCOM asked Nuctech for specific evidence as to its profitability in the export market. The panel provided that the EU did not have evidence before it relating to Nuctech's export performance, or at least that the precise evidence provided by Nuctech to MOFCOM was lacking from the public record. The panel held that there is evidence that MOFCOM did not raise any direct question regarding the profitability of exports. However, MOFCOM did ask Nuctech about the prices, sales revenue and volume of its exports. The panel noted that apart from the sales revenue, the data could not be used to adjust the aggregated data on cash flow, investments, return on investments and profits to take account of exports. The panel found China's admission plausible that MOFCOM did not request for relevant information to adjust but sought a revised questionnaire by Nuctech. (Para 7.151-153)

The panel found that the EU did not establish that MOFCOM together with Nuctech could have adjusted aggregated data to exclude information relating to the export of the like products. The panel is satisfied that MOFCOM had information before it to draw a conclusion about export profitability in the final determination. (Para 7.154)

b) Credibility of the modified data used by MOFCOM

The panel considered whether the information relied upon by MOFCOM after modifying the original information as submitted by Nuctech was credible? The EU argued that the export data underlying the adjustments to the original data provided by Nuctech was not credible, as there was evidence on record that suggested that the exports of the like product were having a negative effect on the state of industry as against the MOFCOM's findings. The EU provided Smiths arguments and an exhibit from a report in a Chinese magazine, Caijing to prove the argument. (Para 7.160-161)

However, the panel held it not to be sufficient evidence due to the following reasons:

a. The panel held that the annual report of Tongfang (parent company of Nuctech) presents a broad view of overseas project cycles and export performance and does not focus upon the particular product under investigation. Hence, the EU's argument upon such evidence is not reliable.
b. As to the impact of financial crisis of 2008, the panel was convinced that the export contracts are held in months advance and it is not clear whether the EU's argument that exports fell during the crisis could be logical. *(Para 7.163)*

The panel finally held that the European Union did not establish a prima facie case that MOFCOM did not rely upon positive evidence in making its findings on the state of the domestic industry. Thus, it found that the EU has not made out a case that in this regard China acted inconsistently under Article 3.1 and 3.4 of the AD Agreement. (Para 7.177)

c) Discrepancy between the data used by MOFCOM and that available in public domain

The panel considered whether the alleged differences between the data relied by MOFCOM and the data in publicly available documents indicated that MOFCOM's data is not positive? The EU argued that the data reflected in MOFCOM's final determination is unreliable based on the discrepancies between the data relied by MOFCOM and that in Nuctech's parent company annual report as well as data filed with the Administration for Industry and Commerce. China does not contest the discrepancy between the data cited by MOFCOM in its determinations and data in publicly available documents. Indeed an examination reveals that in a report prepared by Nuctech's parent company, Tongfang, the gross profit margins for Nuctech were cited as 25.52% in 2006, 27.42% in 2007 and 25.86% in 2008. (Para 7.169)

The EU argued that it is difficult to reconcile these figures with the negative pre-tax profits reported in MOFCOM's final determination. The EU disputed that the explanation provided by MOFCOM as the

'like' products accounted for a major proportion (90% based upon Smiths' estimate on its best market knowledge) of Nuctech's production and argued that the difference between the Nuctech's data and the public domain data should not have been so marked. The panel held that the EU was asserting a fact without evidence and China had actually provided the confidential information with respect to the domestic and export production in Nuctech. The panel noted that after deduction of export data from the total production in Nuctech the domestic production should be near the 90% estimate advanced by the EU. Therefore, the panel held that the EU did not make a prima facie case in that the discrepancies between the data used by MOFCOM and the data in certain public sources indicated that MOFCOM did not rely upon positive evidence. (Para 7.173-175)

The panel stated that the EU 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. The panel held that the EU failed to make a case against China under Article 3.1 and 3.4 of the AD Agreement. (Para 7.175)

d) MOFCOM did not consider all injury factors under Article 3.4 AD Agreement

The panel considered the EU's argument that MOFCOM acted inconsistently under Article 3.1 and 3.4 of the AD Agreement as it did not examine all factors listed in Article 3.4, particularly it failed to examine the magnitude of the margin of dumping. The panel noted that the Appellate Body and a number of panels have held that it is mandatory for an investigating authority to evaluate all of the 15 factors listed in Article 3.4 of the AD Agreement.

(***Key Question:*** *Whether an insufficient explanation of an injury factor could render the injury analysis inconsistent with Article 3.4 of AD Agreement?*)

The panel cited *Thailand-H-Beams*[10] where the Appellate Body upheld the panel's opinion that each of the fifteen factors should be evaluated under Article 3.4 by the investigating authorities in order to determine the status of domestic industry. (Para 7.179)

Some panels have reasoned that an "evaluation" of the factors in Article 3.4 of the AD 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. As per the panel in *EC-Bed Linen (Article 21.5- India)*[11]:

> An 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 assess the role, relevance and relative weight of each factor in the particular investigation. Where the authority determined 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 held not to be central to the decisions, must therefore be at least implicitly apparent from the determination. Silence on the relevance or irrelevance of given factors will not suffice. (Para 7.180)

[10] 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
[11] 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

The panel upheld the view under the text of Article 3.4 that the examination "shall" include an evaluation of all relevant economic factors, including the 15 listed factors in the provision which clearly requires that each of the factors be evaluated. MOFCOM did not refer to the magnitude of the margin of dumping in the final determination when conducting its injury analysis and in particular when constructing its assessment of industry-related economic factors and indicators. However, in two sections of the final determination, MOFCOM listed the margins of dumping for Smiths and others. China argued that this constituted an express examination by MOFCOM of the margin of dumping. Although MOFCOM did not explicitly characterize the margins as "substantial" or "significant", it follows from the decision itself, to impose measures, that margins were not considered to be *de minimus*. (Para 7.181-182)

The panel stated that simple listing of the margins in the final determination and dumping sections of the determinations is insufficient evidence to conclude that the magnitude of the margin of dumping was evaluated in the context of examining the state of domestic industry. The panel held that an investigating authority is required to evaluate the margin of dumping and to assess the relevance as well as the weight to be attributed to it in the injury assessment. The panel held that MOFCOM failed to do this and 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.(Para 7.183)

China argued that the fact that it imposed AD duties indicates that it concluded that the dumping margins which were not *de minimus* under Article 5.8 of the AD Agreement. The panel was not convinced by the argument as under Article 3.4 it would amount to accepting that every time an investigating authority imposed anti-dumping duties it would obligate the investigating authority to evaluate the magnitude of the margin of dumping by virtue of concluding that it was not *de minimus* and would seem to render superfluous its conclusion under Article 3.4 list. (Para 7.184)

Therefore, the panel concluded that China acted inconsistently with Articles 3.1 and 3.4 of the AD Agreement in failing to evaluate the magnitude of the margin of dumping. (Para 7.185)

e) Product comparability in the injury analysis

The EU argued 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 thereby belong to distinct markets. The EU clarified that the argument is not 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. Rather, the EU's argument focuses primarily on injury factors relating to prices and costs. According to the EU, 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 industry. (Para 7.186)

The panel noted 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 AD Agreement. In *US-Hot-Rolled* Steel[12], the Appellate Body noted that the term 'domestic industry' is defined in Article 4.1 of the AD 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 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, sector or segment of it. (Para 7.187)

The Appellate Body noted in *US-Hot-Rolled Steel* that in some circumstances it may be 'highly pertinent' from an economic perspective for an investigating authority to undertake an evaluation of

[12] 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

particular parts, sectors or segments within a domestic industry in assessing the state of the industry as a whole. The Appellate Body held that any segmented analysis must be conducted in an objective manner. This means that when one sector in 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. The panel noted that the Appellate body has never been required to consider whether a failure to conduct an analysis by sector may amount to acting inconsistently under Articles 3.1 and 3.4 of the AD Agreement. (Para 7.187)

The panel did utilize judicial economy in the circumstances of this case to resolve whether MOFCOM acted inconsistently under Articles 3.1 and 3.4 of the AD Agreement by making injury findings on the basis of the industry as a whole and not conducting a segmented analysis on any distinction between products produced by the domestic industry. The EU submitted that its main concern was with respect to prices and costs under Article 3.4 of the AD Agreement. EU stated that the analysis of domestic prices and costs in the context of the price effects analysis should have been disaggregated under Article 3.4 of the AD Agreement. (Para 7.188)

The panel held that since there was a considerable overlap between the EU's claim under Article 3.1 and 3.2 of the AD Agreement, and Article 3.1 and 3.4 of the AD Agreement, there was no requirement to make a further finding of inconsistency under Article 3.4 of the AD Agreement which deals with the same aspect of MOFCOM's reasoning. (Para 7.189)

f) Analysis of the overall development and interaction among injury factors

The EU argued 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 AD Agreement. The EU proceeded on the assumption that MOFCOM based its analysis on positive evidence and contended the manner in which MOFCOM evaluated the evidence was not objective. The EU alleges three different aspects of MOFCOM's examination of the injury factors and claims that each gives rise to a violation of Article 3.1 and 3.4 of the AD Agreement:

(i) MOFCOM did not conduct an objective examination when considering the interaction between positive and negative injury factors.
(ii) MOFCOM failed to examine all factors in their proper context and made contradictory observations.
(iii) MOFCOM failed to take into account all facts and arguments on the record relating to the state of industry.(Para 7.190-191)

The panel evaluated the first two allegations as part of the integrated approach to this aspect of the dispute. However, with respect to third allegation, the panel utilized judicial economy because the third allegation has to be examined as a part of Article 3.5 analysis. The main argument of the EU is that MOFCOM failed to address as to how and why domestic sales prices were decreasing, even in 2008 when the import prices of the subject products consistently increased throughout the period but were higher than those of the domestic products in 2008. (Para 7.193)

The panel considered whether MOFCOM evaluated the interaction between positive and negative injury factors and considered them in proper economic context. The EU argued that the way in which MOFCOM treated individual injury factors and characterized them as negative by ignoring positive trends exhibited by each of the factors at issue by making contradictory observations was incorrect and it further failed to explain the basis for its assertions regarding certain injury indicia. The EU argued 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. The panel cited *Thailand-H-Beams*[13] wherein it has held that *there are positive trends in a number of*

[13] 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

factors during the POI, it would necessarily require the investigating authority to give a compelling explanation of why and how the domestic industry remained injured in the light of such apparent positive trends. The panel also cited *EC-Countervailing Measures on DRAM Chips*[14] wherein there was an analogous provision under the Agreement on Subsidies and Countervailing Measures. The panel held *that when a number of factors have 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*. Finally, the panel cited *EC-Fastners (China)*[15] where the panel considered whether the investigating authority's characterization of certain injury factors as 'negative' was considered with an objective examination of the evidence.(Para 7.194-197)

g) Profits

In respect of profits the panel noted that MOFCOM did not indicate on what basis it concluded that Nuctech did not realize "expected profits". The panel held that an objective and even-handed examination of the expected level of profit according to which the industry's actual profit level was evaluated should be based on more than an assertion that a company expected to be profitable. According to the panel, 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. The panel further explained that an even-handed examination of profits required and recognition of the positive trend in which this factor was having and an accompanying 'adequate explanation' as to why in the light of the positive factors the industry should nevertheless be considered injured. The EU argued that the two statements in the final determination with respect to profits are inconsistent. The panel clarified that the first statement referred to absolute levels of pre-tax profits and the second refers to pre-tax profit rates. (Para 7.202-203)

h) Net cash flow, rate of return and employment

As regards the net cash flow, rate of return and employment, the EU argued that MOFCOM classified them as negative without considering their trends over the POI. As there was cash outflow and a negative rate of return throughout the course of the POI, the panel noted that this could reasonably support a conclusion that these factors contributed to a negative state of industry. The panel held that an objective and impartial examination would have required an acknowledgment and analysis of the fluctuations in the factors over the POI, inclusive of the upward trend they both experienced in the final year. Similarly, with respect to employment levels, while end-to-end comparison indicated a decline in employment over the POI, MOFCOM did not attempt to analyse its fluctuations. The panel held it to be inconsistent with an unbiased examination. (Para 7.204)

i) Sales revenue growth

As regards the growth in sales revenue, EU argued that MOFCOM could not have found severe depression in sales revenue growth, especially in circumstances where the sales revenue increased by more than 50% during each year of the POI. Further, the sales volume and domestic output were growing well in excess of domestic demand. China clarified that in comparison to the growth in sales volume, growth in sales revenue was much lower. (Para 7.205-206)

The panel held that the EU's argument is not convincing as MOFCOM's assertion of severe depression in sales revenue growth was made in the context of the fast growth in sales volume over the POI. Hence, MOFCOM's finding that sales revenue was severely depressed did not lack even-handedness or objectivity. (Para 7.206)

[14] 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
[15] 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

j) Investment and financing capacity

As regards the investment and financing capacity, the EU argued that MOFCOM's finding that the domestic industry 'saw continued expansion' cannot be reconciled with the finding that the 'investment and financial capacity declined'. The panel held that it is not clear whether it is a case of decline in investment and financial capacity or decline in investment in the final determination and clarification by China. The panel stated that this 'less than clear' drafting in a determination is not an indication of a lack of an objective examination. However, in the light of MOFCOM's lack of clarity and China's contrasting explanations during the course of the panel proceedings, the panel found that MOFCOM's finding was not reasoned or adequate. The panel held that it shall weigh this in balance when making its overall assessment regarding whether the MOFCOM acted inconsistently under Articles 3.1 and 3.4 of the AD Agreement in considering individual injury factors in its evaluation of the interaction between positive and negative injury factors. (Para 7.207-209)

k) Examination of the interaction between positive and negative injury factors

The panel considered MOFCOM's examination of the interaction between positive and negative injury factors. The EU argued that MOFCOM failed to provide a compelling explanation that the negative injury factors supported an affirmative injury determination in the light of several factors exhibiting positive trends. The EU argued that MOFCOM found 9 out of 16 indicia of the state of the industry to be positive, yet MOFCOM instead of explaining why the positive developments outweigh the negative developments merely juxtaposed the positive and negative factors. The panel agreed with the EU that MOFCOM's treatment of certain injury factors did not reflect an objective examination of the evidence. This consequently affects MOFCOM's overall assessment of the state of the industry. In addition, MOFCOM ignored trends in certain injury factors and did not explain the basis for some of its conclusions which undermined the overall assessment of the state of industry. MOFCOM also did not explain the developments in capacity utilization, productivity and wages in the descriptive section of its analysis of the industry. The panel held that a balanced approach would have been to analyze all of the 16 factors in the description of the state of industry and weigh them in the assessment. Given these flaws with MOFCOM's analysis of the state of industry, the panel did 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 that one it did.(Para 7.210-215)

Overall conclusion

The panel stated that "its 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. The panel also noted "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'. According to the panel some aspects of MOFCOM's finding were not reasoned and adequate and that an objective examination would have included and weighted each of the 16 injury indicia as a part of the analysis of the state of industry. Therefore, the panel concluded that MOFCOM acted inconsistently with Article 3.1 and 3.4 of the AD Agreement. (Para 7.216)

C. Whether the MOFCOM failed to make an objective examination in determining whether the dumped imports were through the effects of dumping, causing injury to the domestic industry under Articles 3.1 and 3.5 of the AD Agreement?

1. AD Agreement Articles 3.1 and 3.5- Causation

The EU claimed that MOFCOM attributed the injurious state of the domestic industry to the subject imports on the flawed volume effects analysis and price effects analysis. MOFCOM's non-attribution analysis was inconsistent with Articles 3.1 and 3.5 of the AD Agreement because MOFCOM disregarded the actual causes for any negative condition of the domestic industry. (Para 7.237-238)

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

The panel considered whether MOFCOM's causation analysis is inconsistent with Articles 3.1 and 3.5 of the AD Agreement on the basis that MOFCOM did not consider the differences between the products under consideration in its price effects analysis. The panel stated that since MOFCOM's price effect analysis suffered from serious shortcomings under Article 3.1 and 3.2 of the AD Agreement, it failed to consider price comparability while undertaking its price effects analysis. As MOFCOM relied upon its price effect analysis in the causation analysis, its causation analysis also suffered from the flaws which had affected its price effect analysis. (Para 7.239-240)

Hence, the panel held that MOFCOM's causation analysis was inconsistent with Article 3.1 and 3.5 of the AD Agreement. (Para 7.240)

b) Reasoned and adequate explanation of the causal link

(***Key Question:*** *What is the significance of correlation and causation under Art. 3.5 of the AD Agreement?)*

The panel considered whether MOFCOM provided a reasoned and adequate explanation of the causal link between the prices of the dumped imports and the injury to the domestic industry. The EU argued that MOFCOM failed to provide a reasoned and adequate explanation as to how the increasing prices of dumped imports forced the domestic prices to further reduce the prices. The EU contended that MOFCOM did not provide a reasoned and adequate explanation as to how the dumped imports caused price depression/suppression in circumstances, where, at least in 2008, the import prices were higher than the domestic prices. (Para 7.241-243).The EU stated that MOFCOM was required to provide a very compelling explanation in the absence of a temporal correlation between the trends in prices of the domestic product and imports.

The panel restated that MOFCOM found price undercutting in 2006 and 2007. Although the prices of dumped imports were above the prices of the domestic like product in 2008, MOFCOM found price suppression in that year. MOFCOM provided an explanation that the import of the subject product in large volumes and at low prices had undercutting and suppressing effects on prices of the like domestic product which caused injury to the domestic industry. The panel agreed with the EU that MOFCOM's causal examination was not reasoned and adequate. According to the panel, MOFCOM concluded that dumped imports were the cause but did not explain how the dumped products were the only cause of injury to the domestic industry. MOFCOM also did not explain as to why if nothing else, Nuctech could not increase its prices at least to the level of Smith's prices. (Para 7.244-247)

The panel noted that it appears that Nuctech lowered its prices to increase its market share than to defend or maintain it. Further, MOFCOM's non-attribution analysis lacked a reasoned and adequate explanation as to why Nuctech lowered its prices below those of the dumped imports in 2008, to such an extent that its market share increased. (Para 7.245)

During the panel process, China had relied upon the decision of the Appellate Body in *US-Wheat Gluten*[16] which highlighted the relevance of a general coincidence between trends in injury factors and trends in imports to support a finding of a causal connection between increased imports and serious injury. (Para 7.246). The panel disagreed with China's reasoning by stating that even if an overall correlation between dumped imports and injury to the domestic industry may find causation such a coincidence analysis is not dispositive of causation. The panel stated that correlation and causation are two different concepts.. The panel concluded that 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

[16] United States – Definitive Safeguard Measures on Imports of Wheat Gluten From The European Communities, WT/DS166/AB/R

dumped imports in 2008, in circumstances where MOFCOM did not find other causes of injury apart from dumped imports. (Para 7.248)

Consequently, the panel held that MOFCOM did not conduct an objective examination of the evidence and acted inconsistently under Articles 3.1 and 3.5 of the AD Agreement. (Para 7.248)

c) Causation analysis and the volume of imports

The panel considered the EU's argument that MOFCOM's characterization of the import volume of subject imports as "large" or "great" in the context of its analysis under Article 3.5 of the AD Agreement was improper, partial and not even-handed. As MOFCOM had compared the increasing imports in absolute terms in comparison to total domestic consumption and did not consider it in relation to total domestic production which was exhibiting a 'skyrocket[ing] trend'. The panel stated that the conformity of MOFCOM's volume effects analysis with Articles 3.1 and 3.5 would not alter the inconsistency of the causation findings by MOFCOM. (Para 7.249-250)

The panel stated that under Article 3.5 of the AD Agreement, an investigating authority is required to *demonstrate that the dumped imports are through the effects of dumping as set forth in paragraph 2 and 4 causing injury. Paragraph 2 sets out the requirements for analyzing the volume and price effects of the dumped imports*. The panel noted that price effect analysis and volume analysis are integral to the MOFCOM's findings on price suppression and undercutting and also the causation analysis. The panel provided that there is nothing in the final determination to indicate as to how price and volume factors interacted or operated independently to cause price effects in relation to the domestic like product or to cause injury to the domestic industry. Hence, the panel noted that there was nothing in the final determination that could allow the panel to conclude that either the price or the volume of dumped imports could alone sustain MOFCOM's price effects finding under Article 3.2 or its causation analysis under Article 3.5 of the AD Agreement. The panel noted that MOFCOM's finding with respect to prices of subject imports were so central to its price effects and causation analysis. China also did not pursue that MOFCOM's causation analysis should be sustained on the basis of volume effects alone. (Para 7.251)

The panel held that it is not necessary to determine whether MOFCOM's characterization of the import volume as large or great was inconsistent with Articles 3.1 and 3.5 of the AD Agreement on the basis that it was not an objective examination of positive evidence. (Para 7.252)

d) *Examination of the relevance of other "known factors" causing injury*

The EU argued that MOFCOM acted inconsistently with Articles 3.1 and 3.5 of the AD Agreement by failing to consider all facts and arguments on the record relevant to or having to do with factors having an effect on the state of the domestic industry, namely Nuctech's alleged start-up situation, aggressive pricing policy or business expansion. The Panel dealt with the issue of whether this claim belongs under Article 3.5 (causation), or Article 3.4 (factors indicating the state of the domestic industry). (Para 7.253)

The panel considered whether MOFCOM had in fact failed to examine properly the relevance of certain known factors and whether its examination of certain other factors was merely *pro forma*. According to the EU, MOFCOM failed to consider arguments made by Smiths in relation to the "effects of exports" and "product quality and technology factors". Moreover, it argued that MOFCOM ignored five other "known factors" raised by interested parties:

(i) 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
(v) Nuctech's start-up situation

The panel examined the "effect of exports" together with the "impact of the global financial crisis" and also the "product quality and technology factors" together with "fair competition". (Para 7.264)

The panel cited the test developed by the Appellate Body in *EC-Tube or Pipe Fittings*[17] as to what triggers the non-attribution obligation under Article 3.5 of the AD Agreement. Specifically, the factor at issue must:

(i) Be known to the investigating authority
(ii) Be a factor other than dumped imports
(iii) Be injuring the domestic industry at the same time as the dumped imports

In response to panel's question, China clarified that it did not contend that the five factors at issue were not "known" to MOFCOM. However, China asserted that in addition to being "known", there must be relevant evidence demonstrating that the factor is causing injury to the domestic industry and further argued that Smiths did not present such evidence to MOFCOM. The panel said that it agreed with this position as a general proposition, such that if there is no relevant evidence in this regard, then there is no requirement for the investigating authority to conduct a non-attribution analysis. The panel explained that 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 industry, rather than not mentioning the factor at all in its determination". (Para 2.65-267)

The panel examined each of the following known factors:

i) **The impact of global financial crisis in 2008 and the effects of exports**: Panel held that the EU had failed to establish that MOFCOM's statement regarding Nuctech's export trade was not based on positive evidence. As panel agreed with MOFCOM that the annual reports of the parent company of Nuctech included information on additional products and therefore it was not required to take them into account. (Para 7.268-271)

ii) **The alleged inferior quality of Nuctech's products in terms of product range, quality, track-record, user friendliness and service:** The panel stated that MOFCOM should have addressed Smiths' argument that there were no equivalent products in the Chinese market as compared to Smiths which could be obtained domestically. Although China argued based on the panel report in *Thailand-H-Beams* that MOFCOM did not need to address every argument raised by Smiths regardless of how tenuously it was evidenced, the panel held that "the evidence presented by Smiths was such as to require a more reasoned and detailed response from MOFCOM. Also, unlike in the *Thailand-H-Beans* case, the panel could find nothing in the final determination to suggest that MOFCOM implicitly considered the evidence presented by Smiths. On this basis, the panel concluded that "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, and therefore, MOFCOM did not conduct an objective examination of the evidence as required by AD Agreement Articles 3.1 and 3.5. (Para 7.272-280)

iii) **The alleged business expansion of Nuctech**: The panel said that an objective and unbiased investigating authority should have assessed whether the statements in the annual reports about Nuctech's business expansion caused increases in inventories by 50% annually which is more than an annual increase in the domestic demand.(Para 2.284-286)

iv) **The alleged *aggressive pricing strategy* by Nuctech:** The EU argued 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

[17] 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

address this causal factor in its final determination'. The panel did not find direct evidence of the existence of an aggressive pricing policy on the domestic market. However, it pointed out that any evidence of the existence of this nature will necessarily be "circumstantial" as a result of the "highly confidential nature of a company's pricing strategies". Smiths referred to a study detailing pricing strategy pursued by Nuctech in the high-energy export market, and 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. The panel found that 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 and the fact that MOFCOM did not do so was inconsistent with Articles 3.1 and 3.5 of the AD Agreement. (Para 7.287-291)

v) **Nuctech's alleged "start-up" situation**: The panel found that many of the allegations regarding Nuctech's start-up situation were not supported by evidence, but rather were bare assertions. Moreover, after reviewing record evidence and possible definitions of start-up (including based on AD Agreement Article 2.2.1.1, which provides no definition, and SCM Agreement Annex IV, paragraph 4), the panel found that 'MOFCOM was justified in reaching the conclusion that there was no relevant evidence before it to support Smiths' assertions that Nuctech was in a 'start-up situation'. In particular, it noted that the evidence "demonstrated that Nuctech's production of low-energy scanners commenced at least three years prior to the beginning of the POI and that during the POI it appears that Nuctech was selling significant quantities of low-energy scanners". While the panel recognized that there may be room for debate regarding for how many years after the commencement of production that a company be considered to be in a start-up phase, it noted that MOFCOM cannot be considered to have lacked objectivity or evenhandedness for taking the view that there was no relevant evidence before it that Nuctech was in such a phase. The panel suggested that it 'would have been preferable for MOFCOM to explicitly state this conclusion. (Para 7.287-292)

Panel's overall conclusion

In view of the above, the panel held that MOFCOM acted inconsistently with Articles 3.1 and 3.5 of the AD Agreement 'by failing to conduct an objective examination of the evidence on the record'. The Panel noted that MOFCOM failed to separate and distinguish the injurious effects of other causal factors from those of the dumped imports which violated the non-attribution requirement of Article 3.5. In this regard, MOFCOM failed to consider the evidence on the record regarding the known factors listed above. The panel concluded that MOFCOM's causation analysis, which rests upon these findings, is inconsistent with Article 3.5 and reached an overall conclusion that China acted inconsistently with Article 3.1 and 3.5 of the AD Agreement. (Para 7.300)

PROCEDURAL ISSUES

D. Whether the MOFCOM's treatment of non-confidential summaries prepared by Nuctech violates Article 6.5.1?

The EU contended the adequacy of certain non-confidential summaries provided by Nuctech under Article 6.5.1 of the AD Agreement. The EU raised additional claims under Article 6.2 and 6.4 of the AD Agreement. (Para 7.328)

a) Adequacy of non-confidential summaries

The EU contested the non-confidential summaries of Nuctech's application, certain attachments to Nuctech's questionnaire response and some of Nuctech's questionnaire responses. (Para 7.329) The EU claimed that MOFCOM failed to require Nuctech to adequately summarize the confidential

information concerning the two models in respect of which Nuctech had alleged dumping in its application to MOFCOM. The EU also contested the non-confidential summaries of certain exhibits of the applications. (Para 7.330)

b) Model designation

Nuctech alleged dumping in respect of two models in its application. The model names were treated as confidential and were not revealed. Nuctech referred to "Model 1" and "Model 2" and it indicated that Model 1 and Model 2 are main models of the subject products. The EU claimed 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 the confidential submission. (Para 7.331)

The panel agreed with the EU's claim that simply designating the relevant models as "Model 1" and "Model 2" does not provide any information of the underlying confidential information about the subject products. China asserted that Smiths should have known the "main" models in question as only four models were exported by Smiths in significant quantities. The panel rejected this assertion by stating 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*." The panel cited *China-GOES* which noted as follows:

> *[I]nterested party furnishing the confidential information [is required] to provide a summary thereof, rather than requiring other interested parties to infer, derive and piece together a possible summary of the confidential information*. (Para 7.332)

The panel held that the interested parties were supposed to infer from Nuctech's use of the term "main" that the relevant models were those most exported by Smiths. In any case, as those four models were apparently exported in significant quantities in China, there would have been a doubt regarding which two models were precisely at issue. (Para 7.333)

China argued that Nuctech would not have been able to provide further details without compromising the confidentiality of the underlying information. The panel cited *Mexico-Olive Oil*[18] wherein it was held that "confidential information should usually be capable of being summarized". Furthermore, if the confidential information were not susceptible of summary then the exceptional circumstances mechanism under Article 6.5.1 should have been utilized by MOFCOM. There is no evidence before the panel or argumentation by China that such confidentiality of matter was at issue to invoke exceptional circumstances. (Para 7.334)

Therefore, the panel agreed with the EU's claim under Article 6.5.1 regarding Nuctech's non-confidential information with respect to the models stated in its Application to MOFCOM. (Para 7.331-7.337)

The panel noted with respect to the exhibits in Nuctech's Application that the Article 6.5.1 of the AD Agreement applies to "[a]ll information designated as "confidential" and in cases where "multiple types of information" are designated, the substance of each type of confidential information must be summarized". The panel noted that Nuctech had provided only the summary of the confidential data in the exhibits which MOFCOM did not question or require Nuctech to provide summary of other two types of confidential information at issue. With respect of an exhibit containing a group of financial audit reports, the panel considered that mere identification of the reports as financial audits reports was insufficient and that the non-confidential summaries should have provided "a reasonable understanding of the substantive content of those reports". **Therefore, the panel upheld the EU's claim under Article 6.5.1 relating to the non-confidential summaries of the confidential information as provided in Exhibits 8,9,10, 11 and 14 of the application**. (Para 7.338-343)

[18] Panel Report, *Mexico – Definitive Countervailing Measures on Olive Oil from the European Communities*, WT/DS341/R, adopted 21 October 2008, DSR 2008:IX, 3179

The EU contested the MOFCOM's summaries on the basis that the attachments to Nuctech's Application contained quarterly rather than annual trends. China defended these summaries on the basis that the underlying confidential information was made on a quarterly basis. Given that the EU did not contest China's factual assertion, the panel noted that "as a matter of law…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 Article 6.5.1". **Hence, the panel did not agree with the EU's assertions under Article 6.5.1 in respect of attachments 14, 16, 17, 18 and 19 to Nuctech's questionnaire response**. (Para 7.322-347)

The panel disagreed with China that the EU did not substantiate its claim with respect to Nuctech's replies to certain questions in MOFCOM's questionnaire by explaining the deficiencies in the documents. The panel considered that there was no need for the EU to further explain the nature of the deficiency in Nuctech's replies. The panel further rejected China's argument that a "yes"/ "no" reply in the questionnaire cannot be summarized. The panel provided that a *yes/no* answer to a highly general question could not reveal any specific confidential information.

The panel stated that MOFCOM should had invoked Article 6.5.1 of the AD Agreement for exceptional circumstances when it was satisfied that a summary would have revealed confidential information. The panel also rejected China's assertion that usage of other language in the questionnaire response constituted non-confidential summaries of the information challenged by the EU.

Finally, China contended that the interested parties never questioned about certain of these inadequacies in the period of investigation and that the adequacy of the summaries is provided by the fact that the respondents prepared extensive comments on the basis of the summaries provided by Nuctech. The panel stated in response that "[t]he 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." **On this basis, the panel upheld the EU's claim that MOFCOM was required to obligate Nuctech to provide adequate non-confidential summaries of the confidential information contained in Nuctech's replies to questions 17, 19, 19(1), 19(23), 32, 33 and 38(5) of MOFCOM's questionnaire and attachments 4 and 15 to those replies' and its failure to do so was inconsistent with Article 6.5.1 of the AD Agreement.** (Para 7.348-364)

c) *Non-summarization in exceptional circumstances*

The panel addressed the EU's claim with respect to the non-summarization of certain confidential information submitted to MOFCOM by the Public Security Bureau. The panel clarified that this claim concerns with the exceptional circumstances mechanism as provided in the third and fourth sentences of Article 6.5.1, such that the panel "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'. (Para 7.314-315, 7.365)

China provided in response, a written statement that the material could not be summarized because of its "nature" and an oral explanation that a summary could not be provided without risking disclosure of highly sensitive security information. The panel saw no recorded evidence of the alleged oral explanation, and thus said that it would resolve this issue based solely on the written statement. That statement read as follows:

> As the information here below involves confidential commercial information, the disclosure of which will cause material adverse effects on relevant interested parties, 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.

China stated 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". (Para 7.366-367)

The panel rejected China's argument and noted that Article 6.5.1 only allows non-summarization in "exceptional" circumstances. The panel also pointed out the "nature" of information could refer to a "multitude of factors", not all of which would necessarily prevent summarization.' The panel said that 'the mere fact that information pertains to air transport safety would not necessarily preclude all possibility of summarization.' (Para 7.368)

The panel did not accept the additional arguments made by China. The panel noted that "[t]he requirements of Article 6.5.1 seek to ensure a degree of transparency of anti-dumping investigations, and in this way it considered that while the third and fourth sentences of Article 6.5.1 expressly provide for non-summarization in exceptional circumstances, they do not provide that the reasons making summarization impossible do not need to be disclosed". (Para. 7.369)

Therefore, the panel upheld the EU's claim under Article 6.5.1 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'. (Para 7.370-371)

E. Whether the MOFCOM failed to disclose certain essential facts to the interested parties under Articles 6.9 of the AD Agreement?

1. <u>AD Agreement Articles 6.9 – Disclosure of Essential Facts</u>

(***Key Question:*** *What data can be considered as 'essential facts' under Article 6.9 of the AD Agreement?*)

The EU contended that MOFCOM failed to disclose certain essential facts to interested parties, contrary to Article 6.9 of the AD Agreement (Para. 7.375) The EU had made some additional claims under Article 6.2 and 6.4 of the AD Agreement, but the panel exercised judicial economy as these claims were based upon Article 6.8 claims under AD Agreement. (Para 7.427-429)

The so-called "essential facts" in this dispute were made of the underlying data and the 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. (Para 7.378, 7.398) The panel while deciding the EU's claim as to the disclosure of certain essential facts relied upon the recent findings of the Appellate Body in of *China-GOES*. In particular, the Appellate Body while ascertaining the importance of disclosing the essential facts under consideration provided that there is a need for the interested parties to be able to defend their interests. The panel had held that it is 'important to interpret the first sentence of Article 6.9 in a manner that allows interested parties to defend their interests'. (Para 7.399-400)

The panel in this dispute examined the various alleged "essential facts".

a) <u>Underlying data and methodology for price effects analysis</u>

The EU contended that MOFCOM has failed to disclose the methodology and underlying data used for price effects analysis of the subject imports. China denied that this methodology was covered under "essential facts" and provided that MOFCOM complied with Article 6.9 of the AD Agreement by disclosing the trends in subject import prices and domestic prices and in domestic costs. (Para. 7.401)

The panel restated that MOFCOM's price undercutting finding was based on a comparison of annual AUVs (Average Unit Values) of subject imports and the domestic like product and that its price suppression finding was based on a conclusion that the rate of decline in domestic prices was greater than the rate of decline in the unit cost of production. (Para 7.402)

The panel stated that the AUVs and its underlying price data was required to be disclosed by MOFCOM under 'essential facts' under Article 6.9 of the AD Agreement. The panel explained that AUVs and its underlying price data were factual in nature and were under consideration by MOFCOM. The panel then considered as to whether it is necessary to determine that the facts are *essential* as contended by China or that by the EU. As the EU provides that both the elements should have been conducted more holistically by considering that a fact is essential only if it forms the basis for final determination. The structure of the first sentence of Article 6.9 of the AD Agreement is consistent with the approach taken by the panel in the *EC-Salmon*[19] wherein the panel observed 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 upon the question whether to apply definitive measures' are essential."

The panel found this approach was propounded by the Appellate Body in *China-GOES.* (Para 7.403) In particular, the panel found that '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 have the effect of price undercutting and price suppression'. The panel held that the AUVs and the underlying price data constituted the body of facts on which MOFCOM's determination of price effects was based. Therefore, this body of facts should have been disclosed by MOFCOM under Article 6.9 of the AD Agreement. The panel rejected China's argument that the facts under consideration for the Article 3.2 price effects analysis are not "essential" because Article 3.2 of the AD Agreement only requires authorities to "consider" the price effects. In this regard, the panel cited the Appellate Body in *China-GOES* where the Appellate Body had rejected the same argument made by China. (Para 7.404-406)

The panel rejected China's contention that MOFCOM complied with Article 6.9 of the AD Agreement by disclosing the trends in both the domestic and subject import prices. In particular, China cited the panel's findings in *Korea-Paper*[20] to argue that the disclosure of trend data satisfies the requirements of Article 6.9 of the AD Agreement. The panel distinguished the present dispute from *Korea-Paper* by noting that simply because trend data may be seen as non-essential fact does not exclude the possibility that AUVs should be seen as another essential fact. The panel in *Korea-Certain Paper* dealt with a plea for disclosure of absolute price data whereas in the present dispute the EU was requesting only ranges of price data. The panel recalled that the scope of the disclosure obligation in the first sentence of Article 6.9 of the AD Agreement should be determined in the light of the objective set forth in the second sentence to ensure that interested parties are able to properly defend their interests. According to the panel, to properly 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." The panel restated the reasoning of the Appellate Body in *China-GOES*, where it found that the essential facts include the price comparisons between subject imports and the like domestic products. (Para 7.407-409)

With respect to the EU's claim whether MOFCOM should have disclosed the methodology applied by it in its price effects analysis, the panel recalled its finding that MOFCOM should have disclosed the relevant AUVs. The Panel provided that if the MOFCOM had done that, it would have inevitably also disclosed that it would assess the price effects on the basis of AUVs. In this way, the panel considered this separate issue decided and it said that it would decide on it further. (Para. 7.410)

[19] 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
[20] Panel Report, Korea – Anti-Dumping Duties on Imports of Certain Paper from Indonesia, WT/DS312/R, adopted 28 November 2005, DSR 2005:XXII, 10637

Therefore, the panel upheld the EU's claim under Article 6.9 that *MOFCOM should have disclosed the AUVs and underlying price data that MOFCOM would use to analyze the price effects of the dumped imports*. (Para 7.411)

b) Disclosure on affiliated distributor adjustment to export price

The EU claimed that MOFCOM failed to disclose the underlying facts and the criteria on which the adjustments to the export price were made. China rebutted that MOFCOM explained which adjustments were made, the amount thereof, and the reason for making them.(Para. 7.412)

The Panel noted after examining MOFCOM's Dumping Disclosure to Smiths, that 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.* The Disclosure also contained a table that included "CIF Price" and "Export Price", indicating the amount of adjustment made. The panel found this Disclosure to be sufficient to disclose to Smiths that an adjustment was being made, that the adjustment was made to reflect direct and indirect selling expenses, and also amount of the adjustment. Thus, the panel saw "no factual basis" for the EU's claim. (Para 7.413-414)

Therefore, the panel rejected the EU claim under Article 6.9 of the AD Agreement that MOFCOM failed to disclose the underlying facts and criteria on the basis of which the affiliated distributor adjustment to export price was made. (Para 7.415)

c) MOFCOMS' Determination of the dumping margin for Smiths

The EU claimed that MOFCOM violated Article 6.9 of the AD Agreement by failing to "disclose the calculations it relied on to determine Smiths' margin of dumping as well as the data and adjustments underlying those calculations." China rebutted that it properly explained how the margin was calculated and it argued that the actual calculations do not constitute "essential facts" under Article 6.9. (Para 7.416)

The panel considered China's rebuttal and noted, "…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." As such data *are salient to the establishment of the margin of dumping* and the margin established cannot be understood with them. In this dispute, MOFCOM had provided Smiths with a table setting out the quantity of sales, normal value, export price, CIF price and margin of dumping for 10 models of scanner. However, according to the panel, the model/model overview contained in the table provides little, if any, basis for Smiths to defend its interests. According to the panel, for smiths to defend its interests properly, it needs to fully understand the factual basis from which MOFCOM's model/model findings were derived and for that, Smiths would have needed access to the transaction-specific price and adjustment data on which MOFCOMs model-specific findings of normal value and export price were based. In this regard, the panel rejected China's reliance on the panel report in *Argentina-Poultry Anti-Dumping Duties*[21] noting that the *Poultry* case did not address whether the data underlying the normal value and export price determinations constituted "essential facts". (Para 7.417-419)

The panel, noted that it was not persuaded that MOFCOM was required under Article 6.9 of the AD Agreement 'to disclose the actual calculation of Smiths' margin of dumping'. The panel explained that the 'facts…under consideration' are… the factual elements that form the basis for that mathematical determination, while 'the mathematical determination is part of the 'consideration' of those facts'. (para 7.421)

[21] Panel Report, Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil, WT/DS241/R, adopted 19 May 2003, DSR 2003:V, 1727

In sum, the panel upheld the EU's claim that MOFCOM violated Article 6.9 of the AD Agreement by failing to disclose the price and adjustment data underlying its determination of Smiths' margin of dumping. However, the panel rejected the EU claim that MOFCOM violated Article 6.9 AD Agreement by failing to disclose its calculations of Smiths' margin of dumping'. (Para 7.421)

d) Determination of the residual anti-dumping duty

The EU contended that MOFCOM acted inconsistently with Article 6.9 of the AD Agreement because MOFCOM did not provide interested parties with information about the essential facts under consideration for the calculation of the residual duty, namely, the facts forming the basis for its decision to apply facts available and the facts that led to conclude that 71.8% is an appropriate residual rate. (Para 7.422)

With respect to the allegation concerning the facts behind MOFCOM's decision to apply facts available, the panel considered MOFCOM's statement in this regard, which explained that facts available would be applied 'for other EU companies who failed to make any response or submit any answer sheet' pursuant to the applicable Article of China's Anti-Dumping Regulations. The panel stated that this statement properly discloses that MOFCOM's decision to apply facts available was based on the failure of other EU companies to respond to MOFCOM's questionnaire. **Therefore, the panel rejected the EU's claim that MOFCOM did not disclose the facts forming the basis for its decision to apply facts available.** (Para 7.423-424)

The panel noted with respect to the facts forming the basis for the imposition of a residual rate of 71.8%, that MOFCOM disclosed that the residual rate would be based on facts originating from 'the sales data of products of relevant models reported by the respondent company'. The panel said that it did not consider that this statement reveals the totality of the essential facts which should have been disclosed under Article 6.9. The panel clarified that such limited disclosure does not reveal all salient facts, as 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%. Thus, the panel recalled that it had, already identified some of the 'essential facts' that should have been disclosed in respect of MOFCOM's determinations of Smiths' margin of dumping, and it reasoned that similar essential facts should also have been disclosed in respect of MOFCOM's determination of the all others rate. (Para 7.425)

Therefore, the panel rejected the EU claim under Article 6.9 that MOFCOM failed to disclose the facts forming the basis for its decision to apply the facts available'. However, it upheld the EU 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%. (Para 7. 426)

F. Whether the MOFCOM's public notice of affirmative determination providing for the imposition of definitive anti-dumping duties had shortcomings and therefore violated Article 12.2.2 of the AD Agreement?

1. Shortcomings in the public notice of affirmative determination in violation of Article 12.2.2

The EU contended that China violated Article 12.2.2 of AD 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. (Para. 7.430). The panel referred to the Article 12.2.2 of the AD Agreement and its chapeau. The chapeau of Article 12.2 establishes 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."

The EU made two specific claims under Article 12.2.2:

(i) MOFCOM did not include in its public notice 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.

(ii) MOFCOM did not 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 (Para 7.434, 7.455)

a) Article 12.2.2, first sentence: alleged failure to include relevant information on matters of fact and law

The EU argued that the first sentence of Article 12.2.2 provides the basis for its firs claim. According to EU, 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 EU exporters/producers constitutes a clear violation of the WTO commitments. (Para 7.456)

MOFCOM's price effects analysis was considered as relevant information by the EU which MOFCOM was required to include in its public notice. The panel stated that the question to consider is 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 it to include an explanation of its price effects methodology. (Para. 7.457)

> Examining the text of Article 12.2.2, along with Article 12.2.1, which is referenced therein and the contextual guidance afforded by Article 12.2, the panel said that it was in broad agreement with the findings of the panels in *EU-Footwear* and *EC-Tube or Pipe fittings*. The panel stated 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 to its decision to impose final measures* and *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 authority's reasons for concluding as it did can be discerned and understood by the public***. It considered that *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…and for example, consumer organizations that might be expected to have an interest in the imposition of anti-dumping measures*. Stating that Article 13 of the AD Agreement provides for judicial review of the final determinations referred to in Article 12.2.2, the panel explained that *the level of detail of the description of the authority's findings and conclusions must be sufficient to allow the above-mentioned 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…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*. The panel considered this approach to be consistent with the recent findings made by the Appellate Body in paragraph 258 of *China-GOES.* (Para 7.458-459)

The panel agreed with the EU that MOFCOM's price effects findings are "material to its decision to impose final measures". Thus, "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". Examining MOFCOM's description of its price effects findings in its public notice, the panel found that the description *does not meet the requirements of Article 12.2.2, since it provides no insight into how those findings were reached*. In particular, the panel explained that *there is no explanation of how MOFCOM assessed the relationship between domestic and subject import prices, and between domestic price and cost*. It continued, *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*. The panel considered that *these elements are relevant for understanding how MOFCOM arrived at its price effect findings,* and for assessing the conformity of those findings with the relevant provisions of domestic law and the WTO Agreement**. (Para 7.460-461)

b) Calculations and underlying data for Smiths' margin and the residual duty

The EU claimed that China acted inconsistently with Article 12.2.2 of the AD Agreement *by failing to make available the calculations and underlying data it used to determine* the residual duty for all other European exporters/producers because in the EU's view *such data and calculations constitute 'relevant information' on the matters of fact and law and reasons which led to the imposition of definitive measures.* (Para 7.462)

The panel agreed with the EU that the margin of dumping established for Smiths constitutes a matter of fact and/or reason that led to the imposition of definitive measures. Therefore, MOFCOM was required to describe all relevant information pertaining to its establishment of that margin. As to whether MOFCOM should have included the calculations for that margin as relevant information, the panel agreed with the interpretation and conclusion of the panel in *China-GOES* that calculations need not be included in the Article 12.2.2 public notice, noting in particular that Article 12.2.2 should be interpreted in the context of Article 12.2.1(iii) which provides that public notices must include the margins, along with a full explanation of the reasons for the methodology used in the establishment and comparison of the export price and normal value. (Para 7.463-464)

As to whether MOFCOM should have included the underlying data in its determination of Smiths' margin in its public notice, the panel recalled that it had already upheld the EU's claim under Article 6.9 regarding non-disclosure of that data. However, the panel pointed out that Article 12.2.2 does not require that all essential facts underlying the margin of dumping should be included in the public notice and it considered that the scope of Article 12.2.2 is more nuanced and would not require the inclusion of all underlying data. The panel concluded, *without a more precise description by the EU of the specific underlying data that, in its view, it should have been reflected in the public notice and there is no basis for us to uphold the EU's claim*. (Para 7.465)

As regards the dumping margin calculations and the underlying data for the residual anti-dumping duty, the panel stated that dumping margin calculations need not be included in Article 12.2.2 notices. With respect to the underlying data, the EU argued that MOFCOM was required to explain why it resorted to facts available, what facts support this conclusion, the relevant factual basis for its determination and the method it relied upon. (Para 7.466) The panel while examining the statement in MOFCOM's public notice regarding the application of facts available to other non-responsive EU companies, the panel found that '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'. (Para 7.466-467)

Therefore, the panel upheld the EU claim that MOFCOM violated the first sentence of Article 12.2.2 by failing to provide relevant information regarding its price effect analysis and its determination of the residual rate. However, the panel rejected the EU's claim in relation to the "calculations and underlying data for Smiths' margin of dumping and calculations for the residual rate". (Para 7.470)

c) Article 12.2.2 second sentence: alleged failure to provide reasons for the rejection of Smiths' arguments

The EU claimed 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 data and other injury issues, and the existence of any causal link between dumped imports and injury to the domestic industry. (Para 7.471)

The panel stated that Article 12.2.2 second sentence 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 its interpretation of Article 12.2.2, first sentence, the panel considered that "relevant" arguments or claims are those that relate to the issues of fact and law considered material by the investigating authority. The panel observed that since this provision concerns the arguments and claims made by those parties 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. (Para 7.472)

d) MOFCOM's treatment of domestic sales to affiliated distributors

In the comments on MOFCOM's Dumping Disclosure, Smiths had questioned MOFCOM's determination that domestic sales to affiliated distributors were not made in the ordinary course of trade and MOFCOM's determination that such sales were affected by the affiliated relationship including that Smiths had not provided sufficient information showing that the price differences vis-à-vis non-affiliated distributors merely reflected sales expenses saved by Smiths. Under Article 12.2.2 second sentence, the EU claimed that MOFCOM failed to provide the reasons for rejected Smiths' arguments in its public notice. (Para 7.473-475) China responded that MOFCOM properly addressed these arguments in its final determination. (Para. 7.476)

The panel observed that since China does not deny that MOFCOM was required to address these arguments in its public notice, there is no need for the panel to determine whether or not Smiths' arguments are relevant. Instead, the panel said that it 'need only consider the adequacy of the explanation provided by MOFCOM for rejecting those arguments'. The panel then reviewed the relevant portion of MOFCOM's final determination. It found that while the relevant excerpt shows that MOFCOM acknowledged the various arguments made by Smiths, it does not amount to a sufficiently detailed explanation of the reasons for rejecting those arguments. **The panel noted that Smiths raised an issue of whether, notwithstanding the relationship of affiliation, the sales still reflected arms-length practice, but that MOFCOM never addressed that issue in its final determination. Moreover, in simply stating that Smiths failed to prove its argument, the panel said, MOFCOM failed to explain the reasons why the documentary evidence provided by Smiths in support of its argument was not sufficient. Thus, the panel concluded that "MOFCOM's failure to fully explain the reasons why it rejected this argument is inconsistent with Article 12.2.2"**. (Para 7.476-478)

e) Credibility of MOFCOM's Injury data

The EU claimed that MOFCOM's public notice omitted the reasons for rejecting certain arguments made by Smiths regarding the credibility of MOFCOM's injury data and also that MOFCOM failed to provide the reasons for rejecting certain additional arguments made by Smiths concerning MOFOM's injury findings. (Para. 7.479)

In respect of the credibility of MOFCOM's injury data, the EU referred 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 and Commerce (SAIC) and the public filings made by Nuctech's parent company'. China responded that Smiths' arguments were not relevant in the sense of being material to MOFCOM's decision to impose final duties, and in any even MOFCOM fully addressed the arguments in its final determination. (Para 7.480-481)

The panel reviewed the relevant portion of MOFCOM's final determination. The panel found MOFCOM's Final Determination adequately explains why Smiths' arguments were rejected. In particular, the final determination explains that the data discrepancies were a reflection of product coverage and the panel considered that this 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. (Para 7.482-483)

f) The causal link

The EU claimed that MOFCOM did not explain certain arguments made by Smiths regarding the establishment of causal link between dumped imports and injury to the domestic industry. China argued that the EU failed to demonstrate that Smiths' arguments are "relevant" under Article 12.2.2 of the AD Agreement. (Para 7.488-489)

The panel found that the EU failed to establish a prima facie case for its claim. In particular, neither did China explain as to how the arguments it identified were "relevant" under Article 12.2.2, nor did it explain the extent to which such arguments were or were not addressed in MOFCOM's final determination. As with the additional arguments, the panel considered that it was being asked to make the EU case, and it emphasized that it is not for the panel to review the EU Article 3.5 claim and determine which aspects of that claim might support the EU claim under Article 12.2.2 (Para 7.490)

Therefore, the panel held the EU'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*. However, the panel rejected the EU 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*. (Para. 7.491)

IV. DISPUTE NOTES ON SELECT ISSUES

- Sources of International Law:
  The Panel in its analyses has mainly relied on treaty text (viz. the AD Agreement) and the previous Panel and Appellate Body Reports.
- Importance of the Panel finding:

Nuctech (x-ray scanner producer-exporter from China) and Smiths (x-ray scanner producer-exporter from the EU) were the only companies who were involved in the MOFCOM anti-dumping investigation, as they alone constituted the relevant market for the anti-dumping investigation by the MOFCOM. Nuctech was the sole producer in China and Smiths the sole exporter of such product in China.

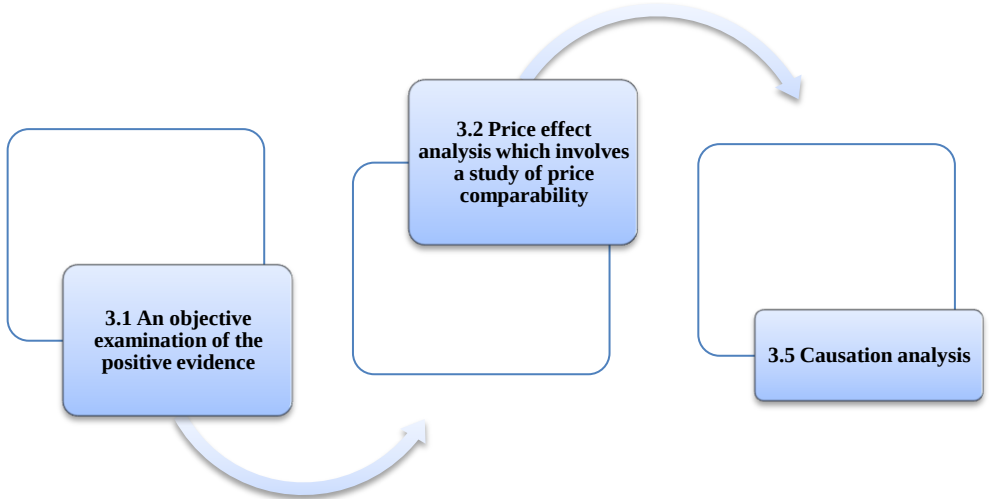
In this case, MOFCOM examined the existence of price undercutting by comparing the weighted average unit value of all imports of all products covered by the investigation to the weighted average unit value of all domestic sales of all like products made by Nuctech. The EU argued that the relevant products were heterogeneous and a different mix of low and high energy scanners was included in the price effects analysis. The panel agreed with EU that MOFCOM did not take any steps to examine whether these products were comparable for the purposes of price effects analysis. The panel suggested that an investigating agency could make use of "carefully defined product categories for the collection of price information." This is especially important when the product under consideration and the like product constitute a wide category as is seen in this case.

- Causal inquiry under the AD Agreement and the consequent importance of price comparability:

The panel cited the Appellate Body's decision in *China-GOES* wherein it has been stated that Article 3.1 to Article 3.5 of the AD Agreement provides for a logical progression of inquiry leading the investigating authority to an ultimate causation determination. The panel held that the Appellate Body's decision in *China-GOES* is relevant to this dispute as the Appellate Body's analysis presents a relationship between the various provisions of Article 3 of the AD Agreement culminating into a definitive causation analysis under Article 3.5. The panel report highlighted the importance of price

comparability in the price undercutting analysis under Article 3.2 in assessing whether dumped imports are causing injury to the domestic industry under Article 3.5 or not. The panel provided that if the products are not comparable it is hard to justify causation analysis against such imports.

An illustration of the relationship between Articles 3.1, 3.2 and 3.5 of the AD Agreement is provided in the chart below:



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