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**CHINA – ANTI-DUMPING MEASURES ON STAINLESS STEEL
PRODUCTS FROM JAPAN**
(DS601)

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<i>China – GOES</i>	Appellate Body Report, <i>China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States</i> , WT/DS414/AB/R , adopted 16 November 2012, DSR 2012:XII, p. 6251
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<i>EC – Fasteners (China)</i>	Appellate Body Report, <i>European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China</i> , WT/DS397/AB/R , adopted 28 July 2011, DSR 2011:VII, p. 3995
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<i>Pakistan – BOPP Film (UAE)</i>	Panel Report, <i>Pakistan – Anti-Dumping Measures on Biaxially Oriented Polypropylene Film from the United Arab Emirates</i> , WT/DS538/R and Add.1, circulated to WTO Members 18 January 2021 [appealed; adoption pending]
<i>Russia – Commercial Vehicles</i>	Appellate Body Report, <i>Russia – Anti-Dumping Duties on Light Commercial Vehicles from Germany and Italy</i> , WT/DS479/AB/R and Add.1, adopted 9 April 2018, DSR 2018:III, p. 1167
<i>Thailand – H-Beams</i>	Appellate Body Report, <i>Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland</i> , WT/DS122/AB/R , adopted 5 April 2001, DSR 2001:VII, p. 2701
<i>Thailand – H-Beams</i>	Panel Report, <i>Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland</i> , WT/DS122/R , adopted 5 April 2001, as modified by Appellate Body Report WT/DS122/AB/R, DSR 2001:VII, p. 2741
<i>Ukraine – Ammonium Nitrate</i>	Panel Report, <i>Ukraine – Anti-Dumping Measures on Ammonium Nitrate</i> , WT/DS493/R , Add.1 and Corr.1, adopted 30 September 2019, as upheld by Appellate Body Report WT/DS493/AB/R, DSR 2019:X, p. 5339

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<i>US – Hot-Rolled Steel</i>	Appellate Body Report, <i>United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan</i> , WT/DS184/AB/R , adopted 23 August 2001, DSR 2001:X, p. 4697
<i>US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)</i>	Panel Report, <i>United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina – Recourse to Article 21.5 of the DSU by Argentina</i> , WT/DS268/RW , adopted 11 May 2007, as modified by Appellate Body Report WT/DS268/AB/RW, DSR 2007:IX, p. 3609
<i>US – Wheat Gluten</i>	Panel Report, <i>United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities</i> , WT/DS166/R , adopted 19 January 2001, as modified by Appellate Body Report WT/DS166/AB/R, DSR 2001:III, p. 779

LIST OF ACRONYMS, ABBREVIATIONS AND SHORT FORMS

Abbreviation	Full Form or Description
Anti-Dumping Agreement	Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
Final Determination	A document titled "Final Determination of the Ministry of Commerce of the People's Republic of China on Anti-Dumping Investigation on Imported Stainless Steel Billets and Hot-Rolled Stainless Steel Plates/Coils Originating in the European Union, Japan, Korea and Indonesia"
MOFCOM	Ministry of Commerce of China
SCM Agreement	Agreement on Subsidies and Countervailing Measures
Subject Imports	Certain stainless steel products imported from the European Union, Japan, Korea and Indonesia
Product Under Investigation	Stainless steel slabs (billets), hot-rolled stainless steel coils and hot-rolled stainless steel plates

I. INTRODUCTION

1. Australia welcomes the opportunity to present its views to the Panel. Australia considers that the proceedings initiated by Japan under the DSU raise important questions of legal interpretation and proper application of key provisions in the Anti-Dumping Agreement. These include provisions relating to an investigating authority's definition of a domestic industry (Article 4.1), determination of injury (Articles 3.1, 3.2, 3.4 and 3.5), treatment of confidential information (Article 6.5), disclosure of essential facts (Article 6.9) and explanations in public notices (Article 12.2).

2. The Anti-Dumping Agreement provides a framework that governs the application of anti-dumping measures by a WTO Member. It sets out the substantive requirements that must be met, as well as detailed due process requirements regarding the conduct of anti-dumping investigations and the imposition of anti-dumping measures. Australia considers that it is of critical importance that anti-dumping measures are applied consistently with the Anti-Dumping Agreement, especially given the potential trade-distorting impacts of such measures.

3. Australia observes that while the Anti-Dumping Agreement does not prescribe how a product under investigation should be defined, a broad definition will have an impact on how an investigating authority defines the domestic industry and undertakes its subsequent injury analysis. Australia considers that an investigating authority bears the responsibility for ensuring that its definition of the product under investigation does not introduce a material risk of distortion to the subsequent analysis.

4. In this submission, Australia outlines the importance of an investigating authority undertaking its injury analysis, including in relation to price effects, impact and non-attribution, in a manner that is objective and based on positive evidence. Australia submits that flaws in an investigating authority's definition of the domestic industry necessarily give rise to a material risk of distortion in its injury analysis.

5. Australia also discusses the importance of ensuring interested parties are furnished with sufficient information to allow them to meaningfully engage in the investigative process, and affording interested parties an opportunity to defend their interests during and after an

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

6. Australia reserves the right to raise other issues at the third party hearing before the Panel.

II. DOMESTIC INDUSTRY

7. Japan submits that MOFCOM's definition of "domestic industry" was inconsistent with Articles 3.1 and 4.1 of the Anti-Dumping Agreement and introduced a material risk of distortion in its injury analysis.¹ Japan submits, among other things, that "MOFCOM's definition of the domestic industry failed to ensure its representativeness of the total domestic production in light of the differences among stainless steel slabs, hot-rolled stainless steel coils, and hot-rolled stainless steel plates".²

8. On this issue, China argues that the "starting point for the identification of the domestic industry pursuant to Article 4.1 of the Anti-Dumping Agreement is the 'like product', and that whether a group of producers represents a 'major proportion' of total domestic output must be determined in relation to the production of the like product by the domestic producers as a whole."³ On this basis, China submits that "MOFCOM was not required to perform the analysis for each billets, plates and coils individually, as this would go beyond the requirement to base the determination on the like product as a whole."⁴

9. Australia agrees with China's submission that the concept of the "domestic industry" is defined by Article 4.1 of the Anti-Dumping Agreement by reference to "like products". Article 4.1 provides that "domestic industry" can be defined in two ways: either as (i) "domestic producers as a whole of the like products"; or (ii) "those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products". With respect to the second definition, relied upon by MOFCOM in this case, the Appellate Body has explained that the "major proportion" requirement has both

¹ Japan's first written submission, para. 468.

² Japan's first written submission, para. 468.

³ China's first written submission, para. 669.

⁴ China's first written submission, para. 670.

quantitative and qualitative connotations.⁵ In respect of the quantitative element, the Appellate Body has explained that "'a major proportion' should be properly understood as a relatively high proportion of the total domestic production" that "substantially reflects" the total domestic production.⁶ The qualitative element is concerned with "ensuring that the domestic producers of the like product that are included in the definition of domestic industry are representative of the total domestic production".⁷

10. Australia recalls that the definition of "domestic industry" is a "keystone" of an anti-dumping investigation.⁸ It sets the scope of the investigation and lays the foundation for the injury and causation analyses required under Article 3 of the Anti-Dumping Agreement. In *EC – Fasteners (China)*, the Appellate Body considered footnote 9 of Article 3 of the Anti-Dumping Agreement, as well as the context provided in Articles 3.1 and 3.4, to be relevant for the interpretation of Article 4.1 of the Anti-Dumping Agreement.⁹

11. As the Appellate Body explained, "the domestic industry forms the basis on which an investigating authority makes the determination of whether the dumped imports cause or threaten to cause material injury to the domestic producers",¹⁰ and this determination "must be based on 'positive evidence'".¹¹ Such positive evidence "includes relevant economic factors and indices collected from the domestic industry, which have a bearing on the state of the industry", and "requires wide-ranging information concerning the relevant economic factors in order to ensure the accuracy of an investigation concerning the state of the industry and the injury it has suffered".¹² Accordingly, "'a major proportion of the total domestic production' should be determined so as to ensure that the domestic industry defined on this basis is capable of providing ample data that ensure an accurate injury analysis".¹³ Further, the Appellate Body clarified that an investigating authority "bears the obligation to ensure that the way in which it defines the domestic industry does not introduce a material risk of

⁵ Appellate Body report, *EC – Fasteners (China) (Article 21.5 – China)*, para 5.302.

⁶ Appellate Body reports, *EC – Fasteners (China)*, para. 412; *EC – Fasteners (China)*, para. 419.

⁷ Appellate Body report, *Russia – Commercial Vehicles*, para. 513.

⁸ Panel report, *EC – Tube or Pipe Fittings*, para. 7.397.

⁹ Appellate Body report, *EC – Fasteners (China)*, paras. 413-414.

¹⁰ Appellate Body report, *EC – Fasteners (China)*, para. 413.

¹¹ Appellate Body report, *EC – Fasteners (China)*, para. 413.

¹² Appellate Body report, *EC – Fasteners (China)*, para. 413.

¹³ Appellate Body report, *EC – Fasteners (China)*, para. 413.

skewing the economic data and, consequently, distorting its analysis of the state of the industry".¹⁴

12. Australia submits that MOFCOM has an obligation to define the domestic industry in a way that ensures the definition is reflective of "a major proportion of the total domestic production" of the like products. Australia observes that if MOFCOM did not properly define "domestic industry" in accordance with Article 4.1 of the Anti-Dumping Agreement, and in an objective manner and based on positive evidence, there would necessarily have been a material risk of distortion in its subsequent injury analysis. As the panel noted in *China – Autos (US)*, "a wrongly-defined domestic industry necessarily leads to an injury determination that is inconsistent" with the Anti-Dumping Agreement.¹⁵

13. Accordingly, Australia's view is that the question of whether MOFCOM's approach to defining the domestic industry was consistent with Article 4.1 of the Anti-Dumping Agreement is a key issue in these proceedings, with foundational significance for the injury and causation analyses subsequently required as part of the investigation. Australia submits that the Panel should, therefore, critically examine the approach used by MOFCOM to define the domestic industry.

III. INJURY

14. In conducting an injury analysis, Article 3.1 of the Anti-Dumping Agreement requires the investigating authority to conduct an "objective examination" and base its determination on "positive evidence".¹⁶ The Appellate Body has explained that the former requires an investigating authority to investigate the effects of dumped imports "in an unbiased manner, without favouring the interests of any interested party".¹⁷ The latter requires an investigating authority to rely on evidence that is of an "affirmative, objective and verifiable character" and is credible.¹⁸ Australia recalls that Article 3.1 of the Anti-Dumping Agreement sets out a

¹⁴ Appellate Body report, *EC – Fasteners (China)*, para. 416.

¹⁵ Panel report, *China – Autos (US)*, para. 7.210. The panel expressed its agreement with the earlier finding of the panel in *EC – Salmon (Norway)* on this point.

¹⁶ Article 3.1 Anti-Dumping Agreement.

¹⁷ Appellate Body report, *US – Hot-Rolled Steel*, para. 193. Quoted in several subsequent Appellate Body reports including *China – GOES*, para. 126, *China – HPP-SSST (EU)/China – HP-SSST (Japan)*, para. 5.138.

¹⁸ Appellate Body report, *US – Hot-Rolled Steel*, para. 192. Quoted in several subsequent Appellate Body reports including *China – GOES*, para. 126, *China – HPP-SSST (EU)/China – HP-SSST (Japan)*, para. 5.138.

Member's "fundamental, substantive obligation" with respect to injury determination, and investigating authorities must act consistently with Article 3.1 in fulfilling their obligations under the subsequent paragraphs of Article 3.¹⁹

A. PRICE COMPARABILITY

15. Australia understands that one of the key issues in this dispute is whether MOFCOM's price effects analysis appropriately considered whether the dumped imports had the effect of depressing the domestic prices. Japan argues that MOFCOM's price effects analysis was inconsistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement, as it failed to ensure price comparability by not taking into account the significant differences among the Subject Imports, including in terms of the three product types comprising the Product Under Investigation (i.e. stainless steel slabs (billets), hot-rolled stainless steel coils and hot-rolled stainless steel plates).²⁰

16. China argues that in the context of the Product Under Investigation, "the obligation to take steps to ensure price comparability is not triggered by *any* differences that might exist... the only differences that matter and which an investigating authority needs to take into account are differences which impact *prices*."²¹ China submits "when finding a certain 'lack of competitive overlap' because of certain product differences, the investigating authority should make 'further inquiries into those differences to determine whether they affected prices.'"²² On this basis, China submits that "it follows that difference between product types, for instance in physical characteristics or end uses, are not such relevant for the purposes of assessing price comparability."²³

17. The panel in *Korea – Pneumatic Valves (Japan)* explained that price comparability needs to be considered in all price effects analyses to ensure that the injury determination involves an objective examination based on positive evidence.²⁴ As the Appellate Body

¹⁹ Appellate Body report, *China – GOES*, para. 126, citing Appellate Body Report, *Thailand – H-Beams*, para. 106.

²⁰ Japan's first written submission, para. 74.

²¹ China's first written submission, para. 127.

²² China first written submission, para. 128.

²³ China first written submission, para. 128.

²⁴ Panel report, *Korea – Pneumatic Valves (Japan)*, para. 7.266. See also panel reports, *China – X-Ray Equipment*, para.7.68; *Pakistan – BOPP Film (UAE)*, para. 7.309; *China – Autos (US)*, para. 7.277.

discussed in *China – GOES*, "if subject import and domestic prices were not comparable, this would defeat the explanatory force that subject import prices might have for the depression or suppression of domestic prices."²⁵ The panel in *China – X-Ray Equipment* reinforced this logic by stating that "if two products being analysed in [a price] undercutting analysis are not comparable, for example in the sense that they do not compete with each other, it is difficult to conceive how the outcome of such an analysis could be relevant to the causation question."²⁶

18. In ensuring price comparability amongst a group of products, Australia notes that the panel in *China – Broiler Products* found that "in a situation in which it performs a price comparison on the basis of a 'basket' of products or sales transactions, the authority must ensure that the groups of products or transactions compared on both sides of the equation are sufficiently similar so that any price differential [is] not merely from differences in the composition of the two baskets being compared."²⁷ The panel also noted that this "may well require the investigating authority to perform its price comparison at the level of product models".²⁸ In this instance, Japan argues that "MOFCOM's comparison between the overall average prices of Subject Imports as a whole and those of domestic like products as a whole did not preclude the possibility that the price correlation between them, if any, was merely coincidental".²⁹ This was on the basis that the changes in the average prices of the Subject Imports and domestic like products could have been "the result of changes in the product mix".³⁰

19. Australia submits that an investigating authority has an obligation to ensure the comparability of the prices of the three product types comprising the Product Under Investigation and the domestic like products for the purposes of its price effects analysis. While Article 3.2 of the Anti-Dumping Agreement does not prescribe a methodology for investigating authorities to ensure price comparability, Australia recalls that in *China – X-Ray Equipment*, the panel observed that where there are differences in the physical characteristics

²⁵ Appellate Body report, *China – GOES*, para. 200.

²⁶ Panel report, *China – X-Ray Equipment*, para. 7.50.

²⁷ Panel report, *China – Broiler Products*, para. 7.483.

²⁸ Panel report, *China – Broiler Products*, para. 7.483.

²⁹ Japan's first written submission, para. 89.

³⁰ Japan's first written submission, para. 89.

and uses of the product under investigation (e.g. "low energy scanners" and "high energy scanners"), an investigating authority must take these differences into account to ensure price comparability.³¹

20. Australia submits there are serious questions to be asked about MOFCOM's approach to ensuring price comparability. With a broadly defined Product Under Investigation that comprises the three product types, Australia submits that it will be important for the Panel to assess whether MOFCOM appropriately considered and took into account the differences in the physical characteristics and uses of the three product types to ensure price comparability. Australia considers that an absence of price comparability brings into question whether MOFCOM's price effects analysis was undertaken in an objective manner and was based on positive evidence, as required under Articles 3.1 and 3.2 of the Anti-Dumping Agreement.

B. IMPACT ANALYSIS

21. Japan argues that MOFCOM's analysis of the impact of the Subject Imports on the domestic industry was inconsistent with Articles 3.1 and 3.4 of the Anti-Dumping Agreement.³² Japan submits, among other things, that MOFCOM did not objectively evaluate the economic factors listed in Article 3.4 of the Anti-Dumping Agreement, particularly in relation to capacity utilization, ending inventory, pre-tax profit, market share and return on investment.³³ Japan also submits that MOFCOM did not "provide a compelling explanation as to why the economic factors showing negative trends supported an affirmative injury determination in light of the fact that several factors exhibited positive trends".³⁴

22. China argues that the analysis carried out by MOFCOM "addressed in great detail the various indices" and submits that MOFCOM had explained why certain factors had positive trends.³⁵

23. Article 3.4 of the Anti-Dumping Agreement requires an investigating authority to evaluate "*all* relevant economic factors and indices" that have a bearing on the state of the

³¹ Panel report, *China – X-Ray Equipment*, para. 7.85.

³² Japan's first written submission, para. 302.

³³ Japan's first written submission, para. 355.

³⁴ Japan's first written submission, para. 360.

³⁵ China's first written submission, paras. 504 and 505.

domestic industry concerned in examining injury, including consideration of the 15 prescribed factors.³⁶ As the list of factors in Article 3.4 of the Anti-Dumping Agreement is not exhaustive, the circumstances of a particular case may require an investigating authority to give consideration to other relevant economic factors, and these factors must be apparent in the final determination of the investigating authority.³⁷

24. In conducting an impact analysis under Article 3.4 of the Anti-Dumping Agreement, an investigating authority must examine the "explanatory force" of the Subject Imports for the domestic industry.³⁸ The panel in *Pakistan – BOPP Film (UAE)* explained that this requires an investigating authority to "identify the trends in the injury factors and place those trends in the relevant context that is informative of the injury suffered by the domestic industry, taking into account the relevant evidence and explanations that are on its record".³⁹

25. Consistent with the requirements of Article 3.1 of the Anti-Dumping Agreement, an investigating authority must also explain "in a satisfactory way why the evaluation of the injury factors set out under Article 3.4 led to the determination of material injury, including an explanation of why factors which would seem to lead in the other direction do not, overall, undermine the conclusion of material injury".⁴⁰ A mere "checklist approach" consisting of a "mechanical exercise", which referred to each of the factors in some way, would not constitute an objective examination.⁴¹

26. Australia submits that Articles 3.1 and 3.4 of the Anti-Dumping Agreement require an investigating authority to provide a reasoned explanation for all the factors under consideration, including explaining how any positive trends do not undermine the conclusion of injury. Australia submits that the Panel should carefully consider whether MOFCOM has adequately explained how it objectively evaluated the economic factors in Article 3.4 of the Anti-Dumping Agreement. Further, where there are positive movements in a number of factors, Australia submits that the Panel should also consider whether MOFCOM provided "a

³⁶ Appellate Body reports, *EC – Tube or Pipe Fittings*, para. 156; *Thailand – H-Beams*, para. 128.

³⁷ Panel report, *Mexico – Corn Syrup*, para. 7.128.

³⁸ Appellate Body report, *China – GOES*, para. 149.

³⁹ Panel report, *Pakistan – BOPP Film (UAE)*, para. 7.352.

⁴⁰ Panel report, *Korea – Certain Paper*, para. 7.272.

⁴¹ Panel report, *Thailand – H-Beams*, para. 7.236.

compelling explanation of why and how, in light of such apparent positive trends, the domestic industry [is], or remain[s], injured".⁴²

C. NON-ATTRIBUTION

27. Japan argues that MOFCOM's causation analysis is inconsistent with Article 3.1 and the third sentence of Article 3.5 of the Anti-Dumping Agreement, as "the analysis described therein is not sufficient to ensure that the injurious effects of factors other than the Subject Imports would not be attributed to the Subject Imports."⁴³ Specifically, Japan submits that MOFCOM did not distinguish the injurious effects caused by known factors such as fluctuations in global prices of nickel and the effects of stricter environmental standards.⁴⁴

28. China submits that "MOFCOM did not find that the increase of the price of nickel caused any injury to the domestic industry... and it was therefore not required to carry out a non-attribution analysis."⁴⁵ China further submits that "even if MOFCOM had concluded that the increase of the nickel price did cause injury to the domestic industry, *quod non*, China considers that the non-attribution analysis carried out by MOFCOM complies with the requirements of Article 3.5."⁴⁶ In relation to the effects of stricter environmental standards, China submits that "MOFCOM did look into this and concluded that the domestic industry did not suffer any injury due to this element, thus MOFCOM was not under any obligation to carry out any additional non-attribution analysis."⁴⁷

29. Australia notes that Article 3.5 of the Anti-Dumping Agreement establishes the framework for an investigating authority to determine whether a "causal relationship" exists between dumped imports and injury to the relevant domestic industry. The third sentence of Article 3.5 of the Anti-Dumping Agreement includes a "non-attribution" requirement, which requires an investigating authority to examine any "known factors" other than the dumped imports which at the same time are injuring the domestic industry.

⁴² Panel report, *Thailand – H-Beams*, para. 7.249.

⁴³ Japan's first written submission, para. 419.

⁴⁴ Japan's first written submission, para. 419.

⁴⁵ China's first written submission, para. 575.

⁴⁶ China's first written submission, para. 576.

⁴⁷ China's first written submission, para. 582.

30. The Appellate Body stated in *EC – Tube or Pipe Fittings* that, in order to fall within the scope of the term "known factor" in Article 3.5 of the Anti-Dumping Agreement, a factor must:

- (i) be "known" to an investigating authority;
- (ii) be a factor "other than dumped imports"; and
- (iii) be injuring the domestic industry at the same time as the dumped imports.⁴⁸

The panel in *EU – Footwear (China)* considered that "known" other factors would "at a minimum, include factors allegedly causing injury that are clearly raised by interested parties during the course of the anti-dumping investigation".⁴⁹

31. In assessing the injury caused to the domestic industry by other known factors, Australia recalls that an investigating authority is required to separate and distinguish "the injurious effects of the other factors from the injurious effects of the dumped imports... In the absence of such separation and distinction of the different injurious effects, the investigating authorities would have no rational basis to conclude that the dumped imports are indeed causing the injury which, under the Anti-Dumping Agreement, justifies the imposition of anti-dumping duties."⁵⁰ An investigating authority must also provide "a satisfactory explanation of the nature and extent of the injurious effects of the other factors, as distinguished from the injurious effects of the dumped imports."⁵¹

32. This non-attribution analysis is important in ensuring that injury caused by these other factors is not attributed to the dumped imports, and that the dumped imports, which need not be the "sole" cause, are a "genuine and substantial" cause of the injury to the domestic industry.⁵² In the context of Article 15.5 of the SCM Agreement, which is drafted in nearly identical terms to Article 3.5 of the Anti-Dumping Agreement, the Appellate Body has explained, "the 'genuine' component of the 'genuine and substantial' causation test requires

⁴⁸ Appellate Body report, *EC – Tube or Pipe Fittings*, para. 175.

⁴⁹ Panel report, *EU – Footwear (China)*, para. 7.484. See also Panel report, *Thailand – H-Beams*, para. 7.273.

⁵⁰ Appellate Body report, *US – Hot-Rolled Steel (2001)*, para. 223.

⁵¹ Appellate Body report, *US – Hot-Rolled Steel (2001)*, para. 226.

⁵² Appellate Body reports, *EU – PET (Pakistan)*, para. 5.169; *US – Wheat Gluten*, para. 67. While these cases relate to Article 15.5 of the SCM Agreement and Article 4.2 of the Agreement on Safeguards, respectively, Australia notes that the Appellate Body has found that in interpreting the elements of a non-attribution analysis under Articles 3.5 and 15.5 of the Anti-Dumping and SCM Agreement, respectively, the Agreement on Safeguards can provide guidance (*US – Hot-Rolled Steel*, para. 230).

that the nexus between the causal agent and the consequence at issue be 'real' or 'true',⁵³ while the "'substantial' component of the test concerns the 'relative importance' of the causal agent in bringing about the consequences."⁵⁴

33. Australia notes that while the Anti-Dumping Agreement does not specify how a non-attribution analysis should be conducted, the analysis still needs to be objective and based on positive evidence, as required under the overarching obligations set out in Article 3.1 of the Anti-Dumping Agreement. Accordingly, Australia submits that the Panel should carefully consider whether MOFCOM distinguished and separated the known factors (i.e. fluctuations in the price of nickel and the requirement to comply with stricter environmental protection standards) in assessing the injury caused to the domestic industry. Australia submits that the Panel should also carefully consider whether assertions that the known factors "could not refute the causal link"⁵⁵ between dumped imports and material injury to the domestic industry, are sufficient to meet the legal standard required under Articles 3.1 and 3.5 of the Anti-Dumping Agreement.

IV. DUE PROCESS

34. Australia observes that the due process obligations set out in Articles 6 and 12 of the Anti-Dumping Agreement are critically important.⁵⁶ These obligations operate together to ensure that interested parties can meaningfully engage in the investigative process and have an opportunity to defend their interests during an anti-dumping investigation. These obligations also ensure that WTO Members have the relevant information to allow them to assess the consistency of a measure against domestic laws and/or the Anti-Dumping Agreement and, where appropriate, to seek review of an anti-dumping measure through domestic avenues or before a WTO dispute settlement panel. Australia submits that Japan's claims that MOFCOM departed from several due process requirements in the course of this investigation must, therefore, be closely scrutinised.

⁵³ Appellate Body report, *EU – PET (Pakistan)*, para. 5.169.

⁵⁴ Appellate Body report, *EU – PET (Pakistan)*, para. 5.169.

⁵⁵ MOFCOM's Final Determination, (Exhibit JPN-5.b), page 53.

⁵⁶ Appellate Body report, *EC – Tube or Pipe Fittings*, para. 138.

A. TREATMENT OF CONFIDENTIAL INFORMATION

35. Japan submits that MOFCOM's treatment of certain information (specifically, the names of companies) as confidential was inconsistent with Article 6.5 of the Anti-Dumping Agreement, as MOFCOM did not assess whether "good cause" for such treatment was shown by the interested parties.⁵⁷ Japan also submits that MOFCOM's confidential treatment of company names was inconsistent with Article 6.5.1 of the Anti-Dumping Agreement because MOFCOM did not require the relevant interested parties to provide sufficiently detailed non-confidential summaries or, in exceptional circumstances, a statement explaining the reasons why summarization was not possible.⁵⁸

36. China submits that publication of the relevant companies' names would have disclosed which companies are related to an exporter or an importer, or are themselves an importer, of the Product Under Investigation, which is sufficiently sensitive information to warrant confidential treatment.⁵⁹ China argues that interested parties were "provided with more than a sufficient summary to be able to defend their interest"⁶⁰ because "apart from the actual names themselves, interested parties knew exactly what was contained in the redacted information" (i.e. these companies were domestic producers of a like product to the Product Under Investigation that were excluded from the domestic industry by the applicant, and that these companies were either importers of the Product Under Investigation or they had started production of a like product to the Product Under Investigation in Indonesia).⁶¹

37. The panel in *Mexico – Steel Pipes and Tubes* observed that the conditions set out in Articles 6.5 and 6.5.1 of the Anti-Dumping Agreement are of "critical importance in preserving the balance between the interests of confidentiality and the ability of another interested party to defend its rights throughout an anti-dumping investigation" and for this reason it is "paramount" that these conditions are fulfilled.⁶² Australia submits that it is important for these conditions to be strictly enforced, in order to maintain this balance.

⁵⁷ Japan's first written submission, para. 493.

⁵⁸ Japan's first written submission, para. 493.

⁵⁹ China's first written submission, paras. 700, 704.

⁶⁰ China's first written submission, para. 732.

⁶¹ China's first written submission, para. 731.

⁶² Panel report, *Mexico – Steel Pipes and Tubes*, para. 7.380.

38. In relation to the "good cause" requirement in Article 6.5 of the Anti-Dumping Agreement, Australia observes that without a "good cause", there is no legal basis for an investigating authority to accord confidential treatment to information. The Appellate Body has clarified that a showing of "good cause" must constitute a reason "sufficient to justify the withholding of information from both the public and from the other parties interested in the investigation", and this assessment is an objective one.⁶³

39. Where an investigating authority has found there to be "good cause" for confidential treatment of certain information, Article 6.5.1 of the Anti-Dumping Agreement applies, requiring non-confidential summaries of that information to be furnished. The Appellate Body has indicated that a failure to comply with this requirement means that interested parties cannot meaningfully engage in the investigative process and have an "adequate opportunity for the defence of their interests".⁶⁴

40. The Appellate Body has clarified that where in "exceptional circumstances" a party considers that the confidential information is not susceptible of summary, it is not sufficient for a party to simply assert that a summary would be burdensome.⁶⁵ Instead, it is incumbent on that party to demonstrate that no alternative method of presenting the information can be developed that would not either disclose the confidential information, or fail to provide a sufficient level of detail to permit a reasonable understanding of the information submitted confidentially.⁶⁶

41. Australia submits that the role of a panel assessing an allegation of a breach of Articles 6.5 and 6.5.1 of the Anti-Dumping Agreement is not to undertake a *de novo* review of the evidence on record to determine whether "good cause" was objectively demonstrated, or if a summary or claim that summarization was not possible was objectively adequate.⁶⁷ Instead, as explained by the Appellate Body in *China – HP-SSST (Japan) / China – HP-SSST (EU)*,

⁶³ Appellate Body report, *EC – Fasteners (China)*, para. 537.

⁶⁴ Appellate Body report, *EC – Fasteners (China)*, paras. 541-542. See also Panel Reports, *China – Broiler Products*, para. 7.50; *China – GOES*, para. 7.188; *Mexico – Steel Pipes and Tubes*, paras. 7.379-7.380; and *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*, para. 7.133.

⁶⁵ Appellate Body report, *EC – Fasteners (China)*, para. 543.

⁶⁶ Appellate Body report, *EC – Fasteners (China)*, para. 543.

⁶⁷ See, for example, Appellate Body reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.97, *Korea – Pneumatic Valves (Japan)*, para. 5.221 and *Russia – Commercial Vehicles*, para. 5.102.

Australia submits that the Panel should assess whether it is discernible from the Final Determination or any supporting documents (and in light of the nature of the information at issue, and the reasons given by the submitting party in its request for confidentiality) that MOFCOM met the standard required by Articles 6.5 and 6.5.1 of the Anti-Dumping Agreement.⁶⁸

B. DISCLOSURE OF ESSENTIAL FACTS

42. Japan submits that to meet the requirements of Article 6.9 of the Anti-Dumping Agreement, which requires an investigating authority to inform all interested parties of the essential facts under consideration, MOFCOM was required to disclose all the essential facts under consideration, in a coherent way that would permit an interested party to understand the basis for MOFCOM's decision to continue imposing anti-dumping duties.⁶⁹ Japan submits that MOFCOM failed to disclose the essential facts underlying the definition of the products under investigation, the determinations of injury and causation, and the definition of the domestic industry in a manner that was consistent with Article 6.9 of the Anti-Dumping Agreement.⁷⁰

43. While China disagrees with Japan's views that the elements outlined in the above paragraph would qualify as "essential facts", China submits that MOFCOM nonetheless complied with the requirements under Article 6.9 of the Anti-Dumping Agreement.⁷¹

44. Australia observes that Article 6.9 of the Anti-Dumping Agreement has been interpreted to require an investigating authority to "disclose such facts, in a coherent way, so as to permit an interested party to understand the basis for the decision whether or not to apply definitive measures."⁷² Article 6.9 of the Anti-Dumping Agreement states that the disclosure of essential facts must be made "before a final determination is made"⁷³ and "in

⁶⁸ Appellate Body report, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.97.

⁶⁹ Japan's first written submission, para. 529.

⁷⁰ Japan's first written submission, para. 531.

⁷¹ China's first written submission, paras. 754 and 755.

⁷² Appellate Body report, *China – GOES*, para. 240. See also Appellate Body report *Russia – Commercial Vehicles*, para. 5.177.

⁷³ Article 6.9 Anti-Dumping Agreement.

sufficient time for the parties to defend their interests." ⁷⁴ Australia submits that this requirement is critical to ensuring the provision of procedural fairness to all interested parties.

45. The Appellate Body has explained that "'essential facts'...refer to those facts that are significant in the process of reaching a decision as to whether or not to apply definitive measures. Such facts are those that are salient for a decision to apply definitive measures, as well as those that are salient for a contrary outcome."⁷⁵ The requirement to disclose the essential facts is intended to "provide the interested parties with the necessary information to enable them to comment on the completeness and correctness of the facts being considered by the investigating authority, provide additional information or correct perceived errors, and comment on or make arguments as to the proper interpretation of those facts".⁷⁶

46. The panel in *Ukraine – Ammonium Nitrate* explained that an investigating authority must disclose essential facts in a coherent way and interested parties are not required to "engage in back-calculations and inferential reasoning, or piece together a puzzle" in order to ascertain the essential facts.⁷⁷ Australia appreciates that what facts are "essential" will depend on the nature and scope of the particular substantive obligations, the content of the particular findings needed to satisfy the substantive obligations at issue, and the factual circumstances of each case.⁷⁸

47. If MOFCOM did not "disclose all of the essential facts under consideration, coherently and in a manner that would permit an interested party to understand the basis for MOFCOM's decision to continue imposing anti-dumping duties",⁷⁹ MOFCOM would not have met its obligations under Article 6.9 of the Anti-Dumping Agreement. Australia submits that, given the critical importance of the due process obligations in the Anti-Dumping Agreement, the Panel should carefully consider whether MOFCOM has met its disclosure obligations.

⁷⁴ Article 6.9 Anti-Dumping Agreement.

⁷⁵ Appellate Body report, *China – GOES*, para. 240. See also Appellate Body Report, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.130.

⁷⁶ Appellate Body report, *China – GOES*, fn. 390, citing Panel report, *EC – Salmon (Norway)*, para. 7.805.

⁷⁷ Panel report, *Ukraine – Ammonium Nitrate*, para. 7.227.

⁷⁸ Appellate Body reports, *Russia – Commercial Vehicles*, para. 5.220, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.130.

⁷⁹ Japan's first written submission, para. 529.

C. PUBLIC NOTICE

48. Japan submits that MOFCOM failed to comply with Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement because it "failed to provide its findings and conclusions on all issues of fact and law considered material by the investigating authority in sufficient detail, and failed to provide all relevant information on those matters of fact and law, or on the reasons that led to the imposition of the final measure."⁸⁰ In particular, Japan claims, among other things, that "MOFCOM failed to make sufficiently detailed disclosures regarding its treatment of the arguments by interested parties regarding the differences among the three Products."⁸¹

49. China submits that it "does not see why the criteria and factors that MOFCOM took into account in defining the Product Under Investigation (which in this case were in any event fully disclosed in MOFCOM's Final Determination) should be subject to the notification requirements laid down in Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement."⁸² Nonetheless, China also submits that MOFCOM had fully disclosed its assessment of the products' similarities and differences in the Final Determination and the reasons for concluding that the three products fell "into the same category of product".⁸³

50. Australia notes that the purpose of Article 12.2 of the Anti-Dumping Agreement is to provide transparency of the authority's decision-making at crucial points of the investigation.⁸⁴ This article requires any public notice (or separate report) to set out in "sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities".⁸⁵ The panel explained in *EC – Tube or Pipe Fittings* that a "material issue" is "an issue that has arisen in the course of the investigation that must necessarily be resolved in order for the investigating authorities to be able to reach their determination".⁸⁶ Parties affected by the imposition of anti-dumping duties "are entitled to

⁸⁰ Japan's first written submission, para. 618.

⁸¹ Japan's first written submission, para. 620.

⁸² China's first written submission, para. 909.

⁸³ China's first written submission, para. 913.

⁸⁴ Panel report, *Mexico – Corn Syrup*, para. 7.104.

⁸⁵ Article 12.2, Anti-Dumping Agreement.

⁸⁶ Panel report, *EC – Tube or Pipe Fittings*, para. 7.424. See also Panel report, *EU – Footwear (China)*, para. 7.844.

know, as a matter of fairness and due process, the facts, law and reasons that have led to the imposition of such duties".⁸⁷

51. Further, the second sentence of Article 12.2.2 of the Anti-Dumping Agreement requires inclusion in the public notice of "the reasons for the acceptance or rejection of relevant arguments or claims made by the exporters and importers". The panel in *China – X-Ray Equipment*, noted that "it is particularly important that the "reasons" for rejecting or accepting such arguments [made by exporters and importers] 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".⁸⁸

52. Australia notes that over the course of the investigation, interested parties had raised with MOFCOM their concerns that "the scope of the subject product... was too broad, involving several different products with different prices".⁸⁹ While MOFCOM acknowledged that although the Subject Imports "have differences in specific segment uses and customers, these are reasonable differences within the products of the same category due to segmentation specifications",⁹⁰ it did not provide further explanation to support this assertion, including how it reached the conclusion that the differences constituted a "reasonable difference". Australia submits Panel should carefully consider whether the explanations set out in MOFCOM's determination met the requirements under Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement.

V. CONCLUSION

53. Japan's claims in this dispute raise important questions regarding the proper legal interpretation and application of the Anti-Dumping Agreement. Australia reiterates the potential trade-distorting impacts of anti-dumping measures and the consequent responsibility of investigating authorities to conduct anti-dumping investigations and impose

⁸⁷ Appellate Body report, *China – GOES*, para. 258.

⁸⁸ Panel report, *China – X-ray Equipment*, para. 7.472.

⁸⁹ MOFCOM's Final Determination, (Exhibit JPN-5.b), page 11.

⁹⁰ MOFCOM's Final Determination, (Exhibit JPN-5.b), page 12.

measures consistently with the Anti-Dumping Agreement. In this submission, Australia has outlined its understanding of the obligations contained in key provisions of the Anti-Dumping Agreement, including by reference to the interpretations of those provisions in previous decisions of panels and the Appellate Body.

54. While Australia acknowledges an investigating authority has discretion in defining the product under investigation, Australia recognises the responsibility placed on investigating authorities by the Anti-Dumping Agreement to ensure an undistorted and objective injury analysis based on positive evidence. In addition, Australia reiterates that compliance with due process obligations is an essential element an anti-dumping investigation. Australia submits that MOFCOM's approach on these issues raises serious questions. It is, therefore, incumbent on the Panel to closely examine MOFCOM's definition of the domestic industry and injury analysis, as well as MOFCOM's compliance with due process obligations, to ensure that the measures at issue are applied consistently with the Anti-Dumping Agreement.

55. Australia thanks the Panel for the opportunity to submit its views on the issues raised in this dispute.