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

REPORT OF THE PANEL

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China – Autos (US)	Panel Report, *China – Anti-Dumping and Countervailing Duties on Certain Automobiles from the United States*, WT/DS440/R and Add.1, adopted 18 June 2014, DSR 2014:VII, p. 2655
China – Broiler Products	Panel Report, *China – Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States*, WT/DS427/R and Add.1, adopted 25 September 2013, DSR 2013:IV, p. 1041
China – Cellulose Pulp	Panel Report, *China – Anti-Dumping Measures on Imports of Cellulose Pulp from Canada*, WT/DS483/R and Add.1, adopted 22 May 2017, DSR 2017:IV, p. 1961
China – GOES	Appellate Body Report, *China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States*, WT/DS414/AB/R, adopted 16 November 2012, DSR 2012:XII, p. 6251
China – GOES (Article 21.5 – US)	Panel Report, *China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States – Recourse to Article 21.5 of the DSU by the United States*, WT/DS414/RW and Add.1, adopted 31 August 2015, DSR 2015:VII, p. 3865
China – X-Ray Equipment	Panel Report, *China – Definitive Anti-Dumping Duties on X-Ray Security Inspection Equipment from the European Union*, WT/DS425/R and Add.1, adopted 24 April 2013, DSR 2013:III, p. 659
EC – Bed Linen	Panel Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/R, adopted 12 March 2001, as modified by Appellate Body Report WT/DS141/AB/R, DSR 2001:VI, p. 2077
EC – Fasteners (China)	Appellate Body Report, *European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*, WT/DS397/AB/R, adopted 28 July 2011, DSR 2011:VII, p. 3995
EC – Fasteners (China) (Article 21.5 – China)	Appellate Body Report, *European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China – Recourse to Article 21.5 of the DSU by China*, WT/DS397/AB/RW and Add.1, adopted 12 February 2016, DSR 2016:I, p. 7
EC – Salmon (Norway)	Panel Report, *European Communities – Anti-Dumping Measure on Farmed Salmon from Norway*, WT/DS337/R, adopted 15 January 2008, and Corr.1, DSR 2008:I, p. 3
EC – Tube or Pipe Fittings	Appellate Body Report, *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/AB/R, adopted 18 August 2003, DSR 2003:VI, p. 2613
EC – Tube or Pipe Fittings	Panel Report, *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/R, adopted 18 August 2003, as modified by Appellate Body Report WT/DS219/AB/R, DSR 2003:VII, p. 2701
EC and certain member States – Large Civil Aircraft	Appellate Body Report, *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/AB/R, adopted 1 June 2011, DSR 2011:I, p. 7
EU – Fatty Alcohols (Indonesia)	Appellate Body Report, *European Union – Anti-Dumping Measures on Imports of Certain Fatty Alcohols from Indonesia*, WT/DS442/AB/R and Add.1, adopted 29 September 2017, DSR 2017:VI, p. 2613
EU – Fatty Alcohols (Indonesia)	Panel Report, *European Union – Anti-Dumping Measures on Imports of Certain Fatty Alcohols from Indonesia*, WT/DS442/R and Add.1, adopted 29 September 2017, as modified by Appellate Body Report WT/DS442/AB/R, DSR 2017:VI, p. 2765
EU – Footwear (China)	Panel Report, *European Union – Anti-Dumping Measures on Certain Footwear from China*, WT/DS405/R, adopted 22 February 2012, DSR 2012:IX, p. 4585
Guatemala – Cement I	Appellate Body Report, *Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico*, WT/DS60/AB/R, adopted 25 November 1998, DSR 1998:IX, p. 3767
Korea – Certain Paper	Panel Report, *Korea – Anti-Dumping Duties on Imports of Certain Paper from Indonesia*, WT/DS312/R, adopted 28 November 2005, DSR 2005:XXII, p. 10637
Korea – Pneumatic Valves (Japan)	Appellate Body Report, *Korea – Anti-Dumping Duties on Pneumatic Valves from Japan*, WT/DS504/AB/R and Add.1, adopted 30 September 2019, DSR 2019:XI, p. 5637
Korea – Pneumatic Valves (Japan)	Panel Report, *Korea – Anti-Dumping Duties on Pneumatic Valves from Japan*, WT/DS504/R and Add.1, adopted 30 September 2019, as modified by Appellate Body Report WT/DS504/AB/R, DSR 2019:XI, p. 5935
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Russia – Commercial Vehicles	Appellate Body Report, *Russia – Anti-Dumping Duties on Light Commercial Vehicles from Germany and Italy*, WT/DS479/AB/R and Add.1, adopted 9 April 2018, DSR 2018:III, p. 1167

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Thailand – H-Beams	Panel Report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, WT/DS122/R, adopted 5 April 2001, as modified by Appellate Body Report WT/DS122/AB/R, DSR 2001:VII, p. 2741
US – Carbon Steel	Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, WT/DS213/AB/R and Corr.1, adopted 19 December 2002, DSR 2002:IX, p. 3779
US – Continued Zeroing	Appellate Body Report, *United States – Continued Existence and Application of Zeroing Methodology*, WT/DS350/AB/R, adopted 19 February 2009, DSR 2009:III, p. 1291
US – Hot-Rolled Steel	Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, adopted 23 August 2001, DSR 2001:X, p. 4697
US – Softwood Lumber VI	Panel Report, *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada*, WT/DS277/R, adopted 26 April 2004, DSR 2004:VI, p. 2485
US – Zeroing (EC)	Appellate Body Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294/AB/R, adopted 9 May 2006, and Corr.1, DSR 2006:II, p. 417

EXHIBITS REFERRED TO IN THIS REPORT

Exhibit	Short Title (if any)	Description
CHN-7.b (BCI)	Nisshin Steel's questionnaire response, section V	Nisshin Steel's response to the questionnaire for the anti-dumping case of stainless steel billet and hot-rolled stainless plate/coil, section V
CHN-11.b (BCI)	Nisshin Steel's response to additional questions of MOFCOM	Nisshin Steel's response to additional questions of MOFCOM (26 December 2018)
CHN-12.b (BCI)	Nippon Steel's response to additional questions of MOFCOM	Nippon Steel's response to additional questions of MOFCOM (26 December 2018)
CHN-13.b		Non-confidential version of attachment 6 to the application
CHN-21.b	Applicant's reply to interested parties' comments (1 November 2018)	The applicant's reply to certain interested parties' comments of the anti-dumping investigation on stainless steel billet and hot rolled stainless steel plate (coil) (1 November 2018)
CHN-22.b	Applicant's reply to interested parties' comments (23 January 2019) (revised)	The applicant's reply to certain interested parties' comments of the anti-dumping investigation on stainless steel billet and hot-rolled stainless steel plates (coils) (23 January 2019) (revised)
CHN-23.b	Gansu Jiu's questionnaire response	Gansu Jiu's response to the questionnaire for the anti-dumping case of stainless steel billet and hot-rolled stainless plate/coil (extract)
CHN-24.b	BCMR's questionnaire response	BCMR's response to the questionnaire for the anti-dumping case of stainless steel billet and hot-rolled stainless plate/coil (extract)
CHN-25.b	BCF's questionnaire response	BCF's response to the questionnaire for the anti-dumping case of stainless steel billet and hot-rolled stainless plate/coil (extract)
CHN-26.b	Angang Lianzhong's questionnaire response (revised)	Angang Lianzhong's response to the questionnaire for the anti-dumping case of stainless steel billet and hot-rolled stainless plate/coil (extract) (revised)
JPN-5.b	MOFCOM's final determination	MOFCOM, Final determination 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 (22 July 2019)
JPN-6.b	Application	Applicant, Application for anti-dumping investigation submitted by the PRC domestic stainless steel billet and hot rolled stainless steel plate/coil industry (22 June 2018)
JPN-8.b (BCI)	Non-injury brief (revised)	Japanese respondents, Non-injury defense in the stainless steel anti-dumping investigation (revised) (21 November 2018)
JPN-11.b		MOFCOM's questionnaire for domestic producers
JPN-18.b	MOFCOM's disclosure	Letter dated 5 July 2019 disclosing essential facts for final determination of the anti-dumping case on stainless steel billets and hot-rolled stainless steel plates/coils

ABBREVIATIONS USED IN THIS REPORT

Abbreviation	Description
Angang Lianzhong	Angang Lianzhong Stainless Steel Corporation
Anti-Dumping Agreement	Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994
Baosteel	Baosteel Stainless Steel Co., Ltd.
BCF	Beihai Chengde Ferronickel and Stainless Steel Co., Ltd.
BCI	business confidential information
BCMR	Beihai Chengde Metal Rolling Co., Ltd.
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
Gansu Jiu	Gansu Jiu Steel Group Hongxing Iron & Steel Co., Ltd.
GATT 1994	General Agreement on Tariffs and Trade 1994
MOFCOM	Ministry of Commerce of China
NYK	Nippon Yakin Kogyo Co., Ltd.
POI	period of investigation
WTO	World Trade Organization

1 INTRODUCTION

1.1 Complaint by Japan

1.1. On 11 June 2021, Japan requested consultations with China pursuant to Articles 1 and 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Article XXIII:1 of the General Agreement on Tariffs and Trade 1994 (GATT 1994), and Articles 17.2 and 17.3 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement) with respect to the measures and claims set out below.[1]

1.2. Consultations were held on 19 July 2021.

1.2 Panel establishment and composition

1.3. On 19 August 2021, Japan requested the establishment of a panel pursuant to Articles 4.7 and 6 of the DSU, Article XXIII of the GATT 1994, and Article 17.4 of the Anti-Dumping Agreement.[2] At its meeting on 27 September 2021, the Dispute Settlement Body (DSB) established a panel pursuant to the request of Japan in document WT/DS601/2, in accordance with Article 6 of the DSU.[3]

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

> To examine, in the light of the relevant provisions of the covered agreements cited by the parties to the dispute, the matter referred to the DSB by Japan in document WT/DS601/2 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.[4]

1.5. On 13 January 2022, Japan requested the Director-General to determine the composition of the panel, pursuant to Article 8.7 of the DSU. On 24 January 2022, the Director-General accordingly composed the Panel as follows:

Chairperson:	Mr José Luis Pérez Gabilondo
Members:	Ms Keisha-Ann Thompson
	Mr Jose Antonio Buencamino

1.6. Australia, Brazil, Canada, the European Union, India, the Republic of Korea (Korea), Mexico, the Russian Federation, the Kingdom of Saudi Arabia, Chinese Taipei, the United States, and Viet Nam notified their interest in participating in the Panel proceedings as third parties.

1.3 Panel proceedings

1.7. After consultation with the parties, the Panel adopted its Working Procedures[5], Additional Working Procedures on business confidential information (BCI)[6] and a partial timetable on 23 February 2022. The Panel subsequently revised the timetable on 28 February 2022, 4 August 2022, 14 October 2022, and 3 November 2022.

1.8. The Panel held a first substantive meeting with the parties on 29 and 30 June, as well as 1 July 2022. A session with the third parties took place on 30 June 2022. The Panel held a second substantive meeting with the parties on 11 and 12 October 2022. While the Panel proposed to the parties that the substantive meetings be held in-person at the WTO premises in Geneva, due to constraints related to the COVID-19 pandemic identified by the parties, the Panel conducted both substantive meetings via secure videoconference. On 12 December 2022, the Panel issued the descriptive part of its Report to the parties. The Panel issued the Interim Report and Final Report to the parties on 22 March 2023 and 10 May 2023 respectively.

[1] Request for consultations by Japan, WT/DS601/1 (Japan's consultation request).
[2] Request for the establishment of a panel by Japan, WT/DS601/2 (Japan's panel request).
[3] DSB, Minutes of the meeting held on 27 September 2021, WT/DSB/M/456, para. 5.4.
[4] Constitution note of the Panel, WT/DS601/3.
[5] Working Procedures of the Panel (Annex A-1).
[6] Additional Working Procedures of the Panel concerning business confidential information (Annex A-2).

2 THE MEASURES AT ISSUE

2.1. In its panel request, Japan identified the measures at issue as China's measures imposing anti-dumping duties on stainless steel products from Japan, as set forth in the Ministry of Commerce of China (MOFCOM) Announcement No. 9 of 2019 and Announcement No. 31 of 2019, including any and all annexes and amendments thereto.[7] Pursuant to the measures, China imposed definitive anti-dumping duties on imports of certain steel products[8] from Japan, Korea, the European Union, and Indonesia.[9]

3 PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

3.1. Japan requests that the Panel find that the measures at issue are inconsistent with Articles 1, 3.1, 3.2, 3.3, 3.4, 3.5, 4.1, 6.5, 6.5.1, 6.9, 12.2 and 12.2.2 of the Anti-Dumping Agreement and Article VI:6(a) of the GATT 1994.[10] Japan further requests, pursuant to Article 19.1 of the DSU, that the Panel recommend that China bring its measures into conformity with the GATT 1994 and the Anti-Dumping Agreement.[11]

3.2. China requests that the Panel reject Japan's claims in this dispute in their entirety.[12]

4 ARGUMENTS OF THE PARTIES

4.1. The arguments of the parties are reflected in their executive summaries, provided to the Panel in accordance with paragraph 25 of the Working Procedures adopted by the Panel (see Annexes B-1 and B-2).

5 ARGUMENTS OF THE THIRD PARTIES

5.1. The arguments of Australia, Brazil, Canada, the European Union, Chinese Taipei, and the United States are reflected in their executive summaries, provided in accordance with paragraph 28 of the Working Procedures adopted by the Panel (see Annexes C-1, C-2, C-3, C-4, C-5, and C-6). India, Korea, Mexico, the Russian Federation, the Kingdom of Saudi Arabia, and Viet Nam did not submit written or oral arguments to the Panel.

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[7] Japan's panel request, pp. 1-2 (referring to MOFCOM Announcement No. 9 of 2019 on the preliminary ruling of anti-dumping investigation into imports of stainless steel billets and hot-rolled stainless steel plates/coils originating in the European Union, Indonesia, Japan, and Korea, available at: http://www.mofcom.gov.cn/article/b/c/201903/20190302845525.shtml; and MOFCOM Announcement No. 31 of 2019 on final ruling of anti-dumping investigation into imports of stainless steel billets and hot-rolled stainless steel plates/coils originating in the European Union, Indonesia, Japan, and Korea, available at: http://www.mofcom.gov.cn/article/b/e/201907/20190702883527.shtml).

[8] The "Subject product" section of MOFCOM's final determination sets out the following as the "Product description":

> Stainless steel billet and hot-rolled stainless steel plate (coil) refers to alloyed steel with carbon content (by weight) of 1.2% or less and chromium content of 10.5% or more, regardless of other elements, except for cold-rolled ones. Stainless steel billet has a rectangular (except square) cross-section or other semi-finished stainless steel products. Hot-rolled stainless steel plate (coil) is made of stainless steel billet through hot rolling and other processes, which is in the shape of roll or plate, regardless of the width and thickness.

(MOFCOM's final determination (Exhibit JPN-5.b), pp. 10-11)

In these panel proceedings, Japan used the term "slabs" instead of "billets" because, in its view, slabs is the more precise term to describe the stainless steel products in question. China used the term "billets", noting in this regard that MOFCOM used the term billets in the investigation, that the relevant HS codes refer to either billets or slabs, and the relevant HS codes describe the products in a manner that corresponds to MOFCOM's description of billets. (Japan's request for interim review, para. 2; China's comments on Japan's request for interim review, para. 4).

[9] China's first written submission, para. 68.
[10] Japan's first written submission, paras. 65, 218, 302, 361, 444, 453, 493, 531, 609, 673, and 675.
[11] Japan's first written submission, para. 676.
[12] China's first written submission, para. 982.

6 INTERIM REVIEW

6.1. On 5 April 2023, the parties submitted a written request asking us to review precise aspects of the Interim Report. On 19 April 2023 both parties submitted comments on each other's request for review. The request and comments made at the interim review stage as well as our discussion and disposition of the parties' request are set out in Annex A-4.

7 FINDINGS

7.1 Japan's claims concerning MOFCOM's definition of the domestic industry

7.1.1 Introduction

7.1. In the underlying investigation, MOFCOM defined the domestic industry as domestic producers representing a "major proportion" of total domestic production of the like product, namely, stainless steel billets (slabs), coils, and plates. MOFCOM found that the share of total domestic production of the applicant domestic producers and those domestic producers that supported the application was 65.18% to 81.37% over the injury period of investigation (POI) (2014 to the first quarter of 2018) and concluded that this represented a "major proportion". In reaching this finding, MOFCOM calculated the collective output of the domestic producers included in the "domestic industry" as the sum of their (a) production volume of coils and plates, and (b) *sales volume* of billets (slabs). MOFCOM then divided that figure by what it stated was the "total production output" in China of the same products to arrive at the proportion of total domestic production represented by the collective output of the producers included in the definition of the domestic industry.[13] The "total production output" used by MOFCOM was calculated as the sum of overall (a) production volume of coils and plates, and (b) *sales volume* of billets (slabs) in China.

7.2. MOFCOM used the *sales volume* of billets (slabs) as an indicator of the production volume of billets that were not further processed into coils or plates, to avoid what it referred as the "double counting" problem. In particular, noting that billets (slabs) are mainly processed into coils and plates, MOFCOM sought to avoid a situation where it double counted the production of billets (slabs), once in the production volume of billets (slabs), and then again in the production volume of coils and plates.[14]

7.3. Japan claims that MOFCOM's determination of the domestic industry was inconsistent with Articles 4.1 and 3.1 of the Anti-Dumping Agreement, because of the following three alleged flaws:

a. By using the *sales volume* of billets (slabs) as an indicator for production, MOFCOM's methodology for calculating domestic production created a risk of inflating the domestic industry's share in domestic production.

b. MOFCOM failed to address and explain an alleged discrepancy in the domestic industry's share in domestic production and its market share, which brought into question the reliability of MOFCOM's production data.

c. MOFCOM failed to examine whether the defined domestic industry was representative.

7.4. China rejects the entirety of Japan's claims, and in addition, maintains that certain aspects of Japan's claims are outside of the Panel's terms of reference. In paragraphs 7.5-7.24 below, we first focus on the issues arising with regard our terms of reference, and then turn, in paragraph 7.29 to the substantive issues.

7.1.2 Terms of reference

7.5. Japan's panel request states in relevant part as follows:

[13] MOFCOM's final determination (Exhibit JPN-5.b), p. 28.
[14] MOFCOM's final determination (Exhibit JPN-5.b), p. 28.

> Japan considers that these measures are inconsistent with China's obligations under the following provisions of the GATT 1994 and the Anti-Dumping Agreement:
>
> …
>
> 6. Article 4.1 of the Anti-Dumping Agreement:
>
> (a) because China, in defining the domestic industry, *relied on sales volume of slabs instead of production volume of slabs*, and did not define the domestic industry as domestic producers whose output of the products constitutes a major proportion of the total domestic production of those products; and
>
> (b) in conjunction with Article 3.1 of the Anti-Dumping Agreement, because China improperly defined the domestic industry and, *as a result*, failed to base its determination on positive evidence and conduct an objective examination of the facts with respect to the domestic industry producing the like products.[15]

7.6. China raises two concerns about how Japan has sought to argue the claims specified in paragraph 6 of its panel request.

a. First, China contends that the claim Japan pursues in this proceeding challenging MOFCOM's determination of the domestic industry impermissibly expands the scope of the claim presented in Japan's panel request, which according to China, is specifically focused on MOFCOM's failure to rely on the *production* volume of billets (slabs).

b. Second, China contends that Japan's claim under Article 3.1 of the Anti-Dumping Agreement, as presented in its panel request, is purely consequential to a finding of violation under Article 4.1 of the Anti-Dumping Agreement. Accordingly, China submits that Japan is not entitled to pursue the claim it has raised in this proceeding that MOFCOM's determination of the domestic industry was inconsistent with Article 3.1.

7.7. We recall that a panel's terms of reference are defined by Articles 6.2 and 7.1 of the DSU. Under the terms of Article 7.1, a panel is instructed to "examine … the matter referred to the DSB" in the complaining party's panel request. In turn, Article 6.2 provides that:

> The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.

7.8. Previous DSB reports, with which we agree, have clarified that the "matter referred to the DSB" consists of the following two elements, which together form the basis of a panel's terms of reference: (a) identification of the specific measure at issue; and (b) a brief summary of the legal basis of the complaint, or the claims.[16] China's complaint concerns the extent to which Japan's submissions in these proceedings correspond to the "brief summary of the legal basis of the complaint" set out in the panel request.

7.9. The legal basis of a complaint refers to the claims set out in a panel request alleging that the respondent has violated, or nullified or impaired the benefits arising from, an identified provision of a covered agreement.[17] To provide *a brief summary* of the legal basis of a complaint, a panel request must plainly connect the challenged measure with the provision of the covered agreement that it claims was infringed.[18] With these considerations in mind, we examine in the sections that follow, each of China's two concerns with respect to how Japan has sought to argue the claims specified in paragraph 6 of its panel request – namely, (a) whether Japan's submissions in this proceeding go beyond the brief summary of the legal basis of its complaint presented in the panel request; and (b) whether Japan's claim under Article 3.1 of the Anti-Dumping Agreement, as presented in its

[15] Emphasis added.
[16] See e.g. Appellate Body Reports, *Guatemala – Cement I*, paras. 69-76; *US – Carbon Steel*, para. 125; *US – Continued Zeroing*, para. 160; and *EC and certain member States – Large Civil Aircraft*, para. 639.
[17] Appellate Body Report, *Korea – Pneumatic Valves (Japan)*, para. 5.31.
[18] Appellate Body Report, *Korea – Pneumatic Valves (Japan)*, para. 5.6.

panel request, is purely consequential to a finding of violation under Article 4.1 of the Anti-Dumping Agreement.

7.1.2.1 Whether the claim Japan pursues in this proceeding challenging MOFCOM's definition of the domestic industry is outside of the scope of our terms of reference

7.10. According to China, paragraph 6(a) of Japan's panel request reveals only one reason for Japan's concern about MOFCOM's determination of the domestic industry – namely, that "MOFCOM should have relied on the *production* volume of stainless steel billets [slabs]", instead of the *sales* volume of billets (slabs).[19] Thus, according to China, any claim by Japan that does not take issue specifically with MOFCOM's failure to rely on the production volume of billets (slabs) is outside the Panel's terms of reference.[20]

7.11. During the course of this proceeding, Japan explained that it is no longer pursuing the claim set out in paragraph 6(a) of its panel request.[21] Instead, Japan has clarified that it is pursuing the claim set out in paragraph 6(b) of its panel request, which it argues is a claim based on Article 4.1 of the Anti-Dumping Agreement read in conjunction with Article 3.1.[22]

7.12. In response to Japan's submission that it has abandoned its claim under paragraph 6(a), and that it is only pursuing the claim set out in paragraph 6(b) of the panel request, China contends that if paragraph 6(b) was meant to describe an independent claim under Article 4.1, whether or not in conjunction with Article 3.1, there would not be point of also providing paragraph 6(a).[23] In particular, China contends that the language of Japan's panel request shows that paragraph 6(b) establishes a purely consequential claim to the claim set out in paragraph 6(a).[24] Thus, China maintains that paragraph 6(b) does not cover the claim that Japan has presented and pursued in its submissions in this dispute.

7.13. Turning to Japan's panel request, we note that the *chapeau* of paragraph 6 refers to Article 4.1 of the Anti-Dumping Agreement, thus indicating that this provision serves as the legal basis for the claims set out in both paragraph 6(a) *as well as* paragraph 6(b). However, we see nothing in the text of either paragraph suggesting that the allegations made in paragraph 6(b) are dependent and consequential on those made in paragraph 6(a).

7.14. Paragraph 6(b) can be read as being comprised of two parts. In the first part, the stated basis for the alleged violation is "because China improperly defined the domestic industry". In the second part, the text of paragraph 6(b) stipulates that "as a result" of this conduct, MOFCOM "failed to base its determination on positive evidence and conduct an objective examination of the facts with respect to the domestic industry producing the like products". The second part of paragraph 6(b) is, therefore, dependent on the first part of paragraph 6(b), because Japan contends that "*as a result*" of the improper definition of the domestic industry, China failed to make its determination on positive evidence and conduct an objective examination of the facts. In contrast, the first part of paragraph 6(b) stands by itself and indicates that the object of Japan's challenge is the improper definition of the domestic industry. Thus, we do not share China's view that the *entirety* of paragraph 6(b) presents a purely consequential claim to the one set out in paragraph 6(a). Instead, paragraph 6(b), and particularly the first part of this paragraph, provides an independent basis for Japan's claims challenging the improper definition of the domestic industry.

7.15. Considering that the first part of paragraph 6(b) reveals that Japan is challenging the improper definition of the domestic industry, and does so without limiting its focus to MOFCOM's failure to rely on the *production* volume of billets (slabs), we do not consider that Japan is precluded, as China contends, from raising a claim that does not take issue specifically with MOFCOM's failure to rely on the production volume of billets (slabs). Instead, we consider that the three grounds raised by Japan challenging MOFCOM's domestic industry definition are three arguments in support of Japan's claims. Thus, Japan's terms of reference do not preclude it from

[19] China's first written submission, para. 597.
[20] China's first written submission, para. 599.
[21] Japan's comments on China's request for a preliminary ruling, para. 18.
[22] Japan's comments on China's request for a preliminary ruling, paras. 19-22.
[23] China's second written submission, para. 356.
[24] See e.g. China's second written submission, paras. 357-358.

raising a claim that does not take issue specifically with MOFCOM's failure to rely on the production volume of billets (slabs).

7.1.2.2 Whether Japan's claim under Article 3.1 is a consequential claim

7.16. We now turn to the second question before us, i.e. whether Japan's claim under Article 3.1, as presented in its panel request, is purely consequential.

7.17. China observes that in paragraph 6(b) of its panel request, Japan stated that "as a result of" MOFCOM's allegedly improper definition of the domestic industry, MOFCOM "*failed to base its determination on positive evidence and conduct an objective examination of the facts*", noting that the italicized language reflects the text of Article 3.1.[25] Thus, China contends that Japan's claim under Article 3.1 is consequential to its claim under Article 4.1.[26]

7.18. Japan argues that its claim under Article 3.1 is not consequential to its claim under Article 4.1, and furthermore clarifies that it is not making an independent claim under Article 3.1.[27] Instead, Japan contends that "Articles 4.1 and 3.1 of the Anti-Dumping Agreement should be interpreted together", and that MOFCOM's "improper definition of domestic industry … is inconsistent with the disciplines pursuant to both Articles 4.1 *and* 3.1 of the Anti-Dumping Agreement".[28]

7.19. We recall that the relevant part of Japan's panel request states as follows:

> Japan considers that these measures are inconsistent with China's obligations under the following provisions of the GATT 1994 and the Anti-Dumping Agreement:
>
> …
>
> 6. Article 4.1 of the Anti-Dumping Agreement:
>
> …
>
> (b) *in conjunction* with Article 3.1 of the Anti-Dumping Agreement, because China improperly defined the domestic industry and, *as a result, failed to base its determination on positive evidence and conduct an objective examination of the facts with respect to the domestic industry producing the like products*.[29]

7.20. Paragraph 6(b) refers to Article 4.1 of the Anti-Dumping Agreement "in conjunction with" Article 3.1. It is followed by two narrative descriptions. The first description, starting with "because" refers to the improper definition of the domestic industry. The second description, starting with "as a result", refers to MOFCOM's failure to "base its determination on positive evidence and conduct an objective examination of the facts with respect to the domestic industry producing the like products". Japan's argument is that the panel request refers to Article 4.1 "in conjunction with Article 3.1", and thus Japan is challenging under both these provisions MOFCOM's improper definition of the domestic industry, *as well as* the failure to base the determination on positive evidence and conduct an objective examination.[30] However, in our view, if that were the case, paragraph 6(b) would become circular and the second part of the paragraph would be redundant.

7.21. In this regard, we note that the reference to "objective examination" and "positive evidence" in the second part of paragraph 6(b) echoes the text of Article 3.1. If, in the first part of

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[25] China's second written submission, para. 360.
[26] China's second written submission, paras. 359-361.
[27] Japan's response to Panel question No. 1, para. 2. See also Japan's second written submission, para. 272.
[28] Japan's response to Panel question No. 1, para. 2. (emphasis added)
[29] Emphasis added.
[30] See e.g. Japan's second written submission, para. 272. Japan contends that if the second description in paragraph 6(b), starting after the phrase "as a result", only corresponds to an investigating authority's obligation under Article 3.1, no language highlighting the reference to "the domestic industry producing the like products" would appear in this paragraph because, according to Japan, the obligation in Article 3.1 is not limited to the definition of the domestic industry, but is centred on the determination of injury. (Ibid. para. 272).

paragraph 6(b), Japan were contending that MOFCOM failed to make an objective examination based on positive evidence in defining the domestic industry (as a reliance on Article 3.1 would suggest), then, in our view, there would be no need for the second part of paragraph 6(b), which also refers to a failure to make an objective examination based on positive evidence. Indeed, the second part of paragraph 6(b) would in that case become redundant because if the first part already challenged the definition of the domestic industry on this basis under Article 4.1 and Article 3.1, there would be no reason to repeat that allegation in the second part. Moreover, even if only part of the reason for the alleged violation described in the first part of paragraph 6(b) were the same as the reason for the consequential violation described in the second part (as reliance on Article 3.1 would suggest), then Japan's contentions in the two parts of paragraph 6(b) would be circular.

7.22. However, the circularity and redundancy in Japan's panel request are removed if one understands the first part of paragraph 6(b) to be challenging an improper definition of the domestic industry under Article 4.1, and the second part to be contending that *as a result of* this violation, MOFCOM acted inconsistently with Article 3.1, to the extent that its findings were not based on an objective examination of positive evidence. This understanding would be consistent with the fact that Article 4.1 (not Article 3.1), is the provision in the Anti-Dumping Agreement that prescribes rules for how to define the domestic industry. It is an understanding that also matches how Japan presented its claims in its first written submission. For instance, in heading F.3(a) of its first written submission, Japan contends that MOFCOM acted inconsistently with Articles 4.1 and 3.1 because MOFCOM relied on a methodology that may have overestimated the proportion of the total domestic production held by the domestic industry, "*thereby*" allegedly introducing a material risk of distortion in the *injury* analysis.[31] The use of the adverb "thereby" here indicates that Japan's contention that MOFCOM introduced a material risk of distortion into the *injury* analysis (a matter regulated by Article 3, not Article 4) is *dependent* upon the assertion that MOFCOM may have overestimated the proportion of total domestic production of those companies forming part of the domestic industry. To this extent, in our view, Japan's submissions confirm that its allegation of a violation of Article 3.1 is dependent upon MOFCOM's alleged failure to define the domestic industry in accordance with Article 4.1.

7.23. Thus, in the light of the above considerations, paragraph 6(b) of Japan's panel request presents two sets of claims in relation to MOFCOM's determination of the domestic industry. The first of these claims, described in the first part of paragraph 6(b), broadly challenges the consistency of MOFCOM's definition of the domestic industry with Article 4.1 alone. As we have explained, in our view, this part of Japan's claims cannot be read as being grounded in Article 3.1 because that would lead to redundancy and circularity. Japan's second claim is purely consequential to its first claim, and it is grounded in Article 3.1.

7.24. In the light of our finding that the reference to Article 3.1 in Japan's terms of reference indicates a claim that is consequential to its claim under Article 4.1, in the sections that follow, we will first review the merits of Japan's submissions with respect to its claim under Article 4.1 of the Anti-Dumping Agreement.

7.1.3 Article 4.1 of the Anti-Dumping Agreement

7.25. Article 4.1 of the Anti-Dumping Agreement, which sets out the rules on the definition of the domestic industry, states in relevant part as follows:

> For the purposes of this Agreement, the term "domestic industry" shall be interpreted as referring to the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products[.]

7.26. Article 4.1 defines the domestic industry as:

a. domestic producers as a whole of the like products, or

[31] Japan uses a similar formulation in headings F.3(b), and F.3(c) of its first written submission.

b. those whose collective output of the like products constitutes a *major proportion* of the total domestic production of those products.

7.27. Previous DSB reports, with which we agree, have understood the phrase "major proportion" in Article 4.1 to have both quantitative and qualitative connotations.[32]

a. Regarding the quantitative connotation, previous DSB reports have found that while Article 4.1 does not explain in numerical terms what exact proportion of domestic production represents a major proportion, it should be *a relatively high proportion of the total domestic production*.[33]

b. With respect to the qualitative connotation, previous DSB reports have found that domestic producers of the like product who are included in the domestic industry must be *representative of the total domestic production*.[34]

7.28. Thus, if MOFCOM's definition of the domestic industry does not comply with the quantitative and qualitative aspects of the "major proportion" requirement, we will find a violation under Article 4.1 of the Anti-Dumping Agreement. In addition, we note that while reviewing whether MOFCOM's definition complies with these requirements, we will be bound by our standard of review under Article 17.6(i) of the Anti-Dumping Agreement. Article 17.6(i) states that in its assessment of the facts of the matter, "the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective." Thus, if we find that in defining the domestic industry, MOFCOM failed to establish the facts properly, or failed to make an unbiased and objective evaluation of those facts, we will find a violation under Article 4.1.

7.1.3.1 Japan's arguments with respect to the alleged flaws in MOFCOM's methodology for calculating domestic production

7.29. As already noted, MOFCOM calculated the share of total domestic production of the producers selected to represent the "domestic industry" by summing the volume of production of stainless steel coils and plates with the external *sales* volume of billets (slabs), instead of the *production* volume of billets (slabs). Japan contends that, as a matter of fact, it is possible that producers included in the definition of the domestic industry had a higher proportion of external sales of billets (slabs) compared to domestic producers not included in the domestic industry.[35] In such a scenario, Japan maintains that MOFCOM's method of calculation would overestimate the share of these producers in the total domestic production as opposed to those producers not included in the domestic industry.[36]

7.30. Japan acknowledges that MOFCOM used the sales volume of billets (slabs) to avoid double counting the production volume of billets (slabs).[37] However, Japan maintains that MOFCOM's decision to use sales volume of billets (slabs) as an indicator for its production volume did not resolve the double counting problem.[38] According to Japan, this is because billets (slabs) *sold* by the domestic industry may be consumed in China by other producers (whether or not part of the domestic industry) to produce coils and plates, thus again creating the "double counting" issue that MOFCOM sought to resolve through its methodology of using sales volume of billets (slabs).[39]

7.31. China defends MOFCOM's decision to use the sales volume of billets (slabs), and contends that MOFCOM did not overrepresent the domestic industry's share in overall production. China submits that because the majority of billets (slabs) were captively used to produce coils and plates, MOFCOM needed to avoid double counting those billets (slabs), once as production volume of billets

[32] Appellate Body Reports, *Russia – Commercial Vehicles*, para. 5.12; *EC – Fasteners (China) (Article 21*.5 *– China)*, para. 5.302.
[33] Appellate Body Report, *EC – Fasteners (China) (Article 21*.5 *– China)*, para. 5.299 (quoting Appellate Body Report, *EC – Fasteners (China)*, para. 412).
[34] Appellate Body Reports, *Russia – Commercial Vehicles*, para. 5.13; *EC – Fasteners (China) (Article 21*.5 *– China)*, para. 5.303.
[35] Japan's response to Panel question No. 3, para. 9.
[36] Japan's response to Panel question No. 3, para. 9.
[37] Japan's first written submission, para. 470.
[38] Japan's first written submission, para. 470.
[39] Japan's first written submission, para. 470.

(slabs), and then again as production volume of coils and plates.[40] China argues that the use of sales volume of billets (slabs) as an indicator for its production volume was a reasonable alternative, considering it was not known whether billets (slabs) sold in the market were transformed into plates and coils.[41] In this way, China maintains that MOFCOM was able to avoid the problem of double counting to the extent possible.

7.32. China also contends that MOFCOM's methodology could not have overestimated the proportion of total domestic production represented by the domestic industry because the domestic industry's share in domestic production was very high, and its sales of billets (slabs) were limited. Accordingly, China maintains that such sales could not have distorted MOFCOM's assessment of the domestic production.[42]

7.33. The question before us is whether, in assessing whether the production of the firms included in the domestic industry represented a "major proportion" of total domestic production under Article 4.1, MOFCOM properly established the facts and evaluated those facts in an unbiased and objective manner. The relevant parts of MOFCOM's determination of the domestic industry are set out below.

> The Applicant used stainless steel billet as an indicator to calculate the production output of stainless steel billet and hot-rolled stainless steel plate (coil) in the application. In the preliminary determination, the *Investigating Authority considered that this indicator resulted in omission of production output or double counting, and it would be more reasonable to use the commodity volume of stainless steel billet, plus the production output of hot-rolled stainless steel plate* (*coil*)*, as an indicator to calculate the production output of stainless steel billet and hot-rolled stainless steel plate* (*coil*)*, so as to avoid the omission of external sales of a few stainless steel billets and avoid the double counting to the extent possible*.
>
> After preliminary determination, some interested parties asserted that when the Investigating Authority calculated the domestic industry representativeness, the production output (rather than sales volume) of stainless steel billet should be used. The Applicant asserted that it would be more reasonable to use the commodity volume of stainless steel billet, plus the production output of hot-rolled stainless steel plate (coil), as an indicator to calculate the production output of stainless steel billet and hot-rolled stainless steel plate (coil), so as to avoid the omission of external sales of a few stainless steel billets and avoid the double counting to the extent possible. If it was calculated according to the production output of the stainless steel billet, the double counting would be further caused. After review, *the Investigating Authority considered that the usage of stainless steel billets included two aspects in the case: firstly, they were mainly processed to stainless steel plate* (*coil*)*; secondly, a few of them were sold as commodity billet. The sales volume of the commodity billet was actually the partial production output of stainless steel billet in the case. Therefore, the Investigating Authority decided to maintain the preliminary finding in the final determination, and calculated the production output of stainless steel billet and hot-rolled stainless steel plate* (*coil*) *by using commodity volume of stainless steel billet, plus the production output of hot-rolled stainless steel plate* (*coil*)*, as the indicator*.[43]

7.34. This excerpt reveals that MOFCOM recognized that the calculation of total production of the domestic like product was not a straightforward exercise because of the fact that billets (slabs) are inputs into the production of coils and plates. MOFCOM acknowledged that these facts could give rise to a double counting problem, and it sought to avoid this by using the external *sales* volume of billets (slabs) as an indicator of domestic production of billets (slabs). At the same time, MOFCOM considered that using the sales volume of billets (slabs) would also avoid omitting "a few" external sales of billets (slabs) from its calculation.

7.35. MOFCOM explained that using the sales volume of billets (slabs) allowed it to avoid double counting the production of billets (slabs) to the extent possible – once as production of billets

[40] China's first written submission, para. 648.
[41] China's response to Panel question No. 2, para. 13.
[42] China's first written submission, para. 653.
[43] MOFCOM's final determination (Exhibit JPN-5.b), pp. 28-29. (emphasis added)

(slabs), and then again as coils or plates made from such billets (slabs). In our view, the type of double counting alluded to by MOFCOM in its report would have resulted in an inaccurate calculation of the domestic production data used to determine the proportion of the total domestic production attributable to firms included in the defined domestic industry. We recognize that it was precisely to avoid this potential problem that MOFCOM chose to use external sales of billets (slabs) in its calculation.

7.36. However, as Japan notes, to the extent that billets (slabs) may be sold by one Chinese producer to another Chinese producer that consumed them to manufacture coils or plates, the same type of double counting problem that MOFCOM sought to address by relying on external sales volume would arise. Thus, we agree with Japan that on the facts before MOFCOM, double counting could arise in two scenarios:

a. First, when a domestic producer in China captively consumes billets (slabs) and processes it into coils or plates.

b. Second, when a domestic producer in China sells billets (slabs) to another producer in China, which, in turn processes it into coils and plates.

While MOFCOM acknowledged and sought to avoid the first of these two instances of possible double counting, it did not address that double counting might also arise in the second scenario.

7.37. In our view, faced with such circumstances, an unbiased and objective investigating authority determining whether the production of certain firms constituted a "major proportion" of total domestic production should have either (a) described whether, and if so how, it avoided double counting arising from external sales to other Chinese producers who would use such billets (slabs) to manufacture coils or plates or, in the alternative (b) provided a reasoned and adequate explanation as to why it was unnecessary to address the double counting arising in this second scenario. MOFCOM's report addresses neither of these points.

7.38. China maintains that MOFCOM's approach was appropriate for two reasons. First, China submits that the external sale of billets (slabs) was a unique practice that hardly took place.[44] China's view thus is that for this reason the impact of MOFCOM's methodology in ascertaining the percentage share of the domestic industry in domestic production would be very low.[45] Second, China contends that because MOFCOM had no information on the record as to what happened with the billets (slabs) that were sold externally, it could not have taken any further action with regard to the sale of billets (slabs).[46]

7.39. China's first line of argument is essentially that because of the limited external sales of billets (slabs), MOFCOM's decision to use those sales volumes as an indicator of production volume would only minimally affect the outcome in terms of the percentage share of the domestic industry in domestic production. However, while China contends that the impact of MOFCOM's methodology in ascertaining the percentage share of the domestic industry in domestic production would be very low, China has not supported this factual assertion with evidence. In response to our questions at the second meeting of the Panel, China stated that the volume of external sales of stainless steel billets (slabs) was based on the statistics provided by the Stainless Steel Branch of China Special Steel Enterprise Association, which was confidential.[47] By way of illustration, China stated that in the most recent time period (first quarter of 2018), the volume of external sales of billets by Chinese producers represented [[***]] of the production of steel billets.[48] However, given that the period of investigation used by MOFCOM in its analysis covered consecutive years from 2014 to the first quarter of 2018, we do not consider that data from only the first quarter of 2018 is adequately representative of the period MOFCOM used to make its assessment. In any case, nowhere in MOFCOM's report is there any discussion or analysis of this kind.

7.40. As regard China's second argument, we are of the view that having noted that stainless steel billets (slabs) are mainly processed into coils and plates, MOFCOM would have been on notice that

[44] China's second written submission, para. 382.
[45] China's second written submission, para. 382.
[46] China's second written submission, para. 380.
[47] China's response to Panel question No. 42(a), para. 13.
[48] China's response to Panel question No. 42(a), para. 13.

the same type of double counting problem it sought to avoid by not using production of billets (slabs) could have arisen by using *sales* volume of billets (slabs) in its calculations. While we recognize that MOFCOM decided to use the external sales volume of billets (slabs) to avoid double counting the production of billets (slabs), we consider that acting as an unbiased and objective investigating authority, MOFCOM should have either (a) further investigated whether billets (slabs) sold externally by Chinese producers were being used to produce coils or plates in China by other producers; or (b) at the very least, provided a reasoned and adequate explanation as to why it was unnecessary to address the double counting arising in this second scenario. MOFCOM's report contains no such discussion.

7.41. Based on the foregoing, we find that Japan has established that MOFCOM's determination of the domestic industry was inconsistent with Article 4.1 of the Anti-Dumping Agreement because, by not addressing in any way the second double counting scenario described above, MOFCOM failed to provide a reasoned and adequate explanation of its finding that the production of the firms included in the domestic industry represented a "major proportion" of the total production of all Chinese producers.

7.1.3.2 Japan's arguments concerning the alleged discrepancy between domestic industry market share data and its share in domestic production

7.42. Japan contends that MOFCOM overestimated the domestic industry's share in domestic production because certain data showed that the domestic industry's market share (i.e. share of domestic sales) was lower than its share of total domestic production.[49] Japan acknowledges that the domestic industry's market share and its share of domestic production could differ because market share, unlike domestic production, is calculated based on the domestic industry's share in overall sales plus imports, minus exports (i.e. total apparent domestic consumption). However, Japan contends that because imports into China were low, the domestic industry's market share and its share in domestic production should have been quite similar (but were not).[50] Japan also recognizes that market share and the share in domestic production would differ when domestically produced billets (slabs) are exported, and thus not included in overall consumption figures in China.[51] However, Japan contends that MOFCOM's final determination is silent on whether this was indeed the case.[52] In particular, Japan contends that "[e]ven when faced with the dramatic divergence between the proportion of the domestic industry [in domestic production] and its market share(s), MOFCOM's final determination [was] silent on this issue".[53]

7.43. China contends that any analysis pertaining to market share is irrelevant to an analysis under Article 4.1, because Article 4.1 focuses on the domestic industry's share in total domestic *production* whereas market shares are based on the overall sales volume.[54] In addition, China submits that the alleged discrepancy between the domestic industry's market share and its share in domestic production may be explained by the following:

a. The domestic industry's market share data were calculated by dividing the domestic industry's sales by the overall consumption in China. The overall consumption included sales by three Chinese producers that were excluded from the domestic industry because they were related to exporters.[55] The domestic industry's share in domestic production was calculated by dividing their production by the total production output in China. The total production output excluded the production data pertaining to those three Chinese producers that were specifically excluded from the domestic industry.[56]

b. Japan itself refers to the possibility that a large part of domestic production was sold outside China.[57]

[49] Japan's first written submission, paras. 478-481.
[50] Japan's first written submission, paras. 477 and 482-483.
[51] Japan's first written submission, para. 484.
[52] Japan's first written submission, para. 484.
[53] Japan's second written submission, para. 288.
[54] China's first written submission, paras. 663-664.
[55] China's first written submission, para. 666; second written submission, para. 399. See also China's first written submission, paras. 441-442.
[56] China's first written submission, para. 666. See also Japan's second written submission, para. 291.
[57] China's first written submission, para. 665.

7.44. We note that the "major proportion" requirement in Article 4.1 focuses on the share of the domestic industry in total domestic *production*, and not the domestic industry's share in domestic *consumption* (or *market share*). We also note that Article 4.1 of the Anti-Dumping Agreement (or any other provision of the Anti-Dumping Agreement) does not specifically require an explanation of why there may be a difference between the domestic industry's market share and its share of domestic production.[58] In the absence of any obligation, we do not consider that MOFCOM was required to explain in its determination any difference between the domestic industry's share of domestic production and its market share. Moreover, to the extent that Japan may be arguing that the difference in the domestic industry producers' market share compared with their share in total domestic production shows that the latter data relied upon by MOFCOM were inaccurate, we note that, as Japan acknowledges, the sources of the different data sets are different. In our view, the difference in the market share of the domestic industry compared with its share of total domestic production is not, alone, sufficient to show that the data used to calculate the domestic industry's share in domestic production was unreliable. Japan has not demonstrated how exactly the data on domestic production was inaccurate.

7.45. Based on the foregoing, we find that Japan has not established that MOFCOM's definition of the domestic industry was inconsistent with Article 4.1 because of an absence in MOFCOM's final determination of any explanation with respect to the difference in the domestic industry's share of domestic production and its market share.

7.1.3.3 Japan's arguments concerning the representativeness of the domestic industry

7.46. Japan contends that MOFCOM failed to comply with the "qualitative" aspect of the "major proportion" requirement in Article 4.1 of the Anti-Dumping Agreement because it did not ensure that the domestic industry was substantially representative of the domestic producers as a whole. For Japan, MOFCOM's failure arises because in examining the proportion of the domestic production of billets (slabs) represented by the applicant and its supporters, MOFCOM accumulated the sales volume of billets (slabs) with the production volume of coils and plates.[59] In doing so, Japan maintains that MOFCOM failed to ensure that the domestic industry substantially reflected the total domestic production of each of these three product categories.[60] Japan submits in this regard that if the composition of the producers included in the domestic industry is different and unique compared to the array of producers responsible for total domestic production (comprising producers other than those in the domestic industry), then there would be a material risk that any injury found with respect to the "domestic industry" would not reflect the actual state of the domestic producers as a whole.[61]

7.47. In particular, Japan contends, by pointing to certain exhibits, that the evidence before MOFCOM should have allowed it to understand that the domestic industry's production ratio of billets (slabs), coils, and plates differed from the production ratio of the domestic producers as a whole.[62] Japan also points to evidence showing significant differences between billets (slabs), coils, and plates, which according to Japan were three different products that had different characteristics and were not substitutable with one another.[63] Japan contends that a definition of the domestic industry that does not properly take into account the differences among these three product categories will

[58] We note that Japan responded to China's argument that the difference between the domestic industry's market share, and its share in domestic production could be explained (a) by differences between the production and sales volume; and (b) MOFCOM's exclusion of three producers from the "total production output" used to calculate the share of the domestic industry in domestic production. (Japan's second written submission, paras. 289-291).

Regarding the first argument, Japan contends that by arguing that the difference between production and sales may explain the discrepancy, China admits that the domestic industry had unique characteristics that affect its production or sales, and which, in turn, supports Japan's view that the domestic industry was not representative of domestic production. However, Japan did not explain how such a difference establishes that the domestic industry was not representative of domestic production.

Regarding the second argument, Japan contends that the final determination does not show the extent to which production volume of the three excluded producers explain the discrepancy between the domestic industry's market share and share in domestic production. However, again Japan did not point to any legal requirement why MOFCOM was required to make such a showing in its final determination.

[59] Japan's first written submission, para. 486.

[60] Japan's first written submission, para. 486.

[61] Japan's first written submission, para. 489.

[62] Japan's response to Panel question No. 4, para. 14.

[63] Japan's response to Panel question No. 4, para. 15; second written submission, para. 296.

not be able to accurately analyse the different impact that the imports of each of these categories may have on the state of the domestic industry.[64]

7.48. China notes that Japan has not provided any evidence to support its view that the domestic industry before MOFCOM was different or unique compared to the firms making up total domestic production, noting in this regard Japan's admission during the first substantive meeting that there was no evidence to support Japan's view.[65]

7.49. China also questions the legal basis of Japan's view that MOFCOM should have confirmed that the production ratio of the domestic industry with respect to these three products was equivalent or close to the production ratio of these three products in total domestic production.[66] Moreover, noting Japan's reliance on certain exhibits that, per Japan, should have allowed MOFCOM to understand that the domestic industry's production ratio of billets (slabs), coils, and plates differed from the production ratio of the domestic producers as a whole, China asserts that Japan fails to show how these exhibits support Japan's view.[67]

7.50. In addition, China rejects Japan's argument that MOFCOM's definition of the domestic industry should have properly taken into account the differences among billets (slabs), coils, and plates. Instead, China states that the "major proportion" requirement of Article 4.1 must be assessed in relation to the like product produced by the domestic producers as a whole. Having defined the domestic like product to include billets (slabs), coils, and plates (which Japan does not challenge), MOFCOM, per China, was not required to conduct a separate analysis for these three product categories.[68] Instead, in China's view, MOFCOM was only required to define the domestic industry based on the like product as a whole (which included all these three product categories), which is what it did.

7.51. The question before us is whether MOFCOM failed to comply with the "major proportion" requirement in Article 4.1 by not ensuring that the production of the defined domestic industry substantially reflected the total domestic production of each of the three product categories falling within the scope of the domestic like product. In answering this question, we start by noting that, as previous DSB reports have also recognized, neither the product under consideration nor the domestic like product need to be homogenous, and thus products falling within the "domestic like product" do not need to be like each other.[69] However, to comply with the *qualitative* aspect of the "major proportion" requirement under Article 4.1, the domestic industry as defined by the investigating authority must still be *representative* of domestic producers as a whole. If the domestic industry is unique compared to the rest of the domestic producers because, for example, it focuses on the production of a particular type of like product that is not produced by other domestic producers, then depending upon the facts, the domestic industry may potentially be unrepresentative of the domestic industry as a whole. However, the burden for demonstrating any such unrepresentativeness is on the complainant, and here it is up to Japan to make a *prima facie* case through arguments and evidence, that MOFCOM failed to define the domestic industry consistently with Article 4.1.

7.52. In respect of Japan's arguments in its first written submission, we asked Japan to identify the specific evidence before MOFCOM supporting its view that the domestic industry was different and unique compared to the rest of the domestic producers. While at the first substantive meeting Japan contended that there was "no decisive evidence" in this regard, in its written responses to our questions it pointed to two attachments (attachments 4 and 5) in the application filed by the

[64] Japan's first written submission, para. 488.
[65] China's second written submission, para. 387.
[66] China's second written submission, para. 393.
[67] China's second written submission, para. 395.
[68] China's first written submission, paras. 668-670. During the interim review, China objected to the use of the term "product categories" when referring to billets (slabs), coils and plates. (China's request for interim review, para. 3). China requests the use of the term "shapes" instead. We note that MOFCOM did not use consistent terminology when referring to billets (slabs), coils and plates, and MOFCOM did not use the term "shapes". In contrast, we do find certain MOFCOM references to "product categories" in the parts of MOFCOM's determination in relation to billets (slabs), coils and plates. (MOFCOM's final determination (Exhibit JPN-5.b), p. 43). We have decided to retain the reference to product categories in the final report, and note that this reference does not prejudge any of the substantive issues before us.
[69] See e.g. Panel Report, *Korea – Certain Paper*, paras. 7.217-7.220.

domestic industry.[70] Japan notes that attachment 4 and some portions of attachment 5 were not disclosed by MOFCOM (or China) for confidentiality reasons.[71] However, Japan does not properly explain what exactly in those exhibits could be potentially relevant to supporting Japan's claim, instead contending that "it is impossible for Japan to fully understand what types of data are contained" in those attachments.[72] Nevertheless, Japan contends that based on this evidence MOFCOM "must have been able to understand" that the domestic industry's production ratios differed from the ratio of the same for domestic production.[73] For instance, Japan contends that MOFCOM "could have noticed" that Shanxi Taigang Stainless Steel Co. Ltd, which was a major component of the domestic industry, was different and unique with regard to the production volume of composition of these three products. However, Japan does not cite to any evidence in support of this view.[74]

7.53. Japan also points to evidence presented by Japanese respondents to MOFCOM which showed significant differences between billets (slabs), coils, and plates.[75] Japan submits that based on this evidence, interested parties requested MOFCOM to assess the representativeness of the domestic industry separately for each of the three product categories at issue.[76] Japan asserts that MOFCOM failed to properly review this evidence. Instead, MOFCOM rejected, without proper consideration of this evidence, the interested parties' request to assess the representativeness of the domestic industry separately for each of the three product categories at issue, based on MOFCOM's view that the three product categories, i.e. billets, coils, and plates formed part of the same domestic like product and product under consideration.[77]

7.54. In our view, Japan has not established that the domestic industry as defined was not representative of the domestic industry as a whole because of differences between billets, coils, and plates. We noted above that neither the product under consideration nor the domestic like product need to be homogeneous. Thus, differences between the product categories forming part of the product under consideration or domestic like products are not determinative of whether the domestic industry as defined is representative of the domestic industry as a whole. While evidence in a particular case might lead to a conclusion that a domestic industry was not representative due to the mix of products it produced, in this case Japan has presented no such evidence.

7.55. Based on the foregoing, we find that Japan has failed to establish that MOFCOM defined the domestic industry inconsistently with the "major proportion" requirement in Article 4.1 of the Anti-Dumping Agreement for the reason that the domestic industry was unrepresentative of domestic production as a whole.

7.1.4 Conclusion

7.56. Based on the foregoing, and for the reasons set out in paragraph 7.41, we find that Japan has established that MOFCOM's determination of the domestic industry was inconsistent with Article 4.1 of the Anti-Dumping Agreement. We furthermore find that Japan has not established that MOFCOM's definition of the domestic industry was inconsistent with Article 4.1 of the Anti-Dumping Agreement because of the following reasons:

a. the alleged discrepancy between the domestic industry's market share data and its share in domestic production; and

b. the alleged lack of representativeness of the domestic industry.

7.57. In light of these findings under Article 4.1 of the Anti-Dumping Agreement, and in the absence of an independent claim by Japan under Article 3.1, we do not consider it is necessary, for the

[70] Japan's response to Panel question No. 4, para. 14.
[71] Japan's response to Panel question No. 4, para. 14.
[72] Japan's response to Panel question No. 4, para. 14.
[73] Japan's response to Panel question No. 4, para. 14.
[74] Japan's response to Panel question No. 4, para. 14.
[75] Japan's response to Panel question No. 4, para. 15.
[76] Japan's response to Panel question No. 4, para. 15.
[77] Japan's response to Panel question No. 4, para. 16.

purpose of securing a positive solution to the dispute, to make additional findings in relation to Japan's consequential claim under Article 3.1 of the Anti-Dumping Agreement.

7.2 Japan's claims concerning MOFCOM's cumulation analysis

7.2.1 Introduction

7.58. In conducting its injury analysis, MOFCOM cumulatively assessed the impact of dumped imports from all four sources of investigated imports, namely, imports from the European Union, Indonesia, Japan, and Korea. Japan claims that MOFCOM's decision to cumulatively assess the impact of the dumped imports was inconsistent with Articles 3.1 and 3.3 of the Anti-Dumping Agreement.[78]

7.59. Japan notes that Article 3.3 of the Anti-Dumping Agreement permits an investigating authority to cumulatively assess the impact of imports from different countries or territories under investigation *only if* it determines, *inter alia*, that such a cumulative assessment is "appropriate" in light of (a) the conditions of competition between the imported products from the subject countries or territories; and (b) the conditions of competition between those imported products and the domestic like product. Japan contends that MOFCOM failed to properly determine whether such conditions of competition existed, and thus did not have a proper basis to cumulatively assess the dumped imports from the four sources under investigation.

7.2.2 Articles 3.3 and 3.1 of the Anti-Dumping Agreement

7.60. Article 3.3 of the Anti-Dumping Agreement, which sets out the relevant rules on cumulation, reads as follows:

> Where imports of a product from more than one country are simultaneously subject to anti-dumping investigations, the investigating authorities may cumulatively assess the effects of such imports only if they determine that *(a)* the margin of dumping established in relation to the imports from each country is more than *de minimis* as defined in paragraph 8 of Article 5 and the volume of imports from each country is not negligible and *(b) a cumulative assessment of the effects of the imports is appropriate in light of the conditions of competition between the imported products and the conditions of competition between the imported products and the like domestic product*.[79]

7.61. Article 3.1 of the Anti-Dumping Agreement provides that:

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

7.62. The interpretative question before us focuses on the investigating authority's obligation under Article 3.3 to cumulatively assess imports from different sources only if it is "appropriate" to do so in light of the conditions of competition between (a) the imported products and (b) the imported products and the domestic like product.

7.63. Japan argues that Article VI of the GATT 1994 does not allow investigating authorities to attribute injury to subject imports from a specific member if imports from that member do not in fact cause material injury to the domestic industry, and asserts that Article 3.3 of the Anti-Dumping Agreement is not an exception to this principle.[80] Thus, relying in part on certain statements made by the Appellate Body in *EC – Tube or Pipe Fittings*, Japan initially argued, in its first written submission, that a cumulative assessment of imports is permitted under Article 3.3

[78] Japan also makes consequential claims under Articles 3.2, 3.4, and 3.5. (Japan's first written submission, paras. 391, 393, and 440-450).
[79] Emphasis added.
[80] Japan's first written submission, paras. 225-226.

"[o]nly in such circumstances" where "dumped imports from each country (region) [under investigation] could be found to be 'in fact' causing injury through a cumulative assessment, which cannot be identified through a country-specific analysis".[81] However, in response to our questions, Japan subsequently clarified that this argument should not be understood to mean that an investigating authority is required under Article 3.3 to examine, or make a separate assessment of, whether imports from only some of the investigated members are causing injury to the domestic industry.[82] Japan has explained that it is not contending that an investigating authority is required under Article 3.3 to conduct separate causation assessments for each source of investigated imports.[83] Instead, Japan maintains that in determining whether a cumulative assessment is appropriate in light of the conditions of competition, an investigating authority must at least identify factual circumstances where the imported products from any one source compete with each other, and with the domestic like products, in such a way that the imports from any source can make up for lower levels of imports from any other source.[84]

7.64. China rejects Japan's interpretation of Article 3.3. China contends that under Japan's interpretation, an investigating authority may find cumulation to be appropriate in light of the conditions of competition only if it first conducts a country-specific injury analysis to ascertain that such a country-specific analysis would not be capable of identifying material injury to the domestic industry.[85] However, per China, Article 3.3 does not impose such a requirement.[86]

7.65. In reflecting on the legal standard under Article 3.3, we note that this provision permits an investigating authority to cumulatively assess the effects of subject imports from different sources if three conditions are met:

a. the margin of dumping established in relation to imports from each country or territory under investigation is more than *de minimis*;

b. the volume of imports from each such country or territory is not negligible; and

c. cumulative assessment is "appropriate" in light of the "conditions of competition" between the imported products, and between the imported and domestic like product.

7.66. Article 3.3, on its face, does not impose any additional conditions that an investigating authority must meet before cumulating imports from different sources.[87] Moreover, Article 3.3 does not set out any mandatory or indicative factors that it requires an investigating authority to consider when determining whether cumulation is "appropriate" in light of "the conditions of competition".[88] The absence of any such factors suggests that Article 3.3 leaves an investigating authority with a margin of discretion as to how to structure this determination.[89] In our view, however, it follows from the text of Article 3.3, that an investigating authority must at the very least ground its cumulation findings on an understanding of the dynamics of competition between the relevant products derived from the record evidence.

7.67. Japan submits that Article 3.3 establishes an obligation on investigating authorities to identify factual circumstances in which the imported products from any one source compete with each other, and with the domestic like products, "*in such a way that the imports from any source can make up for lower levels of imports from any other source*".[90] To the extent that we should understand this submission to mean that Japan is of the view that factors such as the competitive overlap between imports from different sources under investigation, and the degree of competition between those sources of imports and the domestic like product, are relevant considerations, we agree that such factors, which go to the heart of the competitive relationship between the relevant products, might

[81] Japan's first written submission, para. 228.
[82] Japan's responses to Panel question No. 6(a), para. 21; question No. 6(b), para. 26; and question No. 9, para. 35.
[83] Japan's response to Panel question No. 6(b), para. 26.
[84] Japan's second written submission, para. 138; response to Panel question No. 7, para. 29.
[85] China's second written submission, para. 235.
[86] China's second written submission, para. 236.
[87] See e.g. Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 109.
[88] Panel Report, *EU – Footwear (China)*, para. 7.404.
[89] See e.g. Panel Report, *EU – Footwear (China)*, para. 7.403.
[90] Japan's second written submission, para. 138. (emphasis added)

well inform an investigating authority's determination of whether a cumulative assessment is "appropriate".

7.68. However, we do not see any textual basis in Article 3.3 to find that investigating authorities are *required* to identify factual circumstances showing that the competitive relationship between imported products and the domestic like product is such that "*imports from any source can make up for lower levels of imports from any other source*". While considerations pertaining to the substitutability of the relevant products may be an important part of developing an understanding of the conditions of competition, it does not follow that an investigating authority is precluded from cumulating the effects of dumped imports *unless* it has demonstrated that the competitive relationship between relevant products is such that imports from any one of the investigated sources may take the place of imports from other sources. In our view, such an approach would be at odds with the very purpose of cumulation, as it would mean that a domestic industry would have no recourse to remedy injury suffered through the combined effects of different sources of dumped imports, whenever each of the sources of imports are not in close competition with each other, even though they compete directly with the domestic like product. We find a useful statement of the general considerations leading us to reach this conclusion in the following views expressed by the Appellate Body in *EC – Tube or Pipe Fittings*:

> A cumulative analysis logically is premised on a recognition that the domestic industry faces the impact of the "dumped imports" as a whole and that it may be injured by the total impact of the dumped imports, even though those imports originate from various countries. If, for example, the dumped imports from some countries are low in volume or are declining, an exclusively country-specific analysis may not identify the causal relationship between the dumped imports from those countries and the injury suffered by the domestic industry. The outcome may then be that, because imports from such countries could not individually be identified as causing injury, the dumped imports from these countries would not be subject to anti-dumping duties, even though they are in fact causing injury. In our view, therefore, by expressly providing for cumulation in Article 3.3 of the Anti-Dumping Agreement, the negotiators appear to have recognized that a domestic industry confronted with dumped imports originating from several countries may be injured by the cumulated effects of those imports, and that those effects may not be adequately taken into account in a country-specific analysis of the injurious effects of dumped imports.[91]

7.69. Although Japan maintains that this Appellate Body statement supports its own position, we do not read it that way. In this passage, the Appellate Body explains that, in its view, the cumulation analysis under Article 3.3 recognizes that the domestic industry faces the impact of the dumped imports *as a whole*. According to the Appellate Body, "those effects may not be adequately taken into account in a country-specific analysis" because, if, "*for example*, the dumped imports from some countries are low in volume or are declining, an exclusively country-specific analysis may not identify the causal relationship between the dumped imports from those countries and the injury suffered by the domestic industry". Thus, the Appellate Body suggests that, depending upon the facts, cumulation under Article 3.3 may permit an investigating authority to find injury to a domestic industry from the cumulated effects of dumped imports from all investigated sources, in situations when it may not be possible to find injury from the effects of dumped imports on an individual country-specific basis.

7.70. We agree with this understanding of Article 3.3 and find it to be instructive when applied to the factual scenario we have posited above. That scenario is a situation in which each source of dumped imports is in direct competition with the domestic like product, but less so with dumped imports from other sources. In such a situation, a country-specific analysis may not identify injury to the domestic industry because the effects of the dumped imports determined with respect to one of the sources of dumped imports may not be sufficient to satisfy the threshold of injury. However, when the effects of the dumped imports from all sources are combined, it might well be possible to establish injury. Accepting Japan's submission in this context would mean that the domestic industry would have no recourse to remedy the injury suffered from the combined effects of all imports simply because imports from the different investigated sources may not be perfect substitutes for each other or, in any case, capable of replacing theoretical declines in the volume of imports from any

[91] Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 116. (emphasis omitted)

source. Again, we find this outcome to be inconsistent with what we understand to be the purpose of cumulation.

7.71. Thus, to the extent that Japan's complaint against MOFCOM's determination of cumulation is grounded in the view that MOFCOM was required to identify factual circumstances showing that the competitive relationship between dumped imports, or between dumped imports and the domestic like product, is such that "imports from any source can make up for lower levels of imports from any other source", we find that it has no legal basis in Article 3.3 and, therefore, dismiss it.

7.72. Having said that we note that in challenging MOFCOM's decision to perform a cumulative assessment of injury, Japan has not consistently relied upon the legal interpretation of Article 3.3 we have rejected above. While certain aspects of Japan's submissions are clearly based on that interpretation, we understand other aspects of its submissions to be more simply grounded in Japan's view that MOFCOM failed to perform an objective assessment of the competitive relationships between the dumped imports, and the dumped imports and the domestic like product, in light of the record evidence. We proceed to examine the merits of Japan's claims on this basis.

7.2.3 MOFCOM's cumulation analysis

7.73. MOFCOM's decision to cumulatively assess the impact of dumped imports from the European Union, Indonesia, Japan, and Korea, was based on its findings with respect to competitive relationship between the relevant products. In relation to the conditions of competition between *imported products*, MOFCOM's final determination sets out the following analysis and conclusion:

> The investigation shows that the physical and chemical characteristics, product usage, raw material, production technology and other aspects of dumped imports originating in the EU, Japan, Korea and Indonesia were basically the same; the companies in the EU, Japan and Korea and Indonesia sold the dumped imports to the domestic market by direct sale, distribution and other manners, which accounted for a relevant market share of the domestic market; all manufacturers or dealers had the same or similar pricing strategies; the dumped imports had the same customer group, and the domestic downstream users could freely purchase and use the dumped imports originating in the EU, Japan, Korea and Indonesia.
>
> To sum up, the Investigating Authority determined that there was a competitive relationship between dumped imports in the preliminary determination.[92]

7.74. With respect to the conditions of competition between *the imported and domestic like products*, MOFCOM's analysis and conclusions were as follows:

> The investigation shows that the physical and chemical characteristics, raw material, production process, product usage, sales channel and other aspects of the dumped imports and domestic like products were basically the same. The consumer market of the domestic stainless steel billet and hot-rolled stainless steel plate (coil) was a competitive and open market, the dumped imports and domestic like products competed with each other in the domestic market, and the price was an important factor that affected the product sales. The sales channel of the dumped imports and domestic like products was same or similar, and they were sold on domestic market by direct sale, distribution and other manners; the customer group of them was same and intersected, and the domestic downstream users purchased and used the dumped imports and domestic like products alternatively; the sale of products of all sources did not have obvious time and regional preference.
>
> Accordingly, the Investigating Authority determined that there was a direct competitive relationship between dumped imports and domestic like products in the preliminary determination.[93]

[92] MOFCOM's final determination (Exhibit JPN-5.b), p. 31.
[93] MOFCOM's final determination (Exhibit JPN-5.b), pp. 31-32.

7.75. During the investigation, certain interested parties highlighted the fact that the models, volumes, and prices of the products they exported were different from those exported from other sources of imports under investigation, and for this reason not in competition with each other.[94] Interested parties from Korea also asserted that Korean products were made for specific customers and were not in a competitive relationship with the domestic like product.[95] While acknowledging that volume and price trends of the investigated imports from different sources were not the same, and that there were many grades of billets (slabs), coils and plates, MOFCOM noted, *inter alia*, that[96]:

a. exports from all four investigated origins included the 300-series grade;

b. exports from all four investigated origins overlapped in terms of product categories and grades;

c. subject imports from Indonesia directly competed with those from European Union, Japan, and Korea; and

d. subject imports from Korea were also sold to unaffiliated downstream users in the Chinese market.

7.76. Japan argues that MOFCOM's cumulation analysis is undermined by its failure to consider a range of factors, which in Japan's view, reveal that the competitive relationship between the relevant products could not support a finding that cumulation was appropriate. The specific factors Japan points to are: (a) the differences in the proportion of billets (slabs), coils, and plates, as well as the different grades of these products, exported from the European Union, Indonesia, Japan, and Korea; and (b) the differences in the distribution channels (affiliated vs. unaffiliated party sales), volumes and prices of the same product categories or grades exported from these four sources.

7.77. While declining to endorse the data Japan relies upon [97], China submits that the data do not support Japan's contentions. Rather, according to China, the relevant data relied upon by Japan show that exports from the four sources of investigated imports were in competition with each other, which in turn, supported MOFCOM's decision to cumulate. China also focuses on the alleged significant overlap in the categories and grades of the products exported from all four investigated sources. Specifically, China maintains that the data Japan relies upon show that:

a. a large proportion of coils, billets (slabs) and except for Indonesia, plates[98], were exported from all four investigated sources;

b. the 300-series, which was the most important grade among the dumped imports[99], was exported from all four investigated sources;

c. the 400-series was exported from all investigated sources except Indonesia.[100]

7.78. We review the merits of Japan's submissions in the sections that follow.

[94] MOFCOM's final determination (Exhibit JPN-5.b), p. 32.
[95] MOFCOM's final determination (Exhibit JPN-5.b), p. 32.
[96] MOFCOM's final determination (Exhibit JPN-5.b), pp. 33-34.
[97] In making its arguments in support of its cumulation claim, Japan presented charts 20-38 in its first written submission, which cited a non-injury brief filed before MOFCOM as the source of the data in those charts. In response to our questions, China agreed that chart 20 in Japan's first written submission, which sets out the ratio of billets (slabs), coils, and plates in the export basket of the European Union, Indonesia, Japan, and Korea, was before MOFCOM in the underlying investigation. (China's response to Panel question No. 11, para. 60). Thus, the data in chart 20 reflect undisputed facts on the record before us. However, China does not take any position regarding the accuracy or reliability of the other charts, and states that these charts and data were not presented as such in the non-injury brief cited by Japan. In any case, China submits that the data put forth by Japan in this regard shows that subject imports from the four investigated sources were in competition with each other. (China's response to Panel question No. 11, paras. 61-62)
[98] China's first written submission, para. 411.
[99] China's first written submission, para. 411.
[100] China's first written submission, para. 411.

7.2.3.1 Differences in the proportions of billets (slabs), coils, and plates, as well as the different grades of these products, exported from the European Union, Indonesia, Japan, and Korea

7.79. In challenging MOFCOM's analysis of the conditions of competition, Japan contends that billets (slabs), coils, and plates are not substitutable with each other. Considering that the proportions, or percentage shares, of billets (slabs), coils, and plates in the export basket of the European Union, Indonesia, Japan, and Korea differed, Japan argues that it was questionable whether exports from these four sources were in competition with each other.[101] Similarly, Japan argues that because the proportions, or percentage shares, of the different steel grades in the export baskets of the European Union, Indonesia, Japan, and Korea differed, the exports from these four sources were not in competition with each other.

7.80. With regard to the differences in the percentage shares of billets (slabs), coils, and plates in the export baskets of the European Union, Indonesia, Japan, and Korea, we refer to the following table, which Japan produced using data China agrees was on MOFCOM's record.[102]

Subject Imports	Stainless steel billets (slabs)	Hot-rolled stainless steel coils	Hot-rolled stainless steel plates
European Union	2.9%	56.5%	40.6%
Indonesia	39.3%	60.7%	0.0%
Japan	0.3%	72.8%	26.9%
Korea	5.0%	94.0%	1.0%

7.81. The data show that with the exception of Indonesia, which did not export plates, the four sources under investigation exported all three product categories, namely, billets (slabs), coils, and plates. In this light, we do not consider that the differences in the proportion of billets (slabs), coils or plates in the basket of imports from each of the investigated sources undermines the objectivity of MOFCOM's conclusion regarding the competitive relationship between subject imports.

7.82. Turning to the differences asserted by Japan in grades of exported steel, China objects to the reliability of the data Japan relies upon for this purpose because of its underlying assumptions.[103] Nonetheless, taken at face value, we note that the relevant data reveal that 300-series products were exported from all four investigated sources, and that the European Union, Japan, and Korea exported the 400-series products as well. In particular, the data provided by Japan show that within the export basket of the European Union, Indonesia, Japan, and Korea the percentage share of nickel-containing products (300-series) was 78.49%, 100%, 44.40% and 92.51% respectively. The share of nickel-free (400-series) products within the export basket of the European Union, Indonesia, Japan, and Korea was 13.21%, 0%, 53.67% and 2.25%.[104]

7.83. Unlike Japan, we do not consider that these data undermine the objectivity of MOFCOM's findings regarding the competitive relationship between exports from the European Union, Indonesia, Japan, and Korea. Instead, we consider them to be consistent with MOFCOM's factual findings, including its findings that (a) exports from the investigated sources overlapped in terms of grades; and (b) exports from all four investigated sources included the 300-series grade. Accordingly, we find that even without resolving the factual dispute between the parties about the reliability of the data Japan relies upon, Japan has not established that the relevant data, when taken at face value, demonstrate that MOFCOM's findings regarding the competitive relationship between the subject imports were not objective or supported by a proper factual basis.

7.2.3.2 Differences in the distribution channels, volumes and prices of the same categories or grades of products exported from the European Union, Indonesia, Japan, and Korea

7.84. Japan contends that a variety of evidence presented before MOFCOM brought into question the competitive relationship between subject imports from the European Union, Indonesia, Japan, and Korea. Japan asserts that MOFCOM's finding of an overall competitive relationship between

[101] Japan's first written submission, para. 248.
[102] China's response to Panel question No. 11, para. 60.
[103] See e.g. China's response to Panel question No. 11, para. 61. See also Japan's first written submission, fn 322 and chart 21.
[104] Japan's first written submission, chart 21.

subject imports from these four sources did not properly engage with this evidence and was thus not objective or based on a reasoned and adequate explanation. Japan's submissions focus on evidence pertaining to differences in distribution channels, volume and price trends, pertaining to the subject imports from the four different sources.

7.2.3.2.1 Distribution channels

7.85. Japan submits that Indonesian and Korean exports of billets (slabs) were mainly intra-group sales and thus not openly commercialized in the Chinese market.[105] Japan also contends that coils from Korea did not compete with subject imports from the other three sources because they were sold to affiliated companies, while adding that in light of the fact that coils are semi-finished products, it was also highly likely that subject imports from the European Union and Indonesia were sold to affiliated customers.[106] Relying on its understanding that cumulative assessment under Article 3.3 is appropriate only when subject imports compete with each other such that the imports from one source can substitute lower imports from any other source, Japan submits that intra-group sales cannot be cumulated with openly commercialized sales because they will normally lack a competitive overlap.[107] Japan contends that the alleged dominance of intra-group sales with regard to certain imports from Korea and Indonesia is one of the important factors that cast doubt on the existence of the competitive overlap allegedly found by MOFCOM, but MOFCOM failed to address this issue in its determination.[108]

7.86. China contends that just because certain imports are focused on intra-group sales does not mean that they do not compete with other imports.[109] China also notes that imports from Korea and Indonesia were not exclusively intra-group sales, but included merchant sales as well.[110]

7.87. We note that Japan's arguments challenging MOFCOM's alleged failure to consider differences in distribution channels are tied to its legal interpretation of Article 3.3, which we have previously rejected. To this extent, Japan's submissions concerning the differences in channels of distribution of the subject imports are based on a misconceived understanding of the obligations in Article 3.3. Moreover, we note that the evidence Japan relies on is not necessarily representative of subject imports from Indonesia or Korea as a whole. In this regard, we take note of China's submission that Japan's assertions are limited to exports of billets (slabs) by Indonesia, and do not apply to coils, which comprised the majority of Indonesian exports.[111] We also note China's submission that POSCO sold to affiliated and non-affiliated customers in China though, as MOFCOM stated, sales to unaffiliated customers accounted for a small share of its total exports.[112] Japan does not disagree with these factual assertions.[113]

7.88. Thus, we do not consider that Japan has shown how the evidence it refers to regarding differences in distribution channels undermines the objectivity of MOFCOM's overall evaluation of the competitive relation between subject imports.

7.2.3.2.2 Volume trends

7.89. Japan notes that (a) almost all of the subject imports of billets (slabs) were from Indonesia and Korea, and notes that Indonesian imports "skyrocketed" in 2017[114]; (b) while the European Union, Japan, and Korea constantly exported coils during the POI, coils from Indonesia suddenly "exploded" in and after 2017[115]; and (c) the majority of plates originated in the European Union and Japan, with small amounts imported from Korea which increased in 2017.[116]

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[105] Japan's first written submission, paras. 261-264.
[106] Japan's first written submission, para. 271. Japan did not cite any evidence in support of its view that it was highly likely that imports from the European Union and Indonesia were sold to affiliated entities.
[107] Japan's comments on China's response to Panel question No. 44, para. 11.
[108] Japan's comments on China's response to Panel question No. 44, para. 23.
[109] China's response to Panel question No. 44, paras. 37-38.
[110] China's response to Panel question No. 44, para. 47.
[111] China's response to Panel question No. 44, para. 49.
[112] China's response to Panel question No. 44, para. 50.
[113] See e.g. Japan's comments on China's response to Panel question No. 44, paras. 23-24.
[114] Japan's first written submission, para. 260.
[115] Japan's first written submission, para. 270.
[116] Japan's first written submission, para. 282.

7.90. China asserts that the volume data relied on by Japan demonstrates, rather than refutes, the existence of a competitive relationship between the subject imports.[117] China supports this assertion by noting, for example, that the data Japan relies upon show that there was a large increase in exports of coils from Indonesia in 2017, and that there were similarities in the export trends from other sources.[118] China also notes how the data reveal that Japan's exports of a particular grade of coils competed with and replaced exports from the European Union and Korea.[119] Finally, China submits that differences in the volume of subject imports exported from different sources do not necessarily call into question their competitive relationship.[120]

7.91. We note that in the underlying investigation MOFCOM acknowledged the differences in volume trends from the different sources under investigation, but found that these did not undermine its finding regarding the competitive relationship that existed between them.[121] In our view, Japan has not established through its arguments regarding the differences in the volumes of the imports, that MOFCOM's overall finding in respect of the conditions of competition, could not have been reached by an objective and impartial investigating authority. If an investigated source of exports increases in volume during the course of the POI (as was the case with Indonesia, whose exports of billets (slabs) and coils increased in 2017) that may well be a sign that exports from that source are effectively competing with imports from all other sources, which would make it appropriate for an investigating authority to cumulatively assess the imports from all such sources.

7.92. Thus, we do not consider that Japan has shown how the evidence it refers to regarding differences in the volumes of the subject imports undermines the objectivity of MOFCOM's overall evaluation of the competitive relation between subject imports.

7.2.3.2.3 Price trends

7.93. Japan argues that considering the differences in price trends within subject imports, MOFCOM's finding that cumulation was appropriate in light of the conditions of competition between subject imports, and between subject imports and the domestic like product, was flawed.

7.94. Japan contends that because the prices of Indonesian and Korean billets (slabs) and coils were close to, or lower than, the prices of the domestic like product, it is these exports, rather than billets (slabs) or coils exported by Japan or the European Union, that were likely to impact the prices of the domestic like product.[122] Japan also argues that it is Korean plates, rather than plates exported from the European Union or Japan, that were likely to impact the domestic like product prices because the European Union and Japan focused on the high-end and high-priced segment of the market, and thus had predominant shares of the subject imports.[123] In this light, Japan contends that MOFCOM erred when it found that the competitive relationship between subject imports and the domestic like product was such that made cumulation appropriate.

7.95. Similarly, Japan maintains that MOFCOM erred when it found that the conditions of competition between subject imports were such that cumulation was appropriate because of the higher prices of billets (slabs) and coils exported by the European Union and Japan, relative to Indonesia and Korea.[124] Japan adds that the stable prices of plates exported by the European Union and Japan confirm their strong positions in the sector, and contends that prices of Korean plates were more variable and generally tended to be slightly lower.[125]

7.96. Although noting that there were differences in the price trends in exports from the European Union, Indonesia, Japan, and Korea, China contends that these differences do not call into question MOFCOM's findings regarding a competitive relationship between subject imports, or between subject imports and the domestic like product.[126] China submits that the data relied on by

[117] China's first written submission, paras. 413-414.
[118] China's first written submission, para. 413.
[119] China's first written submission, para. 414.
[120] China's first written submission, para. 409.
[121] MOFCOM's final determination (Exhibit JPN-5.b), p. 34.
[122] Japan's first written submission, paras. 268, 278, and 280.
[123] Japan's first written submission, paras. 283 and 287.
[124] Japan's first written submission, paras. 265 and 275.
[125] Japan's first written submission, para. 284.
[126] China's first written submission, para. 412.

Japan actually show largely similar trends in the prices of exports from the European Union, Indonesia, Japan, and Korea.[127]

7.97. While we are of the view that a consideration of price trends may be relevant in assessing the conditions of competition between subject imports, or between subject imports and the domestic like product, we do not consider that Japan has shown that MOFCOM's analysis of the conditions of competition was flawed in the light of the price trends Japan maintains demonstrate a lack of competition. Japan focuses on the higher prices from Japan and the European Union relative to prices from Korea and Indonesia. Japan relies on such price differences to advance its view that only part of the subject imports – specifically those from Indonesia or Korea – might have been causing injury to the domestic industry, and that Japanese subject imports could not have had any negative impact on the prices of domestic like products.[128] However, we note that the relevant enquiry under Article 3.3, either when assessing the conditions of competition between subject imports and the domestic like product, or between subject imports, is not whether subject imports could have been *causing injury* to the domestic industry, but rather whether a cumulative assessment of the subject imports is appropriate in light of the conditions of competition.

7.98. Japan contends that the European Union and Japan focused on plates, which is a product category that is high-end and in the high-priced segment, and thus had predominant shares of the subject imports in this product category.[129] However, the data Japan relies upon show an increase in imports of plates from Korea over the POI. In our view, this undermines Japan's argument that higher-priced subject imports from the European Union and Japan did not compete with subject imports from Korea.[130] Similarly, Japan's arguments regarding the absence of competition between Indonesian and Korean coils with those exported by the European Union or Japan are undermined by the fact that Indonesian exports of coils increased significantly in 2017.

7.99. Thus, we do not consider that Japan has shown how the evidence it refers to regarding differences in the prices of the subject imports undermines the objectivity of MOFCOM's overall evaluation of the competitive relation between subject imports.[131]

7.2.3.3 Conclusion

7.100. Based on the foregoing, we conclude that Japan has not established that MOFCOM acted inconsistently with Articles 3.1 and 3.3 of the Anti-Dumping Agreement in finding that a cumulative assessment of the effects of the subject imports was appropriate in light of the conditions of competition between the imported products and the conditions of competition between the imported products and the like domestic product.[132]

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[127] China's first written submission, para. 412.
[128] Japan's first written submission, paras. 268-269, 281, and 288.
[129] Japan's first written submission, para. 283.
[130] We also note that in chart 27 of its first written submission, Japan presents data pertaining to the country-specific volume of subject imports of coils of the 300-series. Chart 27 shows an increase in Indonesian exports of coils of the 300-series over the POI, which is accompanied, particularly in the first quarter of 2018 by decline in Korean, Japanese and EU imports of the same type. (Japan's first written submission, p. 115). In chart 28, Japan presents data pertaining to the country-specific volume of subject imports of coils of the 400-series. The data show an increase in Japanese exports of coils of the 400-series over the POI, which is accompanied particularly in the first quarter of 2018 by decline in imports from Korea and the European Union. (Japan's first written submission, p. 116). We consider, as China also argues, that these data support, rather than undermine, MOFCOM's findings regarding the existence of a competitive relation between subject imports. (See e.g. China's first written submission, paras. 413-414). In particular, the changes in the volume of subject imports from the European Union, Indonesia, Japan, and Korea show that they were competing in the Chinese market for market share.
[131] We also note that in charts 24, 25, 29, 31, 34, and 35 of its first written submission, Japan presented country-specific prices of billets (slabs), coils, and plates, which were not split up based on grades. Considering the parties agree that differences in grades affect prices, we are of view that the probative value of these charts is limited.
[132] In the light of this finding, we also reject Japan's claims that MOFCOM's price effects analysis, impact analysis and causation findings were, respectively, inconsistent with Articles 3.2, 3.4, and 3.5 of the Anti-Dumping Agreement as a *consequence* of MOFCOM's alleged violation under Articles 3.1 and 3.3.

7.3 Japan's claims concerning MOFCOM's consideration of price effects

7.3.1 Introduction

7.101. In the underlying investigation, MOFCOM found that the subject imports significantly depressed the price of domestic like products.[133] In its price effects analysis, MOFCOM examined trends pertaining to:

a. the volume, market share, and prices of subject imports and domestic like products separately for each product grade; and [134]

b. the volume and weighted average prices of the subject imports as a whole, compared with those pertaining to the domestic like product as a whole, over the injury POI.[135]

7.102. While MOFCOM considered the price effects of the subject imports of each grade on the domestic like products of the corresponding grade, MOFCOM rejected the interested parties' argument that it should consider price effects for stainless steel billets (slabs), stainless steel plates, and stainless steel coils (product categories) separately.[136] Several aspects of MOFCOM's price effects findings were based on facts available.

7.103. Japan claims that MOFCOM's consideration of price effects was inconsistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement based on the following grounds:

a. MOFCOM's findings with respect to the comparability of prices of product categories was not based on an objective examination of positive evidence[137];

b. MOFCOM's individual series-specific price effects analyses were not based on an objective examination of positive evidence[138]; and

c. MOFCOM's finding of overall price depression was not based on an objective examination of positive evidence.[139]

7.104. China denies Japan's claims relying upon two broad lines of defence. First, China maintains that Japan's claims must be dismissed because MOFCOM's consideration of price effects was based on best information available, and Japan has not challenged MOFCOM's reliance on best information available under Article 6.8 and Annex II of the Anti-Dumping Agreement.[140] Second, China argues that Japan has, in any case, not demonstrated that MOFCOM's price effects analysis (which was based on best information available) involved a comparison of prices that MOFCOM improperly considered to be comparable, or that the price effects analysis or any aspect thereof was otherwise inconsistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement.[141]

7.105. Below, we first address China's threshold argument that Japan's claims under Articles 3.1 and 3.2 of the Anti-Dumping Agreement must be rejected because Japan has not brought a claim under Article 6.8 and Annex II of the Anti-Dumping Agreement. For reasons explained below, we do not agree with China's threshold submission. We then address Japan's claims under Articles 3.1 and 3.2 of the Anti-Dumping Agreement on merits.

7.3.2 Whether the absence of Japan's claims under Article 6.8 and Annex II legally implies that its claims under Articles 3.1 and 3.2 must be dismissed

7.106. China argues that because MOFCOM's consideration of price effects was based on best information available, Japan's failure to challenge MOFCOM's final determination under Article 6.8

[133] MOFCOM's final determination (Exhibit JPN-5.b), p. 43.
[134] MOFCOM's final determination (Exhibit JPN-5.b), pp. 41-42.
[135] MOFCOM's final determination (Exhibit JPN-5.b), p. 43.
[136] MOFCOM's final determination (Exhibit JPN-5.b), pp. 43-44.
[137] Japan's first written submission, paras. 74 and 138.
[138] Japan's first written submission, paras. 139-141 and 185-187.
[139] Japan's first written submission, para. 188, 204, and 216.
[140] China's first written submission, para. 118.
[141] China's first written submission, paras. 104-105.

and Annex II of the Anti-Dumping Agreement should lead to a dismissal of Japan's claims concerning price effects under Articles 3.1 and 3.2 of the Anti-Dumping Agreement.[142] According to China, a lack of cooperation by investigated exporters would hamper an authority from finding "positive evidence" and carry out an "objective examination" pursuant to Article 3.1 by creating gaps in information, thus necessitating resort to best information available to fill those gaps.[143] Thus, in China's view, allowing Japan to pursue its claim under Articles 3.1 and 3.2 of the Anti-Dumping Agreement would diminish its rights and obligations in Article 6.8 and Annex II of the Anti-Dumping Agreement[144] and upset the careful balance struck by Article 6.8 and Annex II between investigating authorities' ability to complete an investigation in the event of non-cooperation, and the due process and participatory rights of interested parties.[145]

7.107. Japan contends that even when an investigating authority resorts to the use of facts available, it is not exempt from the requirement to ensure that its consideration of price effects is based on an objective examination of positive evidence pursuant to Articles 3.1 and 3.2 of the Anti-Dumping Agreement.[146] Japan argues that its claim under Articles 3.1 and 3.2 is that all the information and evidence that MOFCOM relied upon, whether facts available or not, is insufficient to substantiate that MOFCOM's price effects analysis involved an objective examination of positive evidence.[147]

7.108. We note that nothing in Article 6.8 of the Anti-Dumping Agreement indicates that an investigating authority's resort to best information available with respect to a given aspect of its determination causes other provisions of the Agreement to become inapplicable to that aspect of the determination. Therefore, the fact that MOFCOM resorted to best information available for its consideration of price effects does not imply that its findings on price effects cannot be challenged, as a matter of law, under Articles 3.1 and 3.2 of the Anti-Dumping Agreement. In the absence of a claim under Article 6.8 and Annex II of the Anti-Dumping Agreement, we cannot review whether MOFCOM's decision to resort to facts available was justified, or whether MOFCOM should have chosen a different set of data than the set it chose as the best information available for relevant aspects of its consideration of price effects. However, the Anti-Dumping Agreement does not preclude us from reviewing whether MOFCOM objectively examined the information that it did choose as the best information available with respect to the relevant aspects of its consideration of price effects and whether it reasonably and adequately explained its findings. We review below Japan's claims under Articles 3.1 and 3.2 of the Anti-Dumping Agreement bearing this approach in mind.

7.3.3 Whether MOFCOM's price effects analysis was consistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement

7.109. Before addressing Japan's three main grounds set out in paragraph 7.103 above for challenging MOFCOM's consideration of price effects, we note that the parties disagree on certain aspects of the legal interpretation of these provisions. In resolving Japan's claims, we first set out our interpretation of the aspects of Articles 3.1 and 3.2 of the Anti-Dumping Agreement on which the parties disagree. We then examine whether MOFCOM acted inconsistently with these provisions, as we have interpreted them.

7.3.3.1 Articles 3.1 and 3.2 of the Anti-Dumping Agreement

7.110. There is no disagreement between the parties that Articles 3.1 and 3.2 of the Anti-Dumping Agreement require an investigating authority to ensure that price comparisons used for the purpose of considering the price effects of subject imports on the domestic like product must involve comparable prices.[148] However, when it comes to identifying the circumstances in which the prices of different product categories may or may not be comparable and, therefore, the factual conditions that would *trigger* an investigating authority's obligation to take appropriate steps to ensure price comparability, the parties have expressed competing views.

[142] China's first written submission, para. 118.
[143] China's second written submission, para. 22.
[144] China's second written submission, para. 23.
[145] China's second written submission, paras. 20 and 24.
[146] Japan's second written submission, para. 50.
[147] Japan's second written submission, para. 49.
[148] China's second written submission, para. 61; Japan's first written submission, para. 75.

7.111. China maintains that the obligation to ensure price comparability is triggered only when the following circumstances are present: (a) the investigation covers various product categories, which have *price* differences between them; (b) the price differences between product categories are *significant*; and (c) the baskets of the imported and the domestic like products being compared are not *sufficiently simila*r in their product mix of different product categories.[149] China explains that when product categories have no price differences between them, or when these differences are "very small", comparing prices of product categories in the aggregate would not distort the objectivity of the price effects analysis.[150] Similarly, China asserts that if the baskets of subject imports and the domestic like products are sufficiently similar in their composition, comparing average prices will lead to objective results, even if the underlying categories differ in price.[151]

7.112. According to Japan, China erroneously argues that an authority is required to make adjustments to ensure price comparability only when there are *price* differences between the product categories being compared. Japan contends that non-price differences such as those in physical characteristics or uses that affect the competitive relationship between the product categories also need to be addressed to ensure price comparability between the product categories.[152] Japan also maintains that China wrongly argues that an investigating authority will be required to take steps to ensure price comparability only if there are significant price differences between product categories that comprise the product under consideration.[153] Moreover, Japan submits that even if the composition of the baskets of subject imports and of the domestic like products is similar, changes in the average prices may have been caused by changes in the product mix and not by actual movements in the price of each product.[154] Therefore, for Japan, the text of the Anti-Dumping Agreement or findings of past panels do not require any of the three conditions referred to by China to exist for an investigating authority to be required to take steps to ensure price comparability.[155]

7.113. Articles 3.1 and 3.2 of the Anti-Dumping Agreement provide:

> A determination of injury for purposes of Article VI of GATT 1994 shall be based on positive evidence and involve an objective examination of both (a) the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and (b) the consequent impact of these imports on domestic producers of such products.
>
> With regard to the volume of the dumped imports, the investigating authorities shall consider whether there has been a significant increase in dumped imports, either in absolute terms or relative to production or consumption in the importing Member. With regard to the effect of the dumped imports on prices, the investigating authorities shall consider whether there has been a significant price undercutting by the dumped imports as compared with the price of a like product of the importing Member, or whether the effect of such imports is otherwise to depress prices to a significant degree or prevent price increases, which otherwise would have occurred, to a significant degree. No one or several of these factors can necessarily give decisive guidance.

7.114. The **first interpretative question** to which the parties' arguments give rise is whether there must be significant price differences between investigated product categories for an investigating authority to be compelled to take appropriate steps to ensure price comparability. China asserts that the requirement in Article 3.2 for investigating authorities to consider whether there has been "significant price undercutting" by subject imports, or whether subject imports have depressed prices of the domestic like product or prevented price increases to a "significant degree", shows that Article 3.2 is not concerned with any price differences but only those that are *significant*. According to China, this focus on the *significance* of price effects is also relevant to the obligation to ensure price comparability.[156] Japan, however, argues that China confuses the concept of price

[149] China's second written submission, para. 62.
[150] China's second written submission, para. 64.
[151] China's second written submission, para. 64.
[152] Japan's second written submission, paras. 21-26; opening statement at the first meeting of the Panel, para. 21.
[153] Japan's opening statement at the first meeting of the Panel, para. 21.
[154] Japan's opening statement at the first meeting of the Panel, para. 20.
[155] Japan's second written submission, para. 43.
[156] China's response to Panel question No. 12, para. 68.

comparison with that of price comparability. According to Japan the word "significant" in Article 3.2 of the Anti-Dumping Agreement relates to the investigating authorities' obligation to consider where there has been "significant" price undercutting, price suppression, or price depression, and therefore pertains to price comparisons and not price comparability.[157]

7.115. We share Japan's view that the adjective "significant" in Article 3.2 of the Anti-Dumping Agreement qualifies the concepts of price undercutting, price depression or price suppression. These three price effects are possible *outcomes* of a price effects analysis and are therefore conceptually distinct from *price comparability*. Thus, contrary to China's contention, the term "significant" in the text of Article 3.2 does not appear to establish that a minimum price difference between product categories covered in the investigation is required to trigger the obligation to take appropriate steps to ensure price comparability.

7.116. The logical implication of China's submission is that no issue of price comparability will arise when different product categories are sold at equivalent prices or prices that are not significantly different. Yet, the notion of price comparability under Articles 3.1 and 3.2 is not about the extent to which two prices may *differ*, but rather, whether two prices are *comparable* for the purpose of objectively examining whether the effect of dumped imports on prices of domestic like products is significant price undercutting, price depression, or price suppression. The *comparability* of two prices for this purpose is not informed by their relative levels. It will instead depend upon the characteristics of the transactions to which the prices pertain, and the extent to which the product categories at issue compete with each other. We share Japan's view that the differences that are relevant for the purposes of ensuring price comparability include not only price differences, but also non-price differences (such as those in physical characteristics and uses) that could affect substitutability and the competitive relationship between the subject imports and the domestic like products.

7.117. In this regard, we recall that the obligation to ensure price comparability arises from the requirement in Article 3.1 of the Anti-Dumping Agreement for an authority to objectively examine *the effect* of dumped imports on prices in the domestic market for like products.[158] Article 3.2 also requires investigating authorities to consider whether there has been an "effect of dumped imports on prices" in the form of one or more of the three price effects identified in the provision. Normally, for one product to have an *effect* on the *prices* of another product, the two products would be expected to compete with each other. Thus, contrary to China's view, we do not consider that price differences must exist between product categories in order for there to be a problem of price comparability – and, therefore, a need to make adjustments.[159]

7.118. The **second interpretative question** before us is whether, as China argues, the differences in characteristics of product categories at issue other than their prices (i.e. non-price differences) are relevant to the issue of price comparability only if such non-price differences give rise to a difference in the prices of the product categories. China finds support for this view in certain alleged findings of the panel in *China – Autos (US)*. Specifically, according to China:

> The panel in that dispute held that, when finding a certain "lack of competitive overlap" because of certain product differences, the investigating authority should – in assessing the price effects under Article 3.2 – make "further inquiries into those differences to determine *whether they affected prices*". It follows that other differences between

[157] Japan's response to Panel question No. 12, para. 52.
[158] Appellate Body Report, *China – GOES*, para. 200.
[159] China asserts, relying on certain findings of the Appellate Body in *EU – Fatty Alcohols (Indonesia)*, *US – Hot-Rolled Steel, and US – Zeroing (EC)*, that Article 2.4 of the Anti-Dumping Agreement requires an investigating authority to make allowance only in respect of differences in characteristics of compared transactions that have an impact on prices of the transactions. For China, the same principle must apply to Article 3.2 of the Anti-Dumping Agreement also. (China's response to Panel question No. 21, paras. 112-113 (referring to Appellate Body Reports, *EU – Fatty Alcohols (Indonesia)*, para. 5.22; *US – Hot-Rolled Steel*, para. 177; and *US – Zeroing (EC)*, para. 156)). We consider that the findings of the Appellate Body that China refers to were not made in the context of a situation involving product categories that may not be in a competitive relationship, and hence their price may not be comparable. Thus, we consider China's reliance on the relevant findings of the Appellate Body to be inapposite.

> product models, for instance in physical characteristics or end uses, are only relevant in this context if and to the extent that they have an impact on the products' prices.[160]

7.119. We understand that in referring to differences between product categories that "have an impact on the products' prices", China means such differences between product categories that give rise to a difference in the *relative* prices of the product categories at issue. The following extract from China's opening statement at the second meeting of the Panel confirms our understanding:

> MOFCOM concluded that *the price differences resulting from the different shapes* of the product at issue were "reasonable" and could not undermine the fact that they belonged to the "same category of product". In other words, *the distinction between product models based on their shape was not determinative of the products' price*, and thus not relevant to take into account for price comparability purposes.[161]

In the quoted extract, China indicates that MOFCOM considered shape-based distinctions to not be determinative of prices (or to impact/affect prices) as MOFCOM found that different shapes *did not give rise to price differences*. Further, China states that "[i]f there is *no price difference*, adjustments cannot address the issue at stake" and that "*[d]ifferences that have no impact on prices* cannot be addressed by adjustments and are thus, logically, not to be addressed in the framework of the price effects consideration."[162] Again, China uses the notions of *no price difference* and *differences that have no impact on prices* in the same sense.[163]

7.120. Thus, in relying on the relevant findings of the panel in *China – Autos (US)*, China has understood that non-price differences allegedly causing a lack of competition between dumped product-types and domestic like products should be considered to affect price comparability only if they give rise to a difference in the relative prices of the product categories. We do not consider that this is what the panel in *China – Autos (US)* intended. We note that the panel in *China – Autos (US)* found that:

> By this, we are not saying that price adjustments are needed in every case where there are differences between the subject imports and the domestic like product. Adjustments may not be required where the subject product and the domestic like product are identical or where the [investigating authority] concludes that any differences between the two baskets of goods do not justify such adjustments. However, where there are differences between the subject imports and the domestic like product it cannot simply be presumed that prices are comparable without consideration of the specific facts and circumstances.[164]

The panel clarifies in this passage that when there are (non-price) differences between subject imports and the domestic like product, *price comparability* cannot be presumed. Rather, the (non-price) differences must be examined to determine whether they affect *price comparability*. Had the panel been of the view that non-price differences must *always* give rise to a difference in the relative prices of the product categories in order to impact price comparability, then it is difficult to understand why the panel emphasized the need to perform a fact-specific evaluation of whether non-price differences affect *price comparability* (and not just relative prices, *per se*).

7.121. In addition, there is nothing in the part of the panel's findings that China relies upon to suggest that it was intended to be understood to *exclude* the possibility that there may be circumstances when non-price factors that do not affect relative prices may nevertheless affect price

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[160] China's response to Panel question No. 21, para. 111 (referring to Panel Report, *China – Autos (US)*, paras. 7.280-7.281). (emphasis added by China; fn omitted)

[161] China's opening statement at the second meeting of the Panel, para. 15. (emphasis added; fn omitted)

[162] China's response to Panel question No. 46, para. 69.

[163] We also note that an adjustment accounting for price differentials between product categories is just one possible method available to an investigating authority to ensure price comparability. Another method for an investigating authority to do so might be to separately consider price effects of imports of each product type on domestic like product of the corresponding product type. Thus, in our view, the availability to make adjustments accounting for a price differential between product categories as a method to ensure price comparability does not mean that a price differential must necessarily be found to exist for an investigating authority to be required to take steps to ensure price comparability.

[164] Panel Report, *China – Autos (US)*, fn 448.

comparability. Indeed, this argument was not even considered by the panel in *China – Autos (US).* Thus, China's reliance on *China – Autos (US)* to support its submission that non-price differences should be considered to affect price comparability *only* when they are shown to affect relative *prices* is unfounded.

7.122. As we stated in paragraph 7.116 above, pursuant to Articles 3.1 and 3.2 the question is whether the price of subject imports and the domestic like product are comparable. Prices of two products do not become comparable simply because the products are sold at the same or similar price. For example, if an apple is sold at the same price as an orange, this does not mean that the prices of apples and oranges are comparable for the purpose of a price analysis under Articles 3.1 and 3.2. Whether prices are comparable will instead depend upon the characteristics of the transactions to which the prices pertain, and the extent to which the product categories at issue compete with each other. Competition between the product categories may depend upon differences in the physical or other characteristics of the products.[165] We therefore share Japan's view that non-price differences (such as those in physical characteristics and uses) that could affect substitutability and the competitive relationship between the product categories at issue are relevant for the purposes of ensuring price comparability, regardless of whether such difference cause the relative prices of product categories to differ.[166]

7.123. The **third interpretative issue** before us arises from China's contention that the obligation to address price comparability arises only if there are significant differences in the product mix of domestic and imported products being compared.[167] In support of this contention, China refers to the following finding of the panel in *China – Broiler Products*:

> Where the products under investigation are not homogenous, and where various models command significantly different prices, the investigating authority must ensure that the product compared on both sides of the comparison are sufficiently similar such that the resulting price difference is informative of the "price undercutting", if any, by the imported products. For this reason, for the price undercutting analysis to comply with Articles 3.1/15.1 and 3.2/15.2 may well require the investigating authority to perform its price comparison at the level of product models. 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 can reasonably be said to result from "price undercutting" and not merely from differences in the composition of the two baskets being compared. Alternatively, the authority must make adjustments to control and adjust for relevant differences in the physical or other characteristics of the product.[168]

7.124. Disagreeing with China, Japan contends that even in a situation where the baskets of subject imports and domestic like products comprise the same set of product categories, a price effects analysis comparing the aggregated average prices of subject imports and domestic like products may not necessarily constitute an objective price effects consideration.[169] We understand Japan to contend that in a situation in which the baskets of subject imports and domestic like products comprise the same product categories in the same proportion relative to each other within a year, but this proportion changes in absolute terms for both baskets identically from year to year, any change in the weighted average prices of the two baskets from year to year may be caused by the

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[165] We note that the panel in *China – Broiler Products* expressly recognized the centrality of competitive relationship between product categories to the issue of price comparability in the following words:

> An authority only needs to make an adjustment where the difference in physical or other characteristics of the products affects their competitive relationship. Because the focus of the comparison performed under Articles 3.2 and 15.2 is on the competitive relationship between subject imports and domestic like products in the market of the importing Member, price comparability needs to be ensured in terms of the perceived importance of potential differences to consumers in that market[.]

Panel Report, *China – Broiler Products*, fn 737 (referring to Panel Report, *EC – Tube or Pipe Fittings*, para. 7.293)

[166] Japan's response to Panel question No. 12, paras. 49-51.
[167] China's first written submission, para. 125.
[168] Panel Report, *China – Broiler Products*, para. 7.483.
[169] Japan's second written submission, paras. 40-41.

change in the proportion of the product categories within two baskets relative to the previous year even if the prices of all individual product categories remain constant. For example, an identical increase in the proportion of the lower priced product type within both baskets from one year to the next will show a decline in the weighted average price of the two baskets even though the two baskets have the same proportion of the product categories relative to each other and the prices of each individual product type remains the same.[170] In such a scenario, a finding of price depression would be mistaken in Japan's view.

7.125. We agree with Japan that even when the baskets of subject imports and domestic like products comprise the same product categories in the same proportion in a year, any changes in the average prices of the baskets from one year to the other could be a reflection of a change in the proportion of the product categories within two baskets relative to the previous year. Thus, a similarity in the product mix of domestic and imported products being compared does not mean that an issue of price comparability cannot arise. Therefore, we do not agree with China's view that the obligation to ensure price comparability is triggered only if the baskets of the imported and the domestic like product being compared are not *sufficiently similar* in their product mix. Further, in our view, China's reliance on *China – Broiler Products* is misplaced. Contrary to China's assertion, the panel in *China – Broiler Products* did not find that the obligation to ensure price comparability will only arise if there are *significant* differences in the product mix between domestic and imported products. Rather, in stating that "the authority must ensure that the groups of products or transactions compared on both sides of the equation are sufficiently similar", the panel was addressing what an investigating authority must do to undertake an objective consideration of price effects in one particular set of circumstances, namely, where (a) the products under investigation are not homogenous; (b) various product categories command significantly different prices; and (c) the authority performs a price comparison based on a basket of products or sales transactions. Thus, rather than setting out a general condition that must exist in all factual situations in order for *the obligation to ensure price comparability to be triggered*, the panel in *China – Broiler Products* was merely stating how an investigating authority may fulfil the obligation to ensure price comparability in one particular set of factual circumstances. Contrary to China's submission, the panel was not suggesting that the investigating authority's obligation to ensure price comparability will arise only if there are *significant* differences in the product mix of the domestic like products and the imported products being compared.

7.126. To sum up our findings concerning the applicable legal standard, we recall that the parties agree that an investigating authority needs to ensure that price comparisons undertaken for the purposes of Article 3.2 of the Anti-Dumping Agreement involve comparable prices. Price comparability for this purpose is not about the extent to which prices of the products at issue differ in a relative sense. Whether any two prices are the same or different does not speak to whether those prices are comparable. Rather, price comparability depends upon the characteristics of the transactions to which the prices pertain and the competitive relationship between the product categories at issue. In this regard, differences in relative prices of the product categories at issue, as well as non-price differences between them (such as those in terms of physical characteristics or end-uses), that affect the competitive relationship between the product categories will be pertinent to an authority's consideration of price effects. Bearing the foregoing in mind, we will review whether MOFCOM undertook an objective examination of the relevant evidence before it in determining whether the prices of various product categories were comparable and whether MOFCOM supported its findings with reasoned and adequate explanations.

7.3.3.2 MOFCOM's examination of the price comparability of product categories

7.127. Japan argues that MOFCOM's price comparisons between subject imports and the domestic like products, undistinguished by product categories (i.e. billets (slabs), coils, or plates), did not involve an objective examination of positive evidence. According to Japan, MOFCOM failed, for several reasons, to adequately explain the basis upon which it found that the prices of different product categories were comparable, notwithstanding record evidence showing that the product categories differed in various ways.[171] Japan contends that by making price comparisons between baskets of subject imports and domestic like products, including products belonging to different product categories, without ensuring that products on both sides of the comparison are sufficiently

[170] Japan's second written submission, para. 41.
[171] Japan's first written submission, paras. 88-89.

similar, MOFCOM failed to ensure price comparability among product categories.[172] China, however, maintains that MOFCOM was entitled to consider that no adjustment was required to ensure price comparability between billets (slabs), coils, and plates as it concluded, based on the best information available, that the alleged differences between the prices of billets (slabs), coils, and plates, were "reasonable".[173]

7.128. Before evaluating the merits of Japan's allegations of error, we note that MOFCOM addressed the argument of certain interested parties that price effects should be analysed for the three product categories separately at the end of its consideration of price effects in the following manner:

> After preliminary determination, the interested parties commented that, firstly, the price effect should be analyzed for the three product categories, stainless steel billet, hot-rolled stainless steel plate and hot-rolled stainless steel coil, and each of these product categories should be further analyzed according to specification. Secondly, the subject products and the domestic like products had a remarkable price difference and different price trends for individual years, demonstrating that they did not have competitive relationship, and the imported subject products did not depress the price of domestic like products.
>
> The Investigating Authority considered that, firstly, *as previously mentioned*, the stainless steel billet and hot-rolled stainless steel plate (coil) were *the same category of product*. The overall demand, supply and competition for the domestic stainless steel billet and hot-rolled stainless steel plate (coil) were examined in the case, rather than the demand and supply for one segmented product market of stainless steel billet and hot-rolled stainless steel plate (coil). Meanwhile, because some foreign exporters in the case did not submit the questionnaire responses, the Investigating Authority could not obtain the relevant information of classification of the stainless steel billet and hot-rolled stainless steel plate (coil), and the Investigating Authority made best efforts to conduct price effect analysis for 200-series, 300-series, 400-series and other series specifications of the stainless steel billet and hot-rolled stainless steel plate (coil) according to the best information available.[174]

This passage reveals that MOFCOM rejected the interested parties' comments and decided to make no adjustments to the relevant prices to ensure price comparability between product categories on two grounds: (a) MOFCOM's "previously mentioned" finding that "stainless steel billet and hot-rolled stainless steel plate (coil) were the same category of product"; and (b) the fact that "some" foreign exporters' failed to submit questionnaire responses, which according to MOFCOM, meant that it "could not obtain the relevant information of classification of the stainless steel billet and hot-rolled stainless steel plate (coil)".

7.129. We note that the final determination does not specify the relevant section of the determination to which the words "previously mentioned" refer. However, in response to a question from the Panel, China clarified that the words "previously mentioned" refer to pages 11 and 12 of the final determination "where MOFCOM examined the alleged differences between billets, plates and coils" as part of its findings in relation to the *scope of the product* under consideration.[175] Below is the relevant extract from those findings:

> The interested parties from the EU, Japan, and Korea asserted that the scope of the subject product in this case was too broad, involving several different products with different prices, and requested to exclude one or more products to limit the investigation scope or divide into several investigations. After the preliminary determination, relevant interested parties continued to argue that the Investigating Authority shall distinguish

[172] Japan's first written submission, para. 136.
[173] China's first written submission, para. 221.
[174] MOFCOM's final determination (Exhibit JPN-5.b), pp. 43-44. (emphasis added)
[175] China's response to Panel question No. 20, para. 104. We note that even though China referred to page 12 of the final determination alone as being the location of the "previously mentioned" findings identified in MOFCOM's consideration of price effects, we read the findings on page 12 together with the coextensive findings on page 11 which continue into page 12.

different products for separate assessments due to the differences between stainless steel billet and hot-rolled stainless steel plate (coil).

The Applicant asserted that stainless steel billet, hot-rolled stainless steel plate and hot-rolled stainless steel coil have the same basic physical and chemical characteristics, the same or like production process and equipment, final usage, sales channels and regions, customer groups, etc., and the difference in product prices is reasonable for products with different subdivided specifications under the same category of product. Based on either factual or legal analysis, stainless steel billet, hot-rolled stainless steel plate (coil) shall be identified as the same category of product. There is no legal provision requiring that the subcategories/specifications of the subject product must be similar or directly competitive in order to constitute a subject product.

Upon examination, the Investigating Authority considered that: Firstly, the stainless steel billet, hot-rolled stainless steel plate and hot-rolled stainless steel coil are all alloy steel products with the carbon content (by weight) of 1.2% or less and chromium content of 10.5% or more and same basic physical and chemical characteristics, which are mainly made of molten iron, chrome, nickel and stainless steel scrap, with a small amount of niobium, copper, titanium manganese and other alloying elements according to the requirements, and are casted into billet with continuous casting equipment and manufactured by hot rolling. Secondly, the stainless steel billet and hot-rolled stainless steel plate (coil) manufactured by companies with continuous production capacity entered the final consumption market. For the stainless steel billets purchased by some companies without continuous production capacity, they were hot-rolled into hot-rolled stainless steel plate (coil) and entered the final consumption market. Thirdly, due to *the difference in physical form* between stainless steel billet and hot-rolled stainless steel plate (coil), their *prices have reasonable differences*. In addition, given that the products belong to *different classification standards*, it cannot be used as independent standard to determine whether the products belong to the same category of product. Therefore, in the preliminary determination, the Investigating Authority decided not to accept the above arguments from interested parties on the scope of the subject product.

After further examination, the Investigating Authority also found that the physical and chemical characteristics and technical indices of hot-rolled stainless steel plate/coil depended on the physical and chemical characteristics of the stainless steel billet in the steelmaking process, and that there was no substantial difference in the basic internal characteristics, and that *the difference in physical form* cannot disprove the fact that they had the same *basic* characteristics. The final trading market and usage of stainless steel billet and hot-rolled stainless steel plate (coil) are consistent. The hot-rolled stainless steel plate and the hot-rolled stainless steel coil have *crossed and overlapped downstream usages* in actual application, such as storage tanks, bridges and vessels. Although they have *differences in specific segment uses and customers*, these are *reasonable differences within the products of the same category due to segmentation specifications*. Their final usage and customer group have *similarity*. Therefore, the Investigating Authority maintained the preliminary determination that stainless steel billet and hot-rolled stainless steel plate (coil) fall into the same category of product and can be assessed as a whole.[176]

7.130. Referring to the foregoing findings in the final determination, China contends that MOFCOM properly found, based on best information available, that the differences between the prices of the product categories were "reasonable", and thus did not warrant any specific action to ensure price comparability.[177] China also contends that based on even Japan's own allegedly erroneous standard for price comparability, MOFCOM properly addressed the alleged differences between the product categories in terms of their physical and chemical characteristics, end-uses, and customer groups in making this determination.[178]

7.131. We first note that China's submission that MOFCOM was not required to take further action to ensure price comparability, after finding that the price differences between product categories

[176] MOFCOM's final determination (Exhibit JPN-5.b), pp. 11-12. (emphasis added)
[177] China's first written submission, para. 221.
[178] China's second written submission, para. 135; response to Panel question No. 21, para. 107.

was "reasonable", rests on an interpretation of Article 3.2 that we disagreed with in paragraphs 7.114-7.117 above. In particular, we have found that the existence of a significant (or, in fact, any degree of) price difference between two products does not *alone* determine whether prices are comparable for the purpose of the price effects analysis called for under Articles 3.1 and 3.2. Therefore, insofar as MOFCOM concluded that it was not required to take actions to ensure price comparability on the basis of its finding that the price differences between product categories were "reasonable", MOFCOM acted inconsistently with its obligations under Articles 3.1 and 3.2 of the Anti-Dumping Agreement.

7.132. Second, we note that MOFCOM's analyses of price and non-price differences between product categories were made for the purpose of responding to the interested parties' arguments about the *scope of the product under consideration*, not the comparability of the prices of the different product categories.[179] Also, the findings themselves recognize that *"reasonable" differences* exist between product categories as regards prices, physical characteristics, end-uses and customers. We do not consider that such findings concerning *product scope*, in the absence of any additional explanation, could alone support a conclusion that the *prices* of the separate product categories falling within the product under consideration are *all comparable* for the purpose of Article 3.2 of the Anti-Dumping Agreement. In this regard, we note that the definition of product scope and the examination of price comparability for the purpose of considering price effects are two substantively different aspects of an investigating authority's determination. The fact that an authority may consider that certain price and non-price differences between product categories are "reasonable" when deciding whether to include the different product categories into the product scope does not, in and of itself, imply that an investigating authority may, without explanation, appropriately rely upon the same considerations to conclude that such price and non-price differences *do not* give rise to price comparability issues.

7.133. We note that previous panels have faulted investigating authorities for drawing similar inferences concerning price comparability from product scope determinations. In *China – X-Ray Equipment*, the panel rejected China's argument that because MOFCOM had concluded that the domestic products were "like" the subject imports in considering the product scope, MOFCOM ensured price comparability by comparing prices of "like" products in the price effects analysis. The panel took the view that a conclusion in the context of product scope that the domestic product was "like" the product under consideration did not imply that MOFCOM fulfilled its obligation to ensure price comparability when considering price effects under Article 3.2 of the Anti-Dumping Agreement.[180] Likewise, the panel in *China - Autos (US)* did not consider that a finding of "likeness" for the purposes of Article 2.6 of the Anti-Dumping Agreement necessarily means that annual average prices of domestic like products as a whole could be compared to annual average prices of imported products as a whole.[181] In the light of the facts of that dispute, the panel in *China – Autos (US)* concluded by finding that "the differences between the two baskets of goods should have prompted an objective decision-maker to make further inquiries into those differences to determine whether they affected prices, before proceeding to undertake a price effects analysis on the basis of AUVs for the two baskets of goods. Yet, MOFCOM's final determination contains no further discussion of differences between subject imports and the domestic like product for the purposes of a price comparison in the context of MOFCOM's price depression analysis".[182] We share the line of thinking expressed by the panels in these two disputes. Thus, unlike China, we do not consider that by relying on an examination of price and non-price differences between product categories in the context of its analysis of the interested parties' views on product scope, MOFCOM properly established that it was not required to take specific steps to ensure price comparability between product categories.

7.134. Even though we have found MOFCOM's examination of price comparability between product categories to be deficient for reasons discussed in paragraphs 7.131-7.133 above, Japan's claims under Articles 3.1 and 3.2 of the Anti-Dumping Agreement are grounded on several additional allegations of MOFCOM's failure to examine price comparability between product categories based on an objective examination of positive evidence. We address these additional grounds put forth by

[179] As Japan points out, an analysis of differences between product categories for the purpose of defining product scope does not in itself show that such differences were properly considered for the purpose of establishing price comparability. (Japan's second written submission, para. 60).
[180] Panel Report, *China – X-Ray Equipment*, paras. 7.65-7.66.
[181] Panel Report, *China – Autos (US)*, para. 7.278.
[182] Panel Report, *China – Autos (US)*, para. 7.281. (fn omitted)

Japan in support of its claim below. As some of these grounds pertain to MOFCOM's examination of *price differences* between product categories while others pertain to MOFCOM's examination of *non-price differences* between product categories, we divide our analysis of such grounds into two sections.

7.3.3.2.1 MOFCOM's assessment of evidence concerning *price differences* between product categories

7.135. Japan argues that MOFCOM failed to explain the meaning of "reasonable differences" in prices of different product categories in the final determination and, for this reason, MOFCOM failed to provide a reasoned and adequate explanation of its findings.[183] China explains that MOFCOM considered the price differences to be insignificant, and thus "reasonable".[184] Moreover, according to China, the context in which the finding of "reasonable differences" in prices of product categories appears in the final determination clarified the meaning of the term "reasonable". Specifically, China points to the following as the "context" in question: (a) the statement immediately following the finding of "reasonable differences" in prices of the product categories; and (b) MOFCOM's statement that "difference[s] in physical form cannot disprove the fact that they had the same basic characteristics".[185]

7.136. We do not consider that either of these statements adequately explains the meaning of "reasonable differences" in the prices of the product categories. The sentence in MOFCOM's final determination following the "reasonable differences" finding states that such prices differences cannot be used "as [an] independent standard to determine whether the products belong to the same category of product" as "the products belong to different classification standards".[186] This statement refutes the relevance of price differences between product categories to the question of whether they "belong to the same category of product", not on the ground that such price differences were insignificant, but on a ground that is entirely unrelated to the magnitude of such price differences, namely that the product categories belong to different classification standards. Further, MOFCOM's statement that "difference in physical form cannot disprove the fact that they had the same basic characteristics" is distinct from its finding concerning "reasonable differences" in the prices of the product categories, and is silent on the question of the magnitude of such price differences. We also do not consider that "reasonable" price differences referred to in the final determination could be understood to mean *insignificant* price differences, as China suggests. We therefore agree with Japan that the ambiguity inherent in MOFCOM's finding of "reasonable differences" in the prices of product categories undermines China's submission that this finding was reasonably and adequately explained.

7.137. China contends that MOFCOM made clear that it relied on the best information available for the assessment of price comparability between product categories by stating that "because some foreign exporters in the case did not submit the questionnaire responses, the Investigating Authority could not obtain the relevant information of classification of the stainless steel billet and hot-rolled stainless steel plate (coil), and the Investigating Authority made best efforts to conduct price effect analysis […] according to the best information available".[187] Japan, however, maintains that the final determination does not indicate that MOFCOM used best information available to find that "reasonable differences" existed between the prices of product categories. Moreover, according to Japan, MOFCOM's final determination does not identify the data that MOFCOM used to make this finding.[188]

7.138. The MOFCOM statement China relies upon appears towards the end of its consideration of price effects, when MOFCOM rejects the interested parties' request for MOFCOM to consider price effects for each product category separately. The full sentence reads as follows:

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[183] Japan's first written submission, para. 121.
[184] China's first written submission, para. 219.
[185] China's opening statement at the second meeting of the Panel, para. 16 (referring to MOFCOM's final determination (Exhibit JPN-5.b), p. 12).
[186] MOFCOM's final determination (Exhibit JPN-5.b), p. 12.
[187] China's second written submission, para. 144 (quoting MOFCOM's final determination (Exhibit JPN-5.b), p. 44).
[188] Japan's opening statement at the second meeting of the Panel, para. 13; and comments on China's responses to Panel question No. 45, paras. 27 and 31. See also Japan's closing statement at the second meeting of the Panel, para. 7.

> Meanwhile, because some foreign exporters in the case did not submit the questionnaire responses, the Investigating Authority could not obtain the relevant information of classification of the stainless steel billet and hot-rolled stainless steel plate (coil), and the Investigating Authority made best efforts to conduct price effect analysis for 200-series, 300-series, 400-series and other series specifications of the stainless steel billet and hot-rolled stainless steel plate (coil) according to the best information available.[189]

7.139. In our view, it is not clear what MOFCOM meant by this statement. The statement refers to MOFCOM's inability to obtain "information of classification of" the product categories. However, we do not understand "information of classification" to mean pricing information, and thus nothing in this statement leads us to conclude that MOFCOM relied on best information available to reach the finding of "reasonable differences" in the prices of the product categories. Further, while the statement refers to "best efforts", it uses this expression in relation to MOFCOM's series-specific price effects analyses, and not MOFCOM's finding with respect to the magnitude of the price differences between the product categories. We also note that while the statement China relies upon appears on page 44 of the final determination in the context of MOFCOM's consideration of price effects, the finding of "reasonable differences" in the prices of the product categories is found at page 12 of the final determination in the context of MOFCOM's analysis of product scope. Neither of the findings made on these two pages cross-refers to the other one. Further, the findings and explanation set out on page 12 do not contain any reference to MOFCOM having resorted to best information available in respect of the finding on "reasonable differences" in the prices of the product categories. We therefore agree with Japan that MOFCOM failed to indicate that its finding of "reasonable differences" in the prices of product categories was based on the best information available. In our view, this omission undermines China's assertion that MOFCOM's final determination was reasonably and adequately explained.

7.140. China maintains that the data sets that MOFCOM used as the best information available to conclude that there were reasonable price differences between product categories were (a) MOFCOM's conclusion on price comparability in the dumping determination[190], and (b) the Indonesian imports data from China customs.[191] According to Japan, however, China's assertions are *ex post* rationalizations.[192] Japan contends that nothing in the final determination reveals that MOFCOM's conclusion concerning price comparability of product categories in its dumping analysis formed the basis for MOFCOM's finding of reasonable price differences in the product scope section or any aspect of its price effects analysis.[193] Likewise, Japan argues that nothing in the final determination indicates that MOFCOM relied upon the prices of subject imports from Indonesia as the basis for its conclusion that price differences between product categories were "reasonable", and hence China's submissions in this regard are also *ex post* rationalizations.[194]

7.141. We agree with Japan that MOFCOM's conclusion on price comparability in its dumping determination, which China points to as being a part of the best information available used to reach its reasonable price differences finding, was not mentioned either in the context of MOFCOM's product scope analysis, or in the section containing the price effects analysis of the final determination.[195] Thus, there is no indication in MOFCOM's final determination that it relied upon these findings in any way for the purpose of its consideration of the comparability of prices.

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[189] MOFCOM's final determination (Exhibit JPN-5.b), p. 44.

[190] China states that Nippon Yakin Kogyo Co., Ltd. (NYK), a Japanese respondent, requested MOFCOM to differentiate between product categories for the purposes of dumping analysis prior to the preliminary determination, but did not argue against MOFCOM's decision to reject NYK's request following the preliminary determination. Thus, according to China, MOFCOM considered its conclusion that it need not differentiate between product categories for dumping analysis to be the best information available for its determination that there are no price comparability issues affecting product categories for the purposes of its price effects analysis. (China's response to Panel question No. 15, para. 87).

[191] China's response to Panel question No. 45, para. 58. According to China, data concerning Indonesian imports showed "only very minor price differences" between the product categories at issue. (China's first written submission, para. 219).

[192] Japan's comments on China's response to Panel question No. 45, paras. 27 and 31.

[193] Japan's comments on China's response to Panel question No. 45, para. 31.

[194] Japan's response to Panel question No. 19, para. 67.

[195] Japan's comments on China's response to Panel question No. 45, para. 31.

7.142. Responding to Japan's argument that China's reliance on China customs data concerning Indonesian imports is *ex post facto* rationalization, China points to page 37 of the final determination where MOFCOM states that "China Customs data is the best information available" and that "Indonesia's exports to China mainly comprised of 300-series products".[196] We note, however, that the statements China relies upon concerning Indonesian exports are not made in the part of MOFCOM's final determination where it examined product scope and made the reasonable price differences finding. MOFCOM's statements appear at the beginning of its price effects analysis in the following context:

> The data provided by the responding companies who submitted the questionnaire response and the relevant information provided by the interested parties according to the requirements of the Investigating Authority show that, first, the EU exports to China included 300-series and other series of products; Second, Korea's exports to China included 300-series and 400-series products; Third, Japan's exports to China included 300-series and 400-series and other series of products; *Fourth, Indonesia's exports to China mainly comprised of 300-series products*; Fifth, domestic like products included all four types of products mentioned above. Therefore, the Investigating Authority adjusted the exchange rates, customs duties and customs clearance fees of the 300-series, 400-series and other-series products that were actually exported to China, and then compared with domestic like products of the same specifications in China.
>
> Since the EU and Indonesia companies did not submit the questionnaire responses, the Investigating Authority could not obtain accurate information on the volume and price of dumped imports of each specification. The Investigating Authority determined the relevant specification information of the EU and Indonesian dumped imports based on the facts available, and further determined the total specification data of the four countries (regions) involved. The Investigating Authority considered that *China Customs data is the best information available*. [197]

As we read it, this passage does not indicate that by virtue of comprising mainly of 300-series products, data concerning Indonesian exports to China were picked by MOFCOM as the best information available for the purpose of determining whether prices of product categories were comparable, or that the price differences between product categories were "reasonable".

7.143. In our view, having failed to identify the data sets that constituted the best information available on which MOFCOM relied to conclude that there were "reasonable differences" in the prices of product categories, MOFCOM also, consequently, failed to explain how the data on the record of the investigation supported its conclusion. Thus, without commenting on MOFCOM's alleged resort to any particular data sets as the best information available, we consider that the requirement to undertake an objective examination of the best information available would require an objective and unbiased authority to explain how it supported the relevant conclusion. MOFCOM's final determination does not do so. While China has offered explanations as to why the best information available indicated that there were "reasonable" price difference between product categories, such explanations constitute *ex post* rationalizations that we cannot take into account as they do not appear in the final determination.[198] Finally, Japan argues that MOFCOM failed to objectively examine other record evidence indicating that the prices of product categories were not comparable, and therefore failed to conduct an objective examination of positive evidence in accordance with Articles 3.1 and 3.2 of the Anti-Dumping Agreement. Japan's arguments in this regard have focused on pricing information submitted by certain Japanese respondents[199], and certain presentations of Chinese customs data presented by (a) the applicant, in attachment 9 to the application[200]; (b) the

[196] China's second written submission, para. 144 (quoting MOFCOM's final determination (Exhibit JPN-5.b), p. 37).

[197] MOFCOM's final determination (Exhibit JPN-5.b), p. 37. (emphasis added)

[198] In this regard, we recall that since a panel's review is not *de novo, ex post* rationalizations unconnected to the investigating authority's explanation – even when founded on record evidence – cannot form the basis of a panel's conclusion. (Panel Report, *Korea – Pneumatic Valves (Japan)*, para. 7.10).

[199] Specifically, Japan points to certain questionnaire responses submitted by Nisshin Steel and Nippon Steel. (Japan's comments on China's response to Panel question No. 45, para. 37 (referring to Nisshin Steel's questionnaire response, section V (Exhibit CHN-7.b (BCI)), p. 9); Nisshin Steel's response to additional questions of MOFCOM (Exhibit CHN-11.b (BCI)), pp. 2-8; Nippon Steel's response to additional questions of MOFCOM (Exhibit CHN-12.b (BCI)), p. 2.).

[200] Application (Exhibit JPN-6.b), attachment 9.

Japanese respondents, in annex 17 to the non-injury brief[201], and (c) the Japanese respondents, in annex 34 to the non-injury brief.[202] We note, however, that China has not identified these alternative sources of data and information as the best information available that MOFCOM relied upon for the purpose of its "reasonable price differences" finding. Moreover, while Japan identifies the legal bases of this part of its complaint to be Articles 3.1 and 3.2, we note that the problem at the centre of Japan's submission is MOFCOM's decision not to rely on and disregard the evidence referred to in (a), (b), and (c) above. In our view, Japan's fundamental concern is therefore about the *rejection* of submitted evidence and the *selection* of best information available, which is regulated under Article 6.8 and Annex II of the Anti-Dumping Agreement, not Articles 3.1 and 3.2. Accordingly, as previously explained in paragraph 7.108, we do not see a factual or legal basis to review the merits of Japan's arguments concerning MOFCOM's decision not to review the alternative sources of data and information referred to in (a), (b), and (c) above. We therefore make no findings with respect to Japan's additional submissions on this matter.

7.3.3.2.2 MOFCOM's assessment of evidence concerning non-price differences between product categories

7.144. Japan contends that MOFCOM failed to explain the basis on which it considered various product categories to be comparable despite record evidence showing the existence of various non-price differences between them that affected their substitutability.[203] In Japan's view, MOFCOM disregarded this evidence and thus failed to ensure price comparability.[204]

7.145. China submits that MOFCOM did consider such non-price differences between product categories[205], and points to the following portions of MOFCOM's final determination in support of its submission:

> Upon examination, the Investigating Authority considered that: Firstly, the stainless steel billet, hot-rolled stainless steel plate and hot-rolled stainless steel coil are all alloy steel products with the carbon content (by weight) of 1.2% or less and chromium content of 10.5% or more and same basic physical and chemical characteristics, which are mainly made of molten iron, chrome, nickel and stainless steel scrap, with a small amount of niobium, copper, titanium manganese and other alloying elements according to the requirements, and are casted into billet with continuous casting equipment and manufactured by hot rolling. Secondly, the stainless steel billet and hot-rolled stainless steel plate (coil) manufactured by companies with continuous production capacity entered the final consumption market. For the stainless steel billets purchased by some companies without continuous production capacity, they were hot-rolled into hot-rolled stainless steel plate (coil) and entered the final consumption market. Thirdly, due to the difference in physical form between stainless steel billet and hot-rolled stainless steel plate (coil), their prices have reasonable differences.
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> …
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> After further examination, the Investigating Authority also found that the physical and chemical characteristics and technical indices of hot-rolled stainless steel plate/coil depended on the physical and chemical characteristics of the stainless steel billet in the steelmaking process, and that there was no substantial difference in the basic internal characteristics, and that the difference in physical form cannot disprove the fact that they had the same basic characteristics. The final trading market and usage of stainless steel billet and hot-rolled stainless steel plate (coil) are consistent. The hot-rolled stainless steel plate and the hot-rolled stainless steel coil have crossed and overlapped downstream usages in actual application, such as storage tanks, bridges and vessels. Although they have differences in specific segment uses and customers, these are reasonable differences within the products of the same category due to segmentation specifications. Their final usage and customer group have similarity.

[201] Non-injury brief (revised) (Exhibit JPN-8.b (BCI)), annex 17.
[202] Japan's comments on China's response to Panel question No. 45, paras. 37-40.
[203] Japan's first written submission, para. 88.
[204] Japan's first written submission, paras. 134-135.
[205] China's second written submission, para. 135; response to Panel question No. 21, paras. 106-107.

…

> The investigation shows that the dumped imports are basically the same as the domestically produced stainless steel billets and hot-rolled stainless steel plates (coils) in terms of physical and chemical characteristics, raw materials, production processes, product uses, sales channels and customer group, falling into the like products, both with similarity and substitutability.[206]

7.146. Japan contends that these passages from the final determination do not explain why and how the product categories are substitutable, and thus comparable for the purpose of the price effects analysis.[207] Moreover, according to Japan, MOFCOM's findings did not properly take into account a range of non-price differences between product categories that were brought to MOFCOM's attention in the non-injury brief of the Japanese respondents. Japan extensively describes these differences in terms of physical characteristics, uses, customers and distribution channels, treatment by Chinese customs, applicable tariff rates, classification in Chinese national steel standards, production processes, and raw materials.[208] Japan maintains that MOFCOM's price effects analysis did not reasonably and adequately address this evidence.

7.147. We evaluate the merits of the parties' submissions with respect to these alleged differences in the following subsections.

a. Physical characteristics

7.148. The final determination notes that hot-rolled stainless steel billets (slabs), hot-rolled stainless steel coils, and hot-rolled stainless steel plates have the "same basic physical and chemical characteristics".[209] Before making this finding, MOFCOM notes that billets (slabs), coils, and plates "are all alloy steel products with … carbon content (by weight) of 1.2% or less and chromium content of 10.5% or more".[210] According to Japan, the commonality in chemical composition that the final determination refers to is not adequate to address the differences in physical characteristics of the products that cause them to be non-substitutable.[211] In this regard, Japan points in particular to the following: (a) billets (slabs) are semi-finished products, that are used as inputs in the production of coils and plates; and (b) billets (slabs), coils, and plates have different shapes.[212]

7.149. In our view, MOFCOM's final determination does not explain why billets (slabs) would be substitutable, and hence comparable for the purposes of Article 3.2, with coils and plates if they are an input used in the production of coils and plates. Furthermore, the final determination also does not address whether the differences in the shapes of billets (slabs), coils, and plates would have a bearing on the comparability of their prices.[213] While the final determination states that due to differences in physical form between billets (slabs), coils, and plates, their prices have "reasonable differences", and that they have "reasonable differences" in "specific segment uses and customers" due to "segmentation specifications", this finding does not shed light on whether these "reasonable" differences between billets (slabs), coils, and plates impact the extent to which the products compete and, therefore, the comparability of their prices.

b. Use

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[206] MOFCOM's final determination (Exhibit JPN-5.b), pp. 11-12 and 40.
[207] Japan's second written submission, para. 59.
[208] Japan's first written submission, paras. 90-133. Japan also refers to differences between the three product categories in terms of their prices in these paragraphs. These differences, however, have been discussed in section 7.3.3.2.1.
[209] MOFCOM's final determination (Exhibit JPN-5.b), p. 11.
[210] MOFCOM's final determination (Exhibit JPN-5.b), p. 11.
[211] Japan's first written submission, para. 91.
[212] Japan's first written submission, paras. 92-95 (referring to Non-injury brief (revised) (Exhibit JPN-8.b (BCI)), p. 9).
[213] The non-injury brief indicates that the thickness of billets (slabs) is not less than 50mm, while the thickness of plates is less than 3mm in case of thin plates and not less than 3mm in case of thick plates. The non-injury brief also states that plates are "custom manufactured to meet specific project requirements". Unlike billets (slabs) and plates, coils are not flat but are delivered in a coiled shape. (Non-injury brief (revised) (Exhibit JPN-8.b (BCI)), p. 9).

7.150. MOFCOM described and addressed the uses of the billets, coils, and plates as follows:

> Main usages: It generally has two usages. One is the raw material for cold-rolled stainless steel. It can be manufactured into cold-rolled stainless steel products through cold rolling processes. The other is as a finished product for direct sales. It is mainly used for vessels, containers, railway, electric power, petroleum, petrochemical and other industries.
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> …
>
> The final trading market and usage of stainless steel billet and hot-rolled stainless steel plate (coil) are consistent. The hot-rolled stainless steel plate and the hot-rolled stainless steel coil have crossed and overlapped downstream usages in actual application, such as storage tanks, bridges and vessels. Although they have differences in specific segment uses and customers, these are reasonable differences within the products of the same category due to segmentation specifications. Their final usage and customer group have similarity.[214]

7.151. Japan argues that these findings do not mention the use of billets (slabs), which are used as an input in the production of hot-rolled products. Per Japan, billets (slabs) cannot be used directly for the production of cold-rolled products, or sold as finished products.[215] Japan also argues that while the final determination refers to two uses of the subject product, namely (a) manufacture of cold-rolled products and (b) finished product for direct sales, the two are distinct and non-interchangeable uses of coils on the one hand and plates on the other.[216] According to Japan, coils cannot be used for storage tanks, bridges, or vessels, for which purposes plates are used. Likewise, plates are "custom manufactured to meet specific project requirements" and are not used as raw material for the production of cold-rolled products.[217] Thus, Japan argues that MOFCOM wrongly found that the uses of billets (slabs), coils, and plates "cross" or "overlap".[218] Japan contends that by failing to address the evidence concerning the lack of substitutability of billets (slabs), coils, and plates from a customer's perspective, MOFCOM failed to ensure price comparability between the baskets of subject imports and the domestic like products that comprise three distinct product categories.[219]

7.152. China contends that by explaining that "hot-rolled stainless steel plate (coil) is made of stainless steel billet through hot rolling and other processes", MOFCOM showed that the final usage of billets coincides with the usage of coils and plates.[220] China also contends that "overall evidence before MOFCOM" indicated that coils and plates had overlapping usages.[221]

7.153. We note that the non-injury brief submitted by Japanese respondents before MOFCOM identifies the following uses of billets (slabs), coils, and plates:

> Stainless steel slabs are mainly used for rolling to produce flat sheet materials (including thick plates, medium plates, thin sheets, strip reels), and thus are semi-finished products or raw materials.
>
> Hot-rolled stainless steel coils are mainly used to manufacture coil-cut steel sheets, cold-rolled steel coils, welded steel tubes and steel sections.

[214] MOFCOM's final determination (Exhibit JPN-5.b), pp. 11-12.
[215] Japan's first written submission, para. 98.
[216] Japan's first written submission, para. 98.
[217] Japan's first written submission, para. 98 (quoting Non-injury brief (revised) (Exhibit JPN-8.b (BCI)), p. 8).
[218] Japan's first written submission, para. 102.
[219] Japan's first written submission, paras. 104-105.
[220] China's response to Panel question No. 46, para. 71 (quoting MOFCOM's final determination (Exhibit JPN-5.b), p. 11). (emphasis omitted)
[221] China's response to Panel question No. 46, para. 76.

> Hot-rolled stainless steel plates are widely used in the construction materials of ships, bridges, tanks, etc.[222]

Aside from noting that hot-rolled stainless steel plates and hot-rolled stainless steel coils are made from stainless steel billet, the final determination does not speak to the usages of stainless steel billets (slabs). While China contends that the final usage of stainless steel billet coincides with those of coils and plates because the former is an input used for the production of the latter, we do not consider that this reasoning alone suffices to establish that billets (slabs) compete with plates and coils such that their prices are *per se* comparable for the purposes of Article 3.2. In this regard, we note that the submission from the applicant that China relies upon to show that the usages of coils and plates overlap explains that billet "is basically not circulating in the final consumer market, [and] there is no independent use [of billets]".[223] The final determination, however, does not explain how or why the prices of a product of which there is no independent use (i.e. billets (slabs)) could be considered comparable to downstream products with several independent usages (i.e. coils and plates) for the purposes of Article 3.2.

7.154. Likewise, the final determination refers to the two uses of the subject product, namely "raw material for cold-rolled stainless steel" and "finished product for direct sales", without addressing the fact that the non-injury brief identifies the former as a use of coils alone, and the latter as a use of plates alone. The final determination also does not refer to any evidence showing that both coils as well as plates could be used interchangeably as an input into the production of cold-rolled products, and as a finished product for direct sales. China points to certain briefs submitted by the applicant and certain statements filed by domestic companies before MOFCOM, as record evidence supporting MOFCOM's finding that coils and plates have overlapping usages.[224] We note, however, that the evidence from the applicant contains statements suggesting that coils have overlapping usages as plates *after* coils have been processed into "open and flat plate[s]".[225] To us, these statements indicate that *coils converted into "open and flat plate[s]",* rather than coils *per se*, have overlapping usages as plates. Thus, the applicant's submissions do not support China's assertion that coils and plates have overlapping usages.

7.155. We note that the questionnaire responses of Gansu Jiu Steel Group Hongxing Iron & Steel Co., Ltd. (Gansu Jiu), Beihai Chengde Metal Rolling Co., Ltd. (BCMR), Beihai Chengde Ferronickel and Stainless Steel Co., Ltd. (BCF), and Angang Lianzhong Stainless Steel Corporation (Angang Lianzhong) speak of common usages of coils and plates without distinguishing between the usages of the two.[226] However, the final determination does not indicate how MOFCOM took into account the conflicting evidence in the non-injury brief submitted by Japanese respondents indicating that coils and plates have distinct usages. We also agree with Japan's argument that even if coils and plates are both used in the same project, for example, the construction of a bridge, they may not necessarily be substitutable for specific purposes within that project.[227] Indeed if all components used in the construction of a bridge were to be construed to be comparable for the purposes of a price effects analysis under Article 3.2 of the Anti-Dumping Agreement only because they are used in the same project, stainless steel plates and cement would be comparable products. In our view, an objective and unbiased investigating authority would have considered the differences in the usages of coils and plates more closely than referring generally to broad overlapping applications of these product categories when determining the comparability of their prices for the purposes of Article 3.2.

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[222] Non-injury brief (revised) (Exhibit JPN-8.b (BCI)), pp. 9-10.

[223] Applicant's reply to interested parties' comments (1 November 2018) (Exhibit CHN-21.b), p. 2.

[224] China's response to Panel question No. 46, paras. 78-82 (referring to Applicant's reply to interested parties' comments (1 November 2018) (Exhibit CHN-21.b); Applicant's reply to interested parties' comments (23 January 2019) (revised) (Exhibit CHN-22.b); Gansu Jiu's questionnaire response (Exhibit CHN-23.b); BCMR's questionnaire response (Exhibit CHN-24.b); BCF's questionnaire response (Exhibit CHN-25.b); and Angang Lianzhong's questionnaire response (revised) (Exhibit CHN-26.b)).

[225] Applicant's reply to interested parties' comments (1 November 2018) (Exhibit CHN-21.b), p. 2; Applicant's reply to interested parties' comments (23 January 2019) (revised) (Exhibit CHN-22.b), p. 5.

[226] We also note that the response of Gansu Jiu identifies that hot-rolled coils are used as raw material for cold rolling, but does not state that stainless steel plates could also be used as raw material for cold rolling. (Gansu Jiu's questionnaire response (Exhibit CHN-23.b), p. 2).

[227] Japan's comments on China's response to Panel question No. 46, para. 48.

c. Customers

7.156. Japan argues that while the final determination refers to the "final trading market and usage" of billets (slabs), coils, and plates as being "consistent", in Japan's view, examining only the "final" trading market does not constitute an objective examination as to the substitutability of the product categories from the customer's perspective and, therefore, of the price comparability of the different product categories.[228] Japan asserts that even if the product categories share a "final usage", this does not establish that they have the same *direct* usage, or that they are interchangeable from the perspective of the relevant customers.[229] Referring to record evidence, Japan contends that there are "substantial differences" in the customers and distribution channels of the three product categories.[230]

7.157. We note that even if the product categories at issue are eventually consumed for the same final purpose, their substitutability from the perspective of actual customers will depend on the immediate purpose for which they are used. For example, if product A is a semi-finished product used as an *input* to manufacture product B (like, e.g. billets (slabs) are used to produce coils), which in turn is an *input* used to produce the finished product C (like, e.g. coils may be used to produce steel sheets), all three products are eventually being used for final consumption. However, that does not imply that product A will have the same customer, and will be therefore substitutable from the customers' perspective, with product C. In such a scenario, product A will be purchased by customers with the capacity to produce product B and will not directly be procured by final consumers of product B. Likewise, a manufacturer of the intermediate product B will purchase product A, but not product C. Hence, the fact that all three products have the same "final usage" does not necessarily demonstrate that they are substitutable from the customers' perspective, suggesting that their prices may not be comparable.

7.158. In this case, Japan has referred to record evidence to support its point that, despite having the same "final usage", billets (slabs), coils, and plates differ in terms of actual customers. Japan asserts that customers who need hot-rolled stainless steel coils to produce cold-rolled coils cannot purchase billets (slabs) instead, as they would not have the hot-rolling mills required to convert billets (slabs) into coils.[231] Japan also contends that such customers also cannot purchase plates, as plates cannot be put into cold-rolling mills that are designed to cold-roll thinner and long sheets uncoiled from coils.[232] Japan further asserts that customers of plates for construction cannot purchase billets (slabs) as they would not have hot-rolling mills necessary to produce plates from slabs, and can also not purchase coils as these cannot be turned into plates.[233] In addition to these assertions based on logic, Japan refers to the non-injury brief presented before MOFCOM by the Japanese respondents, which describes the "customer bases" of the three product categories as follows: (a) stainless steel billet (slab) "is typically used by the stainless steel producer to process internal downstream products or sold to affiliated companies[;] [i]n a few cases it may also be sold to other stainless steel producers to produce downstream hot-rolled products"[234]; (b) hot-rolled stainless steel coils have as their "major customers" producers of downstream products including cold-rolled steel "and are rarely used as final products"[235]; and (c) hot-rolled stainless steel plates have as their "major customers" shipyards, container yards, machinery factories, etc. and are "custom manufactured to meet customers' specific project requirements".[236]

7.159. MOFCOM's final determination does not address the divergences in the customer groups of billets (slabs), coils, and plates that were evident from the record evidence before MOFCOM. The mere finding that the three product categories have the same "final trading market and usage" and "crossed and overlapped downstream usages in actual application, such as storage tanks, bridges and vessels" reveals no consideration of the impact of the different actual customer groups on the

[228] Japan's first written submission, paras. 103 and 110.
[229] Japan's first written submission, para. 105.
[230] Japan's first written submission, para. 106.
[231] Japan's first written submission, para. 104.
[232] Japan's first written submission, para. 104.
[233] Japan's first written submission, para. 104.
[234] Non-injury brief (revised) (Exhibit JPN-8.b (BCI)), p. 10. Japan asserts that the non-injury brief notes that "stainless steel slabs from Indonesia Tsingshan are only used for the self-use of the Chinese companies subordinated to Tsingshan Holding Group". (Japan's first written submission, para. 107 (referring to Non-injury brief (revised) (Exhibit JPN-8.b (BCI)), p. 27).
[235] Non-injury brief (revised) (Exhibit JPN-8.b (BCI)), p. 10.
[236] Non-injury brief (revised) (Exhibit JPN-8.b (BCI)), p. 10.

comparability of price. We consider that MOFCOM's failure to examine the evidence concerning the differences in customer groups of billets (slabs), coils, and plates, meant that its ultimate determination was not based on an objective examination of positive evidence and was not reasonably and adequately explained.

d. Tariff classification and Chinese quality standards

7.160. Japan argues that differences in the physical characteristics and uses of the three product categories are reflected in the classification of different steel products in the Chinese tariff system.[237] Japan argues that while MOFCOM listed the applicable tariff numbers that comprised the product under consideration in the final determination, it did not "explore how the differences reflected in the classifications affected price comparability".[238] Japan contends that the application of different tariff rates to different product categories shows "that the conditions of competition between Subject Imports and domestic like products are different for stainless steel slabs, hot-rolled stainless steel coils, and hot-rolled stainless steel plates".[239] Per Japan, the classification of steel products in the National Standard of the People's Republic of China (Chinese quality standards) also shows that "stainless steel slabs, hot-rolled stainless steel coils, and hot-rolled stainless steel plates [are] three separate and distinct products and that stainless steel slabs can be only semi-finished products".[240] Japan submits that MOFCOM improperly failed to address the differences in tariff rates and quality standards applicable to billets (slabs), coils, and plates in its consideration of price effects.[241]

7.161. We understand Japan's submissions concerning MOFCOM's alleged failure to properly explore the differences in tariff classifications and quality standards to be grounded in the view that such classifications and standards reflect the differences in physical characteristics and usages of the product categories that should have been taken into account in MOFCOM's analysis of price comparability. Having already found that MOFCOM did not properly address evidence concerning the physical characteristics, usages and customers, of the relevant products, we do not think it is necessary, for the purpose of securing a positive solution to the dispute, to make additional findings with respect to the merits of this aspect of Japan's complaint.

e. Production processes

7.162. Finally, Japan maintains that MOFCOM's findings regarding production processes of different product categories did not address the possibility that differences in production stages could lead to differences among the three products in terms of their uses and customers, rendering them non-substitutable.[242] Japan argues that the commonality in the production processes of various product categories identified by MOFCOM would lead "to an absurd conclusion that the prices of all products made of stainless steel … are comparable".[243] As the essence of Japan's arguments regarding differences in the production processes of different product categories appears to be that such differences could give rise to differences in the uses and customers of the product categories, we consider that, in the light of our previous findings, we need not address Japan's submissions on production processes to assist the parties achieve a satisfactory resolution of the dispute.

Conclusion in respect of MOFCOM's assessment of non-price differences:

7.163. For the reasons discussed above, we consider that MOFCOM did not properly engage with record evidence concerning differences in the physical characteristics, usages, and customer groups of the three product categories, which were relevant to the competitive relationship between the product categories, and thus to the comparability of their prices. Accordingly, we consider that MOFCOM failed to provide a reasoned and adequate explanation supporting its determination that the prices of the product categories were comparable for the purpose of its price effects analysis.

[237] Japan's first written submission, para. 111.
[238] Japan's first written submission, para. 111.
[239] Japan's first written submission, paras. 116-117 (referring to Application (Exhibit JPN-6.b), attachment 7).
[240] Japan's first written submission, paras. 119-120 (referring to Non-injury brief (revised) (Exhibit JPN-8.b (BCI)), annex 1, pp. 67-69).
[241] Japan's first written submission, paras. 117 and 120.
[242] Japan's first written submission, para. 128.
[243] Japan's first written submission, para. 133. (emphasis omitted)

7.3.3.2.3 China's arguments concerning the relevance of MOFCOM's findings of price comparability to MOFCOM's consideration of price effects

7.164. As a general defence to Japan's arguments concerning MOFCOM's alleged failure to properly address the issue of price comparability, China argues that since MOFCOM's price effects consideration was based on a comparison of price trends rather than of actual prices, and on volume of the subject imports, the price comparability issues concerning product categories could not have impacted the objectivity of MOFCOM's assessment.[244] Below, we first address China's arguments concerning the distinction China seeks to draw between a price effects analysis based on a comparison of "price trends" and one based on a comparison of "actual prices". We then address China's defence concerning MOFCOM's use of volume trends in its price effects analysis.

a. Price trends versus actual prices

7.165. In support of its view that MOFCOM's comparison of *price trends* was not affected by the price comparability issues raised by Japan[245], China refers to the following excerpt from the Appellate Body report in *Korea – Pneumatic Valves*:

> The KTC's transaction-to-average comparison analysis was thus aimed at assessing whether the prices of dumped imports were lower than the prices of domestic like products for determining price effects within the meaning of Article 3.2, second sentence. Price comparability thus became an important issue as the probative value of the comparison depended on the degree of price comparability and concerned the objectivity and evidentiary foundation of the KTC's price suppression and price depression findings under Articles 3.1 and 3.2. We agree with the Panel that the KTC was required to ensure price comparability in these price comparisons inasmuch as it relied on the price differentials to find that dumped imports had price-suppressing and -depressing effects on domestic prices.
>
> …
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> Accordingly, to the extent an investigating authority relies on price comparisons in its consideration of price effects of subject imports, price comparability needs to be ensured. Thus, where an investigating authority fails to ensure price comparability in price comparisons between dumped imports and the domestic like product, this undermines its findings of price effects under Article 3.2, to the extent that it relies on such price comparisons.[246]

7.166. Disagreeing with China, Japan argues that neither the text of Article 3.2 of the Anti-Dumping Agreement nor any past panel or Appellate Body findings have drawn a distinction between prices and price trends. Japan also considers China's assertion that MOFCOM relied on a comparison of price trends rather than actual prices is an *ex post facto* rationalization of MOFCOM's analysis.[247]

7.167. We share Japan's view that price comparability must be established regardless of whether an investigating authority compares "price trends" or "actual prices". If price comparability is not ensured when comparing price trends, a comparison of the price trends of the baskets of subject imports and of like domestic products will not reveal whether the movements in price trends are the result of actual changes in price rather than changes in the product mix.[248] Thus, as the panel in *China – Autos (US)* found, "the comparability of prices for subject imports and the domestic like product may well have an impact on [an authority's consideration of price effects] even when absolute values or actual prices are not directly considered".[249] Accordingly, in our view, China's reliance on the Appellate Body's findings in *Korea – Pneumatic Valves* is misplaced. The Appellate Body's statements do not prescribe different degrees of relevance of the issue of price comparability depending on whether a price effects analysis is based on a comparison of price trends

[244] China's response to Panel question No. 28, para. 151; first written submission, para. 228.
[245] Japan's response to Panel question No. 28, para. 103.
[246] Appellate Body Report, *Korea – Pneumatic Valves (Japan)*, paras. 5.247 and 5.323.
[247] Japan's response to Panel question No. 28, paras. 105-106.
[248] Japan's response to Panel question No. 28, para. 106.
[249] Panel Report, *China – Autos (US)*, para. 7.282.

or of actual prices.[250] China has, therefore, failed to establish that the price comparability issues concerning product categories could not have impacted the objectivity of MOFCOM's assessment simply because MOFCOM's price effects consideration was based on a comparison of price trends rather than of actual prices.

b. Volume of dumped imports

7.168. Relying upon certain findings of the Appellate Body in *China – GOES*, China argues that the objectivity of MOFCOM's assessment of price effects was not affected by price comparability issues as it was grounded in its findings with respect to the volume of dumped imports.

7.169. The Appellate Body in *China – GOES* found that in circumstances where an investigating authority relies on both subject import prices and volume, a panel must still allow for the possibility that either prices or volume was sufficient by itself to sustain a finding.[251] However, the Appellate Body agreed with the panel's conclusion that in the facts of that case it was not possible to conclude that MOFCOM's finding of price depression might be upheld based purely on MOFCOM's findings regarding the effect of the increase in the volume of subject imports.[252] The Appellate Body noted that in reaching that conclusion, the panel had found that nothing in MOFCOM's determination suggested that MOFCOM itself found the volume effects of subject imports *alone* to be sufficient for a finding of price suppression. The Appellate Body noted that without such explanation from MOFCOM, the panel could not have itself undertaken to disentangle the relative contribution of prices and volume based effects of the subject imports to MOFCOM's final determination without risking engaging in a *de novo* review.[253]

7.170. We agree with the Appellate Body that, in principle, a finding of price effects could be sustained based on the effect of the volume of subject imports on the prices of the domestic like product. Moreover, as the parties point out, MOFCOM's findings of series-specific price effects do contain references to the volume of subject imports.[254] However, as was the case before the panel and the Appellate Body in *China – GOES*, MOFCOM's final determination in this case does not explain whether MOFCOM's analysis of import volume *alone* could have sustained MOFCOM's consideration of price effects. We note that in response to our question asking whether MOFCOM's consideration of price effects could be sustained on the basis of MOFCOM's volume-trends analysis *alone*, China did not respond in the affirmative and did not provide any explanation as to how anything in MOFCOM's final determination would support that conclusion. Rather, China only asserted that "MOFCOM in this case relied on both the prices and the volumes of the dumped imports to reach its conclusion on the existence of adverse price effects".[255] Given that China itself does not argue that, or explain how, MOFCOM's volume effects analysis was alone sufficient to justify its price effects findings, we do not see a need to consider this issue any further.

7.3.3.2.4 Conclusion in respect of Japan's claims concerning MOFCOM's findings with respect to the comparability of prices of product categories

7.171. Based on the foregoing analysis, we find that MOFCOM acted inconsistently with Articles 3.1 and 3.2 of the Anti-Dumping Agreement because in making its findings on price effects, MOFCOM failed to ensure that there was no issue of price comparability between the product categories. In particular, we find that MOFCOM acted inconsistently with these provisions for the following reasons:

a. to the extent that MOFCOM's price effects findings were based on China's view that the obligation to ensure price comparability is triggered only when there are significant price differences between products categories, MOFCOM proceeded on a misconceived understanding of the notion of price comparability;

[250] Japan's response to Panel question No. 28, paras. 106-107.
[251] Appellate Body Report, *China – GOES*, para. 216.
[252] Appellate Body Report, *China – GOES*, para. 221.
[253] Appellate Body Report, *China – GOES*, para. 220.
[254] Japan's response to Panel question No. 29, paras. 108-109; China's response to Panel question No. 29, para. 152.
[255] China's response to Panel question No. 29, para. 153.

b. MOFCOM failed to base its determination on an objective assessment of positive evidence because it relied on its scope of subject product findings, without any further explanation, to show that there were no price comparability issues between product categories;

c. MOFCOM failed to explain what best information available was relied on in making the finding of "reasonable differences" in prices, and MOFCOM did not explain how the best information available that it selected supported this finding. MOFCOM also did not explain how a finding of "reasonable differences" between product categories could be understood to mean that there was no issue of price comparability as regards the products categories; and

d. MOFCOM did not objectively examine the record evidence regarding the non-price differences between product categories submitted by Japanese respondents before MOFCOM.

7.3.3.3 Whether MOFCOM's individual series-specific price effects analyses were based on an objective examination of positive evidence

7.172. Japan argues that MOFCOM failed to ensure price comparability when performing its series-specific price effects analyses for the following reasons[256]:

a. MOFCOM did not address the differences in the mix of various product categories (i.e. billets (slabs), coils, and plates) in the series-specific baskets of imports and the domestic like products that it compared in its series-specific price effects analyses, thus failing to ensure that any price differentials between the series-specific baskets of subject imports and domestic like products were not caused by differences in the mix of product categories in the relevant baskets;

b. the series-specific volume figures on which MOFCOM relied in its series-specific analyses were inaccurate, and series-specific volume and market shares figures did not show fluctuations in series-specific import volumes and market shares during the injury POI;

c. MOFCOM's series-specific analyses in respect of 300-series and other series did not adequately explain why the findings of "adverse price effects" were not undermined by (i) the divergent price trends between subject imports and domestic like products; and (ii) consistent overselling by the subject imports; and

d. MOFCOM's findings of price effects with regard to 300-series and the other series were ambiguous and MOFCOM did not make specific findings of price effects with regard to the 400-series or the 200-series at all.[257]

Japan argues that these defects show that MOFCOM's series-specific price effects analyses did not provide an objective basis for establishing that the subject imports in each of the series had a price effect on the domestic like product in the corresponding series, and could not have been a valid basis for MOFCOM's conclusion that the subject imports as a whole had a price depressing effect on the domestic like products as a whole.[258] China requests the Panel to reject Japan's arguments concerning each of the alleged defects in MOFCOM's series-specific price effects consideration identified by Japan.

7.173. As we have found in section 7.3.3.2 above that MOFCOM's finding with respect to the price comparability of the three product categories was not based on an objective examination, we also consider that MOFCOM's individual series-specific price effects analyses did not involve an objective examination of positive evidence. This is because the baskets of subject imports and domestic like products belonging to individual series would each comprise the three product categories. Given that MOFCOM failed to establish that the prices of product categories were comparable, we agree with Japan that, as a consequence, MOFCOM also failed to ensure that its series-specific price comparisons did not preclude the possibility that the observed changes in average series-specific

[256] Japan's first written submission, para. 140; second written submission, para. 90.
[257] Japan's second written submission, para. 112.
[258] Japan's second written submission, para. 120.

prices could be the result of changes in the product category mix rather than genuine changes in series-specific prices.

7.174. In the light of this finding, we do not consider it is necessary, for the purpose of securing a positive solution to the dispute, to make additional findings on the merits of Japan's remaining arguments in support of its view that MOFCOM's series-specific price effects analyses did not involve an objective examination of positive evidence as required under Articles 3.1 and 3.2 of the Anti-Dumping Agreement.[259]

7.3.3.4 Whether MOFCOM's finding of overall price depression was based on an objective examination of positive evidence

7.175. Japan argues that MOFCOM's finding of overall price depression in respect of the product under consideration as a whole was not objective because MOFCOM failed to explain how such a finding could have been made in the light of evidence showing that prices of the domestic like product as a whole "generally rose" over the POI, and that prices of the subject imports as a whole "largely diverged" from, and were "consistently higher" than, prices of the domestic like products.[260] Japan also maintains that MOFCOM's series-specific price effects analyses could not objectively support MOFCOM's overall conclusion of price depression, as MOFCOM did not explain why a price decrease in only two series (i.e. the 300-series and the other series) could form the basis for a finding of price depression in respect of the product as a whole when the prices of the 200-series and the 400-series showed an overall increasing trend.[261]

7.176. China argues that Japan has mischaracterized MOFCOM's findings. According to China, MOFCOM's overall finding of "price depression" was not based on a comparison of weighted average prices of the subject imports and the domestic like products taken as a whole, but rather MOFCOM's series-specific price effects analyses.[262] Moreover, China maintains that its series-specific price effects analyses adequately supported its overall conclusion of price depression.[263]

7.177. We note that we have already concluded that (a) MOFCOM's decision to compare prices of subject imports and domestic like products undistinguished by product categories was inconsistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement; and (b) MOFCOM's individual series-specific price effects analyses did not involve an objective examination of positive evidence. MOFCOM's overall conclusion of price depression was dependent on both of these findings.[264] Consequently, we find that MOFCOM's overall conclusion of price depression was also inconsistent with Articles 3.1 and 3.2. In such circumstances, we do not consider it is necessary, for the purpose of securing a positive solution to the dispute, to make findings on the merits of Japan's additional allegation that MOFCOM's finding of price depression failed to properly account for the fact that average domestic prices for the product as a whole "generally rose", and that average import prices "largely diverged" from, and were "consistently higher" than, average domestic prices.

[259] We note that Japan argues that MOFCOM improperly failed to consider differences between series of grades, including differences in their mechanical properties, uses and customers, which cast doubt on the comparability of the prices of baskets of products comprising products of different series of grades. Given that MOFCOM divided the PUC into products of various series of grades and purported to perform series-specific price effects analyses for each grade separately, we do not consider it necessary, for the purpose of securing a positive solution to the dispute, to consider Japan's arguments concerning MOFCOM's alleged failure to consider the differences between series of grades that had a bearing on the comparability of their prices. (Japan's first written submission, paras. 142-172).

[260] Japan's first written submission, paras. 188 and 205.

[261] Japan's first written submission, paras. 197 and 202.

[262] China's first written submission, paras. 250-251 and 346.

[263] China's first written submission, para. 260.

[264] We make no finding, however, as to whether MOFCOM's overall conclusion of price depression was based exclusively on its series-specific price effects analyses, or was also based on its comparison of weighted average prices of the subject imports and domestic like products as a whole.

7.3.4 Overall conclusion in respect of Japan's claims under Articles 3.1 and 3.2 of the Anti-Dumping Agreement

7.178. In the light of the analysis set out above, we conclude that Japan has established that MOFCOM's consideration of price effects was inconsistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement because:

a. for reasons summarized in section 7.3.3.2.4, MOFCOM's findings with respect to the comparability of prices of stainless steel billets (slabs), stainless steel plates, and stainless steel coils (product categories) was not based on an objective examination of positive evidence;

b. for reasons set out in section 7.3.3.3, MOFCOM's individual series-specific price effects analyses were not based on an objective examination of positive evidence; and

c. MOFCOM's overall conclusion of price depression was dependent on MOFCOM's erroneous findings of price comparability and its flawed series-specific price effects analyses.

7.4 Japan's claims concerning MOFCOM's examination of the impact of the subject imports on the state of the domestic industry

7.4.1 Introduction

7.179. In the underlying investigation, MOFCOM examined trends concerning a range of economic indices reflecting the state of the domestic industry over the injury POI. Following this examination, MOFCOM summarized its assessment of the state of the domestic industry as follows:

> In summary, despite the improvement of the domestic industry's production and financial situation for individual years, due to the impact of increased volume and decreased price of dumped imports, during the injury POI, under the circumstance of favorable market conditions such as steady growth in domestic demand and positive industrial policies, the domestic industry was still facing severe production and operation pressures, production capacity was not effectively released, market share saw an overall downward trend, and ending inventory was high, pre-tax profits were still at a low level, and investment did not receive returns that it should have had.[265]

7.180. MOFCOM went on to reject the interested parties' argument that most of the relevant economic indices were positive and did not suggest the existence of injury. In this respect, MOFCOM noted that its injury determination was not "based solely on certain indices of the domestic industry, but all economic indices and the impact of other factors".[266] MOFCOM found that a comprehensive consideration of all indices indicated that the domestic industry suffered injury.[267]

7.181. Japan challenges MOFCOM's analysis of the impact of the dumped imports on the domestic industry under Articles 3.1 and 3.4 of the Anti-Dumping Agreement on several grounds. Japan claims that MOFCOM did not objectively examine evidence pertaining to domestic sales price, domestic sales volume, market shares of the domestic industry, apparent domestic consumption, capacity utilization, ending inventory, pre-tax profits, and return on investment.[268] Japan also argues that MOFCOM failed to explain why the economic factors showing negative trends supported an affirmative injury determination even though several factors exhibited positive trends.[269] China argues that each of Japan's arguments is unfounded.[270]

[265] MOFCOM's final determination (Exhibit JPN-5.b), p. 49.
[266] MOFCOM's final determination (Exhibit JPN-5.b), p. 50.
[267] MOFCOM's final determination (Exhibit JPN-5.b), p. 50.
[268] Japan's first written submission, paras. 350 and 354-355.
[269] Japan's first written submission, para. 360.
[270] China's first written submission, para. 419.

7.4.2 Articles 3.1 and 3.4 of the Anti-Dumping Agreement

7.182. Article 3.1 of the Anti-Dumping Agreement, which prescribes a set of overarching obligations that must be followed when determining injury, states:

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

7.183. Article 3.4 of the Anti-Dumping Agreement provides:

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

7.184. We note that Article 3.1 requires a determination of injury, including the examination of the impact of subject imports on the domestic industry pursuant to Article 3.4, to be based on an objective examination of positive evidence. Article 3.4 requires an investigating authority to examine the impact of the dumped imports on the domestic industry. Thus, the text of Article 3.4 creates a link between dumped imports and the state of the domestic industry. An investigating authority is required to examine this link by evaluating *all* relevant economic factors and indices that have a bearing on the state of the domestic industry, including those set out explicitly in Article 3.4. While an investigating authority must assess the factors listed in Article 3.4, this provision does not require all factors to be indicative of injury. We agree in this regard with previous panels that an investigating authority may conclude that there is injury to the domestic industry even when certain individual factors do not show negative trends, provided that the authority adequately explains how its evaluation of the relevant economic factors and indices support the overall determination of injury.[271] Consistent with its obligation to conduct an objective examination of injury, an investigating authority faced with evidence that would not support a finding of injury must explain how it took that evidence into account in reaching a conclusion of injury.[272]

7.4.3 Analysis of Japan's claims under Articles 3.1 and 3.4

7.4.3.1 MOFCOM's examination of domestic sales price and domestic sales volume

7.185. Japan argues that MOFCOM failed to properly examine the impact of subject imports on the state of the domestic industry because its evaluation of certain relative and absolute trends in domestic sales prices and volumes was deficient.[273] According to Japan, MOFCOM's impact analysis failed to adequately address the following trends:

Sales prices

a. From 2014 to 2015, when the domestic sales price declined, the price of the subject imports increased, indicating that subject imports did not explain the decrease in domestic sales price.[274]

[271] Panel Report, *Pakistan – BOPP Film (UAE)*, appealed 22 February 2021, para. 7.353 (referring to Panel Reports, *Thailand – H-Beams*, paras. 7.236 and 7.249; and *China – Cellulose Pulp*, para. 7.129).
[272] Panel Report, *Pakistan – BOPP Film (UAE)*, appealed 22 February 2021, para. 7.420 (referring to Panel Reports, *Thailand – H-Beams*, para. 7.249; and *China – Cellulose Pulp*, para. 7.129).
[273] Japan's first written submission paras. 344-350; second written submission, paras. 199-205.
[274] Japan's first written submission, para. 348.

b. The decrease in domestic sales price from 2014 to 2015 was followed by increases in domestic sales prices in 2016 and 2017, and the domestic sales price increased overall by 11.87% between 2014 to 2017.[275]

Sales volume

c. From 2014 to 2015, when the domestic sales volume decreased, the volume of subject imports also decreased, indicating that subject imports did not explain the decrease in domestic sales volume.[276]

d. The decrease in domestic sales volume from 2014 to 2015 was followed by significantly larger volumes of domestic sales in 2016 and 2017, and domestic sales volume between 2014 and 2017 increased overall.[277]

7.186. We note that Japan's concerns about the manner in which MOFCOM evaluated *trends in sales prices* pertain to MOFCOM's finding in its impact analysis that "the price of dumped imports continuously fell, and the price of domestic like products was significantly depressed".[278] China refutes Japan's argument by asserting that this finding is "based on the detailed price effects consideration MOFCOM carried out with due consideration for the different series of steel grade".[279] We recall that in section 7.3.4 above, we have found MOFCOM's consideration of price effects to be inconsistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement. Given that China acknowledges that MOFCOM's consideration of trends in sales prices for the purpose of its impact analysis was based on its earlier consideration of price effects, the defects in the latter would taint the former. Consequently, we find that Japan has established that MOFCOM's evaluation of trends in sales prices for the purpose of its impact analysis to the extent that it relied upon MOFCOM's earlier findings with respect to price effects, was inconsistent with Articles 3.1 and 3.4 of the Anti-Dumping Agreement.

7.187. Turning to Japan's submissions in relation to MOFCOM's examination of *trends in sales volumes*, China asserts that MOFCOM was not obliged to focus on the part of the injury POI Japan focuses on in making its arguments (i.e. developments between 2014 and 2015).[280] China contends that Japan's arguments disregard MOFCOM's analysis of the state of the domestic industry in respect of the injury POI *as a whole* and for each individual year of the injury POI, including an assessment of the first quarter of 2018 relative to the first quarter of 2017.[281] China also submits that an investigating authority need not find injury for all relevant economic factors, provided it addresses conflicting evidence.[282] China contends that MOFCOM properly explained that due to steady growth in domestic demand, the implementation of favourable industrial policies and the reduction of outdated production capacity, certain indicators, including production output and sales volume, improved during the injury POI, but that these positive elements did not undermine its conclusion as many indicators declined despite favourable developments.[283]

7.188. We note that MOFCOM found that the sales volume of the domestic like products "kept an overall growth trend during the injury POI".[284] When assessing the state of the domestic industry on a year-by-year basis, MOFCOM noted that from 2014 to 2015, several indicators pertaining to the state of the domestic industry deteriorated, *including sales volume*. Regarding 2016, MOFCOM noted that "due to the favorable effects of domestic industrial adjustment policies and continuous improvement of the domestic industry's management and technical level"[285], several indicators, *including sales volume*, developed positively. For 2017, MOFCOM found that while "factors such as

[275] Japan's first written submission, para. 346.
[276] Japan's first written submission, para. 347.
[277] Japan's first written submission, para. 346. In this regard, Japan points to the fact that while the domestic sales volume (in 10,000 tons) dropped from 373.69 in 2014 to 365.81 in 2015, the domestic sales volume in 2016 and 2017 were "significantly larger" relative to the level in 2015: 516.40 and 502.68 for 2016 and 2017, respectively.
[278] MOFCOM's final determination (Exhibit JPN-5.b), p. 48.
[279] China's first written submission, para. 464.
[280] China's first written submission, paras. 472 and 479.
[281] China's first written submission, paras. 474, 475, and 480.
[282] China's first written submission, para. 478.
[283] China's second written submission, paras. 280-288.
[284] MOFCOM's final determination (Exhibit JPN-5.b), p. 45.
[285] MOFCOM's final determination (Exhibit JPN-5.b), p. 49.

further elimination of outdated production capacity" led to improvement in several factors, the increased volume and decreased price of the subject imports led to, among others, a decrease in *domestic sales volume*. Finally, for the first quarter of 2018, MOFCOM noted that although *sales volume* increased, several other factors deteriorated.[286] In conclusion, MOFCOM again acknowledged that for the injury POI as a whole, "circumstance[s] of growing trend of domestic demand" led to improvement in *sales volume*, but found that other factors declined nevertheless.[287]

7.189. We recall that Articles 3.1 and 3.4 do not require an investigating authority to find that all factors, or even a defined set of factors, display negative trends in order to conclude that there is injury to the domestic industry. An investigating authority must, however, adequately explain how its evaluation of the relevant economic factors and indices (potentially showing both positive and negative trends) support an overall determination of injury. Consistent with its overarching obligation to conduct an objective examination of injury, an investigating authority faced with evidence that would not support a finding of injury must explain how it took that evidence into account in reaching a conclusion of injury.[288]

7.190. The final determination reveals that MOFCOM examined and acknowledged the *positive movements in domestic sales volume*, both in individual parts of the injury POI as well as over the injury POI as a whole. MOFCOM weighed those positive movements against negative developments in certain other factors, and found the negative developments to outweigh the positive movements in domestic sales volume.[289] Japan has not explained how MOFCOM's balancing of the effects of the different factors (including positive movements in domestic sales) was deficient. Accordingly, we find that Japan has not establish that MOFCOM failed to properly address the positive movements in domestic sales volume in its impact analysis.

7.191. We next consider Japan's argument that MOFCOM did not properly evaluate *relative changes* in the sales volume of subject imports and domestic like products between 2014 and 2015. In our view, Japan has not explained why MOFCOM's examination of the impact of *dumped* imports on the domestic industry ought to have addressed sales volume trends from 2014 to 2015. We note that the relevant inquiry under Article 3.4 pertains to the "examination of the impact of the *dumped* imports on the domestic industry". MOFCOM found subject imports to be dumped during the period 1 January 2017 to 31 December 2017. Thus, the question before MOFCOM for the purpose of Article 3.4 pertained to the impact of these dumped imports on the state of the domestic industry. MOFCOM found that the volume of subject imports increased in 2017, whereas the volume of domestic sales decreased.[290] The trends in 2017 must be certainly viewed in context of the trends in the overall injury POI (1 January 2014 to 31 March 2018), which includes the base year 2014-2015. However, whether or not the volume of subject imports and domestic like products declined together in that base year (i.e. 2014, a period at the very beginning of the injury POI which did *not* coincide with the dumping POI), does not speak directly to the question of whether the "dumped" imports had an impact on the state of the domestic industry.

7.192. Further, MOFCOM evaluated the decrease in domestic sales volume in the more recent part of the injury POI (i.e. 2017) in relation to the increase in the volume of subject imports in the same period. Given that more recent data are more pertinent to current injury[291], we consider that Japan has not explained why MOFCOM's omission to address the decreasing trends in both domestic sales volume and import volume in a more remote part of the injury POI would, in and of itself, undermine

[286] MOFCOM's final determination (Exhibit JPN-5.b), pp. 48-49.
[287] MOFCOM's final determination (Exhibit JPN-5.b), p. 50.
[288] Panel Report, *Pakistan – BOPP Film (UAE)*, appealed 22 February 2021, para. 7.420.
[289] MOFCOM found that "[t]he evidence show[ed] that, in order to meet the growth of domestic market demand … sales volume of domestic like products kept an overall growth trend during the injury POI … [b]ut the existing capacity of domestic industry was not fully utilized, the utilization of capacity was maintained to 76-86%, and the ending inventory was always in higher level". MOFCOM also found that "[i]n 2016, due to the favorable effects of domestic industrial adjustment policies and continuous improvement of the domestic industry's management and technical level, the sales volume … domestic like products increased … but pretax profits and return on investments were still at a lower level" and that "[i]n January-March of 2018, [even though] the sales volume increased, the economic indices such as sales revenue, market share, productivity, pretax profit, return on investment, and net cash flow declined with varying degrees. The ending inventory of domestic like products reached the highest level in history". (MOFCOM's final determination (Exhibit JPN-5.b), pp. 48-49).
[290] MOFCOM's final determination (Exhibit JPN-5.b), p. 49.
[291] Panel Report, *Pakistan – BOPP Film (UAE)*, appealed 22 February 2021, paras. 7.26 and 7.89.

the objectivity of MOFCOM's impact analysis.[292] Thus, we find that Japan has not established that MOFCOM's evaluation of domestic sales volume was inconsistent with Articles 3.1 and 3.4 of the Anti-Dumping Agreement.

7.4.3.2 MOFCOM's examination of market shares

7.193. In essence, Japan challenges the objectivity of MOFCOM's examination of market shares in the context of its impact analysis and asserts that such examination was not based on positive evidence on the following two grounds: (a) MOFCOM did not objectively calculate the market share figures for the domestic industry[293], and (b) MOFCOM failed to objectively examine certain trends in the market shares of the domestic industry and subject imports.[294]

MOFCOM's calculation of market share figures for the domestic industry

7.194. Japan argues that MOFCOM's calculation of the market share of the domestic industry was not objective, because MOFCOM allegedly included data with respect to the captive use of the products in the numerator as part of the figure representing domestic sales, *but not* in the denominator as part of the figure representing domestic apparent consumption.[295] According to Japan, by including captive use data only in the numerator, MOFCOM distorted the market share figures. Thus, per Japan, MOFCOM's impact analysis did not involve an objective examination of positive evidence.[296]

7.195. China asserts that Japan's understanding of the data used by MOFCOM to calculate the domestic industry's market share is incorrect. Referring to record information, China asserts that, contrary to Japan's submission, MOFCOM included data with respect to the captive use of the products in *both* the numerator and the denominator of the domestic industry's market share calculation.[297]

7.196. Japan has not specifically contested China's explanation or the record evidence China asserts MOFCOM relied upon. Rather, in responding to China's clarification, Japan takes issue with another alleged aspect of MOFCOM's determination of the domestic industry's market share. Specifically, Japan complains about the "mere reference" in MOFCOM's final determination to the fact that MOFCOM evaluated the domestic industry's market share "including the captive use", without disclosing its "complex calculation formula" or providing "evidence or data substantiating the details or mathematical implications" of the inclusion of captive use data in its calculation.[298] According to Japan, by falling short in these areas, MOFCOM failed to provide a "meaningful basis" for its injury determination.[299]

7.197. We recall, however, that Japan has not specifically contested the record evidence China referred to in its clarification of MOFCOM's findings. While Japan takes issue with MOFCOM's "mere" statement about "including the captive use" in the domestic industry's market share figures, Japan has not explained why the record evidence China referred to does not "substantiate the details or mathematical implications" of MOFCOM's calculation. Likewise, to the extent Japan's concern is MOFCOM's failure to disclose the "complex calculation formula", Japan has not explained why such alleged lack of disclosure rendered MOFCOM's examination of domestic market shares inadequate and inconsistent with the substantive obligations of Articles 3.1 and 3.4. Accordingly, there is no basis for us to find that MOFCOM's "mere" statement about "including the captive use" in the domestic market share figures renders its examination of domestic market shares inconsistent with Articles 3.1 and 3.4 of the Anti-Dumping Agreement.

[292] We also note that MOFCOM otherwise repeatedly acknowledged the generally positive trend in domestic sales volume in its impact analysis, and appears to have relied on negative trends in certain other factors as the basis for its conclusion that the domestic industry suffered material injury.
[293] Japan's first written submission, paras. 339-343; second written submission, paras. 217-219.
[294] Japan's first written submission, paras. 351-354; second written submission, paras. 206-209.
[295] Japan's second written submission, paras. 217-218.
[296] Japan's second written submission, paras. 218-219.
[297] China's response to Panel question No. 49, paras. 92 and 97.
[298] Japan's comments on China's response to Panel question No. 49, para. 63.
[299] Japan's comments on China's response to Panel question No. 49, para. 63.

MOFCOM's examination of domestic industry's market shares

7.198. Japan contends that while MOFCOM's determination of material injury to the domestic industry was based, *inter alia*, on its finding that the market share of the domestic industry experienced an overall decline during the injury POI, MOFCOM did not properly examine whether subject imports explained the decline in the domestic industry's market share.[300] Japan argues that the subject imports had a "low" market share between 2014 and 2017, which remained below 4% and increased only by 2 percentage points in this period. Japan also highlights that while subject imports gained 9 percentage points of market share in the first quarter of 2018 relative to the first quarter of 2017, the domestic industry lost "only about 1% of market share" in that period. Based on the foregoing market share figures, Japan argues that to objectively examine the impact of subject imports on the state of the domestic industry, MOFCOM should have explained how and why subject imports with *low market share* that also *oversold* the domestic like products could lead the domestic industry to suffer injury by losing market share.[301] Japan contends that by failing to provide such explanation, MOFCOM acted inconsistently with Articles 3.1 and 3.4 of the Anti-Dumping Agreement.[302]

7.199. China contends that in the first quarter of 2018, when the market share of subject imports more than doubled to reach 10.44%, domestic industry lost approximately 1 percentage point of its market share, which shows that the increase in the market share of the subject imports and the loss in the market share of the domestic like products were correlated.[303] China also notes that during the same period, the domestic prices of all product grades declined.[304] China refers to MOFCOM's finding that "in order to maintain a certain sales volume and market share" the domestic industry was forced to lower its prices, and on that basis asserts that "the domestic industry would have lost even more market share in the first quarter of 2018 had it not further decreased its sales price".[305] China also asserts that for specific series of grades, the market share of the subject imports was "much higher" pointing in particular to MOFCOM's finding that for the other series this figure was 79% to 92% during the injury POI.[306]

7.200. The question before us is whether MOFCOM provided a reasoned and adequate explanation of its findings concerning domestic market shares for the purpose of examining the impact of subject imports on the domestic industry. In its evaluation of the factors having a bearing on the state of the domestic industry, MOFCOM made the following factual observations regarding the domestic industry's market share:

> During the injury POI, the market share of domestic like products kept a fluctuating and declining trend. It was 40.28%, 38.54%, 44.24%, 41.52% and 38.43% respectively in 2014, 2015, 2016, 2017 and January-March of 2018. Of which it was down 1.74 percentage points year-on-year in 2015, up 5.70 percentage points year-on-year in 2016, down 2.72 percentage points year-on-year in 2017; it was 39.59% in January-March of 2017, and it was down 1.16 percentage points year-on-year in January-March of 2018.[307]

7.201. After setting out its factual observations with respect to all other factors, MOFCOM conducted an overall impact analysis, which included the following statements referring to the domestic industry's market shares:

a. In 2017, "the increased volume and decreased price of dumped imports weakened the effect" of positive industrial policies, and that in 2017, "the market share [of the domestic industry] was down 2.72 percentage points".

[300] Japan's first written submission, paras. 351-352.
[301] Japan's first written submission, para. 354.
[302] Japan's first written submission, para. 354.
[303] China's first written submission, paras. 483-485.
[304] China's first written submission, para. 486.
[305] China's first written submission, para. 487 (referring to MOFCOM's final determination (Exhibit JPN-5.b), p. 41).
[306] China's first written submission, para. 483 (referring to Final determination (Exhibit JPN-5.b), p. 42).
[307] MOFCOM's final determination (Exhibit JPN-5.b), p. 45.

b. The market share of the domestic like products also declined in the first quarter of 2018.[308]

MOFCOM then made its finding regarding the overall state of the domestic industry, stating, *inter alia*, in this regard as follows:

> In summary, despite the improvement of the domestic industry's production and financial situation for individual years, due to the impact of increased volume and decreased price of dumped imports, during the injury POI, under the circumstance of favorable market conditions such as steady growth in domestic demand and positive industrial policies, the domestic industry was still facing severe production and operation pressures, production capacity was not effectively released, market share saw an overall downward trend, and ending inventory was high, pretax profits were still at a low level, and investment did not receive returns that it should have had. Therefore, the Investigating Authority determined in the preliminary determination that, during the injury POI, the domestic industry of stainless steel billet and hot-rolled stainless steel plate (coil) suffered material injury.[309]

7.202. China asks us to reject Japan's submission that MOFCOM should have explained how and why subject imports with *low market share* could lead the domestic industry to suffer injury by alluding to the correlation between the increase in the subject imports' market share and the decrease in the domestic industry's market share over the injury POI.[310] In China's view, such a correlation shows the impact of subject imports on the domestic industry's market share. However, MOFCOM's final determination contains no discussion of any such correlation. Thus, China's submission that MOFCOM's market share findings can be explained in the light of the correlation between the market shares of subject imports and domestic like products is *ex post*, and we thus cannot consider it. Accordingly, we find that Japan has established that MOFCOM's examination of the domestic industry's market share in the context of its impact analysis was not reasonably and adequately explained.[311]

7.203. Japan also argues that MOFCOM should have explained how subject imports that significantly oversold domestic like products could have adversely affected the market share of the domestic industry.[312] We note that in making this argument, Japan refers to the prices of subject imports and domestic like products set out at page 57 of the final determination. These are average prices of the dumped imports and domestic like products that do not distinguish between product categories and product grades. In section 7.3.3.2.4 we have found that MOFCOM did not properly establish that the price of different product categories were comparable with each other. Also, the parties agree that the prices of different product grades are incomparable. It follows, therefore, that a comparison of the prices of the subject imports and the domestic like product as a whole cannot be relied upon to objectively establish whether the subject imports did, in fact, oversell the domestic like product. Indeed, Japan has made this very point in other arguments it has advanced in this proceeding.[313] Accordingly, we find that Japan has failed to establish that MOFCOM's examination of the domestic industry's market share in the context of its impact analysis was not reasonably and adequately explained due to MOFCOM's failure to address how the alleged overselling impacted the domestic industry's market share.

7.204. In addition to the arguments discussed above, Japan also alleges that MOFCOM's evaluation of market share did not involve an objective examination of positive evidence as it was based

[308] MOFCOM's final determination (Exhibit JPN-5.b), p. 49.
[309] MOFCOM's final determination (Exhibit JPN-5.b), p. 49.
[310] China's first written submission, paras. 483-485.
[311] China also refutes Japan's argument that MOFCOM failed to explain its findings concerning the market share of the domestic industry in light of the subject imports' market share by referring to certain findings that MOFCOM made in the context of its price effects analysis. (China's first written submission, paras. 486-487) We note, however, that MOFCOM did not link its examination of domestic industry's market share in the context of its impact analysis to the price effects findings that China points to. Thus, China's argument is *ex post* and we thus cannot consider it. In any case, given that we have found MOFCOM's price effects analysis to be inconsistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement, China cannot validly rely on such price effects findings to justify any other aspect of MOFCOM's findings.
[312] Japan's first written submission, para. 354.
[313] Japan's first written submission, para. 76.

"exclusively" on a comparison between the figures for the first quarter of 2018 with those for the first quarter of 2017.[314]

7.205. As reflected in paragraph 7.200 above, when setting out the data concerning the domestic industry's market shares, MOFCOM acknowledged that "the market share of domestic like products kept a fluctuating and declining trend". MOFCOM also noted towards the end of the impact analysis that market share of the domestic industry declined overall during the injury POI despite growing domestic demand. In addition, MOFCOM noted the decline in market share of the domestic industry in 2017 and in the first quarter of 2018. Thus, in its evaluation of market share of the domestic industry, MOFCOM acknowledged the fluctuating trend in this factor, but focused on (a) the overall decline in market share over the injury POI; and (b) the decline in the market share of the domestic industry in the later part of the injury POI. Thus, contrary to Japan's contention, and as a matter of fact, MOFCOM's evaluation of market shares does not appear to have exclusively involved a comparison of figures from the first quarters of 2017 and 2018 alone.

7.206. Based on the foregoing, for reasons set out in paragraph 7.202, we find that Japan has established that MOFCOM failed to provide a reasoned and adequate explanation of its analysis of domestic market share for the purpose of examining the impact of dumped imports on the domestic industry. MOFCOM therefore acted inconsistently with Articles 3.1 and 3.4 of the Anti-Dumping Agreement by failing to perform an objective examination of the impact of the subject imports on the market share of the domestic industry.

7.4.3.3 MOFCOM's examination of apparent domestic consumption

7.207. Japan argues that the method and the figures that MOFCOM used for calculating apparent domestic consumption are unclear from the final determination.[315] Japan asserts that apparent domestic consumption should be calculated by adding total domestic production and import volume and then subtracting export volume. However, according to Japan, in the final determination the figures for total domestic consumption were higher than the sum of the total domestic production and the volume of subject imports.[316] In Japan's view, this inconsistency in figures concerning apparent domestic consumption coupled with the absence of an explanation regarding the calculation method used to arrive at these figures made MOFCOM's impact analysis inconsistent with Articles 3.1 and 3.4 of the Anti-Dumping Agreement.[317]

7.208. China agrees with Japan that apparent domestic consumption is typically calculated by adding total domestic production and import volume and then subtracting export volume, and as such apparent domestic consumption should be equal to or less than the sum of the total domestic production and the import volume.[318] However, China asserts that in arguing that the apparent domestic consumption used in the final determination was greater than the sum of the total domestic production and import volume, Japan overlooks the fact that the domestic production volume referred to in the final determination *excluded volumes produced by three Chinese companies* that were not included in the domestic industry for the purpose of the proceedings before MOFCOM.[319] China points out that the apparent domestic consumption figure on the other hand included the domestic like products produced by the three companies that were otherwise excluded from the investigation. Per China, the figures for apparent domestic consumption and total domestic production identified in the final determination could be reconciled by keeping in view the fact that data concerning these three companies were included in the apparent domestic consumption figures but not in total domestic production figures set out in the final determination.[320]

7.209. We note that China placed before us record evidence corroborating its explanation as to how the figures for apparent domestic consumption and total domestic production set out in the final determination could be reconciled.[321] This evidence shows that for each year of the injury POI,

[314] Japan's first written submission, para. 357.
[315] Japan's first written submission, para. 335.
[316] Japan's first written submission, paras. 334-335.
[317] Japan's first written submission, para. 338.
[318] China's first written submission, para. 441.
[319] China's first written submission, para. 444.
[320] China's first written submission, para. 444.
[321] China's response to Panel question No. 48, paras. 89-91 (referring to Applicant's reply to interested parties' comments (23 January 2019) (revised) (Exhibit CHN-22.b), pp. 2-4; and Application (Exhibit JPN-6.b), attachment 9).

MOFCOM calculated the apparent domestic consumption by first summing up the production volume of the domestic industry as defined for the purposes of the underlying investigation, the production volume of Chinese producers excluded from the domestic industry, and the total import volume (including subject and non-subject imports).[322] From this sum, MOFCOM subtracted the total export volume from China. Japan did not rebut the validity of the evidence submitted by China. Through this uncontested evidence, China has shown that the apparent domestic consumption figures were higher than the sum of the total domestic production and import volume figures set out in the final determination because the apparent domestic consumption figures, but not the latter figures, included (a) production volume of Chinese producers not included in the domestic industry, and (b) import volume of non-subject imports. We therefore consider that Japan has not established that the domestic apparent consumption figures set out in the final determination suffered from any discrepancy.

7.210. Japan also asserts that MOFCOM improperly included the production attributable to Chinese producers not included in the domestic industry in the figure for apparent domestic consumption, and by so doing MOFCOM failed to conduct an objective examination of positive evidence in its evaluation of apparent domestic consumption.[323] Japan also appears to take the view that the figures for apparent domestic consumption should only include the production volume attributable to domestic industry and should exclude the production volume attributable to Chinese producers that were not included in the domestic industry. This view is mistaken, however, because apparent domestic consumption represents the amount of the subject product from *all sources* being consumed domestically in a year, and not just the amount of production attributable to the domestic industry. Indeed, this is also why apparent domestic consumption includes import volumes from investigated countries *and non-investigated countries*.[324] Therefore, Japan has not established that MOFCOM failed to undertake an objective examination of positive evidence in respect of domestic apparent consumption.

7.211. Finally, Japan also argues that MOFCOM failed to disclose the method used to calculate the apparent domestic consumption figures set out in the final determination.[325] However, Japan has not explained why this concern pertaining to disclosure of the precise formula used to calculate apparent domestic consumption must necessarily render MOFCOM's determination inadequate and inconsistent with the substantive obligations in Articles 3.1 and 3.4 of the Anti-Dumping Agreement. Thus, we find that Japan has not established a violation of Articles 3.1 and 3.4 on this basis.

7.4.3.4 MOFCOM's examination of capacity utilization and ending inventory

7.212. Japan argues that MOFCOM's statement in the final determination that production capacity was "not effectively released" and the ending inventory was "high" was not reasonably and adequately explained.[326] According to Japan, capacity utilization was generally improving and ending inventory was stable during the injury POI. Accordingly, Japan contends that MOFCOM's evaluation of capacity utilization and ending inventory did not constitute an "objective examination" and was thus inconsistent with Articles 3.1 and 3.4 of the Anti-Dumping Agreement.[327]

7.213. China argues that MOFCOM's evaluation that the capacity was underutilized, and the ending inventory remained high during the POI was clear on its face. China submits that Japan has failed to advance any reasons about how MOFCOM could have explained this evaluation further.[328]

7.214. We note that in the final determination, MOFCOM provided the following data on capacity utilization and ending inventory in the injury POI[329]:

[322] China states that production volume figures for each producer represented the sum of production volume of coils, production volume of plates, and external sales of billets. (China's response to Panel question No. 48, paras. 89-91).
[323] Japan's second written submission, para. 215.
[324] Japan does not take issue with the inclusion of import volumes in the apparent domestic consumption figures.
[325] Japan's second written submission, para. 214.
[326] Japan's first written submission, para. 356.
[327] Japan's first written submission, para. 356.
[328] China's first written submission, para. 491.
[329] MOFCOM's final determination (Exhibit JPN-5.b), pp. 47-48.

	2014	2015	2016	2017	Q1 2017	Q1 2018
Capacity utilization percentage	76.26	81.73	85.14	83.02	81.69	83.73
Year-on-year change (percentage points)	Not applicable	5.47	3.41	-2.12	Not applicable	2.05 (relative to Q1 2017)

	2014	2015	2016	2017	Q1 2017	Q1 2018
Ending inventory	498,900 tons	543,200 tons	443,300 tons	442,600 tons	650,000 tons	558,200 tons
Year-on-year change	Not applicable	8.88%	-18.39%	-0.15%	Not applicable	-14.13% (relative to Q1 2017)

7.215. In the final determination, MOFCOM noted that the capacity utilization of domestic like products "kept a rising trend".[330] As regards ending inventory, MOFCOM noted that the ending inventory of domestic like products "firstly fell and then rose". MOFCOM also found that over the injury POI, "the existing capacity of domestic industry was not fully utilized, the utilization of capacity was maintained to 76-86%, and the ending inventory was always in higher level".[331] Regarding capacity utilization, MOFCOM also noted that notwithstanding positive developments including elimination of outdated production capacity and growing domestic demand, capacity utilization was down by 2.12 percentage points in 2017.[332] As regards ending inventory, MOFCOM also noted that the "ending inventory of domestic like products reached the highest level in history" in the first quarter of 2018.[333] In summarizing the basis on which MOFCOM found the domestic industry to be materially injured in the preliminary determination – a conclusion that it upheld in the final determination, MOFCOM noted that the "production capacity was not effectively released" and that "ending inventory was high".[334] These findings were used by MOFCOM to support its affirmative material injury determination.

7.216. We note that the data on *capacity utilization* show that except for a decline in the level of capacity utilization from 2016 to 2017, capacity utilization improved in every other part of the injury POI and was also better at the end of the injury POI relative to the beginning. MOFCOM itself noted that capacity utilization kept a rising trend through the injury POI. However, MOFCOM did not refer to any benchmark of what constitutes "effective release" of capacity, or otherwise explain why it considered that the production capacity "was not effectively released" notwithstanding the rising trend in this indicator through the injury POI. While MOFCOM found that capacity of the domestic industry was not "fully utilized" and specified the range within which capacity utilization remained (i.e. 76-86%), we do not consider that this was sufficient to explain MOFCOM's view that the capacity was not "effectively released" – a view that MOFCOM used in support of its affirmative material injury determination.

7.217. As regards *ending inventory*, we note that except for an increase in the inventory level from 2014 to 2015, the inventory level appears to have declined year-on-year for every other part of the injury POI. According to Japan, the inventory level was "stable" during the injury POI, and therefore MOFCOM's appraisal of the ending inventory as being "high" was not adequately explained.[335]

[330] MOFCOM's final determination (Exhibit JPN-5.b), p. 47.
[331] MOFCOM's final determination (Exhibit JPN-5.b), p. 48.
[332] MOFCOM's final determination (Exhibit JPN-5.b), pp. 49-50.
[333] We note that contrary to MOFCOM's finding that the ending inventory reached the highest level in history in the first quarter of 2018, the data in the final determination indicates that the inventory level in the first quarter of 2017 was higher than that in the first quarter of 2018. Therefore, rather than having ascended to the highest level in history, the ending inventory in the first quarter of 2018 appears to have come down relative to the first quarter of the preceding year – a consideration that MOFCOM appears to have overlooked. Japan has not challenged this finding.
[334] MOFCOM's final determination (Exhibit JPN-5.b) p. 49. When weighing indices showing positive trends in the injury POI versus those that showed a negative trend, MOFCOM referred to the "downward trend" in capacity utilization following 2017 to be negative factor. It is unclear what MOFCOM referred to as the downward trend following 2017 in relation to capacity utilization, given that the level of capacity utilization in 2017 (83.02%) as well as the first quarter of 2017 (81.69%) was lower than that in the first quarter of 2018 (83.73%). Thus, utilization of capacity appears to have improved after 2017, rather than having suffered a downward trend after 2017. Japan, however, has not challenged this finding.
[335] Japan's first written submission, para. 356.

China contends that because the ending inventory increased from 2014 to the first quarter of 2018, Japan's assertion that the ending inventory was "stable" during the injury POI was invalid, and MOFCOM's observation that the ending inventory "was always in higher level [*sic*]" was an adequate evaluation of this indicator.[336]

7.218. We note that MOFCOM did not refer to any benchmark that would reveal what it considered to constitute a "high" level of ending inventory, or otherwise explain why it considered that the ending inventory "was always in higher level" during the injury POI. China argues that MOFCOM's appraisal of the ending inventory level as being "high" was clear in and of itself as the ending inventory increased from 2014 to the first quarter of 2018.

7.219. For the following reasons, we do not consider that China's references to the increase in the inventory level in the first quarter of 2018 relative to 2014 constitutes a sufficient explanation as to why MOFCOM characterized the inventory level as being "high" through the injury POI. *First*, we note that MOFCOM did not refer to the higher inventory level in the first quarter of 2018 relative to the ending inventory in 2014 as the explanation for its finding that the ending inventory "was always in higher level". As such, China's argument is *ex post* to MOFCOM's determination. *Second*, the inventory level declined year-on-year for every part of the injury POI except 2014 to 2015. Therefore, in the absence of an explanation by MOFCOM, it is not clear how MOFCOM's own data showing the evolution of inventory levels over the injury POI support its conclusion that they were "always in higher level".

7.220. Based on the foregoing, we find that Japan has established that MOFCOM failed to objectively examine evidence concerning capacity utilization and ending inventory and therefore acted inconsistently with Articles 3.1 and 3.4 of the Anti-Dumping Agreement in respect of its evaluation of capacity utilization and ending inventory.

7.4.3.5 MOFCOM's examination of pre-tax profit and return on investment

7.221. Japan argues that MOFCOM's evaluation of pre-tax profit and return on investment did not involve an objective examination of positive evidence as it was based "exclusively" on a comparison between the figures for the first quarter of 2018 with those for the first quarter of 2017.[337]

7.222. China argues that Japan's contention is factually inaccurate as MOFCOM analysed pre-tax profit and return on investment for the whole injury POI.[338] China also argues that to the extent that MOFCOM's evaluation did focus on the most recent period, Japan has failed to explain why such focus would be unreasonable.[339]

7.223. We note that in the final determination, MOFCOM made the following findings in respect of pre-tax profit and return on investment:

a. When providing data for various indicators, MOFCOM noted that (i) "*the pretax profit* of domestic like products turned losses into gains, but it substantially decreased at the later [part of the] period"; and (ii) "*the investment return* of domestic like products kept a rising trend, and fell at the later [part of the] period".[340]

b. Subsequently, when addressing the status of the domestic industry in the year 2015, MOFCOM noted that the domestic industry experienced "a sharp decline of 944.93% in *pretax profits*" and "a decline of 3.56 percentage points in *the return on investment*".[341]

c. When doing the same for the year 2016, MOFCOM found that due to favourable effects of domestic industrial policies and "continuous improvement of the domestic

[336] China's first written submission, para. 491.
[337] Japan's first written submission, para. 357.
[338] China's first written submission, paras. 493-494.
[339] China's first written submission, paras. 498-499.
[340] MOFCOM's final determination (Exhibit JPN-5.b), pp. 45-46.
[341] MOFCOM's final determination (Exhibit JPN-5.b), pp. 48-49.

industry's management and technical level … [the] domestic industry turned losses into profits, but *pretax profits* and *return on investments* were still at a lower level".[342]

d. For 2017, MOFCOM noted that owing to the effects of "factors such as further elimination of outdated production capacity", *pre-tax profits* increased, but increased volume and decreased price of the subject imports led to a decline in certain other indicators.[343]

e. Finally, MOFCOM noted that in the first quarter of 2018, as the "sales prices of the domestic like products continued to decline", *pre-tax profit* and *return on investment* declined with varying degrees.[344]

f. MOFCOM then summarized its preceding analysis by noting that while "the domestic industry's production and financial situation" improved for individual years, due to increased volume and decreased price of the dumped imports "*pretax profits* were still at a low level" and "*investment did not receive returns* that it should have had" despite favourable market conditions such as steady growth in domestic demand and positive industrial policies.[345] When concluding its impact analysis, MOFCOM found that even under growing domestic demand, *return on investment* and *pre-tax profits* had a "significant downward trend" after 2017.[346]

7.224. The foregoing shows that MOFCOM did not limit its evaluation of pre-tax profits and return on investment to a comparison between the first quarter of 2017 and the first quarter of 2018 alone. Rather, MOFCOM addressed the status of these indicators in other parts of the injury POI as well.

7.225. Accordingly, we find that Japan has not established that MOFCOM acted inconsistently with Articles 3.1 and 3.4 of the Anti-Dumping Agreement because "with respect to pre-tax profit and return on investment, MOFCOM based its finding exclusively on a comparison between the figures for the first quarter of 2018 and those for the first quarter of 2017".[347]

7.4.3.6 MOFCOM's examination of economic factors showing positive trends

7.226. Japan argues that MOFCOM failed to explain in its impact analysis why economic factors showing negative trends supported an affirmative injury determination when several other factors exhibited positive trends. In Japan's view, this failure rendered MOFCOM's impact analysis inconsistent with Articles 3.1 and 3.4 of the Anti-Dumping Agreement.[348]

7.227. China maintains that MOFCOM properly explained that positive trends in certain factors were attributable to a steady growth in domestic demand, favourable industrial policies, and the reduction of outdated production capacity, but that they were not sufficient to counteract the impact of the dumped imports.[349] China asserts that "most importantly", MOFCOM found that in the most recent

[342] MOFCOM's final determination (Exhibit JPN-5.b), p. 49.
[343] MOFCOM's final determination (Exhibit JPN-5.b), p. 49.
[344] MOFCOM's final determination (Exhibit JPN-5.b), p. 49.
[345] MOFCOM's final determination (Exhibit JPN-5.b), pp. 46-49.
[346] MOFCOM's final determination (Exhibit JPN-5.b), p. 50.
[347] We note that Japan has also argued that "given that MOFCOM acknowledged that the interested parties asserted that the profit indices of domestic listed companies had improved, and were not injured, during the first half of 2018, there was a need for MOFCOM to conduct analyses of the trends between the first quarter of 2017 and the first quarter of 2018". (Japan's first written submission, para. 357 (fn omitted)). To us, it is unclear why Japan asserts that based on some data submitted by interested parties regarding "the first half of 2018", there would be a need for MOFCOM to somehow "conduct analyses of the trends between the first quarter of 2017 and the first quarter of 2018". In any case, MOFCOM addressed the argument concerning data from the first half of 2018 in the following manner: "the semi-annual report data of some listed companies relating to the domestic industry for January-June of 2018 submitted by relevant interested parties exceeded the scope of injury POI, and was only the data of individual domestic companies, which cannot be regarded as evidence for non-injury of domestic industry". (MOFCOM's final determination (Exhibit JPN-5.b), p. 50).
[348] Japan's first written submission, para. 360.
[349] China's first written submission, para. 504.

period, namely the first quarter of 2018, a number of economic indices declined with varying degrees.[350]

7.228. We have already found that MOFCOM erred in its evaluation of certain individual economic indices, namely market shares, capacity utilization, and ending inventory. We do not consider it is necessary, for the purpose of securing a positive solution to the dispute, to also make findings on Japan's argument concerning MOFCOM's alleged failure to explain why economic factors showing negative trends supported the conclusion of material injury given other positive developments in the state of the domestic industry.

7.4.4 Conclusion

7.229. Based on the foregoing, we find that Japan has established that MOFCOM acted inconsistently with Articles 3.1 and 3.4 of the Anti-Dumping Agreement because in its impact analysis:

a. MOFCOM failed to perform an objective examination of domestic market share for the purpose of examining the impact of subject imports on the domestic industry;

b. MOFCOM's findings on trends in sales prices were based on its erroneous price effects consideration; and

c. MOFCOM failed to objectively examine evidence concerning capacity utilization and ending inventory of the domestic industry, and did not provide reasoned and adequate explanations in support of its findings concerning these economic indices.

7.5 Japan's claim concerning MOFCOM's causation determination

7.5.1 Introduction

7.230. MOFCOM began its causation analysis by noting that price is the main factor affecting product competition and that price of imported products is an important reference factor for price negotiation between downstream users and the domestic industry. MOFCOM recalled its findings that the overall price of dumped imports had declined over the injury POI and had significantly depressed the price of the domestic like products. In this connection, MOFCOM noted that the domestic industry sold products at prices below "cost of sales", finding, furthermore, that the increase in prices from 2016 attributable to "positive policies" such as the removal of outdated production capacity did not bring reasonable profits to the domestic industry because of the declining prices of subject imports.[351] MOFCOM also found that the increase in the volume and market share of dumped imports over the injury POI had a negative impact on various indices reflecting the state of the domestic industry.[352] Specifically, MOFCOM noted that:

> During the injury POI, dumped imports occupied the market share in China through dumping, while dumped imports caused a downward pressure on the sales prices of domestic like products, resulting in a significant squeeze on the market space of domestic like products, and no effective release in the production capacity, a downward trend in market share, a high level of ending inventory and low pretax profits, which caused difficulties and pressure on the production and operation of the domestic industry.[353]

Accordingly, MOFCOM found that there was a causal link between the subject imports and material injury to the domestic industry.[354]

7.231. MOFCOM then went on to examine other known factors that were potentially causing material injury to the domestic industry, other than dumped imports, exploring, among others,

[350] China's second written submission, para. 288.
[351] MOFCOM's final determination (Exhibit JPN-5.b), p. 51.
[352] MOFCOM's final determination (Exhibit JPN-5.b), pp. 51-52.
[353] MOFCOM's final determination (Exhibit JPN-5.b), pp. 51-52.
[354] MOFCOM's final determination (Exhibit JPN-5.b), p. 52.

interested parties' submissions with respect to the impacts of increased nickel prices and environment protection regulations.

a. MOFCOM found that while in circumstances of growing demand, an increase in the price of nickel could reasonably be expected to be passed through to the domestic like products, "the price of domestic like products was even lower than the cost during the injury POI" due to the price depression caused by subject imports. MOFCOM also found that the price of domestic like products containing nickel decreased when the price of nickel increased. Accordingly, MOFCOM concluded that the increase in nickel price did not refute the causal link between subject imports and material injury.[355]

b. MOFCOM found that "the total period expenses of the five domestic production companies including environmental protection expenses did not increase significantly during the injury POI". Noting that there was no evidence showing that strict environmental standards caused material injury to the domestic industry, MOFCOM found that this factor did not refute the causal link between subject imports and material injury.[356]

7.232. Japan argues that MOFCOM's causation analysis was inconsistent with Articles 3.1 and 3.5 of the Anti-Dumping Agreement based on the following grounds:

a. As MOFCOM's causation analysis was based on its price effects and impact analyses that were themselves inconsistent with Articles 3.1, 3.2, and 3.4 of the Anti-Dumping Agreement, the causation analysis is, *as a consequence*, inconsistent with Article 3.1 and the first sentence of Article 3.5 of the Anti-Dumping Agreement[357] (consequential violation argument).

b. As MOFCOM failed to *take into account certain evidence* pertaining to the trends in the subject imports' volume, prices and market shares in its examination of the causal relationship between subject imports and material injury to the domestic industry, MOFCOM acted inconsistently with Article 3.1 and the obligation in the second sentence of Article 3.5 for an authority to demonstrate causation "based on an examination of all relevant evidence"[358] (argument concerning all relevant evidence).

c. As MOFCOM failed to ensure that it did not *attribute* to the subject imports the injurious effects of (i) the decrease in the price of nickel between May 2014 and the end of 2015, (ii) the increase in the price of nickel after mid-2016, and (iii) stricter environmental protection standards, MOFCOM acted inconsistently with Article 3.1 and the third sentence of Article 3.5 of the Anti-Dumping Agreement (non-attribution arguments).[359]

7.233. China asserts that each ground raised by Japan challenging MOFCOM's causation analysis is unfounded.[360]

7.5.2 Articles 3.1 and 3.5 of the Anti-Dumping Agreement

7.234. Articles 3.1 and 3.5 of the Anti-Dumping Agreement provide as follows:

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

[355] MOFCOM's final determination (Exhibit JPN-5.b), p. 53.
[356] MOFCOM's final determination (Exhibit JPN-5.b), p. 53.
[357] Japan's first written submission, paras. 387 and 394.
[358] Japan's first written submission, paras. 398 and 414.
[359] Japan's first written submission, paras. 419 and 437.
[360] China's first written submission, para. 507.

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

7.235. Article 3.5 requires Members to ascertain whether the dumped imports are causing injury to the domestic industry ("causation") and, as part of that causation analysis, it also requires Members to ensure that they do not attribute to dumped imports the injury caused by known factors other than the dumped imports ("non-attribution"). Specifically, the first sentence of Article 3.5 requires that an investigating authority demonstrate that dumped imports are, "through the effects of dumping, as set forth in paragraphs 2 and 4", causing injury. This text thus requires the authority to bring together the findings arrived at under Articles 3.2 and 3.4 to ascertain whether "the dumped imports are … causing injury". The second sentence of Article 3.5 requires the authority to demonstrate the causal relationship between the dumped imports and injury "based on an examination of all relevant evidence before [it]". The third sentence of Article 3.5 requires an investigating authority to examine "any known factors" that are causing injury "at the same time" as dumped imports, and ensure that it does not attribute the injury caused by those other factors to the dumped imports. The fourth sentence of Article 3.5 lists some of the factors other than dumped imports that "may be relevant", and makes it clear, by using the words "include, *inter alia*", that the list is not exhaustive.

7.236. Article 3.5 does not set out a specific methodology for investigating authorities to follow in order to fulfil its requirements. However, the method applied by an investigating authority must comport with the overarching obligation in Article 3.1 to undertake an objective examination based on positive evidence.

7.5.3 Analysis of Japan's claims under Articles 3.1 and 3.5 of the Anti-Dumping Agreement

7.5.3.1 Consequential violation argument

7.237. Japan argues that MOFCOM's causation analysis was inconsistent with Article 3.1 of the Anti-Dumping Agreement and the first sentence of Article 3.5 of the Anti-Dumping Agreement because it relied on MOFCOM's price effects and impact analyses which were themselves inconsistent with Articles 3.1, 3.2, and 3.4 of the Anti-Dumping Agreement.[361]

7.238. We recall that the first sentence of Article 3.5 requires an investigating authority to demonstrate that dumped imports are causing injury "*through the effects of dumping, as set forth in paragraphs 2 and 4*"[362], which indicates that the examination of causation is based, among others, on the findings arrived at under Articles 3.2 and 3.4. We have already found that Japan has established that MOFCOM's price effects analysis was inconsistent with Articles 3.1 and 3.2, and that MOFCOM's impact analysis was inconsistent with Articles 3.1 and 3.4. Accordingly, we find that Japan has established that MOFCOM's causation analysis was, as a consequence of the preceding inconsistencies, also inconsistent with Articles 3.1 and 3.5 of the Anti-Dumping Agreement.

7.5.3.2 Argument concerning all relevant evidence

7.239. Japan argues that MOFCOM's causation analysis was inconsistent with Article 3.1 of the Anti-Dumping Agreement and the second sentence of Article 3.5 of the Anti-Dumping Agreement because MOFCOM's analysis of the causal relationship between the subject imports and the material injury to the domestic industry was not based on an objective examination of "all relevant

[361] Japan's first written submission, para. 394.
[362] Emphasis added.

evidence".[363] In particular, Japan contends that MOFCOM failed to take into account in its examination of the causal relationship all relevant evidence by failing to address (a) the different price and volume trends pertaining to different subsets of the PUC in its causation and impact analyses, and the impact of certain subsets of the PUC on the corresponding subsets of the domestic like product[364]; (b) the relative trends in the market shares of the subject imports and domestic like products, and the "low" market share of the subject imports[365]; and (c) the overselling by the subject imports and the divergence in certain year-on-year trends in the prices of the subject imports and domestic like products.[366]

7.240. Japan explains that while its consequential claim (set out in section 7.5.3.1 above) is based on the obligation prescribed in the first sentence of Article 3.5, its claim concerning MOFCOM's alleged failure to take into account "all relevant evidence" is based on the requirements in the second sentence of Article 3.5.[367] On its face, the text of these two sentences speaks to the grounds for establishing the same causal relationship. Thus, having already found that MOFCOM failed to establish that causal relationship consistently with Articles 3.1 and 3.5 of the Anti-Dumping Agreement as a consequence of the various flaws in MOFCOM's price effects and impact analyses, we do not think that it is necessary, for the purpose of securing a positive solution to the dispute, to make additional findings with respect to the consistency of the same (already flawed) causation findings with the same provisions.[368]

7.5.3.3 Non-attribution arguments

7.241. Japan argues that MOFCOM acted inconsistently with Article 3.1 and the third sentence of Article 3.5 of the Anti-Dumping Agreement as it failed to (a) examine "any known factors" other than subject imports causing injury to the domestic industry; and (b) ensure that injury caused by such factors was not attributed to the subject imports.[369] In particular, Japan argues that MOFCOM failed to conduct a proper non-attribution analysis with respect to the following factors: (i) the decrease in the price of nickel between May 2014 and the end of 2015; (ii) the increase in the price of nickel since the middle of 2016; and (iii) stricter environmental protection requirements.[370]

7.5.3.3.1 Decrease in the price of nickel from May 2014 to the end of 2015

7.242. Japan asserts that starting May 2014 until the end of 2015, the world price of nickel, and the price of the nickel-containing 300-series products in China, declined simultaneously. According to Japan, this indicates that the decrease in the prices of 300-series products over this period in China was caused "to a significant degree" by the decrease in nickel prices.[371] Japan argues that because MOFCOM did not examine the relationship between the decrease in the price of nickel and the prices of domestic like products, MOFCOM failed to conduct a non-attribution analysis involving an objective examination based on positive evidence in respect of this factor.[372] Referring to certain statements and information concerning "fluctuation" in the pricing of nickel in the non-injury brief and the Japanese respondents' comments on the preliminary determination, Japan contends that the decrease in the price of nickel was "known" as a non-attribution factor to MOFCOM.[373]

7.243. China maintains that nothing in the record evidence indicates that the interested parties argued that the decrease in the price of nickel between May 2014 and the end of 2015 was a factor other than subject imports causing injury to the domestic industry.[374] China also observes that while the argument concerning decrease in nickel prices concerns developments in 2015, MOFCOM's injury

[363] Japan's first written submission, paras. 395-398.
[364] Japan's first written submission, paras. 401-406; second written submission, para. 236.
[365] Japan's first written submission, para. 410-411.
[366] Japan's first written submission, paras. 416-417.
[367] Japan's response to the Panel question No. 30, paras. 118-119.
[368] Moreover, we note that the majority of the facts Japan relies upon to make out its claim under the second sentence of Article 3.5 are the same as those underlying several arguments Japan raised in the context of its price effects and impact analyses claims, which we have already addressed in the resolution of those claims.
[369] Japan's first written submission, para. 419.
[370] Japan's first written submission, para. 419.
[371] Japan's first written submission, paras. 420-421.
[372] Japan's first written submission, para. 423.
[373] Japan's response to the Panel question No. 32, para. 127.
[374] China's response to the Panel question No. 32, para. 156.

assessment – particularly in relation to the nickel-containing 300-series products – was based on the overall evolution of prices in the injury POI. Hence, there was no basis for MOFCOM to treat any decrease in nickel price as an "other factor" that caused injury to the domestic industry.[375]

7.244. We note that pursuant to the third sentence of Article 3.5, the issue that we must address is whether the decrease in the price of nickel between May 2014 to the end of 2015 was a "known factor[] other than the dumped imports which at the same time [was] injuring the domestic industry". We recall, however, that the POI to determine the existence of dumping in this case was 1 January 2017 to 31 December 2017. Thus, the period of the decrease in nickel prices (May 2014 to end of 2015) was not part of the dumping period, and MOFCOM did not make findings on whether subject imports were dumped during this preceding period. For this reason, we do not consider that arguments and evidence presented by the Japanese respondents in respect of "fluctuation" in the pricing of nickel meant that MOFCOM should have been aware that the decrease in price of nickel between May 2014 and end of 2015 was causing injury to the domestic industry "*at the same time* [*as the dumped imports*]". Accordingly, we find that Japan has not established that MOFCOM acted inconsistently with Articles 3.1 and 3.5 of the Anti-Dumping Agreement by failing to perform a non-attribution analysis in respect of the decrease in nickel prices between May 2014 and the end of 2015.

7.5.3.3.2 Increase in the price of nickel since the middle of 2016

7.245. Japan argues that MOFCOM did not perform a non-attribution analysis involving an objective examination of positive evidence in respect of the effect of the increase in world nickel prices since the middle of 2016.[376] Japan argues that this increase in the price of nickel could have led to a shortage of raw materials and rising costs. According to Japan, this could have negatively affected the domestic industry in one of two ways: (a) it could have caused the domestic industry to pass on the increased costs through higher prices, thus sacrificing the domestic industry's price competitiveness and sales volume; or (b) it could have caused the domestic industry to absorb the increased costs to maintain price-competitiveness by decreasing their profit margins.[377] Japan contends that some of MOFCOM's observations in its evaluation of the increase in nickel prices were either contradicted by, or were otherwise not rooted in, record evidence. Specifically, Japan contends that MOFCOM's finding that the prices of nickel-containing domestic products declined when the price of nickel increased contradicts record evidence, as prices of the domestic like products as a whole as well as domestic like products of the nickel-containing 300-series rose after 2016.[378] Japan also argues that MOFCOM did not substantiate its finding that the price of domestic like products was even lower than the costs with any record evidence.[379] On this basis, Japan argues that MOFCOM failed to fulfil the requirements of Articles 3.1 and 3.5 in its evaluation of the increase in price of nickel following 2016.

7.246. China argues that MOFCOM did not find that the increase in the price of nickel caused injury to the domestic industry, and was hence not required to carry out a non-attribution analysis in respect of this factor.[380] China argues that MOFCOM properly reasoned that while nickel price increases should normally be passed through to domestic like products when domestic demand grows, the investigation showed that the price of domestic like products *decreased* as the price of nickel *increased*, and was lower than the domestic industry's cost of production during the injury POI. For MOFCOM this demonstrated that the increase in nickel prices did not cause injury to the domestic industry.[381] Relying on certain findings of the panel in *EU – Fatty Alcohols (Indonesia)*, China argues that by demonstrating the persistence of injury during parts of the injury POI when the price of nickel did not increase, MOFCOM adequately demonstrated that dumped imports caused injury to the domestic industry regardless of the increase in price of nickel.[382] China also argues that Japan's assertion that the prices of 300-series domestic like products continued to rise since 2016

[375] China's second written submission, paras. 337-338.
[376] Japan's first written submission, para. 430.
[377] Japan's first written submission, para. 426.
[378] Japan's first written submission, para. 427.
[379] Japan's first written submission, para. 428.
[380] Chinas' first written submission, para. 575.
[381] China's first written submission, para. 575.
[382] China's first written submission, para. 576 (referring to Panel Report, *EU – Fatty Alcohols (Indonesia)*, para. 7.179).

is factually incorrect, as there was a decrease in such prices in the first quarter of 2018 relative to the first quarter of 2017.[383]

7.247. In the final determination, MOFCOM found that changes in the price of nickel affect "production and operation" of the domestic industry, but the price of nickel is "not the only factor affecting the operation of the companies".[384] MOFCOM explained:

> In the context of sustained and steady growth in domestic market demand, the price fluctuations of raw materials should be reasonably passed through to the price changes of domestic like products. However, as the foregoing analysis shows, the price of domestic like products was even lower than the cost during the injury POI, due to the significant price depression caused by dumped imports. The data show that, with the increase in the price of nickel that is a raw material, the price of corresponding nickel-containing products did not rise but declined.[385]

Based on the foregoing, MOFCOM upheld its preliminary finding that the "rise in raw material prices could not refute the causal link between the dumped imports and the material injury of [the] domestic industry".[386]

7.248. We note that a key pillar in MOFCOM's evaluation of the effect of the increase in nickel prices on the domestic industry was its finding that the price of the domestic like products was lower than the cost of production "due to the significant price depression caused by dumped imports". We recall, however, that we have found that MOFCOM's finding of price depression did not involve an objective examination of positive evidence, and was inconsistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement. By relying on its flawed price depression findings in the way set out above, MOFCOM's evaluation of the impact of increased nickel prices on the domestic industry was, as a consequence, also tainted and, therefore, inconsistent with Articles 3.1 and 3.5 of the Anti-Dumping Agreement.

7.249. We note, furthermore, that as Japan contends, the final determination does not refer to the record evidence MOFCOM relied upon to find that "the price of domestic like products was even lower than the cost during the injury POI". Moreover, MOFCOM's final determination does not specify the magnitude of the differences in the prices and costs of the domestic like products, nor the timing and duration of the alleged differences observed within the injury POI. In the absence of this information, there is, in our view, no objective basis in the published determinations for MOFCOM to have established that the price of domestic like products was "even lower than the cost during the injury POI".[387] We therefore consider that MOFCOM's finding that "the price of domestic like products was even lower than the cost during the injury POI" was not based on an objective examination of positive evidence.

7.250. Japan also challenges MOFCOM's finding that "with the increase in the price of nickel that is a raw material, the price of corresponding nickel-containing products did not rise but declined". Japan contends that this finding is not supported by record evidence, given that, according to Japan,

[383] China's first written submission, paras. 578-579.
[384] MOFCOM's final determination (Exhibit JPN-5.b), p. 53.
[385] MOFCOM's final determination (Exhibit JPN-5.b), p. 53.
[386] MOFCOM's final determination (Exhibit JPN-5.b), p. 53.
[387] We also note that while China asserts that the information concerning pricing and costs of the domestic like products that formed the basis of this finding was contained in "Section IV of the confidential questionnaires lodged by the domestic producers", China did not furnish this information before us despite our explicit request for China to do so. (China's response to Panel question No. 50, paras. 105-106 (referring to MOFCOM's questionnaire for the domestic producers (Exhibit JPN-11.b), pp. 30 and 33)). We note that China refers to MOFCOM's questionnaire for domestic producers, which *inter alia* contained questions concerning the domestic industry's costs and prices, in identifying the basis for MOFCOM's price-below-cost finding. However, we agree with Japan that the document that China points to only shows the questions that MOFCOM asked the domestic producers but not the responses, and the fact that such questions were asked does not establish that domestic sales prices were lower than the costs for all or any of the domestic producers. China also asserts that pursuant to Article 3.10 of the DSU, the good faith of China's submission that MOFCOM made the relevant finding based on information contained in the questionnaire responses should not be questioned. In this regard, we agree with Japan that Article 3.10 of the DSU does not contain a requirement for panels to accept as being valid any factual assertion made by a party without any record evidence substantiating that assertion. (Japan's comments on China's response to Panel question No. 50, para. 67).

the price of nickel-containing 300-series domestic like products rose after 2016.[388] China contends, in response, that MOFCOM's finding was based on developments concerning prices of 300-series and 200-series nickel products from 2014 to 2017 and from January-March 2017 to January-March 2018.[389]

7.251. We note that, contrary to China's assertion, the final determination does not specify that MOFCOM's finding was based on developments concerning prices of 300-series and 200-series nickel products from 2014 to 2017 and from January-March 2017 to January-March 2018. Moreover, we note that the relevant data concerning prices of 300-series and 200-series domestic like products did not distinguish between product categories. As we have found in section 7.3.3.2.4 above, MOFCOM failed to establish that the prices of product categories were comparable.[390] MOFCOM's failure to do so implies that MOFCOM's comparison of prices of products belonging to a certain grade at two different points of time was not objective. This is because any change that MOFCOM observed in the prices of products of a particular grade at two points in time may have been an outcome of a change in the proportion of product categories within the set of products belonging to that grade. Such an analysis would therefore not constitute an objective examination of the relationship between nickel prices and the prices of the domestic like products. Accordingly, it would also not be adequate for a proper non-attribution analysis in respect of nickel prices. We therefore consider that MOFCOM's finding that "with the increase in the price of nickel that is a raw material, the price of corresponding nickel-containing products did not rise but declined" was not reasonably and adequately explained.

7.252. China argues that even if MOFCOM had concluded that the increase in the price of nickel caused injury to the domestic industry, by demonstrating the persistence of injury notwithstanding the prices of nickel, MOFCOM carried out a non-attribution analysis consistent with Article 3.5 of the Anti-Dumping Agreement.[391] In making this argument, China relies on the following passage of the panel report in *EU – Fatty Alcohols (Indonesia)*, which, in China's view, applies *mutatis mutandis* to the present case:

> Article 3.5 does not prescribe a particular methodology for separating and distinguishing the injurious effects of the dumped imports from other known factors. The EU authorities assessed the impact of the dumped imports on the domestic industry during periods when the economic crisis was not affecting the industry, and found downward trends during those periods. In our view, this provided a sufficient basis for them to consider the impact of the dumped imports on the domestic industry and assess whether they were causing injury independently of the effects of the crisis. … [T]he EU authorities inferred – both from the decline in the domestic industry's market share in the face of the dumped imports *before* the crisis, and from the persistence of this reduced market share *after* the crisis – that the dumped imports largely contributed to material injury suffered by the domestic industry regardless of the economic crisis. We do not consider this conclusion to be unreasonable.[392]

7.253. As we understand it, this extract reveals that the panel in *EU – Fatty Alcohols (Indonesia)* found that the EU authorities had undertaken a reasonable non-attribution analysis because they had demonstrated that the subject imports had a negative impact on the domestic industry during the periods when the "other known factor" – i.e. the economic crisis – was not affecting the domestic industry. In reaching this conclusion, the panel specifically referred to the following explanation the EU authorities had provided in support of their findings:

> [T]he investigation showed that the improvement [*after the crisis*] did not allow the recovery of the Union industry which was far from its economic situation that prevailed at the beginning of the period considered. Furthermore, as mentioned in recital 89, 2008, *just before the financial crisis started*, was the year with the highest increase in

[388] Japan's first written submission, para. 427.
[389] China's response to Panel question No. 51, para. 108.
[390] We recall that the subject imports and domestic like products, including products belonging to each product grade, comprised of three product categories: stainless-steel billets (slabs), stainless-steel coils, and stainless-steel plates. In section 7.3.3.2.4 above, we conclude that MOFCOM's finding that there was no price comparability issue in relation to product categories was inconsistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement.
[391] China's first written submission, para. 576.
[392] Panel Report, *EU – Fatty Alcohols (Indonesia)*, para. 7.179. (emphasis original; fns omitted)

> dumped imports from the countries concerned and the sharpest decrease in sales volume of the Union industry. After that year the Union industry did not recover and the dumped imports continued to be massively present in the Union market. For these reasons it is clear that, regardless of other factors, dumped imports largely contributed to the material injury suffered by the Union industry during the IP.[393]

China maintains that MOFCOM demonstrated the persistence of injury regardless of the price of nickel, and hence carried out a proper non-attribution analysis in respect of this factor just as the EU authorities were found to have done in *EU – Fatty Alcohols (Indonesia)*. We note, however, that China has not referred to anything in MOFCOM's final determination to indicate that, like the EU authorities in *EU – Fatty Alcohols (Indonesia)*, MOFCOM actually considered and pursued this line of analysis.[394] Thus, in the circumstances of the stainless steel investigation, we find China's reliance on the panel report in *EU – Fatty Alcohols (Indonesia)* is inapposite.

7.254. In summary, we find that Japan has established that MOFCOM's conclusion that the increase in the price of nickel did not break the causal link between the subject imports and material injury to the domestic industry was inconsistent with Articles 3.1 and 3.5 of the Anti-Dumping Agreement because: (a) MOFCOM's finding that "the price of domestic like products was even lower than the cost during the injury POI" was not based on an objective examination of positive evidence; and (b) MOFCOM's finding that the price of nickel-containing products did not rise but declined with the increase in the price of nickel was not reasonably and adequately explained.

7.5.3.3.3 Stricter environmental protection requirements

7.255. Japan argues that despite acknowledging that "investment in environmental protection will increase the costs and expenses" of the domestic industry, MOFCOM did not objectively examine the evidence submitted by the interested parties concerning the impact on the domestic industry of the cost increases associated with the adoption of stricter environmental standards.[395] This evidence included (a) the Environmental Protection Tax Law that had become effective as of 1 January 2018 and that replaced the pollutant discharge fees with an environment protection tax; and (b) the 2017 annual report of a Chinese steel producer named Gansu Jiu which stated, *inter alia*, that stricter environmental protection standards would cause it to "face enormous pressure on environmental protection".[396] Japan argues that MOFCOM found that there was no evidence that strict environmental standards caused material injury to the domestic industry without addressing this evidence.[397] Japan asserts that while MOFCOM noted that the domestic industry's total expenses did not increase significantly during the injury POI, MOFCOM did not separately examine cost increases associated with stricter environmental protection standards, and did not explain how these increases did not negatively affect the domestic industry.[398]

7.256. China argues that contrary to Japan's submission MOFCOM did, in fact, specifically find that environmental protection expenses did not increase, and there was no evidence suggesting the opposite.[399] China argues that the 2017 annual report of a Chinese stainless-steel company that Japan relies on merely refers to "environment protection pressures" without mentioning specific

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[393] Panel Report, *EU – Fatty Alcohols (Indonesia)*, para. 7.179. (emphasis added)

[394] In fact, in its impact analysis under Article 3.4 of the Anti-Dumping Agreement, MOFCOM emphasized the "significant downward trend" in certain indices *after* 2017, i.e. in the period coinciding with the increase in nickel prices, when weighing the indices that displayed a positive trend over the injury POI against developments that were negative for the domestic industry. In this respect, MOFCOM states that:

> In addition, the Investigation Authorities noted that, first, under the circumstance of the growing trend of domestic demand, the domestic industry expanded its production scale, and some indices such as production capacity, production output, and sales volume saw a certain increase, but the market share of domestic industry saw an overall decline, and indices such as utilization of capacity, sales revenue, return on investment and pretax profits had a significant downward trend *after 2017*.

(MOFCOM's final determination (Exhibit JPN-5.b), p. 50 (emphasis added))

[395] Japan's first written submission, para. 433.

[396] Japan's first written submission, para. 432 (referring to Non-injury brief (revised) (Exhibit JPN-8.b (BCI)), p. 56).

[397] Japan's first written submission, para. 434.

[398] Japan's first written submission, para. 433.

[399] China's first written submission, para. 580.

additional costs. China also submits that the new law that Japan refers to entered into force on 1 January 2018, i.e. towards the end of the injury POI, and thus could not have explained the injury observed throughout the injury POI.[400] China argues that having reviewed the evidence, MOFCOM found that stricter environmental standards did not cause injury, and was thus not obliged to carry out any additional non-attribution analysis.[401]

7.257. We note that before MOFCOM, Japanese interested parties asserted that stricter Chinese environmental protection standards (including through the introduction of a new environmental protection tax law) meant that steel enterprises were not only facing pressure from rising costs, but also from higher environmental management requirements.[402] In support of this assertion, the interested parties pointed to certain statements made in the annual report of one of the Chinese producers, where the producer referred to the effects of the environment protection requirements.[403] Specifically, this producer noted in its report how as an effect of these requirements the "cost of raw materials and fuel rose significantly and the comprehensive profitability of [its] products was challenged".[404]

7.258. In addressing these submissions regarding the impact of environmental protection on the domestic industry, MOFCOM stated as follows:

> [R]egarding the impact of environmental protection, the investment in environmental protection will increase the cost and expenses of the enterprise. However, the total period expenses of the five domestic production companies including environmental protection expenses did not increase significantly during the injury POI. There is no evidence to show that strict environmental standards caused material injury to the domestic industry. The impact of environmental protection cannot refute the causal link between dumped imports and material injury to domestic industry. In the final determination, the Investigating Authority decided to maintain the preliminary determination.[405]

7.259. Thus, MOFCOM began its evaluation of the interested parties' submission by acknowledging that investment in environmental protection would increase costs and expenses. MOFCOM then proceeded to note that in the present case, "the total period expenses of the five domestic production companies including environmental protection expenses did not increase significantly during the injury POI". In other words, MOFCOM found that, whatever the actual costs of environmental protection were to the domestic industry, those costs did not push the industry's total expenses significantly higher. According to China, this finding was based on record evidence of the total expenses of domestic producers, information that was provided in indexed form in the non-confidential versions of the questionnaire responses of the domestic producers. These data do not separately identify environmental expenses incurred by any domestic producer. However, the information on total costs includes data with respect to Gansu Jiu, the company whose annual report was relied upon by interested parties.[406] We see nothing in MOFCOM's finding that total industry expenses (including environmental protection expenses) did not increase significantly to be contradicted by this record evidence.

7.260. Having found that the domestic industry's total expenses, including environmental protection expenses, did not significantly increase, MOFCOM then concluded that there "is no evidence to show that strict environmental standards caused material injury to the domestic industry". Considering the submissions and evidence provided by the interested parties to MOFCOM (which we note pertained to the situation of one of the Chinese domestic producers) focused on the effect of environment protection on the cost of raw material and fuel, it was, in our view, reasonable for MOFCOM to focus on the domestic industry's total cost in addressing this issue.

7.261. Based on the foregoing, we find that Japan has failed to establish that MOFCOM failed to objectively examine the evidence submitted by the interested parties concerning the impact on the

[400] China's first written submission, para. 581.
[401] China's first written submission, para. 582.
[402] Non-injury brief (revised) (Exhibit JPN-8.b (BCI)), p. 56.
[403] Non-injury brief (revised) (Exhibit JPN-8.b (BCI)), p. 56.
[404] Non-injury brief (revised) (Exhibit JPN-8.b (BCI)), p. 56.
[405] MOFCOM's final determination (Exhibit JPN-5.b), p. 53.
[406] China's response to Panel question No. 50, para. 112.

domestic industry of the cost-increases associated with the adoption of stricter environmental standards, and thereby acted inconsistently with Articles 3.1 and 3.5 of the Anti-Dumping Agreement.

7.5.4 Overall conclusion

7.262. Based on the foregoing, we find that Japan has established that MOFCOM's causation analysis was inconsistent with Articles 3.1 and 3.5 of the Anti-Dumping Agreement for the following reasons:

a. because it relied upon MOFCOM's price effects and impact analyses, which we have found were inconsistent with Articles 3.1, 3.2, and 3.4 of the Anti-Dumping Agreement;

b. because, for reasons set out in paragraph 7.254 above, MOFCOM's analysis in respect of the increase in nickel prices since mid-2016 was not based on an objective examination of positive evidence, and was not reasonably and adequately explained.

7.6 Japan's claims concerning MOFCOM's confidential treatment of certain information

7.6.1 Introduction

7.263. In the underlying investigation, the applicant redacted the names of four companies from the application on grounds of confidentiality. These companies were Chinese domestic producers that the applicant excluded from the domestic industry because they were importers of the product under consideration, or were related to companies that had started to produce the product under consideration in a country under investigation (Indonesia). The applicant provided its reasons for requesting confidentiality in the non-confidential version of the application, which stated as follows:

> According to the provision of Article 8 of Provisional Rules for Filing Antidumping Investigations, if domestic producer is related to exporter or importer or if it itself is an importer of the products under investigation, it may be excluded from the domestic industry. [Enterprise Name][4] and [Enterprise Name][5] are importers of products under investigation, and [Enterprise Name][6] and [Enterprise Name][7] started production of products under investigation in Indonesia. Therefore, the production outputs of these four companies are excluded from the total production of the domestic like product in Table 1 above. For relevant proof documents, please see Attachment 6.[407]

[4] The data in [] is names of companies excluded from domestic industries. It involves the trade secrets of enterprises, and is applied for confidentiality.
[5] The data in [] is names of companies excluded from domestic industries. It involves the trade secrets of enterprises, and is applied for confidentiality
[6] The data in [] is names of companies excluded from domestic industries. It involves the trade secrets of enterprises, and is applied for confidentiality.
[7] The data in [] is names of companies excluded from domestic industries. It involves the trade secrets of enterprises, and is applied for confidentiality.

7.264. Attachment 6, referred to in the extract above, states as follows:

> The contents of this [appendix] are the evidence materials of the enterprises excluded from the domestic industry as stated in the text of the Application, which prove that these enterprises are affiliated with the exporters or importers, or are themselves importers of the products under investigation, including screenshots of specific import data, corporate structure charts and related reports, etc.
>
> As this [appendix] involves commercial secrets of the relevant enterprises, we request to keep it confidential.[408]

[407] Application (Exhibit JPN-6.b), pp. 15-16.
[408] Non-confidential version of attachment 6 to the application (Exhibit CHN-13.b).

7.265. Thus, the applicant explained that (a) the redacted data were the names of companies that it excluded from the domestic industry for being either importers of the product under consideration, or a producer of the product under consideration in Indonesia; and (b) the names of the companies involved trade secrets of the companies in question. On 22 March 2019, MOFCOM issued the preliminary determination in which MOFCOM disclosed the names of two of these four companies. Japan asserts, and China does not deny, that MOFCOM did not disclose the names of two other companies. The parties agree that the names of all four companies were disclosed in the final determination.[409]

7.266. Japan challenges MOFCOM's decision to treat this redacted information as confidential, claiming that it is inconsistent with Articles 6.5 and 6.5.1 of the Anti-Dumping Agreement.[410]

7.6.2 Analysis of Japan's claim under Article 6.5

7.267. Japan claims that MOFCOM acted inconsistently with Article 6.5 because it granted, without good cause being shown, the applicant's request to redact the names of four companies from the application on grounds of confidentiality. In its first written submission, Japan argued that the applicant's explanation that the company names pertained to the domestic industries, and were redacted because they were "trade secrets of enterprises", did not show "good cause" because[411]:

a. the company names were public information;

b. although, in general, business activities "related to the exporters or importers or are themselves importers of the allegedly dumped product" might be confidential information deserving of protection, the Application did not contain the kind of detailed information that might be deserving of confidential treatment;

c. the business activities of these companies (i.e. they were importers, or related to exporters or importers) were, in any case, disclosed, which would undermine the applicant's position regarding the confidential treatment of the company names on account of their business activities; and

d. MOFCOM itself did not treat the company names as confidential during the investigation.

7.268. During the course of these proceedings, Japan clarified that its claim is focused on MOFCOM's decision to accept the applicant's request for confidential treatment of the company names *at the time* the application to initiate an anti-dumping investigation against subject imports was filed with MOFCOM.[412] Thus, according to Japan, "[w]hether or not MOFCOM eventually disclosed the names to the Japanese Respondents subsequently is irrelevant in finding whether MOFCOM failed to assess good cause at the time it granted confidential treatment".[413]

7.269. Relying upon several news articles from the internet, Japan contends that the business activities of the relevant companies were public information at the time the application was filed. However, Japan clarifies that it is not arguing that "MOFCOM by itself was required to have 'google-searched' the relevant news article … before its decision" to accept the confidential treatment requested by the applicant.[414] Instead, Japan submits that it is for the party submitting the information to furnish reasons justifying such confidential treatment, and for the investigating authority to assess those reasons, and scrutinize the party's showing in order to determine whether the submitting party has sufficiently substantiated its request.[415] Japan argues that the reasons

[409] China's first written submission, para. 720; Japan's first written submission, para. 507.
[410] Japan also makes conditional claims under Articles 6.5 and 6.5.1, wherein Japan contends that if China seeks to justify either the insufficient disclosure of the "essential facts under consideration" pursuant to Article 6.9, or the inadequacy of the public notice under Articles 12.2 and 12.2.2, on the ground that the information not disclosed in those documents was confidential, we must examine whether confidential treatment of that information was justified under Articles 6.5 and 6.5.1. We address these conditional claims to the extent necessary when we focus on Japan's claims under Articles 6.9, 12.2, and 12.2.2.
[411] Japan's first written submission, paras. 504-507.
[412] Japan's response to Panel question No. 53(a), para. 22. See also Japan's response to Panel question No. 37, para. 143.
[413] Japan's response to Panel question No. 37, para. 143.
[414] Japan's response to Panel question No. 53(b), para. 23.
[415] Japan's response to Panel question No. 53(b), para. 23.

given in the application for the confidential treatment were insufficient for MOFCOM to find that there had been a showing of "good cause".

7.270. China submits that any disclosure of the company names in the underlying investigation would have revealed which exact companies were related to an exporter or an importer, or were themselves importers of the product under consideration.[416] China submits that information pertaining to this kind of business activity can qualify as a trade secret, and is by nature confidential.[417] Thus, China contends that when any information is by nature confidential, the party seeking confidential treatment can show "good cause" by establishing that the information fits into the description provided in Article 6.5. China contends that the applicant showed good cause on this basis because:

a. it explained that the company names were of those excluded from the domestic industry, and that it involved trade secrets of the companies concerned[418]; and

b. MOFCOM's decision to subsequently not treat these company names as confidential did not undermine its original assessment regarding the confidential treatment of this information.[419]

7.271. In resolving Japan's claim, we must examine whether MOFCOM was justified under Article 6.5 in accepting the confidential treatment of the company names at the time the application requesting the initiation of the anti-dumping investigation was filed with MOFCOM.

7.272. Article 6.5 Anti-Dumping Agreement states as follows:

> Any information which is by nature confidential (for example, because its disclosure would be of significant competitive advantage to a competitor or because its disclosure would have a significantly adverse effect upon a person supplying the information or upon a person from whom that person acquired the information), or which is provided on a confidential basis by parties to an investigation shall, upon good cause shown, be treated as such by the authorities. Such information shall not be disclosed without specific permission of the party submitting it.[420]

7.273. Article 6.5 permits investigating authorities to treat as confidential information (a) which is by nature confidential or (b) which is provided on a confidential basis by parties to an investigation, upon good cause shown. We agree with previous DSB reports that the requirement to show good cause applies to these two situations, which may in practice overlap.[421] Moreover, while Article 6.5 does not define good cause, or set out how good cause must be established, we agree with previous DSB reports that the good cause alleged must constitute a reason sufficient to justify the withholding of information from both the public and from the other parties interested in the investigation, who would otherwise have a right to view this information under Article 6 of the Anti-Dumping Agreement.[422] We also agree with previous panels that have taken the view that Article 6.5 does not require any particular form or means of showing good cause, or any particular type or degree of supporting evidence.[423] Instead, the type of evidence and the extent of substantiation an investigating authority must require will depend on the nature of the information at issue and the particular "good cause" alleged.[424] Ultimately, the obligation remains with the investigating authority to examine objectively the justification given for the need for confidential treatment.[425]

7.274. In this case, MOFCOM accepted the applicant's request for confidential treatment on the grounds set out in the application without explanation or giving reasons. MOFCOM's conduct

[416] China's first written submission, paras. 700 and 707.
[417] China's first written submission, para. 704.
[418] China's first written submission, para. 715.
[419] China's first written submission, paras. 717-718.
[420] Fn omitted.
[421] Appellate Body Report, *EC – Fasteners (China)*, paras. 536-537.
[422] Appellate Body Report, *EC – Fasteners (China)*, para. 537.
[423] Panel Report, *EU – Footwear (China)*, para. 7.728.
[424] Appellate Body Report, *EC – Fasteners (China)*, para. 539.
[425] Appellate Body Report, *EC – Fasteners (China)*, para. 539.

suggests that it *implicitly* accepted that the reasons given by the applicant demonstrated there was "good cause" to treat the relevant information confidentially. In our view, the mere fact that MOFCOM did not make an explicit finding with respect to the merits of the request for confidential treatment does not necessarily mean that it acted inconsistently with Article 6.5. As we read it, Article 6.5 does not impose a specific requirement on an investigating authority to set out a reasoned decision in its published report with respect to an interested party's claim of "good cause" in *every factual situation*. Just as Article 6.5 does not prescribe how an interested party must establish good cause, so too is it silent about how an investigating authority must objectively determine whether a request for confidential treatment is warranted. Given the multitude of facts and data presented during an investigation, we cannot exclude that there may be situations when, in the light of the information at issue, and the good cause alleged by the interested party, an investigating authority may be found to have objectively examined good cause *by implication*, simply by accepting into the record and making available a redacted submission which contains a sufficient explanation of the alleged good cause. Such conduct would signal that the investigating authority had accepted and adopted the stated reasons for the confidential treatment of information as its own. In our view, an investigating authority acting in this way would not have acted inconsistently with Article 6.5 if the objective basis of its decision to accept the request for confidential treatment without further explanation, is apparent from the interested party's explanation of good cause.

7.275. Turning to the facts of MOFCOM's investigation, we note from the relevant parts of the application, quoted in paragraph 7.263 above, that the application redacted the names of certain companies but described the business activities of these companies. In particular, the application stated that "[Enterprise Name][fn] and [Enterprise Name][fn] are importers of products under investigation, and [Enterprise Name][fn] and [Enterprise Name][fn] started production of products under investigation in Indonesia." The footnotes explained that the redacted information were "the names of companies excluded from domestic industries", and that these were the "trade secrets" of these companies.

7.276. Japan contends that the names of the companies were public information, and thus there could be no good cause to treat these names as confidential. However, considering that the business activities of the companies were disclosed by the applicant, revealing the company names would mean that their specific business activities would also be disclosed. Japan agrees that the business activities of a company, specifically whether it is related to exporters or importers, or is itself an importer of the allegedly dumped product, may constitute confidential information deserving of protection.[426] However, Japan contends that the application does not contain the "kind of detailed information that might be deserving of confidential treatment" because it contains only broad descriptions, such as "importers of products under investigation" and "start production of products under investigation into production in Indonesia", none of which are confidential in nature.[427] Specifically, Japan maintains that if the applicant believed that the business activities of the relevant companies should be treated as confidential, the applicant should have redacted and summarized the relevant information pertaining to the *business activity* of the companies, rather than redacting only the *names* of the relevant companies.[428]

7.277. We do not see why the applicant should have redacted more information than it considered necessary to protect the relevant trade secrets, given that the redaction of company names was sufficient to achieve that objective. Considering, as Japan agrees, that the business activities of the companies in question may constitute confidential information, and that disclosure of the company names would have revealed the business activities of the specific companies, we do not see why the categorization of the redacted information (i.e. the company names) as a trade secret was unreasonable at the time MOFCOM accepted the request.[429] On the contrary, when considered in the light of the surrounding facts, in our view, the explanations provided in the application reveal that

[426] Japan's first written submission, para. 506.
[427] Japan's first written submission, para. 506.
[428] Japan's first written submission, para. 505.
[429] In reaching this conclusion, we have taken note that Japan's claim focuses on MOFCOM's initial treatment of the company names in the application, and that whether or not MOFCOM eventually disclosed the names to the Japanese respondents subsequently is irrelevant in finding whether MOFCOM failed to assess good cause at the time it granted confidential treatment. (Japan's response to Panel question No. 37, para. 143). We also note that Japan has not suggested that MOFCOM knew, or had any basis to know, at the time the application was made, that the business activities of these specific companies were public information.

MOFCOM had an objective basis to accept the request for confidential treatment without further explanation.

7.278. Based on the foregoing, we find that Japan has not established that MOFCOM acted inconsistently with Article 6.5 of the Anti-Dumping Agreement when it accepted, by implication, that the good cause which the applicant presented justified the redaction of the company names at the time it made its application.

7.6.3 Analysis of Japan's claim under Article 6.5.1

7.279. Japan claims that MOFCOM acted inconsistently with Article 6.5.1 because it accepted the applicant's request for the confidential treatment of company names without requiring the applicant to:

a. provide a non-confidential summary of the redacted information; and

b. describe the "exceptional circumstances" that would justify the applicant's failure to provide such a summary or provide a statement of the reason why summarization was not possible.

7.280. Noting that the applicant explained that the redacted information were names of companies excluded from the domestic industry, and that the information involved trade secrets of enterprises, China asserts that these explanations were non-confidential summaries called for under Article 6.5.1.[430]

7.281. Article 6.5.1 of the Anti-Dumping Agreement provides as follows:

> The authorities shall require interested parties providing confidential information to furnish non-confidential summaries thereof. These summaries shall be in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence. In exceptional circumstances, such parties may indicate that such information is not susceptible of summary. In such exceptional circumstances, a statement of the reasons why summarization is not possible must be provided.

7.282. Article 6.5.1 thus applies in two scenarios:

a. First, investigating authorities must require interested parties providing confidential information to furnish non-confidential summaries.

b. Second, in exceptional circumstances, the parties may indicate that the information is not susceptible of summary, and in such circumstances must provide a statement of the reasons why summarization is not possible.

7.283. Under Article 6.5.1, the requirement to describe the exceptional circumstances justifying the failure to provide a non-confidential summary, or the requirement to provide a statement of the reason why summarization was not possible, arises only when a non-confidential summary is not provided. China contends that such a summary was provided in this case, and thus, according to China, the question of describing the exceptional circumstances that justify failure to provide a non-confidential summary does not arise.

7.284. With respect to the sufficiency of the non-confidential summary, Article 6.5.1 requires that the non-confidential summary "be in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence". The sufficiency of the information provided will depend on the confidential information that is at issue, but must permit a reasonable understanding of the substance of the information withheld in order to allow the other parties to the investigation an opportunity to respond and defend their interests.[431] The confidential information at issue in this case are company names, which were redacted to avoid disclosing the business activities of the relevant companies.

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[430] China's first written submission, paras. 728-729.
[431] Appellate Body Report, *EC – Fasteners (China)*, para. 542.

7.285. We note, as set out in paragraph 7.275 above, that the applicant disclosed in the non-confidential summary of the application the business activities of the companies whose names were redacted, specified that the redacted information were the "names of companies", and also that these companies were excluded from the domestic industry. Attachment 6 of the application, quoted in paragraph 7.264 above, explained that these enterprises were affiliated with the exporters or importers or were themselves importers of the product concerned. Considering the names of the companies were confidential, the non-confidential summary, in our view, was sufficient to permit the interested parties to develop a reasonable understanding of the substance of the information submitted in confidence, namely that four domestic producers were being excluded from the domestic industry in light of their business activities (as importers, or foreign producers of the product concerned). Accordingly, we consider that Japan has not established that the non-confidential summary of the confidential information in the application was inconsistent with Article 6.5.1.

7.286. Based on the foregoing, Japan has not established that MOFCOM acted inconsistently with Article 6.5.1 of the Anti-Dumping Agreement.

7.7 Japan's claims concerning the disclosure of the essential facts under consideration which formed the basis for MOFCOM's decision to apply definitive measures

7.7.1 Introduction

7.287. In the underlying investigation, MOFCOM issued a "Letter Disclosing Essential Facts" (disclosure document),[432] which Japan maintains failed to disclose certain essential facts under consideration forming the basis of MOFCOM's decision to impose definitive measures, as required by Article 6.9 of the Anti-Dumping Agreement. Japan specifically challenges MOFCOM's disclosure with respect to the following aspects of MOFCOM's determination:

a. price effects analysis;

b. definition of the product under consideration;

c. cumulation analysis;

d. impact analysis;

e. causation determination; and

f. definition of the domestic industry.

7.7.2 Article 6.9 of the Anti-Dumping Agreement

7.288. Article 6.9 of the Anti-Dumping Agreement states as follows:

> The authorities shall, before a final determination is made, inform all interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures. Such disclosure should take place in sufficient time for the parties to defend their interests.

7.289. As the terms of Article 6.9 stipulate, essential facts must be disclosed before the decision applying definitive measures is published, and such disclosure must leave enough time for interested parties to defend their interests. Thus, in essence, Article 6.9 prescribes a rule requiring an investigating authority to be transparent in relation to the facts that were essential to reaching a final determination with a view to ensuring that interested parties can defend their interests.

7.290. Essential facts are not defined in Article 6.9 or elsewhere in the Anti-Dumping Agreement. However, we agree with previous DSB reports that have considered them to be those facts that are *significant* in the process of reaching a *decision* as to whether or not to *impose definitive*

[432] MOFCOM's disclosure (Exhibit JPN-18.b).

measures[433]; facts that are *salient* for a *decision* to apply *definitive measures*, as well as those that are salient for a *contrary outcome*.[434] Whether a particular fact is essential depends on the *nature and scope of the substantive obligations* at issue, the content of the *particular findings* needed to satisfy such substantive obligations, and the *factual circumstances* of each case.[435] Moreover, we also agree with a previous DSB report that the disclosure of essential facts should permit an interested party to understand the basis for the decision to apply definitive measures and enable an interested party to defend itself[436]; and that for this reason, they must be disclosed in a coherent way so as to permit an interested party to understand the basis for the decision to apply definitive measures.[437]

7.291. Based on this understanding of Article 6.9, we will examine whether Japan has established that MOFCOM failed to act consistently with this provision in the underlying investigation.

7.7.3 Analysis of Japan's claims under Article 6.9

7.7.3.1 Price effects

7.292. Japan's claims regarding the lack of disclosure with respect to MOFCOM's price effects findings cover the following issues[438]:

a. MOFCOM's finding that billets (slabs), coils, and plates were part of the same category of products.

b. MOFCOM's series-specific price effects analysis.

c. The role of "brand effects" of subject imports in MOFCOM's price analysis.

7.7.3.1.1 Disclosure regarding MOFCOM's finding that billets (slabs), coils, and plates were "the same category of product"

7.293. In the underlying investigation, interested parties requested MOFCOM to examine price effects separately for billets (slabs), coils, and plates.[439] However, MOFCOM did not do so based on, *inter alia*, its finding that billets (slabs), coils, and plates were "the same category of product".[440] MOFCOM's finding was based on its view that billets (slabs), coils, and plates have the "same basic characteristics" and only "reasonable" price differences.[441] Japan contends that MOFCOM was required, but failed, to disclose the factual basis for its finding that billets (slabs), coils, and plates were "the same category of product".[442]

7.294. China submits that due to non-cooperation by exporters, MOFCOM's findings regarding price differences between different grades, and between billets (slabs), coils, and plates, were made based on "best information available".[443] China contends that MOFCOM disclosed the basis for its decision to resort to "best information available" as well as the data it used to replace the information that was missing due to such non-cooperation.[444] In particular, MOFCOM identified China customs data

[433] Appellate Body Report, *China – GOES*, para. 240.
[434] Appellate Body Report, *China – GOES*, para. 240.
[435] Appellate Body Report, *Russia – Commercial Vehicles*, para. 5.220.
[436] Appellate Body Report, *Russia – Commercial Vehicles*, para. 5.220.
[437] Appellate Body Report, *China – GOES*, para. 240.
[438] We do not separately examine submissions made by Japan in paragraphs 562-566 of its first written submission, which are conditional arguments. In these paragraphs Japan submits that "[e]ven if MOFCOM adequately considered the differences among series of grades, MOFCOM was obligated to disclose the facts under consideration". Japan submits that its arguments "presuppose[]" that China did in fact examine additional undisclosed facts relating to differences between the various grades and it maintains its submissions only to the extent this supposition turns out to be correct. (Japan's first written submission, para. 566).
[439] MOFCOM's final determination (Exhibit JPN-5.b), p. 11.
[440] MOFCOM's final determination (Exhibit JPN-5.b), pp. 11-12.
[441] China's response to Panel question No. 20, para. 104 (referring to MOFCOM's final determination (Exhibit JPN-5.b), p. 12).
[442] Japan's first written submission, para. 538.
[443] China's first written submission, para. 771.
[444] China's first written submission, paras. 774-775.

as the best information available, and these data were publicly available.[445] China submits that using in particular Indonesian prices, which pertained to only one grade, from the China customs data, MOFCOM found that there were no significant price differences between billets (slabs), coils, and plates that it needed to address.[446]

7.295. We note that MOFCOM's conclusion that billets (slabs), coils, and plates were in the same category of products was based on its view that billets (slabs), coils, and plates have the "same basic characteristics" and only "reasonable" price differences. In our view, MOFCOM failed to disclose the essential facts that it considered in arriving at this finding. In particular, in assessing the differences between these three product categories, MOFCOM stated that due to the differences in physical form, their "prices have reasonable differences".[447] However, in the disclosure there is no discussion of or reference to the factual basis for this statement. For instance, MOFCOM's statement is not accompanied by any citation explaining the data supporting this finding. While we recognize that MOFCOM used best information available to make its determination in this regard, we do not see why that would justify the non-disclosure of the basis on which MOFCOM found reasonable price differences between billets (slabs), coils, and plates to exist. Thus, we find that MOFCOM failed to disclose in a coherent way the essential facts that it considered at arriving at its finding that there were reasonable price differences between billets (slabs), coils, or plates.

7.296. With respect to MOFCOM's finding that billets (slabs), coils, and plates had the same basic characteristics, which focused on the non-price differences between these product categories, Japan notes that MOFCOM explained that although there were differences in specific segments, uses and customers for these product categories, these were "reasonable differences within the products of the same category due to segment specifications".[448] In the same vein, MOFCOM also noted that their "final usage and customer group have similarity".[449] Japan contends that MOFCOM's disclosure did not disclose any facts used as the basis for MOFCOM's analysis of "segment uses and customers" as well as "final usage and customer groups" broken down on a product-by-product basis.[450] We note China's submission that MOFCOM disclosed the following with respect to the final usage and customer group:

> Main usages: [the product under consideration] generally has two usages. One [billets] is the raw material for cold-rolled stainless steel. It can be manufactured into cold-rolled stainless steel products through cold rolling processes. The other [coils/plates] is as a finished product for direct sales. It is mainly used for vessels, containers, railway, electric power, petroleum, petrochemical and other industries.
>
> … The hot-rolled stainless steel plate and the hot-rolled stainless steel coil have crossed and overlapped downstream usages in actual application, such as storage tanks, bridges and vessels.
>
> … [T]he usage of the domestic stainless steel billet and hot-rolled stainless steel plate (coil) and the subject product was basically the same, and they were mainly applied in vessels, containers, railway, power, petroleum, petrifaction and other industries. The sales channel of the domestic stainless steel billet and hot-rolled stainless steel plate (coil) and the subject product was basically same, which were mainly directly sold, and part of products were sold through trader's agent in Chinese market. Both of them had the same customer group, and partial domestic users purchased and used not only the subject products, but also the domestic stainless steel billet and hot-rolled stainless steel plate (coil).[451]

[445] China's first written submission, para. 775.
[446] China's first written submission, para. 782.
[447] MOFCOM's disclosure (Exhibit JPN-18.b), p. 10.
[448] Japan's second written submission, paras. 358 and 366. Japan makes these submissions in the context of its argument challenging the disclosure with respect to the product under consideration as well as price effects. Moreover, while MOFCOM made these specific findings in the context of defining the product under consideration, and specifically whether billets (slabs), coils, and plates were in the same category of products, as China notes, MOFCOM relied on these findings as part of its price effects analysis.
[449] Japan's second written submission, paras. 358 and 366.
[450] Japan's second written submission, paras. 358 and 366.
[451] China's first written submission, para. 765 (referring to MOFCOM's disclosure (Exhibit JPN-18.b), pp. 9-10, and 14). (emphasis omitted)

7.297. We agree with Japan that these statements do not demonstrate that MOFCOM disclosed the factual basis for its finding that billets (slabs), coils, and plates had the same basic characteristics. For instance, MOFCOM states that there were "reasonable differences within the products of the same category due to segment specifications".[452] Yet, it did not disclose the relevant specifications under consideration. Similarly, MOFCOM states that coils and plates have overlapping usages without identifying the factual basis underlying its assertion. In this regard, we note for example that interested parties argued before MOFCOM that shipyards for construction of ships will not turn directly to purchasing hot-rolled stainless steel coils for replacement just because of the shortage of hot-rolled stainless steel plates.[453] They also argued that rolling mills for processing and manufacturing cold-rolled sheets (such as cold-rolling plants) will not purchase hot-rolled stainless steel plates to roll cold-rolled sheets just because of the shortage in the hot-rolled stainless steel coils market.[454] Considering the arguments made by the interested parties, in our view, they would have needed these facts to defend their interests and engage with MOFCOM's finding that billets (slabs), coils, and plates have the "same basic characteristics". In failing to disclose these facts, MOFCOM failed to disclose the essential facts that formed the basis of its determination with respect to price effects, specifically its finding that billets (slabs), coils, and plates were in the same category of products.

7.298. Based on the foregoing, we find that Japan has established that MOFCOM failed to properly disclose the essential facts forming the basis of its finding that billets (slabs), coils, and plates were in the same category of products.

7.7.3.1.2 Disclosure regarding the series-specific price effects analyses

7.299. Japan contends that MOFCOM did not adequately disclose the factual basis for its series-specific price effects analyses pertaining to the 300-series, 400-series, and other series. Japan's complaint focuses on the lack of disclosure with respect to:

a. The import volume of dumped imports as well as the proportion of dumped imports in the basket of dumped imports and the domestic like product in relation to the 300-series, 400-series, and other series.

b. The relation between the increase in costs of the domestic industry for producing the 400-series and the price effects analysis.

c. The domestic sales volume of the other series for certain years of the injury POI.[455]

7.300. China rejects Japan's arguments.

a. With respect to import volume, China contends that because a price effects analysis does not necessarily require an examination of the volume of dumped imports, MOFCOM was not required to disclose in detail the volume of dumped imports by series of steel grade.[456] China similarly contends that MOFCOM was not required to disclose the series-specific proportion of subject imports in the basket of dumped imports and domestic like products.[457] China asserts that to the extent certain facts pertaining to import volume and proportion were considered as part of MOFCOM's price effects analysis, MOFCOM disclosed them.[458]

b. Regarding the relation between the increase in costs of the domestic industry and the price effects analysis in the 400-series, China contends that MOFCOM found that the prices of the domestic like product increased but not to a level higher than its cost.[459] China submits that because the domestic prices in 2015 and 2016 were lower than in 2014, and the price

[452] MOFCOM's disclosure (Exhibit JPN-18.b), p. 10; MOFCOM's final determination (Exhibit JPN-5.b), p. 12.
[453] Non-injury brief (revised) (Exhibit JPN-8.b (BCI)), p. 10.
[454] Non-injury brief (revised) (Exhibit JPN-8.b (BCI)), p. 10.
[455] Japan's first written submission, para. 558.
[456] China's response to Panel question No. 54 (a) and (b), para. 117.
[457] China's response to Panel question No. 54 (a) and (b), para. 118.
[458] China's response to Panel question No. 54 (a) and (b), para. 118.
[459] China's first written submission, para. 798.

increase took place in 2017, it was logical for MOFCOM to focus on the data in 2017.[460] MOFCOM accordingly disclosed the data for 2017.

c. With respect to the disclosure concerning the domestic sales volume in relation to the other series, China notes that MOFCOM referred to domestic sales volume because the domestic industry increased its domestic sales by lowering prices, which resulted in adverse price effects.[461]

7.301. We will examine below MOFCOM's disclosure with respect to each of these series. In doing so, we note that in determining whether a fact underlying MOFCOM's price effects analysis was "essential" under Article 6.9, we will examine the nature of price effects analysis made by MOFCOM and the facts supporting it. We note in this regard that China confirmed that MOFCOM relied on the volume and price of subject imports in assessing the effect of subject imports on the prices of the domestic like products.[462]

7.7.3.1.2.1 300-series

7.302. With respect to the 300-series, MOFCOM's disclosure states as follows:

> Regarding the 300-series products, during the injury POI, the prices of 300-series dumped imports and 300-series domestic like products both showed a downward trend, and the price difference between the two was significantly reduced, down 72% from 2014 to 2017. In January-March of 2018, the price of 300-series dumped imports was lower than that of 300-series domestic like products, and the price difference was RMB 873/ton. *The total volume of 300-series dumped imports increased from 80,000 tons in 2014 to 500,000 tons in 2017. In 2017, 300-series dumped imports accounted for 17% of the dumped imports and domestic like products of the same specification, and this proportion reached 48% in January-March of 2018*. The overall price decline of the 300-series dumped imports had a comparatively great effect on the price of domestic like products of the same specification and as a whole. In order to obtain and maintain certain quantities of product sales, from 2014 to 2015, the price of 300-series domestic like products was close to or lower than its sales cost; although the price rebounded due to the positive domestic policies in 2016, *as the volume of 300-series dumped imports significantly increased and the import prices continued to decline, the prices of 300-series domestic like products declined again at the end of the POI*. The price of 300-series dumped imports already fell below that of 300-series domestic like products.
>
> The *300-series dumped imports had adverse effects on the prices of 300-series domestic like products*.[463]

7.303. We note that in response to Japan's contention that MOFCOM only partially disclosed the volume and proportion of subject imports over the POI, China submits that MOFCOM relied on the evolution of imports from 2014 to 2017, and it disclosed the volume of imports for those two years. With respect to the proportion of subject imports, China similarly contends that MOFCOM disclosed the facts pertaining to the proportion of subject imports that it relied on as part of its price effects analysis, which were the increase in proportion from 2017 to the first quarter of 2018.[464]

7.304. We note that in reaching its conclusion that dumped imports of the 300-series had adverse effects on the prices of the domestic like product of the 300-series, MOFCOM expressly referred to the evolution of the volume of imports from 2014 to 2017, and the changes in the proportion of subject imports from 2017 to the first quarter of 2018. Considering MOFCOM only relied on changes in the proportion of subject imports from 2017 to the first quarter of 2018, we do not consider that MOFCOM needed to disclose data pertaining to other periods of the POI. However, with respect to subject import volume, we note MOFCOM found that "although the price rebounded due to the

[460] China's first written submission, para. 798.
[461] China's first written submission, para. 794.
[462] China's response to Panel question No. 29(b), para. 153.
[463] MOFCOM's disclosure (Exhibit JPN-18.b), p. 25 (emphasis added). See also MOFCOM's final determination (Exhibit JPN-5.b), p. 41.
[464] China's response to Panel question No. 54(a) and (b), para. 124.

positive domestic policies in 2016, as the volume of 300-series dumped imports significantly increased and the import prices continued to decline, the prices of 300-series domestic like products declined again at the end of the POI". While MOFCOM focuses on the relation between the significant increase in volume of imports and prices of domestic like product (presumably from 2016), the finding would not have made it clear to the interested parties which specific years of the POI MOFCOM relied on to assess the increase in the volume of subject imports. Considering that this finding was a basis for MOFCOM to find adverse effects in the 300-series, in our view MOFCOM should have disclosed the essential facts underlying this finding in a coherent way so as to allow the interested parties to defend their interests. To the extent the passage suggests that MOFCOM was relying on the increase in subject imports from 2016 to the end of the POI (which ended on the first quarter of 2018), this would suggest that MOFCOM also relied on changes in the volume of subject imports in the intervening years of the POI, including the first quarter of 2018, and not just changes from 2014 to 2017 as China contends. In such a case, MOFCOM should have also disclosed the data pertaining to these periods.

7.305. Based on the foregoing, we find that Japan has established that MOFCOM did not disclose the essential facts with respect to its finding concerning the adverse effect of subject imports of the 300-series on prices of the domestic like product of the same series.

7.7.3.1.2.2 400-series

7.306. With respect to the 400-series, MOFCOM's disclosure stated as follows:

> Regarding the 400-series products, the price of 400-series dumped imports was consistently higher than that of 400-series domestic like products, and the trend of the two was generally consistent, showing an upward trend. The price of 400-series dumped imports increased cumulatively by 1.93% in 2017 as compared with 2014, which was less than the cumulative increase in 400-series domestic like products over the same period. *The volume of 400-series dumped imports continued to increase, from 88,000 tons in 2014 to 156,000 tons in 2017, with a cumulative increase of 77%. In January-March of 2018, the volume increased by 18% year-on-year. The proportion of 400-series dumped imports in the dumped imports and domestic like products of the same specification increased from 5% in 2014 to 9% in 2017.* Affected by this, during the injury POI, although the price of 400-series domestic like products increased, the increase in price was basically at the same level as the increase in cost. In 2017, the sales cost of 400-series domestic like products increased by 29%, and the price only increased by 25% during the same period.[465]

7.307. With respect to Japan's contention regarding the partial disclosure of the volume and proportion of subject imports, we take China's point, which in our view is supported by the extract of MOFCOM's disclosure set out above, that MOFCOM's 400-series price effects findings were based on a consideration of the proportion of subject imports only in 2014 and in 2017.[466] However, MOFCOM's statement that the "volume of 400-series dumped imports continued to increase" suggests that MOFCOM's findings were also based on a consideration of the increase in imports over the entire POI, including intervening trends during the POI. Indeed, China itself states that "MOFCOM explained that the increase was continuous, which reveals the intermediary trends (continuously increasing year-on-year) rather than just providing information on starting and end point data", which shows to us that MOFCOM considered the volume of subject imports in the intervening years of the POI, and not just changes from 2014 to 2017.[467] In our view, simply stating that the volume of imports of this series "continued to increase" does not disclose in a coherent way the changes in the volume of subject imports over the POI.

7.308. We also note the following statements made by MOFCOM: "*during the injury POI*, although the price of 400-series domestic like products increased, the increase in price was basically at the same level as the increase in cost"[468]; and that "[i]n 2017, the sales cost of 400-series domestic like products increased by 29%, and the price only increased by 25% during the same period." Japan

[465] MOFCOM's disclosure (Exhibit JPN-18.b), p. 26 (emphasis added). See also MOFCOM's final determination (Exhibit JPN-5.b), p. 42.
[466] China's response to Panel question No. 54 (a) and (b), para. 124.
[467] China's first written submission, para. 797.
[468] Emphasis added.

contends that these MOFCOM statements focused only on the sales cost for 2017 and did not disclose the data other than for 2017 (or explain why those data were not relevant).[469] Japan states that the data pertaining to the "sales cost" and "increase in costs" were essential facts that MOFCOM was required to disclose.[470] However, China maintains that MOFCOM found that subject imports suppressed the prices of the 400-series, and the prices of this series increased but not to a level higher than the increase in costs.[471] China states that the key increase in price took place in 2017, and MOFCOM's focus on 2017 was logical as the domestic prices in 2015 and 2016 were lower than those in 2014.[472]

7.309. In our view, the fact that MOFCOM made statements about the price-cost relationship that existed "*during the injury POI*" reveals that its price effects findings with respect to the 400-series were based on a consideration of information from the entire injury POI – namely, from 2014 to the first quarter of 2018. That being the case, interested parties were entitled to know the data that MOFCOM considered for the entire injury POI. MOFCOM's disclosure that "[i]n 2017, the sales cost of 400-series domestic like products increased by 29%, and the price only increased by 25% during the same period" was not sufficient in our view for interested parties to defend themselves in relation to MOFCOM's finding that during the injury POI the increase in price was basically at the same level as the increase in cost.

7.310. Based on the foregoing, we find that Japan has established that MOFCOM did not disclose the essential facts with respect to its finding concerning the adverse effect of subject imports of the 400-series on prices of the domestic like product of the same series.

7.7.3.1.2.3 Other series

7.311. With respect to the "other" series, MOFCOM's disclosure stated as follows:

> Regarding other series products, the price of other series dumped imports showed an upward trend from 2014 to 2017. In the same period, the price of domestic like products of the same specifications fell first and then rose. In January-March of 2018, the prices of the two declined. *The import volume of other series dumped imports increased first and then decreased, from 58,000 tons in 2014 to 68,000 tons in 2016, and decreased year by year in the later period of the injury POI, but its proportion in the dumped imports and domestic like products of the same specification was 79%-92%*. Since *the import volume of other series dumped imports far exceeded the sales volume of domestic like products, other series domestic like products were forced to lower their prices to achieve an overall increase in sales volume, from less than 5,000 tons in 2014 to 10,000 tons in 2017*. At the end of POI, the price of other series imported products fell again, accompanied by the rise of the import volume accounting for the domestic market share of the same specification, and the price of other series domestic like products also fell in the same period.
>
> Other series dumped imports had adverse effects on the prices of other series domestic like products.[473]

7.312. Japan argues that MOFCOM did not disclose the volume of imports or the domestic sales volume for the different parts of the POI, or specify the period where the proportion of subject imports of the other series was in the range of 79%-92%.[474] China submits that MOFCOM properly disclosed information on the volume of subject imports. In support of this submission, China notes that MOFCOM explained that dumped imports increased from 2014, and then decreased again to the 2016 level.[475] Thus, according to China, it was thus clear that the 2015 volume of imports was higher than the 2014 and 2016 levels.[476] In any event, per China, MOFCOM's finding was not linked to

[469] Japan's first written submission, para. 560.
[470] Japan's first written submission, paras. 560-561.
[471] China's first written submission, para. 798.
[472] China's first written submission, para. 798.
[473] MOFCOM's disclosure (Exhibit JPN-18.b), p. 26. See also MOFCOM's final determination (Exhibit JPN-5.b), p. 42.
[474] Japan's comments on China's response to Panel question No. 54(a) and (b), para. 79(c); first written submission, para. 556.
[475] China's first written submission, para. 793.
[476] China's first written submission, para. 793.

import volume in absolute terms. Instead, MOFCOM's finding was based on the fact that dumped imports were significantly larger than the domestic sales.[477] In this respect, China contends that MOFCOM disclosed that the proportion of subject imports was throughout the relevant period very high, ranging between 79%-92%.[478] The adverse effects, according to China, did not have anything to do with any increase or decrease in the proportion of subject imports. Instead, the adverse effects were based on the proportion of subject imports being significantly higher than that of domestic sales.[479] China also submits that MOFCOM referred to the domestic sales volumes by series since the price effects related to the domestic producers of other series being forced to lower their prices to achieve an increase in their domestic sales.[480]

7.313. In determining whether MOFCOM disclosed the essential facts underlying its finding regarding the adverse effect of subject imports of the other series, we note that MOFCOM focused on the changes in import volumes between 2014 and 2016, as well as the "later period of the injury POI". This shows that MOFCOM examined the changes in volume of imports in different years of the POI as part of its analysis. Thus, to the extent China's contention is that MOFCOM's finding was not linked to import volume in absolute terms, we do not consider that this contention is supported by MOFCOM's disclosure set out above. Instead, we consider that MOFCOM examined the changes in volume of subject imports over the entire POI. However, MOFCOM failed to disclose the import volume of subject imports over the POI. While MOFCOM referred to a decrease in imports in the later period of the POI, in our view, such a narrative description does not disclose the subject import volume in a sufficiently coherent manner for parties to defend their interests. We note, moreover, that MOFCOM found that "[a]t the end of POI, the price of other series imported products fell again, accompanied by the rise of the import volume accounting for the domestic market share of the same specification, and the price of other series domestic like products also fell in the same period". However, in our view, such a disclosure is not consistent with Article 6.9 because it does not clarify the specific period of the POI it refers to, or set out the sales volume for the "end of the POI". We also note that MOFCOM did not set out the specific periods during which the proportion in the dumped imports and domestic like products of the same specification was 79%-92%. We thus do not consider that MOFCOM's disclosure was sufficient under Article 6.9.

7.314. Based on the foregoing, we find that Japan has established that MOFCOM did not disclose the essential facts with respect to its finding concerning the adverse effect of subject imports of the other series on prices of the domestic like product of the same series.

7.7.3.1.3 Disclosure regarding brand effects

7.315. In making its finding on price effects, MOFCOM stated as follows:

> Due to difference of development conditions, a certain brand effect owned by the dumped imports in Chinese market should be recognized by consumers, and the price decline of dumped imports (including the specific specifications) had an obviously adverse effect on the price of the domestic like product.[481]

7.316. Japan contends that since the "brand effect" of subject imports led MOFCOM to conclude that subject imports depressed domestic like product prices, despite being higher-priced, MOFCOM should have, but failed to, disclose the factual basis supporting the finding that subject imports had certain brand effects.[482] China contends that MOFCOM referred in the disclosure document to the fact that the dumped imports had a certain brand effect in the Chinese market, which, China notes, explained why their prices were generally higher than the prices of the domestic like products.[483] However, per China, MOFCOM did not rely on such brand effects to reach any conclusion on price effects.[484] Instead, per China, MOFCOM examined the evolution of prices and volume over the POI

[477] China's first written submission, para. 794.
[478] China's first written submission, para. 794; response to Panel question No. 54(a) and (b), para. 120.
[479] China's first written submission, para. 794.
[480] China's first written submission, para. 794.
[481] MOFCOM's disclosure (Exhibit JPN-18.b), p. 27. See also MOFCOM's final determination (Exhibit JPN-5.b), p. 43.
[482] Japan's first written submission, para. 568; second written submission, paras. 390-391.
[483] China's first written submission, para. 813.
[484] China's first written submission, para. 813.

to assess whether subject imports were having an adverse effect on the prices of the same series despite being priced higher than domestic like products.[485]

7.317. Although China contends that MOFCOM did not rely on brand effects to reach any conclusion regarding the price effects of subject imports, we note from the above extract that MOFCOM, in the same sentence, tied its statement that "a certain brand effect owned by the dumped imports in Chinese market should be recognized by consumers" to the observation that "the price decline of dumped imports (including the specific specifications) had an obviously adverse effect on the price of the domestic like product". In our view, it is not clear from this sentence that MOFCOM did not rely on brand effects to explain the adverse effect on prices of the domestic like product. If anything, the excerpt set out above appears to suggest the opposite. In the absence of a coherent disclosure on the role of brand effects, or more detailed disclosure of the brand effects that MOFCOM found to exist, interested parties would have been unable to meaningfully engage with MOFCOM's findings in this regard or provide meaningful comments on whether such brand effects actually existed, and if so, explained the higher prices of subject imports.

7.318. Based on the foregoing, we find that Japan has established that MOFCOM did not disclose the essential facts with respect to its reference to the brand effect of subject imports.

7.7.3.1.4 Overall conclusion

7.319. Based on the foregoing, we find that Japan has established that MOFCOM acted inconsistently with Article 6.9 because it failed to disclose the essential facts under consideration that formed the basis for its price effects analysis with respect to the following:

a. MOFCOM's findings that billets (slabs), coils, and plates were in the same category of products;

b. MOFCOM's price effects findings with respect to the 300-series, 400-series and other series; and

c. MOFCOM's reference to certain brand effects of subject imports.

7.7.3.2 Definition of the product under consideration

7.320. In its disclosure document as well as its final determination, MOFCOM stated that "[b]ased on either *factual* or *legal* analysis, stainless steel billet, hot-rolled stainless-steel plate (coil) shall be identified as the same category of product [i.e. the product under consideration]".[486] It then added that "there is no legal provision requiring that the subcategories/specifications of the subject product must be similar or directly competitive in order to constitute a subject product".[487] Nevertheless, MOFCOM went on to make the following findings which it relied upon to support its definition of the product under consideration:

> [D]*ue to the difference in physical form between stainless steel billet and hot-rolled stainless steel plate (coil), their prices have reasonable differences*.
>
> …
>
> After further examination, the Investigating Authority also found that the physical and chemical characteristics and technical indices of hot-rolled stainless steel plate/coil depended on the physical and chemical characteristics of the stainless steel billet in the steelmaking process, and that there was no substantial difference in the basic internal characteristics, and that the difference in physical form cannot disprove the fact that they had the same basic characteristics. The final trading market and usage of stainless steel billet and hot-rolled stainless steel plate (coil) are consistent. The hot-rolled stainless steel plate and the hot-rolled stainless steel coil have crossed and overlapped

[485] China's first written submission, para. 812.
[486] MOFCOM's disclosure (Exhibit JPN-18.b), p. 9; MOFCOM's final determination (Exhibit JPN-5.b), p. 11. (emphasis added)
[487] MOFCOM's disclosure (Exhibit JPN-18.b), p. 9; MOFCOM's final determination (Exhibit JPN-5.b), p. 11.

> downstream usages in actual application, such as storage tanks, bridges and vessels. *Although they have differences in specific segment uses and customers, these are reasonable differences within the products of the same category due to segmentation specifications*. Their *final usage and customer group have similarity*. Therefore, the Investigating Authority maintained the preliminary determination that stainless steel billet and hot-rolled stainless steel plate (coil) fall into the same category of product and can be assessed as a whole.[488]

7.321. Japan submits that interested parties were unable to examine the factual basis of MOFCOM's finding that the price differences between billets (slabs), coils, and plates were "reasonable" because MOFCOM failed to provide the figures for the prices that it considered.[489] Japan also contends that because MOFCOM did not disclose the kind of segment uses and customers, or final usage and customer groups that MOFCOM reviewed for each type of product category, and the extent to which MOFCOM found them to be similar or different, interested parties could not examine whether the differences in them were, as MOFCOM stated, "reasonable".[490]

7.322. China contends that, in light of the absence of any discipline in the Anti-Dumping Agreement regarding the definition of the product under consideration, MOFCOM was under no obligation to disclose the factual basis for assessing the similarities or dissimilarities between billets (slabs), coils, and plates.[491] Nonetheless, China contends that MOFCOM disclosed this factual basis.

7.323. We note that MOFCOM made its finding that that billets (slabs), coils, and plates were in "the same category of product" when defining the product under consideration, and then relied on this finding as part of MOFCOM's price effects analysis. We recall that in paragraphs 7.295-7.298 above, we examined Japan's complaint against MOFCOM's disclosure pertaining to its price effects analysis, finding that MOFCOM failed to disclose the essential facts underlying its finding that billets (slabs), coils, and plates were in "the same category of product".

7.324. Specifically, we have found that in the light of the nature of its finding, MOFCOM was required to, but did not, disclose the facts that it relied upon to conclude that that the products had the same basic characteristics (for instance regarding non-price differences pertaining to segment specifications and usages). Japan's complaint against MOFCOM's alleged failure to disclose the essential facts underlying its decision on the product under consideration is focused on an alleged failure on the part of MOFCOM to disclose the same information – namely, prices relied upon to reach the "reasonable" price differences conclusion as well as the data underlying MOFCOM's finding that the differences in the segment uses and customers of these three product categories were reasonable. Having already found that MOFCOM failed to disclose this information in the context of its price effects analysis, we do not believe it is necessary for the purpose of achieving a positive resolution of this dispute to also make findings on the alleged non-disclosure of the essential facts underlying MOFCOM's definition of the product under consideration.

7.325. Accordingly, we make no findings with respect to Japan's claim under Article 6.9 challenging the lack of disclosure of the essential facts under consideration in relation to MOFCOM's definition of the product under consideration.

7.7.3.3 Cumulation

7.326. Japan contends that MOFCOM failed to disclose the essential facts underlying its findings regarding the similarities between certain characteristics of the subject imports from the European Union, Indonesia, Japan, and Korea.[492] In particular, Japan contends that MOFCOM failed to disclose the essential facts pertaining to the following: (a) physical and chemical characteristics of the products exported by the four countries, (b) their distribution channels, (c) their pricing strategies (d) their customer groups, and (e) their volume and price change trends.[493] Japan contends in this regard, relying on previous DSB reports, that Article 6.9 requires an investigating

[488] MOFCOM's disclosure (Exhibit JPN-18.b), p. 10; MOFCOM's final determination (Exhibit JPN-5.b), p. 12.
[489] Japan's first written submission, para. 536.
[490] Japan's first written submission, para. 536.
[491] China's first written submission, para. 759.
[492] Japan's first written submission, para. 571.
[493] Japan's first written submission, paras. 572-580; second written submission, paras. 394-410.

authority to disclose the facts in a manner that an interested party can understand what data the investigating authority has used, and how it has used it.[494] China rejects Japan's contentions.

7.327. In its disclosure document, MOFCOM stated, *inter alia*, as follows:

> The investigation shows that the *physical and chemical characteristics, product usage, raw material, production technology* and other aspects of dumped imports originating in the EU, Japan, Korea and Indonesia *were basically the same*; the companies in the EU, Japan and Korea and Indonesia sold the dumped imports to the domestic market by direct sale, distribution and other manners, which accounted for a relevant market share of the domestic market; *all manufacturers or dealers had the same or similar pricing strategies; the dumped imports had the same customer group, and the domestic downstream users could freely purchase and use the dumped imports originating in the EU, Japan, Korea and Indonesia*. To sum up, the Investigating Authority determined that there was a competitive relationship between dumped imports in the preliminary determination.
>
> After preliminary determination, the Investigating Authority also listened to the statement of the Applicant and responding companies as well as other parties at hearing and reviewed the written statement materials provided after hearing. After review, firstly, the Investigating Authority considered that there were many grades of the stainless steel billet and hot-rolled stainless steel plate (coil), and it was normal to have a certain difference on different specifications and models. A cumulative assessment does not require completely identical competitive conditions of different countries (regions). Secondly, according to the statistical data of China Customs, *although the volume and price change trend of the imports from four countries (regions) were different*, the dumping margin of imports from all countries (regions) within the dumping POI was not de minimis, the volume of imports was not negligible, and the differences in the volume and price change trends could not refute a competitive relationship. Thirdly, *as shown by the statistical data of China Customs, questionnaire responses* and sales information on a product-specific basis provided by various interested parties, *all of the dumped imports exported from the EU, Japan and Korea and Indonesia to China included 300-series products*, the subject products of four countries (regions) *overlapped in terms of specifications and models, the dumped imports of Indonesia had direct competition with those of the EU, Japan and Korea in the Chinese market*. Therefore, the Investigating Authority did not accept the assertion from the foregoing interested parties. Through comprehensive consideration of above opinion and reason, the Investigating Authority maintained the decision of the preliminary determination in the final determination, i.e., there was a competitive relationship between the subject products and between the subject products and domestic like products, and it was appropriate to make a cumulative assessment of the effects of dumped imports on the domestic industry.[495]

7.328. The question before us is whether the disclosure above was sufficient to permit interested parties to understand, for the purpose of defending their interests, the essential factual basis of MOFCOM's finding that imports from the four investigated countries were similar on account of (a) physical and chemical characteristics; (b) distribution channels; (c) pricing strategies; (d) customer groups; and (e) volume and price change trends.

7.329. We begin by noting that when it comes to MOFCOM's findings with respect to volume and price trends, MOFCOM's disclosure refers to the "statistical data of China Customs" as the source of its analysis. Thus, contrary to Japan, we do not find fault in MOFCOM's disclosure with respect to this matter. As regards MOFCOM's findings with respect to the four other matters, we note that Japan argues that MOFCOM was required to disclose (a) the data concerning various specifications and models of the product broken down by four countries; (b) detailed facts that led MOFCOM to conclude that the distribution channels of these four countries were similar, such as the "percentage of each of the products imported from each of the countries (regions) via each of the relevant distribution channels"; (c) the kind of customer groups or downstream users that exist for subject imports from each of the countries, or (d) the country-specific volume and price trends for each

[494] Japan's second written submission, para. 395.
[495] MOFCOM's disclosure (Exhibit JPN-18.b), pp. 17 and 19.

country that was under investigation in this case.[496] In our view, this level of detail is not required as part of a disclosure of essential facts for the purpose of Article 6.9. This is not to suggest that this type of information is not relevant to the defence of the parties' interest in the course of the anti-dumping proceedings in general. In fact, Article 6.4 specifically requires that investigating authorities provide whenever practicable timely opportunities to interested parties to see information that is relevant to the presentation of their case. Since Article 6.9 is not meant to duplicate the requirements of Article 6.4, we do not consider that such detailed data needs to be disclosed as part of the disclosure on essential facts.

7.330. Based on the foregoing, we find that Japan has not established that MOFCOM's disclosure of the essential facts underlying its cumulation analysis was inconsistent with Article 6.9 of the Anti-Dumping Agreement.

7.7.3.4 State of domestic industry

7.331. Japan contends that in evaluating the various factors that indicate the state of the domestic industry, MOFCOM failed to disclose the calculation formulas and source of the information of the figures for (a) domestic apparent consumption, (b) domestic sales volume, and (c) domestic market share.[497] In addition, as discussed in more detail below, per Japan, MOFCOM failed to provide a sufficient disclosure of the essential facts underlying certain assertions it made as part of its analysis of the impact on the domestic industry.[498] China rejects Japan's contentions.

7.7.3.4.1 Disclosure of "calculation formula and source of information"

7.332. Japan argues that MOFCOM failed to disclose the calculation formula and sources of information used to determine domestic apparent consumption, domestic sales volume and domestic market share figures used in its injury analysis. According to Japan, because injury factors for the analysis of the state of domestic industry are important factors that affect the determination of injury, the formulas and sources of information used to determine those factors should be considered essential facts.[499] Japan maintains that because its own calculations pertaining to apparent domestic consumption, domestic sales volume and domestic market share raise serious doubts on the reliability of the figures used by MOFCOM (and disclosed) to analyse the status of the domestic industry, the disclosure of the facts underlying MOFCOM's assessment of these three injury factors was even more important.[500] Thus, according to Japan, MOFCOM should have disclosed the method of calculation and the source of the data used for these three injury factors so that the interested parties could verify the accuracy of MOFCOM's calculations.[501]

7.333. China contends that MOFCOM's disclosure pertaining to apparent domestic consumption, domestic market share and domestic sales volume was consistent with Article 6.9.[502] Noting Japan's submission that it is unable to reconcile the figures presented by MOFCOM with respect to these injury factors with its own calculations, China contends that this is due to calculation errors made by Japan itself.[503]

7.334. With respect to apparent domestic consumption, as we note in paragraph 7.208 above, the parties agree that it is typically calculated by adding total domestic production and import volume and then subtracting the export volume. Japan contends that MOFCOM's disclosure with respect to this factor was inadequate because, according to its own calculations the figures for apparent domestic consumption set out in the determination were higher than the sum of total domestic production and import volume. However, as we noted in paragraphs 7.209-7.210 above, Japan has not established that this was actually the case. Specifically, Japan calculates the apparent domestic consumption based on the production volume of the domestic industry set out in MOFCOM's injury analysis. MOFCOM disclosed that the production output used for the injury analysis did not include

[496] Japan's first written submission, paras. 572, 575, 578, and 580.
[497] Japan's first written submission, para. 582.
[498] Japan's first written submission, paras. 589-590 and 591-592.
[499] Japan's first written submission, para. 583.
[500] Japan's first written submission, para. 588.
[501] Japan's first written submission, para. 588.
[502] China's first written submission, para. 844.
[503] China's first written submission, paras. 847-851.

the production of three companies that MOFCOM excluded from the domestic industry.[504] However, the data set MOFCOM used to calculate apparent domestic consumption included (as it should have) the domestic production of all domestic producers, including those excluded from the scope of the domestic industry.[505] Thus, as we see it, Japan's concerns do not arise from the lack of disclosure, but from its own misunderstanding of the disclosed information.

7.335. With respect to domestic market share, as we note in paragraph 7.195 above, China explains, relying on record evidence, that to calculate the domestic industry's market share, MOFCOM used the domestic industry's sales volume plus domestic captive consumption in the numerator and the total apparent consumption in the denominator. Japan does not include captive consumption in the numerator, and thus its own calculations lead it to a market share figure that is different from that presented by MOFCOM. However, we note that in its injury analysis, MOFCOM stated that "[i]f the captive use [of domestic companies] was excluded, the market share of the commodity volume was still gradually diminished since 2017".[506] In our view, this disclosure would have made it reasonably clear to the interested parties that the market share figures used as part of the injury analysis included data on captive consumption. Thus, as we see it, again Japan's concerns do not arise from the lack of disclosure, but from its own misunderstanding of the disclosed information.

7.336. With respect to the domestic sales volume, we note China's argument, with which we agree, that domestic sales volumes are not based on any formula as such, but instead are a collation of the reported sales volume of the domestic producers. In the absence of sufficient arguments from Japan as to what specific calculations MOFCOM was required to disclose as part of the domestic sales volume, we do not address this argument any further.

7.337. Based on the foregoing, we find that Japan has not established that MOFCOM failed to disclose the essential facts with respect to domestic apparent consumption, domestic industry's market share and sales volume.

7.7.3.4.2 Factual basis for certain assertions MOFCOM made as part of its analysis of the impact of dumped imports on the domestic industry

7.338. Japan argues that MOFCOM failed to provide a sufficient disclosure of the essential facts underlying certain assertions made by MOFCOM as part of its analysis regarding the impact of dumped imports on the domestic industry. Japan focuses on the following finding made by MOFCOM.

> In summary, despite the improvement of the domestic industry's production and financial situation for individual years, due to the impact of increased volume and decreased price of dumped imports, during the injury POI, under the circumstance of favorable market conditions such as steady growth in domestic demand and *positive industrial policies*, the domestic industry was still facing *severe production and operation pressures*, production capacity was not effectively released, market share saw an overall

[504] China's first written submission, para. 848 (referring to MOFCOM's disclosure (Exhibit JPN-18.b), p. 36).

[505] Japan objected to China's assertion that in calculating the production output of the domestic industry (for the purpose of the injury analysis), MOFCOM excluded the production output of three domestic producers (which were those producers that MOFCOM had excluded from the scope of the domestic industry), but included the production of these domestic producers while calculating domestic apparent consumption. In particular, Japan contended in its second written submission that China did not substantiate this assertion "with any data or other information" demonstrating the total production output of the three producers it excluded, and it is not possible to confirm whether the exclusion of those three producers from the total production output can explain the discrepancy alluded by Japan. (Japan's second written submission, para. 415). However, China provided explanations and data showing that one could derive the apparent consumption figures provided in the final determination by adding to the production output of the domestic industry, the production volume of excluded producers along with the import volume (and excluded export volume). (China's response to Panel question No. 48, paras. 88-91). In its comments on China's response to Panel questions, Japan did not object to these explanations and data.

[506] MOFCOM's disclosure (Exhibit JPN-18.b), p. 33. See also MOFCOM's final determination (Exhibit JPN-5.b), p. 50.

> downward trend, and ending inventory was high, pretax profits were still at a low level, and *investment did not receive returns that it should have had*.[507]

7.339. Japan refers to the extract set out above, and states that this extract contains a "summary of the reasons" that MOFCOM relied upon in concluding that the domestic industry suffered injury, and that all items set out therein (including the reference to (a) positive industrial policies, (b) severe production and operation pressures, and (c) that the domestic industry did not receive the return on its investment that it should have) were essential facts that MOFCOM was required to disclose.[508] Japan submits that interested parties were unable to examine these statements properly because they received no information about the facts underlying these statements.

7.340. Regarding the reference to "positive industrial policies", China contends that the reference was not extremely important and necessary in the process of reaching a decision and thus not an essential fact.[509] In any case, per China, MOFCOM disclosed details about the policy as follows:

> According to the data of the injury POI, the domestic demand continued to increase, and the actual production output and demand basically increased simultaneously. At the same time, the state's implementation of industrial policies to eliminate outdated production capacity played a positive role in improving domestic production and operation.[510]
>
> Because of the positive industrial policy of Chinese market in 2016, when the import price of the dumped imports continuously fell, the market price of the domestic like products transiently rebounded.[511]
>
> In 2016, due to the favorable effects of domestic industrial adjustment policies and continuous improvement of the domestic industry’s management and technical level, the sales volume and sales revenue of domestic like products increased, and domestic industry turned losses into profits, but pretax profits and return on investments were still at a lower level. In 2017, affected by factors such as further elimination of outdated production capacity, the sales price of domestic like products rebounded, and the sales revenue and pretax profits increased accordingly. However, the increased volume and decreased price of dumped imports weakened the effect of relevant industrial policies.[512]

7.341. With respect to the reference to "severe production and operation pressures", China submits that this statement is part of MOFCOM's reasoning (and not an essential fact itself).[513] China contends that the disclosure explained the following in relation to severe production and operation pressures:

> During the injury POI, dumped imports occupied the market share in China through dumping, while dumped imports caused a downward pressure on the sales prices of domestic like products, resulting in a significant squeeze on the market space of domestic like products, and no effective release in the production capacity, a downward trend in market share, a high level of ending inventory and low pretax profits, which caused difficulties and pressure on the production and operation of the domestic industry.[514]

7.342. China contends that this explanation clarified that the production and operation pressures relied on the data concerning production capacity, market share, ending inventory and pre-tax profits, all of which were disclosed in detail.[515]

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[507] MOFCOM's disclosure (Exhibit JPN-18.b), p. 32. See also MOFCOM's final determination (Exhibit JPN-5.b), p. 49. (emphasis added)
[508] Japan's first written submission, para. 590.
[509] China's first written submission, para. 857.
[510] MOFCOM's disclosure (Exhibit JPN-18.b), p. 36.
[511] MOFCOM's disclosure (Exhibit JPN-18.b), p. 28.
[512] MOFCOM's disclosure (Exhibit JPN-18.b), p. 32.
[513] China's first written submission, para. 859.
[514] China's first written submission, paras. 859-860. MOFCOM's disclosure (Exhibit JPN-18.b), p. 34.
[515] China's first written submission, para. 860.

7.343. With respect to the assertion that "investment did not receive returns that it should have had", China again notes that this statement is part of MOFCOM's reasoning, and thus not an essential fact.[516] According to China, MOFCOM relied on the following data set out in the disclosure to support its reasoning:

> 9. Return on Investment.
>
> During the injury POI, the investment return of domestic like products kept a rising trend, and fell at the later [part of the] period. It was -0.37%, -3.94%, 0.26%, 2.34% and 0.45% respectively in 2014, 2015, 2016, 2017 and January-March of 2018. Of which it fell by 3.56 percentage points year-on-year in 2015, changed from the negative to the positive in 2016, rose by 2.08 percentage points year-on-year in 2017, it was 1.68% in January-March of 2017, and fell by 1.23 percentage points year-on-year in January-March of 2018.[517]
>
> In 2016, due to the favorable effects of domestic industrial adjustment policies and continuous improvement of the domestic industry's management and technical level, the sales volume and sales revenue of domestic like products increased, and domestic industry turned losses into profits, but pretax profits and return on investments were still at a lower level.[518]

7.344. In determining whether MOFCOM made the proper disclosures, we agree with China that the statements Japan focuses on must be considered in the context of other parts of the disclosure document.

7.345. With respect to industrial policies, to the extent the reference to these industrial policies were essential facts, MOFCOM's reference in other parts of the disclosure document to the state's implementation of industrial policies to eliminate outdated production capacity would have indicated to the interested parties the nature of the industrial policies that MOFCOM was referring to in this summary section.

7.346. With regard to severe production and operation pressures, we note from the part of the disclosure document cited by China, set out in paragraph 7.341 above, that MOFCOM identified a series of factors "which caused difficulties and pressure on the production and operation of the domestic industry". In our view, Japan has not adequately explained why in light of these explanations in other parts of the disclosure document, interested parties could not understand what the reference to severe production and operation pressures meant.[519]

7.347. With regard to MOFCOM's reference to the domestic industry's investment not receiving the returns it should have we note that the disclosure document contains a section titled "return on investment". In that section MOFCOM noted that "the investment return of domestic like products kept a rising trend, and fell at the later [part of the] period". MOFCOM also set out the percentage changes in this regard in 2014, 2015, 2016, 2017, and the first quarter of 2018. In light of these references, we do not consider that Japan has established why interested parties would have been unable to understand MOFCOM's reference in the summary section that the domestic industry's investment did not receive the returns it should have had.[520]

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[516] China's first written submission, para. 859.
[517] China's first written submission, paras. 861-862. MOFCOM's disclosure (Exhibit JPN-18.b), p. 30.
[518] China's first written submission, paras. 861-862. MOFCOM's disclosure (Exhibit JPN-18.b), p. 32.
[519] See e.g. Japan's second written submission, para. 421. Japan generally asserts that with respect to, *inter alia*, production and operation pressures, China's explanations are not understandable from the disclosure document, and are thus *ex post facto* rationalizations, and in any event do not provide underlying data or other information that allows the interested parties to verify the accuracy of MOFCOM's intermediate findings. Japan does not identify the underlying data or other information that MOFCOM failed to disclose in this regard, and it is not clear to us from Japan's response why, when viewed in context of other more details references in other parts of MOFCOM's determination, MOFCOM's disclosure with regarding to production and operation pressures was inadequate.
[520] See, Japan's second written submission, para. 421. Like with respect to "production and operation pressures", Japan contends that China's explanations, with regard to the domestic industry's investments not receiving the returns it should have, are not understandable from the disclosure document, and are thus

7.348. Japan also challenges MOFCOM's alleged failure to make disclosures with respect to the following excerpt from MOFCOM's determination:

> The Investigating Authority considered that the determination of whether domestic industry was subject to material injury should not be based solely on certain indices of the domestic industry, but all economic indices and the impact of *other factors* in the domestic industry should be considered. The Investigating Authority *comprehensively considered* the changes in all indices and found that the domestic industry suffered from material injury. Therefore, the assertions of the above-mentioned interested parties were not established.[521]

7.349. Japan states that in the underlying investigation several injury factors showed positive trends, and that the reference to "other factors" in the above passage suggests that undisclosed negative factors provided sufficient evidence to rebut the implication that no injury to the domestic industry occurred during the POI.[522] Japan also submits that while MOFCOM stated that all economic indices should be considered as part of the injury analysis, and that it comprehensively considered the changes in all indices, it did not offer any explanations, or disclose any information about which factors played a decisive role to the point that they overrode the positive performance in several economic indices.[523] China responds that the "other factors" referred to issues such as the favourable effect of domestic industrial adjustment policies, improvements in the domestic industry, and elimination of outdated production capacity.[524] China also notes that the comprehensive consideration refers to a detailed analysis of the different economic indices pertaining to the state of the domestic industry.[525]

7.350. In our view, the part of the extract quoted by Japan, including the references therein, needs to be reviewed in proper context. The extract is from section IV of the disclosure document, where MOFCOM examined the "domestic industry status within the POI". In examining the status of the domestic industry, MOFCOM first reviewed 16 factors pertaining to the state of the domestic industry.[526] MOFCOM then continued to discuss other factors such as the effects of domestic industrial adjustment policies and continuous improvement of the domestic industry's management and technical level, as well as elimination of outdated production capacity, on the status of the domestic industry.[527] Having set out those factors, MOFCOM noted the improvement in several factors but concluded that despite such improvements in light of the negative factors, MOFCOM had determined in the preliminary determination that the domestic industry was suffering material injury.[528] MOFCOM then turned to address the submissions made by the interested parties and the applicant, and noted in this regard that "the interested parties once again asserted" after the preliminary determination that, *inter alia*, most of the indices of the domestic industry were good.

7.351. In responding to these assertions, MOFCOM stated that it considered that the determination of whether domestic industry was subject to material injury should not be based solely on certain indices of the domestic industry, but all economic indices and the impact of other factors in the domestic industry should be considered. MOFCOM added that it had comprehensively considered the changes in all indices and found that the domestic industry suffered material injury. In our view, when viewed in the context of the injury analysis that preceded these statements, it should have been clear that MOFCOM was referring to its review of the 16 economic indices and other factors, and its consideration of the changes in the economic indices set out in the earlier parts of section IV

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ex post facto rationalizations, and in any event do not provide underlying data or other information that allows the interested parties to verify the accuracy of MOFCOM's intermediate findings. But again Japan does not identify the underlying data or other information that MOFCOM failed to disclose in this regard, and it is not clear to us from Japan's response why, when viewed in context of the more details referenced in other parts of MOFCOM's determination, MOFCOM's disclosure with respect to domestic industry not receiving the return on investment it should have, was inadequate.

[521] MOFCOM's disclosure (Exhibit JPN-18.b), p. 33; MOFCOM's final determination (Exhibit JPN-5.b), p. 50. (emphasis added)

[522] Japan's first written submission, para. 592.

[523] Japan's first written submission, para. 592.

[524] China's first written submission, para. 865.

[525] China's first written submission, para. 866.

[526] MOFCOM's disclosure (Exhibit JPN-18.b), pp. 28-31.

[527] MOFCOM's disclosure (Exhibit JPN-18.b), p. 32.

[528] MOFCOM's disclosure (Exhibit JPN-18.b), p. 32.

of the disclosure document. Thus, we do not consider that Japan has established that MOFCOM failed to properly disclose the essential facts in this regard.[529]

7.352. Based on the foregoing, we find that Japan has not established that MOFCOM failed to disclose the essential facts underlying the assertions made as part of its analysis of the impact of dumped imports on the domestic industry.

7.7.3.5 Causation

7.353. Japan claims that MOFCOM failed to disclose the essential facts underlying its finding that (a) nickel price fluctuation and (b) cost of environment regulations, were not factors that caused injury to the domestic industry.[530]

7.7.3.5.1 Fluctuations in the nickel price

7.354. Japan notes that MOFCOM acknowledged the increase in the price of nickel during the POI, but that it found that:

> However, as the foregoing analysis shows, *the price of domestic like products was even lower than the cost during the injury POI*, due to the significant price depression caused by dumped imports. The data show that, *with the increase in the price of nickel that is a raw material, the price of corresponding nickel-containing products did not rise but declined*.[531]

7.355. Japan submits that MOFCOM did not reveal anything about the specific content of the price of nickel-containing products, and asserts that the "price of nickel-containing products" and their "cost" were essential facts that MOFCOM should have disclosed.[532] Japan contends that the disclosure document contains no explanation about the meaning of the phrase "nickel-containing products", and asserts that China itself has been inconsistent in explaining what the phrase means.[533] In this regard, Japan submits that whereas in its first written submission China stated that nickel-containing products referred to the 300-series, in response to our questions it subsequently stated that it referred to both the 300 and the 200-series.[534] Japan also contends that MOFCOM provided no grounds to support its view that the prices of domestic like products were even lower than their cost during the injury POI, and notes that it is unclear what part of the disclosure document MOFCOM's reference to a "foregoing analysis" pertains to.[535] In particular, Japan submits in this regard that MOFCOM did not provide any information on what cost MOFCOM analysed, or offer any grounds to support its statement that the price of domestic like products was generally lower than the cost.[536]

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[529] We note in this regard that Japan also argues that if MOFCOM only referred to factors listed in section IV of the disclosure or factors indicated as "other factors", this supports Japan's claims under Article 3.4 of the Anti-Dumping Agreement. (Japan's second written submission, para. 421). We note that we have found it unnecessary to address Japan's claims under Articles 3.4 and 3.1 challenging MOFCOM's evaluation of each of the factors and the overall impact thereof. Nonetheless, we note that we are concerned here with MOFCOM's disclosure and not the substantive deficiencies in MOFCOM's injury analysis. Japan also contends that to the extent MOFCOM's reference to "other factors" included the "elimination of outdated production capacity" it should have provided the factual basis for this factor, including what event MOFCOM was referring to. (Ibid.). We note that Japan is advancing through this argument a different basis for challenging MOFCOM's disclosure than that it advanced in its first written submission. In any case, we find the reference to the elimination of outdated production capacity to be self-explanatory, and do not see why MOFCOM needed to refer to any specific event pertaining to the elimination of such capacity as part of its disclosure obligations.

[530] Japan's first written submission, para. 593.

[531] Japan's first written submission, paras. 594-595 (quoting MOFCOM's final determination (Exhibit JPN-5.b), p. 53). (emphasis added by Japan)

[532] Japan's first written submission, para. 598.

[533] Japan's comments on China's response to Panel question No. 55, paras. 85-86. See also Japan's second written submission, para. 424.

[534] Japan's comments on China's response to Panel question No. 55, para. 85.

[535] Japan's first written submission, paras. 595 and 597.

[536] Japan's first written submission, para. 597.

7.356. In its first written submission, China stated that the "notion of 'nickel-containing products' relates specifically to the 300-series".[537] China explained that given that the 300-series contained a significant amount of nickel as compared to the 200-series, it was logical that the 300-series would be especially affected by fluctuations in the market price of nickel.[538] China submits that "[i]t was therefore mainly this series [i.e. the 300-series] that MOFCOM was referring to when it explained in the Final Determination that 'with the increase in the price of nickel that is a raw material, the price of corresponding nickel-containing products did not rise but declined'".[539] China adds that "the 200-series was not the primary focus of MOFCOM's observations".[540] Nonetheless, in response to our questions at the second meeting, China submitted that MOFCOM's statement regarding the decline in the prices of nickel-containing products applied to both the 300-series and the 200-series, both of which contained nickel, though because the 300-series contained more nickel it was particularly affected by fluctuations in the market price of nickel.[541] With regard to Japan's contention that MOFCOM provided no grounds to support its view that the prices of domestic like products were even lower than their cost during the injury POI, China submits that MOFCOM provided the essential facts in this regard.[542] In support of this submission, China notes that MOFCOM referred to the "foregoing analysis" that the price of domestic like products was even lower than the cost during the injury POI, and this analysis referred to MOFCOM's findings in the context of price effects that in order to obtain an maintain certain quantities of product sales, from 2014 to 2015, "the price of 300-series domestic like products was close to or lower than its sales cost".[543] China submits that any more detailed information on the relation between costs and prices of the domestic industry for specific series risk providing domestic producers with too much information about their competitors.[544]

7.357. We recall that under the terms of Article 6.9, essential facts must be disclosed in a coherent way so as to permit an interested party to understand the basis for an investigating authority's decision. We do not consider that a reference to "nickel-containing products" would have disclosed with sufficient clarity to interested parties whether MOFCOM was referring to the 300-series or the 200-series, or both. China argues that MOFCOM disclosed the grounds for its finding that "the price of domestic like products was even lower than the cost during the injury POI" through its "foregoing analysis". In that analysis, MOFCOM found that from 2014 to 2015, "the price of 300-series domestic like products was close to or lower than its sales cost". However, we do not consider that this amounts to a coherent disclosure of essential facts underlying its finding that the price of domestic like products was even lower than the cost "during the injury POI". In this regard, we note that whereas MOFCOM's finding pertained to nickel containing products and for the *entire injury POI*, the findings on price effects that MOFCOM was referring to pertained to the 300-series alone, and pertained only to 2014 and 2015. Thus, we do not consider that MOFCOM coherently disclosed the factual basis of its finding that the price of domestic like products was even lower than the cost during the injury POI.

7.358. Based on the foregoing, we find that Japan has established that MOFCOM did not properly disclose the essential facts underlying its causation determination in relation to the fluctuation in nickel prices.

7.7.3.5.2 Cost of environment regulations

7.359. Japan notes that MOFCOM found that the impact of the cost of environmental regulations did not preclude a finding that subject imports caused injury to the domestic industry, because the total period expenses of five domestic companies, including environmental protection expenses, did not increase significantly during the POI.[545] Japan contends that MOFCOM should have disclosed the factual basis for the finding that the total period expenses of these companies did not increase significantly during the POI.[546] According to Japan, MOFCOM's failure to make such disclosure was even more serious because Japanese respondents had provided MOFCOM with data indicating that

[537] China's first written submission, para. 870.
[538] China's response to Panel question No. 55, para. 128.
[539] China's response to Panel question No. 55, para. 128.
[540] China's response to Panel question No. 55, para. 128.
[541] China's response to Panel question No. 55, paras. 128-129.
[542] China's first written submission, para. 871.
[543] China's first written submission, para. 871.
[544] China's first written submission, para. 872.
[545] Japan's first written submission, para. 599.
[546] Japan's first written submission, para. 600.

such costs did, in fact, increase.[547] Moreover, Japan maintains that if China's argument is that it was not required to disclose this cost data because they were confidential, then it must prove that MOFCOM provided sufficient non-confidential summaries.[548] China contends that MOFCOM's disclosure that the costs of these five domestic companies did not increase significantly was adequate under Article 6.9, and more detailed information would have led to disclosure of confidential facts.[549]

7.360. In the disclosure document, MOFCOM noted the argument made by interested parties that the "strict environmental standards caused the cost of companies to rise, causing injury to the domestic industry".[550] MOFCOM then stated as follows:

> [R]egarding the impact of environmental protection, the investment in environmental protection will increase the cost and expenses of the enterprise. However, the total period expenses of the five domestic production companies including environmental protection expenses did not increase significantly during the injury POI. There is no evidence to show that strict environmental standards caused material injury to the domestic industry. The impact of environmental protection cannot refute the causal link between dumped imports and material injury to domestic industry. In the final determination, the Investigating Authority decided to maintain the preliminary determination.[551]

7.361. We note that in the absence of sufficient arguments from Japan challenging the confidential treatment of the expenses of the domestic production companies, we must presume that the expenses of these companies constituted confidential information that MOFCOM could not disclose. However, an investigating authority is not exempted from its disclosure obligations under Article 6.9 when the essential facts in question are confidential. Instead, an investigating authority may meet its disclosure obligations by providing non-confidential versions of the confidential information. But this does not mean that an investigating authority necessarily has to include, as part of its Article 6.9 disclosure, all evidence that was on the non-confidential file of the investigating authority (which interested parties had access to). Indeed, as we noted above, Article 6.9 is not meant to duplicate the requirements of Article 6.4, which requires that investigating authorities provide, whenever practicable, timely opportunities to interested parties to see information that is relevant to the presentation of their case.

7.362. In paragraphs 7.258-7.259 of this Report, as part of our review of Japan's causation claims, we noted that MOFCOM found that, whatever the actual costs of environmental protection were to the domestic industry, those costs did not push the industry's total expenses significantly higher. We also noted that per China this finding was based on record evidence of the total expenses of domestic producers, and this information was provided in indexed form in the non-confidential versions of the questionnaire responses of the domestic producers. The disclosure document through its references to the expenses of the five domestic companies made it clear whose specific data MOFCOM were referring to, and we note that these data were on MOFCOM's file and available to Japanese respondents.

7.363. Based on the foregoing, we find that Japan has not established that MOFCOM acted inconsistently with Article 6.9 because it failed to make adequate disclosure of the essential facts under consideration that formed the basis for its causation determination in relation to environmental costs.

[547] Japan's second written submission, para. 429; first written submission, para. 599.
[548] Japan's second written submission, paras. 430-432.
[549] China's first written submission, para. 874.
[550] MOFCOM's disclosure (Exhibit JPN-18.b), p. 35.
[551] MOFCOM's disclosure (Exhibit JPN-18.b), p. 36.

7.7.3.6 Definition of the domestic industry

7.364. Japan contends that MOFCOM failed to disclose the detailed method of calculating the domestic industry's proportion of domestic production or the relevant supporting data.[552] In particular, per Japan, MOFCOM should have, but failed to disclose the following[553]:

a. meaning of the phrase "commodity volume";

b. names of companies supporting the domestic industry's application; and

c. figures for the commodity volume of billets (slabs) and production volume of coils and plates.

7.365. China contends that it was clear from the disclosure document that MOFCOM used the phrase "commodity volume" to refer to the external sales volume of the domestic producers.[554] China also submits that the disclosure document named the companies that supported the domestic industry's application.[555] In addition, China argues that MOFCOM was not required to disclose individual data for billets (slabs), coils or plates because considering these product categories were part of a single like product, the essential fact was the total production data of these product categories.[556]

7.366. In its disclosure document, MOFCOM stated as follows:

> The sales volume of the commodity billet was actually the partial production output of stainless steel billet in the case. Therefore, the Investigating Authority decided to maintain the preliminary finding in the final determination, and calculated the production output of stainless steel billet and hot-rolled stainless steel plate (coil) by *using commodity volume* of stainless steel billet, plus the production output of hot-rolled stainless steel plate (coil), as the indicator.
>
> According to the data provided by Stainless Steel Council of China Special Steel Enterprises Association, the national total production output of the stainless steel billet and hot-rolled stainless steel plate (coil) within the POI was 10,950,400 tons in 2014, 11,055,200 tons in 2015, 12,107,600 tons in 2016, 11,737,000 tons in 2017 and 2,760,300 tons in January-March of 2018, and the total production output of the stainless steel billet and hot-rolled stainless steel plate (coil) of the Applicant and supporting companies was 7,137,800 tons, 7,649,800 tons, 9,160,900 tons, 8,932,800 tons and 2,246,200 tons respectively. The proportion that the production output of the *Applicant and supporting companies* accounted for out of the national total production output in the case was 65.18%, 69.20%, 75.66%, 76.11% and 81.37% respectively. Therefore, the Investigating Authority determined that the Applicant and supporting companies could represent the domestic industry in the preliminary determination according to Article 11 of Anti-Dumping Regulations, and the data could be taken as the basis for analysis of the causal link between dumping and injury. *The domestic industry data based by this determination were from the above domestic producer unless otherwise specified*.[557]

7.367. With respect to the meaning of "commodity volume", we note from the excerpt set out above that MOFCOM stated that the sales volume of the commodity billet was actually the partial production output of stainless steel billet. It then stated that "[t]herefore" it had decided to calculate the production output of billet and plates (coil) by "*using commodity volume* of stainless steel billet", plus the production output of hot-rolled stainless steel plate (coil), as the indicator. In our view, an interested party would be able to understand from these statements that MOFCOM used the phrase "commodity volume" to refer to the sales volume of billets (slabs).

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[552] Japan's first written submission, para. 602.
[553] Japan's first written submission, para. 602.
[554] China's first written submission, para. 886.
[555] China's first written submission, para. 878-882.
[556] China's first written submission, para. 888.
[557] MOFCOM's disclosure (Exhibit JPN-18.b), p. 15. (emphasis added)

7.368. With respect to the identity of those domestic companies that supported the application, we note that on page 1 of the disclosure document, MOFCOM stated as follows:

> On June 22, 2018, on behalf of the domestic stainless steel billet and hot-rolled stainless steel plate/coil industry, Shanxi Taigang Stainless Steel Co., Ltd. officially submitted an application to the Investigating Authority to request an anti-dumping investigation on stainless steel billet and hot-rolled stainless steel plate/coil originating in the EU, Japan, Korea and Indonesia. *Baosteel Stainless Steel Co., Ltd., Beihai Chengde Ferronickel and Stainless Steel Co., Ltd., Beihai Chengde Metal Rolling Co., Ltd., Gansu Jiu Steel Group Hongxing Iron & Steel Co., Ltd. and Angang Lianzhong Stainless Steel Corporation supported this application*.[558]

7.369. Thus, on page 1 MOFCOM identified the companies that supported the application at the time it was made. Japan notes that the supporters identified above did not remain constant through the course of the proceedings before MOFCOM. In particular, Baosteel Stainless Steel Co., Ltd. (Baosteel) was excluded from the scope of the domestic industry. But we note that on page 16 of the disclosure document, MOFCOM explained that Baosteel was excluded from the domestic industry. Thus, interested parties were made aware of the change in the composition of supporter companies as part of MOFCOM's disclosure of the essential facts, which shows, in our view, that MOFCOM adequately disclosed the names of supporter companies.

7.370. With respect to the figures pertaining to the sales volume of billets (slabs) (which MOFCOM used as an indicator for its production volume), and the production volume of coils and plates, we note that MOFCOM did not disclose separate data for billets (slabs), coils, and plates, and instead disclosed only an aggregate data of these three product categories. MOFCOM disclosed that to arrive at these figures it used the production volume of coils and plates, and the commodity volume of billets (slabs). We agree with China that considering billets (slabs), coils, and plates were part of the domestic like product as a whole, the essential facts for the purpose of the definition of the domestic industry, were the aggregate data, and not separate data for billets (slabs), coils, and plates. In particular, considering that there is no requirement in the Anti-Dumping Agreement to separately consider the production data of each constituent of the domestic like product, in our view Japan has not established that MOFCOM failed to act consistently with Article 6.9 by failing to disclose separate data for billets (slabs), coils, and plates.

7.371. Based on the foregoing, we find that Japan has not established that MOFCOM failed to disclose the essential facts that formed the basis for its definition of the domestic industry.

7.8 Japan's claims concerning MOFCOM's public notice

7.8.1 Introduction

7.372. Japan makes claims under Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement challenging MOFCOM's alleged failure to make the requisite degree of disclosure in its public notice setting out its final determination. With one exception, Japan's claims alleging the lack of disclosure in this context focus on aspects of MOFCOM's final determination that it also challenges on a substantive basis. The exception is Japan's claims on public notice concerning MOFCOM's determination of the product under consideration, which Japan does not challenge on a substantive basis.

7.8.2 Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement

7.373. Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement state as follows:

> Public notice shall be given of any preliminary or final determination, whether affirmative or negative, of any decision to accept an undertaking pursuant to Article 8, of the termination of such an undertaking, and of the termination of a definitive anti-dumping duty. Each such notice shall set forth, or otherwise make available through a separate report, *in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities*. All such

[558] Emphasis added.

> notices and reports shall be forwarded to the Member or Members the products of which are subject to such determination or undertaking and to other interested parties known to have an interest therein.
>
> A public notice of conclusion or suspension of an investigation in the case of an affirmative determination providing for the imposition of a definitive duty or the acceptance of a price undertaking *shall contain, or otherwise make available through a separate report, all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures* or the acceptance of a price undertaking, due regard being paid to the requirement for the protection of confidential information. In particular, the notice or report shall contain the information described in subparagraph 2.1, as well as the reasons for the acceptance or rejection of relevant arguments or claims made by the exporters and importers, and the basis for any decision made under subparagraph 10.2 of Article 6.[559]

7.374. The "public notice" at issue here is MOFCOM's final determination (Exhibit JPN-5.b). Pursuant to Article 12.2.2, a public notice must contain all relevant information on matters of fact and law, which have led to the imposition of final measures. The *chapeau* of Article 12.2.2, i.e. Article 12.2, requires publication of findings and conclusions on all issues of fact and law considered material by the investigating authorities. According to the DSB report in *EU – Footwear (China)*, with which we agree, what is "material" in this respect refers to an issue that must be resolved in the course of the investigation in order for the investigating authority to reach its determination on whether to impose a definitive anti-dumping duty.[560]

7.375. Article 12.2.2 applies once the investigating authority has made its final determination. The provision has been understood to reflect the principle that those parties whose interests are affected by the imposition of final anti-dumping and countervailing duties are entitled to know, as a matter of fairness and due process, the facts, law and reasons that have led to the imposition of such duties.[561] We agree with the DSB report in *EU – Footwear (China)* that this provision requires the authority to explain its final determination, providing sufficient background and reasons for that determination, such that its reasons for concluding as it did can be discerned and are understood.[562]

7.376. Likewise, we agree with the DSB report in *China – X-Ray Equipment*, that the level of detail of the description of the authority's findings and conclusions must be sufficient to allow (a) *inter alia*, the interested parties 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; (b) exporting Members to ascertain the conformity of the findings and conclusions with the provisions of the WTO Agreement, and to avail the WTO dispute settlement procedures where they consider it necessary.[563]

7.377. We also note that having found substantive violations, several panels have found it unnecessary to address claims under Articles 12.2 and 12.2.2.[564] The panel in *EC – Bed Linen* explained the rationale of this approach as follows:

> A notice may adequately explain the determination that was made, but if the determination was substantively inconsistent with the relevant legal obligations, the adequacy of the notice is meaningless. Further, in our view, it is meaningless to consider whether the notice of a decision that is substantive[ly] inconsistent with the requirements of the [Anti-Dumping] Agreement is, as a separate matter, insufficient under Article 12.2. A finding that the notice of an inconsistent action is inadequate does not add anything to the finding of violation, the resolution of the dispute before us, or to the understanding of the obligations imposed by the [Anti-Dumping] Agreement.[565]

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[559] Emphasis added.
[560] Panel Report, *EU – Footwear (China)*, para. 7.844.
[561] Appellate Body Report, *China – GOES*, para. 258.
[562] Panel Report, *EU – Footwear (China)*, para. 7.844.
[563] Panel Report, *China – X-Ray Equipment*, para. 7.459.
[564] Panel Reports, *EC – Bed Linen*, para. 6.259; *EC – Salmon (Norway)*, para. 7.831; and *China – GOES (Article 21.5 – US)*, para. 7.200.
[565] Panel Report, *EC – Bed Linen*, para. 6.259.

7.378. We generally agree with this approach, and will apply it in this case unless we consider that additional findings under Articles 12.2 and 12.2.2 are necessary for the successful resolution of this dispute. In addition, we note that we have rejected in previous sections of the report some of Japan's substantive claims that are based on MOFCOM's alleged failure to provide reasoned and adequate explanations in its final determination (which, in fact, constitutes MOFCOM's public notice). To the extent we have found, as part of our review of those substantive claims, that Japan has not established that MOFCOM failed to provide a reasoned and adequate explanation of the relevant issues in its public notice, we may, as appropriate, reach the same finding as part of our review of Japan's claims under Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement. In this regard, we agree with the following approach of the DSB report in *US – Softwood Lumber VI*:

> Canada specified that the asserted requirement for a "reasoned and adequate explanation" of the USITC's determination, which it alleges was not provided in this case, did not derive from Articles 12.2.2 and 22.5, but rather from the substantive obligations of Article 3 of the [Anti-Dumping] Agreement and Article 15 of the SCM Agreement. In our view, *Canada's claims under Articles 12.2.2 of the [Anti-Dumping] Agreement and 22.5 of the SCM Agreement are thus dependent on the disposition of the specific claims of violation*.
>
> In evaluating these claims, we *note that our conclusions with respect to each of the alleged substantive violations asserted by Canada rest on our examination of the USITC's published determination, which constitutes the notices provided by the United States under Article 12.2.2 of the [Anti-Dumping] Agreement* and Article 22.5 of the SCM Agreement with respect to the injury determination in this case. No additional materials have been cited to us with respect to the determination for consideration in determining whether or not the USITC's determination are consistent with the relevant provisions of the Agreements. *Thus, if we find no violation with respect to a particular specific claim, such a conclusion must rest on the USITC's published determination. In this circumstance, it is clear to us that no violation of Articles 12.2.2 and 22.5 could be found to exist in this case, where it is not disputed that the USITC determination accurately reflects the analysis and determination in the investigations*. On the other hand, if we find a violation of a specific substantive requirement, the question of whether the notice of the determination is "sufficient" under Article 12.2.2 of the [Anti-Dumping] Agreement or Article 22.5 of the SCM Agreement is, in our view, immaterial.[566]

7.8.3 Price effects

7.379. Japan challenges the deficiencies in MOFCOM's public notice regarding the analysis of price effects. Japan contends that MOFCOM's finding regarding the existence of price effects and depressive effect of subject imports on the prices of the domestic like product is "material" to the decision to impose definitive measures.[567] However, according to Japan, MOFCOM failed to make the disclosures required under Articles 12.2 and 12.2.2. Specifically, Japan contends that MOFCOM failed to make the requisite disclosures regarding its (a) findings on price comparability for billets (slabs), coils, and plates; (b) its series-by-series price effects analysis; (c) relevant findings supporting MOFCOM's consideration of the differences among the various series of the product; (d) findings regarding the brand effects of subject imports. China rejects Japan's submissions.

7.380. In section 7.3 of the Report, we have found several substantive deficiencies in MOFCOM's price effects analysis, as set out in its final determination. In light of those findings, we are of the view that any additional finding that MOFCOM failed to also comply with Articles 12.2 and 12.2.2 when presenting its price effects analysis in the final determination is not necessary to achieve a positive resolution of this dispute.

7.381. Accordingly, we make no findings with respect to Japan's claims under Articles 12.2 and 12.2.2 challenging the lack of disclosure regarding MOFCOM's price effects analysis in the public notice.

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[566] Panel Report, *US – Softwood Lumber VI*, paras. 7.40-7.41. (emphasis added; fn omitted)
[567] Japan's first written submission, para. 625.

7.8.4 Product under consideration

7.382. Japan notes that MOFCOM found billets (slabs), coils, and plates to be part of the same category of products, but asserts that in making this finding MOFCOM failed to provide reasons for ignoring the price and non-price differences among billets (slabs), coils, and plates.[568] Thus, according to Japan, MOFCOM's disclosure with respect to the product under consideration was inconsistent with Articles 12.2 and 12.2.2. China rejects Japan's submissions. China contends that neither the Anti-Dumping Agreement nor Chinese domestic law sets out any requirements regarding the definition of the product under consideration, and thus the criteria that MOFCOM took into account in defining the product under consideration is not a material issue of fact or law in this dispute.[569] China contends that in any case MOFCOM disclosed its assessment regarding the similarities and differences between the product categories that served to inform its determination of the product under consideration.[570]

7.383. We note that Japan challenges MOFCOM's public notice of its finding that billets (slabs), coils, and plates were part of the same category of products, arguing that it fails to set out MOFCOM's reasons for ignoring the price and non-price differences among billets (slabs), coils, and plates. We recall that in addressing Japan's substantive claims on price effects, we made findings regarding MOFCOM's assessment of the price and non-price differences between billets (slabs), coils, and plates. Specifically, as set out in paragraph 7.171 above, we have found several substantive deficiencies in MOFCOM's finding regarding the price and non-price differences between billets (slabs), coils, and plates. While we note the parties' disagreement on whether the criteria that MOFCOM took into account in defining the product under consideration is a material issue of fact or law under Article 12.2, considering we have already found substantive violations in MOFCOM's assessment of the price and non-price differences between billets (slabs), coils, and plates, we are of the view that any additional finding that MOFCOM failed to also comply with Articles 12.2 and 12.2.2 in the public notice of its assessment of the product under consideration in the final determination is not necessary to resolve this dispute.

7.384. Accordingly, we make no findings with respect to Japan's claims under Articles 12.2 and 12.2.2 challenging the lack of disclosure regarding MOFCOM's assessment of the product under consideration in the public notice.

7.8.5 Cumulation

7.385. Japan contends that MOFCOM failed to disclose the relevant facts and other matters in sufficient detail with respect to its finding to cumulate imports from the European Union, Indonesia Japan, and Korea. In particular, Japan contends that without concrete explanations as to why MOFCOM found similarities and denied the existence of differences between the exports from these four countries, and the factual basis for these decisions, the interested parties and exporting Members could not understand why their claims and evidence as to the differences among the three products were rejected.[571] For this same reason, they could also not examine whether or not MOFCOM's use of cumulative assessment conformed to the requirements of domestic law and/or the Anti-Dumping Agreement.[572]

7.386. China contends that in presenting its analysis on cumulation, MOFCOM described its analysis in detail and addressed all arguments raised by the interested parties.[573] China asserts that MOFCOM was not required to provide more details to comply with the public notice obligations under Articles 12.2 and 12.2.2.[574]

7.387. We note that MOFCOM stated as follows in the public determination:

> 3. Competitive condition between dumped imports.

[568] Japan's first written submission, paras. 620-623.
[569] China's first written submission, paras. 909 and 911.
[570] China's first written submission, paras. 912-916.
[571] Japan's first written submission, para. 645.
[572] Japan's first written submission, para. 645.
[573] China's first written submission, para. 955.
[574] China's first written submission, para. 956.

> The investigation shows that the physical and chemical characteristics, product usage, raw material, production technology and other aspects of dumped imports originating in the EU, Japan, Korea and Indonesia were basically the same; the companies in the EU, Japan and Korea and Indonesia sold the dumped imports to the domestic market by direct sale, distribution and other manners, which accounted for a relevant market share of the domestic market; all manufacturers or dealers had the same or similar pricing strategies; the dumped imports had the same customer group, and the domestic downstream users could freely purchase and use the dumped imports originating in the EU, Japan, Korea and Indonesia. To sum up, the Investigating Authority determined that there was a competitive relationship between dumped imports in the preliminary determination.[575]
>
> 4. Competitive condition between dumped imports and domestic like products.
>
> The investigation shows that the physical and chemical characteristics, raw material, production process, product usage, sales channel and other aspects of the dumped imports and domestic like products were basically the same. The consumer market of the domestic stainless steel billet and hot-rolled stainless steel plate (coil) was a competitive and open market, the dumped imports and domestic like products competed with each other in the domestic market, and the price was an important factor that affected the product sales. The sales channel of the dumped imports and domestic like products was same or similar, and they were sold on domestic market by direct sale, distribution and other manners; the customer group of them was same and intersected, and the domestic downstream users purchased and used the dumped imports and domestic like products alternatively; the sale of products of all sources did not have obvious time and regional preference.
>
> Accordingly, the Investigating Authority determined that there was a direct competitive relationship between dumped imports and domestic like products in the preliminary determination.[576]

7.388. In our view, Japan has not established that MOFCOM's findings set out above do not explain in a manner consistent with Articles 12.2 and 12.2.2 the reasons underlying its findings on cumulation. We recall that our focus under Articles 12.2 and 12.2.2 is on the adequacy of the explanations and reasons provided by the investigating authority in its public notice. Having already found that MOFCOM's explanations of its cumulation findings are consistent with China's substantive obligations under Articles 3.3 and 3.1, we see no basis to find that MOFCOM's explanations were deficient under Articles 12.2 and 12.2.2.

7.389. Based on the foregoing, we find that Japan has not established that MOFCOM's public notice with respect to its cumulation analysis was inconsistent with Articles 12.2 and 12.2.2.

7.8.6 Impact analysis

7.390. Japan makes two main arguments challenging the adequacy of MOFCOM's disclosure in the public notice with respect to its impact analysis.

7.391. First, Japan refers to the following finding made by MOFCOM in the context of the impact analysis.

> In summary, despite the improvement of the domestic industry's production and financial situation for individual years, due to the impact of increased volume and decreased price of dumped imports, during the injury POI, under the circumstance of favorable market conditions such as steady growth in domestic demand and *positive industrial policies*, the domestic industry was still facing *severe production and operation pressures*, production capacity was not effectively released, market share saw an overall

[575] MOFCOM's final determination (Exhibit JPN-5.b), p. 31.
[576] MOFCOM's final determination (Exhibit JPN-5.b), pp. 31-32.

> downward trend, and ending inventory was high, pretax profits were still at a low level, and *investment did not receive returns that it should have had*.[577]

7.392. Japan contends that MOFCOM did not explain what these "positive industrial policies" and "severe production and operation pressures" were, and gave no factual basis for these allegations or for the statement that "investment did not receive returns that it should have had".[578]

7.393. Second, Japan focused on the following excerpt from MOFCOM's determination:

> The Investigating Authority considered that the determination of whether domestic industry was subject to material injury should not be based solely on certain indices of the domestic industry, but all economic indices and the impact of *other factors* in the domestic industry should be considered. The Investigating Authority *comprehensively considered* the changes in all indices and found that the domestic industry suffered from material injury. Therefore, the assertions of the above-mentioned interested parties were not established.[579]

7.394. Japan contends that MOFCOM should have disclosed a detailed explanation about the "other factors", and specifically which factors played a decisive role in overriding the positive economic indices during MOFCOM's alleged comprehensive consideration of all relevant indices.[580]

7.395. China notes that Japan's submissions challenging the adequacy of MOFCOM's disclosure in the public notice with respect to its impact analysis are "virtually identical" to its arguments under Article 6.9, where it challenged MOFCOM's disclosure of the essential facts pertaining to its impact analysis.[581] Nonetheless, China submits that MOFCOM provided in other parts of its public notice, a more detailed explanation on each of the issues raised by Japan.[582]

7.396. We note that Japan challenged as part of its claims under Article 6.9 the adequacy of the disclosure with respect to these same findings (which were set out in the disclosure document that MOFCOM issued before the final determination). The grounds advanced by Japan in support of its claims under Articles 12.2 and 12.2.2 are the same that it advanced as part of its Article 6.9 claims, which we rejected in paragraph 7.352 above. The same considerations that we set out in those paragraphs also lead us to reject Japan's claims under Articles 12.2 and 12.2.2. In particular, we consider, that while Japan focuses on certain excerpts from MOFCOM's final determination, a review of MOFCOM's injury analysis as a whole show that MOFCOM provided sufficient reasons for its injury analysis, and those reasons could be understood from the final determination.

7.397. Based on the foregoing, we find that Japan has not established that MOFCOM's public notice with respect to its injury analysis was inconsistent with Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement.

7.8.7 Causation

7.398. Japan makes two main arguments challenging MOFCOM's alleged failure to disclose in the public notice findings and relevant information with respect to the causal relation between subject imports and the injury to the domestic industry.

a. First, Japan contends that MOFCOM failed to make the necessary disclosure in the public notice when rejecting the interested parties' arguments regarding the negative impact of the increase in nickel prices on cost of domestic like products, and the state of the domestic industry.[583]

[577] MOFCOM's final determination (Exhibit JPN-5.b), p. 49. (emphasis added)
[578] Japan's first written submission, para. 648.
[579] MOFCOM's final determination (Exhibit JPN-5.b), p. 50.
[580] Japan's first written submission, para. 653.
[581] China's first written submission, para. 957.
[582] China's first written submission, paras. 959-962 and 965-967.
[583] Japan's first written submission, para. 657.

b. Second, Japan submits that MOFCOM failed to make the necessary disclosure in the public notice when rejecting the interested parties' arguments regarding the negative impact of strict environment standards on the domestic industry.[584]

7.399. China contends that MOFCOM (a) properly disclosed its reasoning with respect to the negative impact of increased price of nickel, and (b) in explaining that total period expenses of the five domestic companies, including environmental protection expenses, did not increase, MOFCOM properly disclosed its reasoning for rejecting interested parties' arguments regarding the alleged negative impact of strict environment standards on the domestic industry.[585]

7.400. With respect to the negative impact of increased price of nickel, in paragraph 7.254 above, we have found, as part of our examination of Japan's claims on causation, substantive deficiencies in MOFCOM's examination of the impact of increased price of nickel. In light of those findings, we are of the view that any additional finding that MOFCOM failed to also comply with Articles 12.2 and 12.2.2 when making its causation determination in this regard is not necessary to resolve this dispute.

7.401. Accordingly, we do not find it necessary to make findings regarding Japan's claims under Articles 12.2 and 12.2.2 challenging the lack of disclosure regarding MOFCOM's price effects analysis in the public notice.

7.402. With respect to the negative impact of strict environment standards on the domestic industry, we have found, as part of our examination of Japan's claims on causation, that Japan has failed to establish that MOFCOM failed to objectively examine in its final determination the evidence submitted by the interested parties concerning the impact on the domestic industry of the cost-increases associated with the adoption of stricter environmental standards. Considering we have found the explanations provided by MOFCOM in its final determination in this regard to be substantively consistent with Articles 3.1 and 3.5, we see no reason to find that MOFCOM failed to adequately explain or provide reasons for its findings in a manner consistent with Articles 12.2 and 12.2.2.

7.403. Based on the foregoing, we find that Japan has not established this aspect of Japan's claim under Articles 12.2 and 12.2.2.

7.8.8 Definition of the domestic industry

7.404. The factual basis of Japan's claims under Articles 12.2 and 12.2.2 challenging the disclosure with respect to the definition of the domestic industry is identical to those it advanced as part of its Article 6.9 claims.[586] In particular, like with respect to its claims under Article 6.9, Japan contends that the final determination does not disclose[587]:

a. the meaning of the phrase "commodity volume";

b. the names of companies supporting the domestic industry's application; and

c. the figures for the commodity volume of billets (slabs) and production volume of coils and plates.

7.405. Noting that Japan relies on the same type of arguments to support its claims under Articles 12.2 and 12.2.2 that it raised under Article 6.9, China contends, that MOFCOM's public notice explained the meaning of "commodity volume" and identified the names of companies supporting the domestic industry's application.[588] China also contends that considering the domestic like product comprised billets (slabs), coils, and plates as a whole, MOFCOM was not required to provide as part of its public notice individual data for each of these product categories.

[584] Japan's first written submission, para. 657.
[585] China's first written submission, paras. 972-974.
[586] Japan's first written submission, para. 667.
[587] Japan's first written submission, para. 667.
[588] China's first written submission, paras. 978-979.

7.406. We rejected all these three arguments when addressing Japan's claims under Article 6.9. The same considerations that led us to reject those arguments in the context of Japan's claims under Article 6.9 (set out in paragraphs 7.367-7.370 above) also lead us to reject these three arguments in the context of Japan's claims under Articles 12.2 and 12.2.2. Accordingly, we find that Japan has not established that MOFCOM failed to provide sufficient background and reasons for its findings with respect to the definition of the domestic industry.

7.407. Based on the foregoing, we find that Japan has not established that MOFCOM's public notice with respect to the definition of the domestic industry was inconsistent with Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement.

7.9 Japan's consequential claims under Article 1 of the Anti-Dumping Agreement and Article VI:6(a) of the GATT 1994

7.408. Japan makes claims under Article 1 of the Anti-Dumping Agreement and Article VI:6(a) of the GATT 1994, which are entirely dependent on Japan's claims of violation under other provisions of the Anti-Dumping Agreement. We do not consider that making findings with respect to Japan's purely consequential claims will contribute towards the positive resolution of this dispute. Accordingly, we make no findings with respect to Japan's claims under Article 1 of the Anti-Dumping Agreement and Article VI:6(a) of the GATT 1994.

8 CONCLUSIONS AND RECOMMENDATION

8.1. For the reasons set forth in this Report, we conclude as follows:

a. With respect to China's request that we find that Japan is precluded, in light of its panel request, from making the claims presented in its first written submission challenging MOFCOM's definition of the domestic industry:

   i. For the reasons set out in paragraph 7.15 above, we find that Japan is not precluded from making the claims presented in its first written submission challenging MOFCOM's definition of the domestic industry; and

   ii. Japan's claim challenging MOFCOM's definition of the domestic industry, based on Article 3.1 of the Anti-Dumping Agreement, is a consequential claim.

b. With respect to Japan's claims concerning MOFCOM's definition of the domestic industry:

   i. Japan has established that MOFCOM's definition of the domestic industry was inconsistent with Article 4.1 of the Anti-Dumping Agreement because MOFCOM failed to provide a reasoned and adequate explanation of its finding that the production of the firms included in the domestic industry represented a "major proportion" of the total production of all Chinese producers.

   ii. Japan has not established that MOFCOM's definition of the domestic industry was inconsistent with Article 4.1 of the Anti-Dumping Agreement because of:

      (1) the alleged discrepancy between the domestic industry's market share data and its share in domestic production; and

      (2) the alleged lack of representativeness of the domestic industry.

   iii. In the light of these findings, and for the reasons set out in paragraph 7.57 of this Report, we decline to make additional findings in relation to Japan's consequential claim under Article 3.1 of the Anti-Dumping Agreement.

c. With respect to Japan's claims concerning MOFCOM's decision to cumulate imports from the different sources under investigation:

   i. Japan has not established that MOFCOM acted inconsistently with Articles 3.1 and 3.3 of the Anti-Dumping Agreement in finding that a cumulative assessment of the effects

of the subject imports was appropriate in light of, *inter alia*, the conditions of competition between the imported products, and the conditions of competition between the imported products and the like domestic product.

ii. In light of this finding, we also reject Japan's claims that the MOFCOM's price effects analyses, impact analyses and causation findings were, respectively, inconsistent with Articles 3.2, 3.4, and 3.5 of the Anti-Dumping Agreement as a consequence of MOFCOM's alleged violation under Articles 3.1 and 3.3.

d. With respect to Japan's claims concerning MOFCOM's price effects analysis:

i. Japan has established that MOFCOM acted inconsistently with Articles 3.1 and 3.2 of the Anti-Dumping Agreement because in making its findings on price effects, MOFCOM failed to ensure that there was no issue of price comparability between the product categories. In particular, MOFCOM acted inconsistently with these provisions for the following reasons:

(1) to the extent that MOFCOM's price effects findings were based on China's view that the obligation to ensure price comparability is triggered only when there are significant price differences between product categories, MOFCOM proceeded on a misconceived understanding of the notion of price comparability;

(2) MOFCOM failed to base its determination of price comparability on an objective assessment of positive evidence because it relied on its scope of subject product findings, without any further explanation, to show that there were no price comparability issues between product categories;

(3) MOFCOM failed to identify the best information available relied on to make the finding of "reasonable differences" in prices, and MOFCOM did not explain how the best information available it selected supported this finding. MOFCOM also did not explain how a finding of "reasonable differences" between product categories could be understood to mean that there was no issue of price comparability as regards the products categories; and

(4) MOFCOM did not objectively examine the record evidence regarding the non-price differences between product categories submitted by Japanese respondents before MOFCOM.

ii. Japan has established that MOFCOM's series-specific price effects analyses were not based on an objective examination of positive evidence and, therefore, inconsistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement, because MOFCOM failed to preclude the possibility that the observed changes in average series-specific prices resulted from changes in the product category mix rather than genuine changes in series-specific prices.

iii. Japan has established that MOFCOM's overall conclusion of price depression was inconsistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement because it was dependent on MOFCOM's flawed findings of price comparability between product categories and series-specific price effects.

iv. In the light of these findings, and for reasons set out in paragraphs 7.161, 7.162, 7.174, and 7.177 above, we decline to make findings on the merits of Japan's additional arguments in support of its claim under Articles 3.1 and 3.2 of the Anti-Dumping Agreement.

e. With respect to Japan's claims concerning MOFCOM's analysis of the state of the domestic industry:

i. Japan has established that MOFCOM acted inconsistently with Articles 3.1 and 3.4 of the Anti-Dumping Agreement because:

(1) MOFCOM's findings on trends in sales prices were based on its flawed consideration of price effects;

(2) MOFCOM failed to perform an objective examination of domestic market share for the purpose of examining the impact of the subject imports on the domestic industry; and

(3) MOFCOM failed to objectively examine the evidence concerning capacity utilization and ending inventory, and did not provide a reasoned and adequate explanation of its findings with respect to these economic indices.

ii. Japan has not established that MOFCOM acted inconsistently with Articles 3.1 and 3.4 of the Anti-Dumping Agreement when examining, in the context of its impact analysis, the domestic industry's sales volume, apparent domestic consumption, pre-tax profits, and return on investment.

iii. In the light of these findings, and for reasons set out in paragraph 7.228 above, we decline to make findings on the merits of Japan's additional arguments in support of its claim under Articles 3.1 and 3.4 of the Anti-Dumping Agreement.

f. With respect to Japan's claims concerning MOFCOM's determination on causation:

i. Japan has established that MOFCOM's causation analysis was inconsistent with Articles 3.1 and 3.5 of the Anti-Dumping Agreement because:

(1) MOFCOM's causation analysis relied on its price effects and impact analyses, which were inconsistent with Articles 3.1, 3.2 and 3.4 of the Anti-Dumping Agreement;

(2) MOFCOM's analysis of the increase in nickel prices since mid-2016 as a factor other than dumped imports allegedly injuring the domestic industry at the same time was not based on an objective examination of positive evidence, and was not reasonably and adequately explained.

ii. Japan has not established that MOFCOM erred by not examining the decrease in the price of nickel from May 2014 to the end of 2015 as a factor other than dumped imports allegedly injuring the domestic industry at the same time.

iii. Japan has not established that MOFCOM failed to objectively examine the evidence submitted by the interested parties concerning the impact on the domestic industry of the cost-increases associated with the adoption of stricter environmental standards.

iv. In the light of these findings, and for reasons set out in paragraph 7.240 above, we decline to make findings on the merits of Japan's claim under Article 3.1 and the second sentence of 3.5 of the Anti-Dumping Agreement.

g. With respect to Japan's claims concerning the confidential treatment of certain company names in the domestic industry's application:

i. Japan has not established that MOFCOM acted inconsistently with Article 6.5 of the Anti-Dumping Agreement when it accepted, by implication, that the good cause the applicant presented justified the redaction of the company names at the time it made its application.

ii. Japan has not established that MOFCOM acted inconsistently with Article 6.5.1 of the Anti-Dumping Agreement by not requiring the interested parties that provided the confidential information to furnish non-confidential summaries thereof.

h. With respect to Japan's claims concerning the disclosure of essential facts under consideration which formed the basis for MOFCOM's decision to apply definitive measures:

i. Japan has established, for the reasons set out in paragraph 7.319 above, that MOFCOM acted inconsistently with Article 6.9 of the Anti-Dumping Agreement in not disclosing the essential facts underlying its price effects analysis.

ii. Japan has established, for the reasons set out in paragraph 7.358 above, that MOFCOM acted inconsistently with Article 6.9 of the Anti-Dumping Agreement in not disclosing the essential facts underlying its causation determination in relation to the fluctuation in nickel prices.

iii. Japan has not established, for the reasons set out in paragraphs 7.330, 7.337, 7.352, 7.363, and 7.371, respectively, that MOFCOM acted inconsistently with Article 6.9 of the Anti-Dumping Agreement in relation to its disclosure of the essential facts pertaining to the following:

(1) MOFCOM's cumulation analysis;

(2) MOFCOM's examination of the state of the domestic industry;

(3) MOFCOM's causation determination in relation to cost of environment regulations; and

(4) MOFCOM's definition of the domestic industry.

iv. For the reasons set out in paragraph 7.325 of this Report, we decline to make additional findings on the merits of Japan's claim with respect to the alleged lack of disclosure concerning MOFCOM's definition of the product under consideration.

i. With respect to Japan's claims concerning the adequacy of the public notice published by MOFCOM:

i. Japan has not established, for the reasons set out in paragraphs 7.389, 7.397, 7.403, and 7.407, respectively, that MOFCOM's public notice in relation to the following was inconsistent with Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement:

(1) MOFCOM's cumulation analysis;

(2) MOFCOM's examination of the state of the domestic industry;

(3) MOFCOM's causation determination in relation to cost of environment regulations; and

(4) MOFCOM's definition of the domestic industry.

ii. For the reasons set out in paragraphs 7.381, 7.384, and 7.401 above, we decline to make additional findings on the merits of Japan's submissions with respect to the consistency of the following aspects of MOFCOM's public notice with Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement:

(1) MOFCOM's price effects analysis;

(2) MOFCOM's definition of the product under consideration; and

(3) MOFCOM's causation determination in relation to the fluctuation in nickel prices.

j. For the reasons set out in paragraph 7.408 above, we decline to make additional findings with respect to Japan's claims under Article 1 of the Anti-Dumping Agreement and Article VI:6(a) of the GATT 1994.

8.2. Under Article 3.8 of the DSU, in cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment. We conclude that, to the extent that the measures at issue are inconsistent with the Anti-Dumping Agreement, they have nullified or impaired benefits accruing to Japan under this agreement.

8.3. Pursuant to Article 19.1 of the DSU, we recommend that China bring its measures into conformity with its obligations under the Anti-Dumping Agreement.