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**CHINA – ANTI-DUMPING MEASURES ON IMPORTS OF  
CELLULOSE PULP FROM CANADA**

REPORT OF THE PANEL

*BCI deleted, as indicated [\*\*\*]*

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### CASES CITED IN THIS REPORT

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<i>China – Autos (US)</i>	Panel Report, <i>China – Anti-Dumping and Countervailing Duties on Certain Automobiles from the United States</i> , WT/DS440/R and Add.1, adopted 18 June 2014, DSR 2014:VII, p. 2655
<i>China – Broiler Products</i>	Panel Report, <i>China – Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States</i> , WT/DS427/R and Add.1, adopted 25 September 2013, DSR 2013:IV, p. 1041
<i>China – GOES</i>	Appellate Body Report, <i>China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States</i> , WT/DS414/AB/R, adopted 16 November 2012, DSR 2012:XII, p. 6251
<i>China – HP-SSST (Japan) / China – HP-SSST (EU)</i>	Appellate Body Reports, <i>China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from Japan / China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from the European Union</i> , WT/DS454/AB/R and Add.1 / WT/DS460/AB/R and Add.1, adopted 28 October 2015
<i>China – HP-SSST (Japan) / China – HP-SSST (EU)</i>	Panel Reports, <i>China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from Japan / China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from the European Union</i> , WT/DS454/R and Add.1 / WT/DS460/R, Add.1 and Corr.1, adopted 28 October 2015, as modified by Appellate Body Reports WT/DS454/AB/R/ WT/DS460/AB/R
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<i>EC – Bed Linen</i>	Panel Report, <i>European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India</i> , WT/DS141/R, adopted 12 March 2001, as modified by Appellate Body Report WT/DS141/AB/R, DSR 2001:VI, p. 2077
<i>EC – Bed Linen (Article 21.5 – India)</i>	Appellate Body Report, <i>European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India</i> , WT/DS141/AB/RW, adopted 24 April 2003, DSR 2003:III, p. 965
<i>EC – Bed Linen (Article 21.5 – India)</i>	Panel Report, <i>European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India</i> , WT/DS141/RW, adopted 24 April 2003, as modified by Appellate Body Report WT/DS141/AB/RW, DSR 2003:IV, p. 1269
<i>EC – Fasteners (China)</i>	Panel Report, <i>European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China</i> , WT/DS397/R and Corr.1, adopted 28 July 2011, as modified by Appellate Body Report WT/DS397/AB/R, DSR 2011:VIII, p. 4289
<i>EC – Hormones</i>	Appellate Body Report, <i>EC Measures Concerning Meat and Meat Products (Hormones)</i> , WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, p. 135
<i>EC – Salmon (Norway)</i>	Panel Report, <i>European Communities – Anti-Dumping Measure on Farmed Salmon from Norway</i> , WT/DS337/R, adopted 15 January 2008, and Corr.1, DSR 2008:I, p. 3
<i>EC – Tube or Pipe Fittings</i>	Appellate Body Report, <i>European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil</i> , WT/DS219/AB/R, adopted 18 August 2003, DSR 2003:VI, p. 2613
<i>EC – Tube or Pipe Fittings</i>	Panel Report, <i>European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil</i> , WT/DS219/R, adopted 18 August 2003, as modified by Appellate Body Report WT/DS219/AB/R, DSR 2003:VII, p. 2701

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<i>EU – Biodiesel (Argentina)</i>	Appellate Body Report, <i>European Union – Anti-Dumping Measures on Biodiesel from Argentina</i> , WT/DS473/AB/R and Add.1, adopted 26 October 2016
<i>EU – Biodiesel (Argentina)</i>	Panel Report, <i>European Union – Anti-Dumping Measures on Biodiesel from Argentina</i> , WT/DS473/R and Add.1, adopted 26 October 2016, as modified by Appellate Body Report WT/DS473/AB/R
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<i>Korea – Dairy</i>	Appellate Body Report, <i>Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products</i> , WT/DS98/AB/R, adopted 12 January 2000, DSR 2000:I, p. 3
<i>Mexico – Anti-Dumping Measures on Rice</i>	Appellate Body Report, <i>Mexico – Definitive Anti-Dumping Measures on Beef and Rice, Complaint with Respect to Rice</i> , WT/DS295/AB/R, adopted 20 December 2005, DSR 2005:XXII, p. 10853
<i>Mexico – Olive Oil</i>	Panel Report, <i>Mexico – Definitive Countervailing Measures on Olive Oil from the European Communities</i> , WT/DS341/R, adopted 21 October 2008, DSR 2008:IX, p. 3179
<i>Mexico – Steel Pipes and Tubes</i>	Panel Report, <i>Mexico – Anti-Dumping Duties on Steel Pipes and Tubes from Guatemala</i> , WT/DS331/R, adopted 24 July 2007, DSR 2007:IV, p. 1207
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<i>US – Carbon Steel</i>	Appellate Body Report, <i>United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany</i> , WT/DS213/AB/R and Corr.1, adopted 19 December 2002, DSR 2002:IX, p. 3779
<i>US – Countervailing Duty Investigation on DRAMS</i>	Appellate Body Report, <i>United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea</i> , WT/DS296/AB/R, adopted 20 July 2005, DSR 2005:XVI, p. 8131
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<i>US – Large Civil Aircraft (2<sup>nd</sup> complaint)</i>	Appellate Body Report, <i>United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)</i> , WT/DS353/AB/R, adopted 23 March 2012, DSR 2012:I, p. 7
<i>US – Softwood Lumber IV (Article 21.5 – Canada)</i>	Appellate Body Report, <i>United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada – Recourse by Canada to Article 21.5 of the DSU</i> , WT/DS257/AB/RW, adopted 20 December 2005, DSR 2005:XXIII, p. 11357
<i>US – Upland Cotton</i>	Appellate Body Report, <i>United States – Subsidies on Upland Cotton</i> , WT/DS267/AB/R, adopted 21 March 2005, DSR 2005:I, p. 3

<b>Short title</b>	<b>Full case title and citation</b>
<i>US – Upland Cotton</i>	Panel Report, <i>United States – Subsidies on Upland Cotton</i> , WT/DS267/R, Add.1 to Add.3 and Corr.1, adopted 21 March 2005, as modified by Appellate Body Report WT/DS267/AB/R, DSR 2005:II, p. 299
<i>US – Washing Machines</i>	Appellate Body Report, <i>United States – Anti-Dumping and Countervailing Measures on Large Residential Washers from Korea</i> , WT/DS464/AB/R and Add.1, adopted 26 September 2016
<i>US – Wheat Gluten</i>	Appellate Body Report, <i>United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities</i> , WT/DS166/AB/R, adopted 19 January 2001, DSR 2001:II, p. 717
<i>US – Wool Shirts and Blouses</i>	Appellate Body Report, <i>United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India</i> , WT/DS33/AB/R, adopted 23 May 1997, and Corr.1, DSR 1997:I, p. 323

**ABBREVIATIONS USED IN THIS REPORT**

<b>Abbreviation</b>	<b>Description</b>
Anti-Dumping Agreement	Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994
BCI	Business Confidential Information
Cosmo	Cosmo Specialty Fibers, Inc.
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
Fortress	Fortress Specialty Cellulose Inc.
GATT 1994	General Agreement on Tariffs and Trade 1994
MOFCOM	Ministry of Commerce of the People's Republic of China
POI	Period of investigation
Rayonier	Rayonier Performance Fibers, LLC.
Vienna Convention	Vienna Convention on the Law of Treaties, Done at Vienna, 23 May 1969, 1155 UNTS 331; 8 International Legal Materials 679
VSF	Viscose Staple Fibre
WTO	World Trade Organization

## 1 INTRODUCTION

### 1.1 Complaint by Canada

1.1. On 15 October 2014, Canada requested consultations with China pursuant to Articles 1 and 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Article XXII: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 anti-dumping measure applied by China on imports of cellulose pulp originating from, *inter alia*, Canada.<sup>1</sup>

1.2. Consultations were held on 2 November 2014, but failed to resolve the dispute. On 12 February 2015, Canada requested the establishment of a panel.<sup>2</sup>

### 1.2 Panel establishment and composition

1.3. At its meeting on 10 March 2015, the Dispute Settlement Body (DSB) established a panel pursuant to the request of Canada in document WT/DS483/2, in accordance with Article 6 of the DSU.<sup>3</sup>

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 Canada in document WT/DS483/2 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.<sup>4</sup>

1.5. On 15 April 2015, Canada requested the Director-General to determine the composition of the panel, pursuant to Article 8.7 of the DSU. On 27 April 2015, the Director-General accordingly composed the Panel as follows:

Chairperson: Mr. Thomas Cottier  
Members: Mr. Greg Weppner  
Mr. Shahid Bashir

1.6. Brazil, Chile, the European Union, Japan, Korea, Norway, Singapore, Uruguay, and the United States notified their interest in participating in the Panel proceedings as third parties.<sup>5</sup>

### 1.3 Panel proceedings

#### 1.3.1 General

1.7. The Panel began its work on this case later than it would have wished due to staff constraints in the WTO Secretariat.<sup>6</sup> After consultation with the parties, on 8 January 2016 the Panel adopted its timetable<sup>7</sup> and Working Procedures.<sup>8</sup>

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<sup>1</sup> *China – Cellulose Pulp*, request for consultations by Canada, (dated 15 October 2014, circulated 20 October 2014), WT/DS483/1.

<sup>2</sup> *China – Cellulose Pulp*, request for the establishment of a panel by Canada, (dated 12 February 2015, circulated 13 February 2015), WT/DS483/2 (Canada's panel request).

<sup>3</sup> Dispute Settlement Body, minutes of meeting held on 10 March 2015, (circulated 20 April 2015), WT/DSB/M/358.

<sup>4</sup> *China – Cellulose Pulp*, constitution note of the panel, (dated 10 March 2015, circulated 28 April 2015), WT/DS483/3.

<sup>5</sup> *China – Cellulose Pulp*, constitution note of the panel, (dated 10 March 2015, circulated 28 April 2015), WT/DS483/3.

<sup>6</sup> *China – Cellulose Pulp*, communication from the panel, (issued and circulated on 27 October 2015), WT/DS483/4.

<sup>7</sup> The Panel revised its timetable on 1 March 2016, 19 May 2016, 8 August 2016, and 12 December 2016.

<sup>8</sup> Working Procedures of the Panel, Annex A-2.

1.8. The Panel held a first substantive meeting with the parties on 11-12 May 2016. A session with the third parties took place on 12 May 2016. The Panel held a second substantive meeting with the parties on 3 August 2016.<sup>9</sup> On 22 September 2016, the Panel issued the descriptive part of its Report to the parties. The Panel issued its Interim Report to the parties on 23 November 2016. The Panel issued its Final Report to the parties on 16 December 2016.

### 1.3.2 Additional working procedures concerning business confidential information (BCI)

1.9. After consultation with the parties, on 8 January 2016 the Panel adopted Additional Working Procedures concerning Business Confidential Information (BCI).<sup>10</sup>

## 2 FACTUAL ASPECTS

2.1. This dispute concerns the anti-dumping measure imposed by China on imports of cellulose pulp originating from Canada, as set forth in Ministry of Commerce of the People's Republic of China (MOFCOM) Notices No. 75 of 6 November 2013 (Preliminary Determination)<sup>11</sup> and No. 18 of 4 April 2014 (Final Determination)<sup>12</sup> and accompanying annexes. Specifically, Canada challenges MOFCOM's determination of injury in the anti-dumping investigation at issue.<sup>13</sup>

2.2. MOFCOM initiated anti-dumping investigations on imports of cellulose pulp from Brazil, Canada, and the United States on 6 February 2013<sup>14</sup>, following the submission of an application by Chinese cellulose pulp producers on 13 December 2012.<sup>15</sup> The period of investigation (POI) for the examination of dumping was from 1 January 2012 to 31 December 2012, and the POI for the examination of injury was from 1 January 2010 to 31 December 2012.<sup>16</sup>

2.3. In its Preliminary Determination, published on 6 November 2013, MOFCOM found that the imports of cellulose pulp from the investigated countries were dumped and caused material injury to the domestic industry in China.<sup>17</sup> MOFCOM confirmed these conclusions in its Final Determination, published on 4 April 2014.<sup>18</sup> MOFCOM calculated final dumping margins for Canadian producers ranging from 0.7% to 23.7%.<sup>19</sup> MOFCOM also concluded that the dumped imports, including those from Canada, caused material injury to the Chinese domestic industry producing the like product.<sup>20</sup>

2.4. MOFCOM applied an anti-dumping measure in the form of *ad valorem* duties on imports from producers in the investigated countries.<sup>21</sup> Anti-dumping duties of 13% were imposed on cooperating Canadian producers, and of 23.7% on all other Canadian producers. One Canadian

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<sup>9</sup> On 15 September 2016, Canada submitted a letter to the Panel commenting on a recently issued Appellate Body report in connection with its arguments in this dispute. Following an invitation from the Panel to respond, China on 23 September 2016 replied asking the Panel not to admit the Canadian letter, and going on to respond to the substance of Canada's comments. Despite the unsolicited nature of Canada's submission, in light of the fact that China had the opportunity to, and did, comment on the substance of the submission, the Panel decided to deny China's request that Canada's letter be rejected.

<sup>10</sup> Additional Working Procedures of the Panel Concerning Business Confidential Information, Annex A-3.

<sup>11</sup> Ministry of Commerce of the People's Republic of China, Announcement of Anti-Dumping Preliminary Determination on Imported Dissolving Pulp from the United States, Canada, and Brazil, Notice No. 75, 6 November 2013 (Preliminary Determination), (Exhibit CAN-2).

<sup>12</sup> Ministry of Commerce of the People's Republic of China, Final Determination on the Anti-Dumping Investigation on the Imported Cellulose Pulp Originated in the United States of America, Canada, and Brazil, Notice No. 18, 4 April 2014 (Final Determination), (Exhibits CHN-1 and CAN-3). Canada and China submitted differing English versions of the Final Determination. The Panel refers principally to the version submitted by China throughout this Report. In the few instances where the parties disagreed on the translation from the original Chinese, the Panel refers to both versions.

<sup>13</sup> In footnote 2 of its first written submission, Canada specifically abandoned claims regarding the determination of dumping and procedural aspects of the investigation set out in paragraphs 1-3 and 7-13 of its panel request. (Canada's first written submission, fn 2).

<sup>14</sup> China's first written submission, para. 15; Canada's first written submission, para. 28.

<sup>15</sup> China's first written submission, para. 14; Canada's first written submission, para. 25.

<sup>16</sup> Final Determination, (Exhibit CHN-1), p. 2.

<sup>17</sup> Preliminary Determination, (Exhibit CAN-2), p. 68.

<sup>18</sup> Final Determination, (Exhibit CHN-1), p. 86.

<sup>19</sup> Final Determination, (Exhibit CHN-1), pp. 57 and 86.

<sup>20</sup> Final Determination, (Exhibit CHN-1), pp. 77 and 78.

<sup>21</sup> Notice on the Final Determination No. 18, 4 April 2014, included in Exhibit CAN-3, pp. 2 and 3.

producer was excluded from the investigation because its dumping margin was determined to be *de minimis*.<sup>22</sup>

### 3 PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

3.1. Canada requests that the Panel find that the measure at issue is inconsistent with China's obligations under Articles 3.1, 3.2, 3.4, and 3.5 of the Anti-Dumping Agreement, and as a consequence also inconsistent with Article 1 of the Anti-Dumping Agreement and Article VI of the GATT 1994.<sup>23</sup> Canada further requests, pursuant to Article 19.1 of the DSU, that the Panel recommend that China bring its measure into conformity with the GATT 1994 and the Anti-Dumping Agreement.<sup>24</sup>

3.2. China requests that the Panel find that the measure at issue is fully consistent with China's WTO rights and obligations.<sup>25</sup>

### 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 19 of the Working Procedures adopted by the Panel (see Annexes B-1, B-2, C-1, and C-2).

### 5 ARGUMENTS OF THE THIRD PARTIES

5.1. The arguments of Brazil, the European Union, Japan, Norway, and the United States are reflected in their executive summaries, provided in accordance with paragraph 20 of the Working Procedures adopted by the Panel (see Annexes D-1-D-5). Chile, Korea, Singapore, and Uruguay did not submit written or oral arguments to the Panel.

### 6 INTERIM REVIEW

6.1. On 23 November 2016, the Panel issued its Interim Report to the parties. On 30 November 2016, Canada and China each submitted written requests for the Panel to review aspects of the Interim Report. Neither party requested an interim review meeting. On 7 December 2016, both parties submitted comments on the other party's requests for review.

6.2. The parties' requests made at the interim review stage as well as the Panel's discussion and disposition of those requests are set out in Annex A-1.

### 7 FINDINGS

#### 7.1 Introduction

7.1. This dispute concerns the imposition of anti-dumping duties by China on imports of cellulose pulp from Canada. Cellulose pulp is described as "a kind of cellulosic material made from plant fibers and used for production of chemical fibers, such as viscose fiber and cellulosic acetate".<sup>26</sup> Following an investigation initiated based on an application by Chinese cellulose pulp producers, MOFCOM concluded that cellulose pulp imported from Brazil, Canada, and the United States was dumped and causing material injury to the domestic industry producing the like product in China. MOFCOM applied an *ad valorem* anti-dumping duty on imports of cellulose pulp from producers in the investigated countries. In the case of Canada, those duties were in the amount of 13% for cooperating Canadian producers, and 23.7% for all other Canadian producers.<sup>27</sup>

7.2. Canada requested consultations with China with respect to the anti-dumping measure applied by China on imports of cellulose pulp from Canada. In its request for panel establishment, Canada

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<sup>22</sup> Notice on the Final Determination, No. 18, 4 April 2014, included in Exhibit CAN-3, p. 2.

<sup>23</sup> Canada's first written submission, para. 189; second written submission, para. 196.

<sup>24</sup> Canada's first written submission, para. 189; second written submission, para. 196.

<sup>25</sup> China's first written submission, para. 181; second written submission, para. 168.

<sup>26</sup> Final Determination, (Exhibit CHN-1), p. 26.

<sup>27</sup> One Canadian producer was excluded from the investigation because its dumping margin was determined to be *de minimis*.

challenged MOFCOM's determinations of injury and dumping, and various procedural aspects of the investigation.<sup>28</sup> In its first written submission, Canada specifically abandoned claims regarding the determination of dumping and procedural aspects of the investigation.<sup>29</sup> Canada has pursued its claims challenging the consistency of MOFCOM's determination of injury with Articles 3.1, 3.2, 3.4, and 3.5 of the Anti-Dumping Agreement. It is those claims which are before us in this dispute.

7.3. In addressing the complaint in this dispute, we will first set out the relevant principles guiding our review, including the relevant principles of treaty interpretation. Second, we will set out our understanding of the framework of Article 3 of the Anti-Dumping Agreement governing the determination of injury, and the interrelationship of its several provisions. Finally, we will set out our detailed analysis of the application of Article 3 to the facts of the underlying determination and investigation.

## **7.2 General principles regarding treaty interpretation, the applicable standard of review, and burden of proof**

### **7.2.1 Treaty interpretation**

7.4. Article 3.2 of the DSU provides that the dispute settlement system serves to clarify the existing provisions of the covered agreements "in accordance with customary rules of interpretation of public international law". Article 17.6(ii) of the Anti-Dumping Agreement similarly requires panels to interpret that Agreement's provisions in accordance with the customary rules of interpretation of public international law.<sup>30</sup> It is generally accepted that the principles codified in Articles 31 and 32 of the Vienna Convention are such customary rules.<sup>31</sup>

### **7.2.2 Standard of review**

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

A panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements.

7.6. In addition, Article 17.6 of the Anti-Dumping Agreement sets forth the special standard of review applicable to disputes under the Anti-Dumping Agreement:

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

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

Thus, Article 11 of the DSU and Article 17.6 of the Anti-Dumping Agreement together establish the standard of review we are to apply with respect to both the factual and the legal aspects of the present dispute.

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<sup>28</sup> Canada's panel request.

<sup>29</sup> Canada's first written submission, fn 2. As a consequence, there is no dispute concerning China's determination that subject imports are dumped.

<sup>30</sup> Article 17.6(ii) of the Anti-Dumping Agreement also provides that if a panel finds that a provision of the Anti-Dumping Agreement admits of more than one permissible interpretation, it shall uphold a measure that rests upon one of those interpretations.

<sup>31</sup> Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 10.

7.7. When a panel is reviewing an investigating authority's determination of facts, the "objective assessment" standard in Article 11 of the DSU requires a panel to review whether the authorities have provided a reasoned and adequate explanation as to: (a) how the evidence on the record supported its factual findings; and (b) how those factual findings support the overall determination.<sup>32</sup> Moreover, with respect to a "reasoned and adequate explanation", the Appellate Body observed:

What is "adequate" will inevitably depend on the facts and circumstances of the case and the particular claims made, but several general lines of inquiry are likely to be relevant. The panel's scrutiny should test whether the reasoning of the authority is coherent and internally consistent. The panel must undertake an in-depth examination of whether the explanations given disclose how the investigating authority treated the facts and evidence in the record and whether there was positive evidence before it to support the inferences made and conclusions reached by it. The panel must examine whether the explanations provided demonstrate that the investigating authority took proper account of the complexities of the data before it, and that it explained why it rejected or discounted alternative explanations and interpretations of the record evidence. A panel must be open to the possibility that the explanations given by the authority are not reasoned or adequate in the light of other plausible alternative explanations, and must take care not to assume itself the role of initial trier of facts, nor to be passive by "simply *accept[ing]* the conclusions of the competent authorities".<sup>33</sup>

Finally, it is clear that a panel should not conduct a *de novo* review of the evidence, nor substitute its judgment for that of the investigating authority. A panel must limit its examination to the evidence that was before the investigating authority during the course of the investigation and must take into account all such evidence submitted by the parties to the dispute.<sup>34</sup> At the same time, a panel must not simply defer to the conclusions of the investigating authority; a panel's examination of those conclusions must be "in-depth" and "critical and searching".<sup>35</sup>

### 7.2.3 Burden of proof

7.8. The general principles applicable to the allocation of the burden of proof in WTO dispute settlement require that a party claiming a violation of a provision of a WTO Agreement must assert and prove its claim.<sup>36</sup> Therefore, as the complaining party, Canada bears the burden of demonstrating that the measure at issue is inconsistent with the provisions of the covered agreements that it invokes. The Appellate Body has stated that a complaining party will satisfy its burden when it establishes a *prima facie* case, namely, a case which, in the absence of effective refutation by the defending party, requires a panel, as a matter of law, to rule in favour of the complaining party.<sup>37</sup> It is generally for each party asserting a fact to provide proof thereof.<sup>38</sup>

## 7.3 The legal framework for injury determination

7.9. As noted above, Canada challenges MOFCOM's injury determination under various provisions of Article 3 of the Anti-Dumping Agreement. Previous decisions of panels and the Appellate Body have elaborated on the meaning of the provisions of Article 3. In our view, it is useful to explain our understanding of the legal framework for injury determination, in order to set out the context for our review of the challenged determination of injury and our conclusions in this dispute.

7.10. Article 3 is entitled "Determination of Injury" and its provisions require an investigating authority to consider, examine, and evaluate a broad range of factors, and to demonstrate that dumped imports are causing injury to the domestic industry. As explained below, in our view,

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<sup>32</sup> Appellate Body Reports, *US – Countervailing Duty Investigation on DRAMS*, para. 186; and *US – Lamb*, para. 103.

<sup>33</sup> Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93 (referring to Appellate Body Report, *US – Lamb*, para. 106). (emphasis original)

<sup>34</sup> Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, paras. 187 and 188.

<sup>35</sup> Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93.

<sup>36</sup> Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14.

<sup>37</sup> Appellate Body Report, *EC – Hormones*, para. 104.

<sup>38</sup> Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14.

there are noteworthy differences in what an investigating authority must do in order to satisfy these various requirements so as to make a determination of injury consistent with Article 3 of the Anti-Dumping Agreement. Moreover, the provisions of Article 3 are inter-related in the sense that the consideration, examination, and evaluation of the required elements all contribute to the explanation of the ultimate determination whether dumped imports are causing material injury to the domestic industry.

7.11. The application of anti-dumping measures is subject to the requirements of Article VI of the GATT 1994 and the Anti-Dumping Agreement. The GATT 1994 establishes basic principles for the imposition of anti-dumping (and countervailing) measures, and the Anti-Dumping Agreement provides considerable elaboration of those principles, setting out a series of detailed substantive and procedural obligations which must be complied with before an anti-dumping measure may be applied. A WTO Member is entitled to apply an anti-dumping measure only if the requirements of the Anti-Dumping Agreement have been met. Recently, the Appellate Body observed that:

Taken as a whole, the object and purpose of the Anti-Dumping Agreement is to recognize the right of Members to take anti-dumping measures to counteract injurious dumping while, at the same time, imposing substantive conditions and detailed procedural rules on anti-dumping investigations and on the imposition of anti-dumping measures.<sup>39</sup>

Article 3 of the Anti-Dumping Agreement sets out the rules and conditions that apply with respect to the determination of injury, which is one of the fundamental prerequisites for the imposition of an anti-dumping measure.

7.12. Article 3.1 establishes the basic principles that a determination of injury for purposes of Article VI of GATT 1994:

[S]hall 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.

It is well established that "positive evidence" refers to "the facts underpinning and justifying the injury determination"<sup>40</sup>, and "the quality of the evidence that an investigating authority may rely upon in making a determination".<sup>41</sup> "Positive" suggests that the evidence should be "affirmative, objective, verifiable, and credible".<sup>42</sup> The "objective examination" relates to the investigative process itself, and requires that it "conform to the dictates of the basic principles of good faith and fundamental fairness", and be conducted "in an unbiased manner, without favouring the interests of any interested party, or group of interested parties, in the investigation".<sup>43</sup>

7.13. These basic principles inform the more detailed provisions set out in the remainder of Article 3. They do not, in our view, establish independent obligations which can be judged in the abstract, or in isolation and separately from the substantive requirements set out in the remainder of Article 3. Instead, they inform the application of all the provisions of Article 3.

7.14. The provisions of Article 3 requiring consideration, examination, and evaluation of various factors contemplate "a logical progression of inquiry leading to an investigating authority's ultimate injury and causation determination".<sup>44</sup> The inquiries under Articles 3.2 and 3.4, together with the inquiries under Articles 3.7 and 3.8 where relevant<sup>45</sup>, "contribute[]"<sup>46</sup>, rather than duplicate[], the overall determination required under Article 3.5. Furthermore, in the event of a dispute, they

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<sup>39</sup> Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.25.

<sup>40</sup> Appellate Body Report, *US – Hot-Rolled Steel*, para. 193.

<sup>41</sup> Appellate Body Report, *China – GOES*, para. 126 (citing *US – Hot-Rolled Steel*, para. 192).

<sup>42</sup> Appellate Body Report, *China – GOES*, para. 126 (citing *US – Hot-Rolled Steel*, para. 192).

<sup>43</sup> Appellate Body Report, *China – GOES*, para. 126 (citing *US – Hot-Rolled Steel*, para. 193).

<sup>44</sup> Appellate Body Report, *China – GOES*, para. 128.

<sup>45</sup> Article 3.7 establishes additional criteria to be considered in making a determination of threat of material injury, and clarifies that such a determination must be based on facts, and not merely on allegations, conjecture, or remote possibility, while Article 3.8 requires that the application of anti-dumping measures shall be considered and decided with special care in cases of threat of material injury.

<sup>46</sup> Appellate Body Report, *China – GOES*, para. 149.

inform a panel's conclusion regarding the investigating authority's compliance with Article 3.1 with respect to a determination of injury.

7.15. An investigating authority's determination of injury comprises a broad range of facts which must be considered in accordance with those substantive requirements, and upon the basis of which the authority must ultimately make a determination as to whether dumped imports are causing material injury to the domestic industry. That determination may become the subject of a dispute, in which case a panel will be required to review it, and decide whether the investigating authority complied with the relevant substantive and procedural obligations, consistently with the fundamental principles set out in Article 3.1. This does not, however, in our view mean that a claim of inconsistency with Article 3.1 can normally be made independently of other provisions of Article 3.

7.16. To us, this seems logical, as the "positive evidence" to be examined by the investigating authority must pertain to the particular substantive elements relevant to the determination made, and the "objective examination" must relate to the consideration and evaluation of that evidence in the investigation at issue. Thus, we do not believe a panel can, on review of a determination, decide whether a particular element of evidence relied upon by an investigating authority is "positive" in some absolute or abstract sense, but only in the context of the role and weight given to it by the investigating authority. A panel must decide whether that evidence is "affirmative, objective, verifiable, and credible" with respect to the substance of the matter in connection with which it is considered and relied upon by the investigating authority.

7.17. Similarly, we do not believe a panel can, on review of a determination, decide whether the examination of the evidence by the investigating authority was objective in the abstract, but only in the context of the substance of the matter with respect to which the authority was considering and relying on that evidence.<sup>47</sup> Whether the decision-making process of the investigating authority "conform[ed] to the dictates of the basic principles of good faith and fundamental fairness", and was undertaken "in an unbiased manner, without favouring the interests of any interested party, or group of interested parties, in the investigation" can, in our view, only be determined on the basis of a careful scrutiny of the decisions made by the investigating authority in reaching a conclusion on the question of whether dumped imports caused injury, as set out in the relevant determination and other documents.

7.18. Looking at the substantive obligations of Article 3, we see that Article 3.2 provides more specific guidance regarding the objective examination of the volume of dumped imports and the objective examination of the effect of those imports on prices in the domestic market, as required by Article 3.1. Article 3.2 first sentence provides that:

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.

In our view, this does not require an investigating authority to make a *determination* regarding the significance of any increase in the volume of dumped imports.<sup>48</sup> Rather, it requires the authorities to *consider* whether there was any increase in dumped imports, and the significance of any such increase, and provides for three different parameters for that consideration.

7.19. Article 3.2 second sentence provides that:

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

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<sup>47</sup> Of course, a general claim of bias on the part of the investigating authority would fall squarely under Article 3.1. But even in such a situation, it is questionable whether the objective nature of the authority's investigation could be determined without going into the substance of the determination which is challenged.

<sup>48</sup> See Appellate Body Report, *China – GOES*, para. 130. The Appellate Body concluded that consideration of the price effects of dumped imports under Article 3.2 does not require a definitive determination such as that required by Article 3.5 with respect to causation. In our view, the same conclusion applies with respect to the consideration of the volume of dumped imports and the significance of any increase in that volume under the first sentence of Article 3.2.

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.

Thus, like the first sentence, the second sentence of Article 3.2 does not require an investigating authority to make a *determination* regarding the effects of dumped imports on prices, but rather to *consider* whether there has been a significant price undercutting by the dumped imports, or whether the effect of dumped imports is otherwise significant price depression or price suppression.<sup>49</sup>

7.20. Article 3.4 sets out a series of "relevant economic factors and indices having a bearing on the state of the industry", which must be evaluated by the investigating authority in all cases when examining the consequential impact of dumped imports on that industry, as required by Article 3.1. Like Article 3.2, Article 3.4 does not require an investigating authority to make a *determination* regarding the impact of dumped imports, but rather to undertake an *examination* of that impact, including an *evaluation* of all relevant economic factors and indices having a bearing on the state of the industry, including those specifically mandated by Article 3.4 itself.

7.21. The fact that Articles 3.2 and 3.4 do not require an investigating authority to make determinations regarding the matters considered, examined, or evaluated, does not diminish the scope of the necessary inquiries under those provisions.<sup>50</sup> With respect to volume, the necessary inquiries call for consideration of the volume of dumped imports and the significance of any increase in that volume. With respect to the effects of dumped imports on prices and their impact on the domestic industry, the necessary inquiries call for consideration of the relationship between the dumped imports and prices of the domestic like product and the factors relevant to the condition of the industry.<sup>51</sup> However, while these inquiries "are necessary in order to answer the ultimate question ... as to whether subject imports are causing injury to the domestic industry"<sup>52</sup>, the fact that no determinations are made under these provisions makes it clear that no particular outcome is a necessary prerequisite for reaching and resolving that "ultimate question".<sup>53</sup>

7.22. An investigating authority's objective examination may reveal no increase in dumped imports, or no significant increase in those imports, or no price undercutting, depression, or suppression, or no impact on one or more of the relevant economic factors and indices evaluated. But this does not mean that the investigating authority need not, or may not, go on to an examination of all relevant evidence before it to consider whether or not dumped imports are causing material injury to the domestic industry. Of course, in the absence of any increase in the volume of dumped imports, any price effects, or any impact on the domestic industry, the answer would be expected to be no. But in the more likely situation where the results of the inquiries under Articles 3.2 and 3.4 are diverse, a thorough consideration of whether there is a causal relationship between the dumped imports and injury will be necessary before a determination of injury within the meaning of the Anti-Dumping Agreement and Article VI of the GATT can be made.

7.23. The analysis under Article 3.5 covers a broader scope and concerns the ultimate question of whether dumped imports are causing material injury to the domestic industry.<sup>54</sup> The elements of that ultimate determination are set out in Article 3.5, which requires a demonstration that the dumped imports are, through their volume, price effects, and impact on the domestic industry, causing material injury to that industry. The results of the inquiries under Articles 3.2 and 3.4 are "linked through a causation analysis" to the demonstration that there is a causal relationship between the dumped imports and the injury to the domestic industry.<sup>55</sup> Article 3.5 specifically refers back to the "effects of dumping, as set forth in [Articles 3.2 and 3.4]" in the context of the

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<sup>49</sup> Appellate Body Report, *China – GOES*, para. 130.

<sup>50</sup> Appellate Body Report, *China – GOES*, para. 131. While the Appellate Body was referring specifically to Article 3.2 in this context, we are of the view that the observation holds for Article 3.4 as well.

<sup>51</sup> Appellate Body Reports, *China – GOES*, paras. 136 and 138; and *China – HP-SSST (Japan) / China – HP-SSST (EU)*, paras. 5.158-5.160.

<sup>52</sup> Appellate Body Report, *China – GOES*, para. 128.

<sup>53</sup> We note in this regard that both Article 3.2 and Article 3.4 provide that no one or several of the factors listed therein can necessarily give decisive guidance. We understand this as indicating that no one or several of the factors listed can give decisive guidance as to the ultimate question whether dumped imports are causing material injury to the domestic industry.

<sup>54</sup> Appellate Body Report, *China – GOES*, paras. 147 and 150.

<sup>55</sup> Appellate Body Report, *China – GOES*, paras. 128 and 130 and fn 217.

demonstration that dumped imports are causing injury within the meaning of the Agreement, and requires a demonstration of a causal relationship between the dumped imports and the injury to the domestic industry based on an examination of all relevant evidence.

7.24. It seems clear that a "causal relationship" is a relationship in which dumped imports contribute to "bringing about", "producing" or "inducing" the material injury.<sup>56</sup> We note that Article 3 does not provide any specific guidance on how an investigating authority should undertake the examination of the relevant evidence in determining whether dumped imports are causing material injury.<sup>57</sup> Thus, "it is for the investigating authorities in the first instance to determine the analytical methodologies that will be applied in the course of an investigation[]"<sup>58</sup> and will enable it to make the required determination consistently with Article 3.<sup>59</sup>

7.25. Article 3.5 also requires that an investigating authority examine known factors other than dumped imports which are causing injury to the domestic industry simultaneously with the dumped imports, and ensure that the injuries caused by such other factors not be attributed to dumped imports. In order to comply with this requirement, an investigating authority must:

[M]ake an appropriate assessment of the injury caused to the domestic industry by the other known factors, and ... must separate and distinguish the injurious effects of the dumped imports from the injurious effects of those other factors. This requires a satisfactory explanation of the nature and extent of the injurious effects of the other factors, as distinguished from the injurious effects of the dumped imports.<sup>60</sup>

7.26. While the investigating authority must find a sufficiently clear contribution by dumped imports to demonstrate that they are causing material injury, and explain its determination in that regard, nothing in the first two sentences of Article 3.5 suggests that those imports must be the sole cause of that injury. The language of Article 3.5 as a whole seems clear – the "causal relationship" between dumped imports and material injury may exist even though other factors are also contributing, "at the same time", to the situation of the domestic industry.

7.27. Similarly, the obligation to distinguish between the effects caused by dumped imports and the effects caused by other factors does not necessarily imply that dumped imports on their own must be capable of causing material injury.<sup>61</sup> Finally, there is no requirement that dumped imports alone, or in and of themselves, must be capable of causing material injury.<sup>62</sup> Article 3 does not provide any specific guidance on how an investigating authority should undertake the examination

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<sup>56</sup> See Appellate Body Report, *US – Wheat Gluten*, para. 67. While the Appellate Body was referring to the meaning of the "causal link" between increased imports and serious injury required under Article 4.2(b) of the Safeguards Agreement in this case, we are of the view that prior decisions relating to the causation requirement in the Agreement on Safeguards can provide guidance in interpreting the very similar phrase "causal relationship" in Article 3.5 of the Anti-Dumping Agreement. (See Appellate Body Report, *US – Hot-Rolled Steel*, para. 230).

<sup>57</sup> Appellate Body Report, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.141 (citing Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, paras. 113 and 118).

<sup>58</sup> Panel Report, *Thailand – H-Beams*, para. 7.159.

<sup>59</sup> In this context, we are of the view that the use of the word "all" in the phrases "all relevant economic factors" in Article 3.4 and "all relevant evidence" in Article 3.5 indicates that the effects of any factor may be relevant to the ultimate determination of causation, irrespective of whether the particular factor relates to dumped imports specifically or to the domestic industry more generally. In our view, all the factors and evidence having a bearing on the question are to be included in the investigating authority's assessment, and the contribution of each relevant factor is to be counted in the determination of injury caused by dumped imports according to its impact on the situation of the domestic industry. In this context, we do not consider that factors specifically related to dumped imports should be counted towards a determination of material injury caused by dumped imports, while others – those not related to dumped imports – should be excluded from that determination. (See Appellate Body Report, *US – Wheat Gluten*, para. 67 (referring to Article 4.2(b) of the Safeguards Agreement)).

<sup>60</sup> Appellate Body Report, *US – Hot-Rolled Steel*, para. 226

<sup>61</sup> Cf. Appellate Body Report, *US – Wheat Gluten*, para. 67. The Appellate Body was referring to the non-attribution language in the *Agreement on Safeguards*, which can provide guidance in interpreting the non-attribution language in Article 3.5 of the *Anti-Dumping Agreement*. (Appellate Body Report, *US – Hot-Rolled Steel*, para. 230).

<sup>62</sup> See, Appellate Body Report, *US – Wheat Gluten*, para. 79. While the Appellate Body was referring to the causation requirement in Article 4.2(b) of the Agreement on Safeguards, we are of the view that its reasoning in that context is highly relevant to understanding the causation requirement in Article 3.5. (Appellate Body Report, *US – Hot-Rolled Steel*, para. 230).

of known factors other than the dumped imports which are injuring the domestic industry, nor how it should ensure that injuries caused by these other factors are not attributed to the dumped imports. Thus an investigating authority may rely on any methodology or methodologies it believes will enable it to make the required determination consistently with Article 3.

7.28. In addition to the provisions establishing substantive criteria for the determination of material injury caused by dumped imports, Article 3 contains two additional provisions which might be viewed as more procedural in nature. Article 3.3 establishes criteria for the cumulative assessment of the effects of dumped imports. A decision to use such a cumulative assessment necessarily will precede the consideration of the volume, price effects and impact of dumped imports, as well as the demonstration of a causal relationship, as it is a necessary element to delimit the corpus of dumped imports to be taken into account under the relevant provisions, Articles 3.2, 3.4, 3.5, and 3.7. Article 3.6 provides for an alternative to the consideration of the effects of dumped imports on domestic production of the like product in certain circumstances. Again, this provision would necessarily come into play before the examination of the impact of the dumped imports in the context of Article 3.4, as the relevant information on the state of the domestic industry will be different if the alternative allowed for is applied.

7.29. Thus, it seems clear to us that while there is a "logical progression" from consideration of the various substantive elements set out in Articles 3.2, 3.4, and when the issue of threat of material injury is raised, Article 3.7, to the ultimate determination whether the dumped imports are causing material injury to the domestic industry under Article 3.5, there is no obligatory sequence for the analysis by an investigating authority to be undertaken, and "no prescribed template or format" for an investigating authority's determination of injury exists under Article 3 of the AD Agreement.<sup>63</sup> As a consequence, we consider it clear that there is no necessary sequence to be followed by an investigating authority in setting out its consideration, examination, evaluation and determination in relevant documentation.<sup>64</sup>

7.30. Finally, an investigating authority's consideration, examination, evaluation, determinations, and importantly, its reasoning and explanations in connection with the foregoing, must be reflected in relevant documentation, such as a public notice or other separate report of its final determination whether or not to impose an anti-dumping measure.<sup>65</sup> It is this documentation that will be considered, in the first instance, by a panel reviewing a Member's imposition of anti-dumping measures, if challenged. Against the background set out above, it is that task to which we now turn in this dispute.

## **7.4 Whether MOFCOM's consideration of the volume of dumped imports was consistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement**

### **7.4.1 Introduction**

7.31. Canada challenges MOFCOM's consideration of the volume of the dumped imports under Articles 3.1 and 3.2 of the Anti-Dumping Agreement. MOFCOM found that the volume of dumped imports increased by 43.82% in absolute terms over the POI.<sup>66</sup> Canada does not disagree with this factual finding, but argues that MOFCOM failed to assess the significance of this increase in light of

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<sup>63</sup> Appellate Body Report, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.141.

<sup>64</sup> We note that the parties are in agreement with us on this point. (Canada's response to Panel question No. 8(i); China's response to Panel question No. 8(i)). Third parties also expressed this view. (Brazil's response to Panel question No. 6(i); Japan's response to Panel question No. 6(i); and United States' response to Panel question No. 6(i)).

<sup>65</sup> Article 12.2 provides that:

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.

See, Appellate Body Report, *China – GOES*, para. 131 (referring to Panel Reports, *Thailand – H-Beams*, para. 7.161; and *Korea – Certain Paper*, para. 7.253).

<sup>66</sup> Final Determination, (Exhibit CHN-1), p. 59.

evidence which Canada alleges indicated that this increase was not significant.<sup>67</sup> Canada bases its claim largely on its interpretation of the term "significant" in the first sentence of Article 3.2.<sup>68</sup> Specifically, Canada argues that in order to consider whether an increase in the absolute volume of the dumped imports is significant, an investigating authority has to examine the factual circumstances surrounding that increase.<sup>69</sup> Canada submits that the relevant factual circumstances will vary from case to case, but may include trends in domestic demand, and trends in the volume of the domestic like product and non-dumped imports.<sup>70</sup>

7.32. China submits that Article 3.2 requires the investigating authority to consider the volume of the dumped imports either in absolute or in relative terms, noting that the text of the provision uses the disjunctive "or" and the words "either" and "absolute".<sup>71</sup> China contends that the interpretation suggested by Canada would require the investigating authorities always to consider an increase in volume in both absolute and relative terms.<sup>72</sup> China points out that MOFCOM considered that there had been a significant increase in dumped imports in absolute terms.<sup>73</sup> According to China, there is no textual basis in Article 3.2 to support Canada's argument that relevant factual circumstances must be taken into account in considering whether there has been a significant increase in the absolute volume of dumped imports. China submits that Article 3.2 clearly specifies how the investigating authorities are required to consider the volume of the dumped imports, and provides a choice between different approaches.<sup>74</sup> China asserts that the term "absolute" suggests that the increase in imports is to be examined on its own, without the need to look at surrounding factual circumstances, and that the magnitude of the increase can be in itself significant.<sup>75</sup>

7.33. We will first address the legal standard under the first sentence of Article 3.2 and then examine each of Canada's allegations in turn.

#### **7.4.2 Legal standard under Articles 3.1 and 3.2, first sentence**

7.34. We start our analysis by considering the relevant provisions of the Anti-Dumping Agreement. Article 3.1 of the Anti-Dumping Agreement provides, in relevant part, that a determination of injury:

[S]hall 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.

7.35. The first sentence of Article 3.2 elaborates on the objective examination of the volume of imports required by Article 3.1, providing as follows:

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.

7.36. As discussed above, consideration of the data and trends with respect to the volume of dumped imports is a step in the logical progression toward a determination whether injury is caused by dumped imports.<sup>76</sup> However, even a significant increase in the volume of dumped imports may not, standing alone, suffice to demonstrate that dumped imports are causing material

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<sup>67</sup> Canada's first written submission, paras. 66-76.

<sup>68</sup> Canada's first written submission, para. 69; second written submission, para. 19.

<sup>69</sup> Canada's first written submission, para. 70.

<sup>70</sup> Canada's first written submission, para. 70; second written submission, para. 26.

<sup>71</sup> China's second written submission, para. 25.

<sup>72</sup> China's second written submission, paras. 18 and 37.

<sup>73</sup> China's first written submission, paras. 47 and 48. China notes that, even though not required to do so, MOFCOM also looked at the volume of dumped imports relative to consumption. (China's first written submission, para. 48).

<sup>74</sup> China's second written submission, para. 24.

<sup>75</sup> China's second written submission, para. 25.

<sup>76</sup> It seems clear that the greater the volume of, or any increase in the volume of, dumped imports, the greater the likely impact of those dumped imports with respect to factors such as lost sales and consequent financial effects, inventories, production capacity, and so on.

injury to the domestic industry. The impact of those imports and of any increase in those imports over the period of investigation (POI) on the condition of the domestic industry will have to be considered before that ultimate question can be answered. Nonetheless, even if the consideration of the volume of dumped imports shows no increase, or an insignificant increase, this does not mean a determination that dumped imports are causing material injury is precluded.<sup>77</sup>

7.37. Canada acknowledges that the first sentence of Article 3.2 gives the investigating authorities discretion to consider the increase in dumped imports in absolute terms or relative to production or consumption in the importing Member.<sup>78</sup> However, Canada asserts that when considering any of these perspectives, the authorities must conduct an objective examination based on positive evidence, and provide reasoned and adequate explanations of its conclusions.<sup>79</sup> For Canada, this means that the significance of an absolute increase in the volume of dumped imports must be considered in the context of the factual circumstances in the market.

7.38. However, we cannot distinguish what Canada describes as a contextual consideration of the significance of an absolute increase in the volume of dumped imports, taking into account trends in domestic production of the like product and trends in domestic demand, from a consideration of the significance of any increase in dumped imports relative to domestic production or consumption, or indeed from the consideration of the significance of any increase in dumped imports in the analysis of causation. Thus, Canada's argument fails to recognize the separate nature of the three inquiries regarding the volume of dumped imports set out in Article 3.2, which are clearly distinguished in the text. In our view, Canada's argument fails to recognize the difference between the consideration of the volume of dumped imports required under Article 3.2 first sentence and the demonstration of the effects of the volume of dumped imports in the context of the demonstration of a causal relationship between dumped imports and material injury to the domestic industry under Article 3.5.

7.39. While it is clear that Article 3.1 requires that an injury determination must be based on an objective examination of positive evidence, and that this principle applies in general to an investigating authority's consideration of increased imports under Article 3.2, this does not inform the substance of that consideration. Nor does it provide guidance, or establish any limitation, as to which of the alternatives set out in Article 3.2 for consideration of the volume of dumped imports should be undertaken by an investigating authority in any given investigation. The three methods for considering the volume of imports set out in Article 3.2 are not mutually exclusive, and the investigating authority may rely on one, two or all of them in the course of its consideration of the significance of any increase in the volume of dumped imports, as well as in its analysis and determination with regard to injury and causation at later stages. However, in our view, there is no basis in the text of Article 3.2, in light of the disjunctive "either ... or", for Canada's view that investigating authorities can, on the facts of a particular case, be required to consider the significance of any increase in the volume of dumped imports in relative terms, in addition to considering the significance of any absolute increase.<sup>80</sup>

7.40. Turning to the interpretation of "significant", we note that the parties agree that the dictionary meaning of the word "significant" is "important, notable, consequential".<sup>81</sup> In the first sentence of Article 3.2, the term "significant" modifies the word "increase" in the phrase "whether

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<sup>77</sup> To us, this distinction is appropriate and indeed, may be significant in a particular case. An absolute increase in the volume of imports in a growing market is likely to have a very different impact on the situation of the domestic industry than if the market were stable or contracting. In such a situation, there may be no increase in the volume of dumped imports relative to domestic production or consumption. But these are considerations to be addressed in the context of the ultimate demonstration whether dumped imports are causing injury under Article 3.5.

<sup>78</sup> Canada's response to Panel question No. 4, para. 1.

<sup>79</sup> Canada's response to Panel question No. 4, para. 2; second written submission, paras. 30-33.

<sup>80</sup> Our conclusion in this regard is consistent with the views of previous panels. See Panel Reports, *Thailand – H-Beams*, para. 7.171 ("it is sufficient for the purposes of this provision for the investigating authorities to consider whether there has been a significant absolute increase"); and *US – Countervailing Duty Investigation on DRAMs*, paras. 7.233 and 7.234 (discussing the corresponding, almost identical provision in the SCM Agreement, the panel stated that there are three ways to comply with the obligation to consider whether there has been a significant increase in dumped imports. The investigating authority may consider whether there has been a significant increase in the volume of the dumped imports: (a) in absolute terms; (b) relative to domestic production; or (c) relative to domestic consumption).

<sup>81</sup> *Shorter Oxford English Dictionary*, 6<sup>th</sup> ed., A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 2, p. 2833; and Canada's first written submission, para. 70.

there has been a significant increase in dumped imports, either in absolute terms or relative to production or consumption in the importing Members". The inquiry as to the significance of any increase in dumped imports implies a consideration of developments, that is, changes or trends, in the volume of dumped imports over the period of the injury investigation. Article 3.2 further specifies *how* the investigating authorities shall consider whether there has been a significant increase in imports: in *either* absolute terms, *or* relative to domestic production or consumption.

7.41. The term "absolute" is defined as "not relative", or "not dependent for meaning or significance on a relationship with another term or concept".<sup>82</sup> Thus, the consideration of whether there has been a significant increase in dumped imports in absolute terms calls for an assessment of whether the increase in dumped imports, if any, is "important, notable or consequential". In this context, we consider that a "significant" absolute increase may be assessed on the basis of the magnitude of that increase. Of course, this does not diminish the rigour of what has to be considered, namely "whether there has been a significant increase in dumped imports, either in absolute terms or relative to production or consumption in the importing Member".<sup>83</sup> Moreover, such consideration has to be reflected in the final determination in order to demonstrate that the investigating authorities have considered the relevant factors.<sup>84</sup>

7.42. The investigating authority will also have to decide whether any given increase in imports, whether considered significant or not, ultimately supports a determination of injury caused by dumped imports. However, in our view, this is a further evaluation of the significance of any increase in dumped imports as an element of determining causation under Article 3.5.<sup>85</sup> In analysing causation, the investigating authority must *demonstrate* that the dumped imports are causing injury to the domestic industry, based on "all relevant evidence before the authorities", which, in light of the structure and logic of Article 3, includes evidence of increases in dumped imports. In that analysis, the investigating authority will have to take into account any such increases in the context of all the other evidence before it, including evidence concerning, for instance, changes in demand, volume of sales of the domestic industry, and non-dumped imports. However, given that Article 3.2 does not require a *determination* that any increase in imports, whether absolute or relative to domestic production or consumption, is significant<sup>86</sup>, we do not see how these latter elements can be considered necessary aspects of the consideration of the significance of an absolute increase in dumped imports required under Article 3.2.

7.43. A different understanding may be appropriate with respect to the consideration of whether an increase in imports is significant relative to domestic production or consumption. In such a case, the significance of any increase is considered in relation to another variable, requiring some comparison. This suggests a degree of contextual analysis, rather than an assessment of the magnitude of an increase. However, even in this context, consideration of the magnitude of any increase in dumped imports relative to domestic production or consumption may be sufficient for purposes of Article 3.2, keeping in mind that, whether any increase in imports relative to domestic production or consumption, significant or not, is ultimately enough to support a determination of injury caused by dumped imports will still have to be addressed by the investigating authority in

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<sup>82</sup> Oxford English Dictionary online, definition of "absolute", available at: <<http://www.oed.com/view/Entry/679?redirectedFrom=absolute#eid>>, accessed 13 July 2016.

<sup>83</sup> Appellate Body Report, *China – GOES*, para. 131.

<sup>84</sup> Appellate Body Report, *China – GOES*, para. 131.

<sup>85</sup> We note in this regard that an investigating authority may make an affirmative determination of injury caused by dumped imports even where there has been no significant increase, or indeed any increase at all, in the volume of dumped imports. This is in contrast to the situation under the Safeguards Agreement, where increased imports are a necessary prerequisite for the imposition of a safeguard measure.

<sup>86</sup> Appellate Body Report, *China – GOES*, para. 130.

In *Thailand – H-Beams* the panel observed that:

While it would certainly be preferable for a Member explicitly to characterize whether any increase in imports as "significant", and to give a reasoned explanation of that characterization, we believe that the word "significant" does not necessarily need to appear in the text of the relevant document in order for the requirements of this provision to be fulfilled. Nevertheless, we consider that it must be apparent in the relevant documents in the record that the investigating authorities have given attention to and taken into account whether there has been a significant increase in dumped imports, in absolute or relative terms.

(Panel Report, *Thailand – H-Beams*, para. 7.161)

We do not disagree. However, as discussed above, in our view this assessment is an element of the ultimate determination of causation.

demonstrating causation. In our view, the consideration of whether there has been a significant increase in the volume of dumped imports under Article 3.2 does not require a duplicative analysis of causal linkages and other factors.

7.44. Furthermore, Article 3.2 does not provide any guidance as to what circumstances might be relevant to consideration of the "significance" of any increase in imports. Recalling that there is no requirement under Article 3.2 for an investigating authority to *determine* that an observed increase in imports, whether absolute or relative, is significant, and an investigating authority may ultimately find injury caused by dumped imports even in the absence of a significant increase in such imports, it would be inappropriate, in our view, to impose requirements for the analysis of the significance of any increase in imports that are duplicative of elements of the analysis of causation relevant to determining whether the dumped imports, whatever their volume, and whether or not it increased significantly in absolute or relative terms, are causing injury to the domestic industry.

7.45. Canada argues in this respect that the interpretation of the term "significant" in the context of Article 3.2 with respect to the effect of the dumped imports on prices is equally applicable with respect to the consideration of increases in volume.<sup>87</sup> We fail to see how this could be the case. The need for a contextual consideration of the significance of any price undercutting, price depression, or price suppression derives from the word "effect" in the second sentence of Article 3.2.<sup>88</sup> However, unlike the second sentence of Article 3.2, which refers to the effect of dumped imports on prices, and Article 3.4, which refers to the impact of dumped imports on the domestic industry, the first sentence of Article 3.2 does not refer to any impact or effect of the dumped imports, but simply to consideration of whether there has been a significant increase in dumped imports. For us, the notion that an increase in the volume of dumped imports, whether absolute or relative to production or consumption, could be considered as an effect or impact of those same imports is illogical. We are of the view that no such contextual analysis in respect of the effect of the dumped imports is required by the first sentence of Article 3.2. In our view, the significance of any particular volume of or increase in dumped imports is, in the first instance, a question of the magnitude of that increase. Whether any given volume of or increase in dumped imports may be significant in the ultimate determination of whether dumped imports cause material injury to the domestic industry will, of course, depend on the evaluation of all the relevant facts in each case. But that is an inquiry under Article 3.5 of the Anti-Dumping Agreement.

#### **7.4.3 MOFCOM's consideration of the volume of dumped imports**

7.46. Turning to the facts of the present case, we note that MOFCOM considered the volume of the dumped imports in both absolute terms and relative to consumption in the Chinese market. Specifically, MOFCOM found an increase in the volume of dumped imports, in absolute terms, of 43.82% over the POI, i.e. 2010-2012.<sup>89</sup> MOFCOM further determined that the market share of the dumped imports also showed an overall upward trend, increasing by 1.31 percentage points over the POI.<sup>90</sup>

7.47. Thus, MOFCOM found that both the absolute quantity and the quantity of the dumped imports relative to consumption showed an increasing trend during the POI. Noting the submissions made by interested parties Rayonier Performance Fibers, LLC. (Rayonier) and Fortress Specialty Cellulose Inc. (Fortress) asserting that there had been no significant increase in volume of the dumped imports, especially relative to production and consumption in China, MOFCOM further observed that volume of the dumped imports relative to production of the domestic like

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<sup>87</sup> Canada's second written submission, paras. 20-26 (referring to Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.161; *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 1272; *EC and certain member States – Large Civil Aircraft*, para. 1218; and *US – Upland Cotton*, para. 427; and Panel Report, *US – Upland Cotton*, paras. 7.1328 and 7.1329). Similarly, we consider that the interpretation of the term "significant" in the context of Article 2.4.2 of the Anti-Dumping Agreement is not applicable to the analysis of the volume of the dumped imports, because it concerns a pattern of export prices which differ significantly, which involves an assessment of price difference. (Canada's letter dated 15 September 2016 (referring to Appellate Body Report, *US – Washing Machines*, paras. 5.63, 5.64, and 5.66, and fns 199 and 202)).

<sup>88</sup> Appellate Body Reports, *China – GOES*, paras. 134-142; and *China – HP-SSST (Japan) / China – HP-SSST (EU)*, paras. 5.155-5.163.

<sup>89</sup> Imports first decreased from 421,000 tonnes in 2010 to 419,000 tonnes in 2011 and then increased to 605,500 tonnes in 2012. (Final Determination, (Exhibit CHN-1), p. 59).

<sup>90</sup> After a decline in the dumped imports' market share from 20.70% in 2010 to 18.96% in 2011, dumped imports' market share increased to 22.01% in 2012. (Final Determination, (Exhibit CHN-1), p. 59).

product showed an increasing trend.<sup>91</sup> As noted above<sup>92</sup>, while it might have been preferable had MOFCOM explicitly characterized the 43.82% increase as "significant" and given a reasoned explanation of that characterization, we consider that it would have been apparent to the interested parties from the Final Determination.

7.48. In light of our interpretation of the first sentence of Article 3.2 set out above, we consider that the Final Determination on its face shows that MOFCOM considered, that is, took into account, whether there was a significant increase in the volume of dumped imports in both absolute and relative terms.

7.49. Canada argues that MOFCOM failed to consider the magnitude and factual circumstances surrounding the increase in dumped imports, which it asserts would suggest that the increase in fact was not significant.<sup>93</sup> Canada argues that while the volume of the dumped imports increased by almost 44%, the volume of sales of the domestic like product and non-subject imports increased by 80% and 78% respectively, and domestic demand increased by 35%.<sup>94</sup> Canada also contends that MOFCOM failed to address arguments of the interested parties in this regard<sup>95</sup>, for instance, the Rayonier submission, which asserted<sup>96</sup>:

[D]emand for dissolving pulp in China increased as a result of market factors that were unrelated to subject imports, including the supply shortage and high prices for cotton during the first half of the POI. The domestic industry could not satisfy this increasing demand, despite rapid attempts to expand capacity. Therefore, downstream producers naturally required increased volumes of subject imports ... .

7.50. In light of our views as set out above, we see no basis to conclude that MOFCOM was required to specifically address arguments regarding the context in which the acknowledged 43.82% increase in dumped imports occurred in its consideration of whether that increase was significant in absolute terms under Article 3.2. In any event, we note that MOFCOM also considered the increase in imports relative to domestic consumption, which of course reflects changes in domestic demand. Moreover, MOFCOM did briefly discuss the volume of dumped imports relative to production of the domestic like product in response to the arguments made by Fortress during the investigation.

7.51. Insofar as Canada argues that MOFCOM was required to consider the interaction between sales of the like domestic product and the volume of dumped imports in its consideration of whether there was a significant increase in dumped imports in absolute terms, as discussed above, we do not view such an inquiry to be necessary in the context of Article 3.2. An evaluation of domestic sales volume is required under Article 3.4 in the context of examining the impact of dumped imports on the state of the domestic industry. The relationship between trends in the volume of dumped imports and trends in domestic sales volume may be relevant in that context, as well as in the demonstration of a causal link between dumped imports and injury under Article 3.5. However, we fail to see how they would be relevant in considering whether there was an increase in the volume of dumped imports in absolute terms. Similarly, the volume or trends in sales of non-dumped imports are not a necessary aspect of consideration of the significance of any increase in dumped imports, although they may well be relevant to a demonstration of causation, and in particular in the context of a non-attribution analysis under Article 3.5.

7.52. Finally, Canada argues that MOFCOM failed to provide a reasoned and adequate explanation for its conclusion that there was a significant increase in dumped imports in absolute terms.<sup>97</sup>

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<sup>91</sup> Final Determination, (Exhibit CHN-1), pp. 60 and 61.

<sup>92</sup> See fn 86 above.

<sup>93</sup> Canada's first written submission, paras. 72-74; second written submission, para. 34.

<sup>94</sup> Canada's first written submission, para. 74 (referring to Final Determination, (Exhibit CAN-3), p. 73; and Apparent Market and Domestic Production Tables, (Exhibit CAN-28), p. 2).

<sup>95</sup> Canada's second written submission, paras. 34 and 35 (referring to Rayonier Performance Fibers, LLC., Anti-Dumping Investigation on Imports of Cellulose Pulp, Comments Regarding Material Injury and Causality, 29 July 2013, (Exhibit CAN-12), pp. 23-37; Cosmo Specialty Fibers, Inc., Anti-Dumping Investigation on Imports of Cellulose Pulp, Argument of no Injury, 4 July 2013, (Exhibit CAN-11), pp. 12-17; and Fortress Specialty Cellulose Inc., Response to MOFCOM's Preliminary Determination on the Anti-Dumping Investigation against Imported Dissolving Pulp, (Exhibit CAN-17), p. 7).

<sup>96</sup> Rayonier Performance Fibers, LLC., Anti-Dumping Investigation on Imports of Cellulose Pulp, Comments Regarding Material Injury and Causality, 29 July 2013, (Exhibit CAN-12), p. 24.

<sup>97</sup> Canada's opening statement at the first meeting of the Panel, para. 21; second written submission, para. 16.

China responds that this allegation should be rejected because Canada did not mention it in the panel request or in the first written submission.<sup>98</sup> China submits that, in any case, the Final Determination makes it clear that MOFCOM considered whether there was a significant increase in the volume of dumped imports in accordance with the first sentence of Article 3.2.<sup>99</sup>

7.53. Article 6.2 of the DSU provides that a panel request "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". Compliance with Article 6.2 must be determined on the basis of the language of the panel request and in light of the circumstances of each case.<sup>100</sup> Canada's claim under Article 3.2 in its panel request is as follows:

4. Articles 3.1 and 3.2 of the Anti-Dumping Agreement because China's determination of injury was not based on positive evidence and did not involve an objective examination of the volume of the dumped imports and the effect of those imports on prices in the domestic market for like products. China failed to properly consider whether there had been:

a. significant increase in dumped imports; ...<sup>101</sup>

7.54. Although the text of the panel request clearly identifies Canada's claim under Articles 3.1 and 3.2, it does not specifically refer to the lack of a "reasoned and adequate explanation" of China's conclusion of a significant increase in dumped imports, but rather to an alleged failure to properly consider whether there had been such an increase. Canada notes that the alleged failure to explain a conclusion regarding the significant increase in dumped imports is part of its claim under the first sentence of Article 3.2.<sup>102</sup> We are not persuaded that by arguing that MOFCOM failed to provide an explanation of its conclusion regarding the increased volume of the dumped imports, Canada is pursuing a claim distinct from the one identified in its panel request. Canada's claim regarding MOFCOM's analysis of the volume of the dumped imports is based on both Articles 3.1 and 3.2. An investigating authority's compliance with the requirements of Article 3.1 must be assessed based on the record of the investigation, and in particular the information and explanations provided in the Final Determination.<sup>103</sup> Therefore, we consider Canada's allegation that MOFCOM failed to provide a reasoned and adequate explanation of its conclusion regarding a significant increase in imports falls within our terms of reference.

7.55. Canada's specific argument in this regard is that MOFCOM failed to provide a reasoned and adequate explanation of how MOFCOM's reference to the share of the dumped imports in total imports supported its conclusion that the volume of the dumped imports increased in absolute terms.<sup>104</sup> In addition, Canada argues that MOFCOM did not take into account the expansion of the market and the increased sales of the domestic like product and non-dumped imports.<sup>105</sup> Based on our views above, consideration of how any increase in the dumped imports correlates with other factors, including sales of the domestic like product and non-dumped imports, is not a required element of the consideration of whether there was a significant increase in the volume of dumped imports in absolute terms under Article 3.2. Moreover, we recall that the obligation is to consider – and not to determine – whether there was a significant increase in dumped imports in absolute

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<sup>98</sup> China's second written submission, para. 38.

<sup>99</sup> China's second written submission, para. 38.

<sup>100</sup> Appellate Body Reports, *EC and certain member States – Large Civil Aircraft*, para. 641; *US – Carbon Steel*, para. 127; and *Korea – Dairy*, paras. 123 and 124.

<sup>101</sup> Canada's panel request, pp. 1 and 2.

<sup>102</sup> Canada's response to Panel question No. 46, para. 26.

<sup>103</sup> E.g. in *US – Hot-Rolled Steel*, the Appellate Body stated that absent "satisfactory explanation" as to why it was not necessary to examine directly or specifically the other parts of the domestic industry, an examination of only certain parts of the domestic industry did not ensure a proper evaluation of the state of the domestic industry as a whole, and did not satisfy the requirement of "objectivity" under Article 3.1. (Appellate Body Report, *US – Hot-Rolled Steel*, paras. 204-206). See also Panel Report, *Mexico – Steel Pipes and Tubes*, para. 7.252.

<sup>104</sup> Canada's second written submission, para. 40 (referring to the Final Determination, (Exhibit CHN-1), p. 77); response to Panel question No. 46, para. 28. In particular, in the section relating to causal link, MOFCOM stated that:

In addition to the continuous growth of the quantity of import, the proportion of the quantity of the dumped imported product to the total quantity of the imported cellulose pulp in China always remained high: 49.32% in 2010, 42.77% in 2011 and 43.96% in 2012.

<sup>105</sup> Canada's response to Panel question No. 46, para. 28.

terms. In the absence of a requirement to make any determination in this regard, we cannot conclude that there is an obligation to provide a reasoned and adequate explanation under Article 3.2. Whether any increase in dumped imports supports a demonstration that dumped imports cause material injury under Article 3.5 will require explanation in order to be consistent with the requirements of that Article and Article 3.1.

7.56. We therefore conclude that Canada has not demonstrated that MOFCOM's consideration of the volume of the dumped imports was inconsistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement.

## **7.5 Whether MOFCOM's consideration of price effects was consistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement**

### **7.5.1 Introduction**

7.57. Canada asserts that MOFCOM's injury determination was based on a flawed consideration of the effect of dumped imports on the prices of the domestic like product, and thus is inconsistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement. Canada argues that MOFCOM's finding of price depression from the second half of 2011 to the end of 2012 failed to establish that the effect of the dumped imports could explain the significant depression in the prices of the domestic like product. In particular, Canada argues that MOFCOM failed to:

- a. objectively examine the existence of parallel price trends and explain the relevance of allegedly parallel trends to its finding of significant price depression;
- b. address the evidence that the prices of the dumped imports were higher than the prices of the domestic like product;
- c. conduct an objective examination of positive evidence that the market share of the dumped imports remained essentially stable; and
- d. assess whether the pricing documents and meeting minutes constituted "positive evidence" or, alternatively, conduct an objective examination of this evidence. Canada argues that even if the Panel finds that the pricing documents and meeting minutes constituted positive evidence and were objectively examined, MOFCOM failed to reconcile these documents with other evidence showing a lack of price depression.<sup>106</sup>

7.58. China responds that MOFCOM's price effects analysis complies with Articles 3.1 and 3.2 of the Anti-Dumping Agreement. China submits, first, that MOFCOM had undisputed evidence of parallel price trends on the record and explained their relevance.<sup>107</sup> Second, MOFCOM was not required to find price undercutting to support its finding of price depression.<sup>108</sup> Third, MOFCOM based the price effects analysis on the increased volume of the dumped imports in absolute terms, and it also considered the movements in market share, even though it was not required to do so.<sup>109</sup> Fourth, MOFCOM based its finding of significant price depression on positive evidence, including pricing documents and meeting minutes showing that the domestic industry was forced to lower prices in order to compete with the rapidly increasing volume of dumped imports at declining prices<sup>110</sup>, and an objective examination.<sup>111</sup> Finally, China emphasizes that MOFCOM did not rely on any single factor in its consideration of price effects, but instead relied on a collective evaluation of various factors, including the competitive relationship between the dumped imports and the domestic like product, the significant increase in the volume of dumped imports, the significant decline in the price of the dumped imports, the parallel trends in the prices of the dumped imports and the domestic like product, and the information provided in pricing documents and meeting minutes, which interacted with each other and collectively informed MOFCOM's price depression analysis.<sup>112</sup>

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<sup>106</sup> Canada's first written submission, paras. 10, 46, and 83-103; and second written submission, paras. 43, 46, 55, 56, 81, and 91.

<sup>107</sup> China's first written submission, paras. 65-73; second written submission, paras. 48-58.

<sup>108</sup> China's first written submission, paras. 74-82; second written submission, paras. 71-76.

<sup>109</sup> China's first written submission, paras. 83-91; second written submission, paras. 77-82.

<sup>110</sup> China's first written submission, paras. 92-98; second written submission, paras. 59-70.

<sup>111</sup> China's first written submission, paras. 9, 10, 61, 65-71, and 82.

<sup>112</sup> China's response to Panel question No. 13, para. 31; second written submission, paras. 41-47; and opening statement at the second meeting of the Panel, para. 20.

7.59. We will first address the legal standard under the second sentence of Article 3.2 and then examine each of Canada's allegations in turn.

### 7.5.2 Legal standard under Article 3.2, second sentence

7.60. The second sentence of Article 3.2 provides, in pertinent part, that the investigating authorities shall "[w]ith regard to the effect of the dumped imports on prices ... consider whether there has been [significant price undercutting], or whether the effect of such imports is otherwise to depress prices to a significant degree ...".<sup>113</sup>

7.61. In *China – GOES*, the Appellate Body noted that price depression means "a situation in which prices are pushed down, or reduced, *by something*".<sup>114</sup> The Appellate Body clarified that the consideration of price depression requires investigating authorities to examine the relationship between dumped imports and domestic prices.<sup>115</sup> The Appellate Body stated that that the mere observation of a price decline is not sufficient to demonstrate that the investigating authority has considered whether the effect of dumped imports is significant for price depression.<sup>116</sup> The investigating authorities must consider whether the dumped imports have "explanatory force" for the domestic price depression which is observed to have occurred. However, the Appellate Body made it clear that the consideration under Article 3.2 does not require a conclusion that dumped imports caused price depression.<sup>117</sup> The Appellate Body also noted that the effect of the dumped imports "stems from the relevant aspects of such imports, including the price and/or the volume of such imports".<sup>118</sup>

7.62. Prior panel and Appellate Body reports have recognized that Article 3.2 does not establish a specific methodology for investigating authorities' examination of the effects of dumped imports on prices. However, although an investigating authority enjoys a certain latitude in choosing a methodology for its consideration of the effect of the dumped imports on prices of the domestic like product, this discretion is not unlimited, and is subject to the overarching principle of Article 3.1 that a determination of injury be based on positive evidence and involve an objective examination.<sup>119</sup>

7.63. Moreover, it is clear that the consideration of price undercutting, price depression, and price suppression may be independent of one another.<sup>120</sup> Thus, the absence of price undercutting, or even the absence of any consideration of price undercutting, is not in itself inconsistent with Article 3.2, and does not preclude consideration of price depression or price suppression, and potentially reliance on one of those factors in demonstrating that dumped imports are causing material injury to the domestic industry.<sup>121</sup> Of course, reliance on only one of these price effects in the context of a determination that dumped imports are causing injury will only be consistent with Article 3.1 to the extent that the investigating authority does not ignore evidence and arguments

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<sup>113</sup> The provision goes on to require consideration of whether the effect of dumped imports is significant price suppression, which is not at issue in this case and is not further discussed.

<sup>114</sup> Appellate Body Report, *China – GOES*, para. 141. (emphasis original)

<sup>115</sup> Appellate Body Report, *China – GOES*, para. 136.

<sup>116</sup> Appellate Body Report, *China – GOES*, paras. 138 and 141.

<sup>117</sup> Appellate Body Report, *China – GOES*, paras. 144 and 145.

<sup>118</sup> Appellate Body Report, *China – GOES*, para. 138.

<sup>119</sup> Panel Reports, *China – Autos (US)*, para. 7.255; *China – Broiler Products*, para. 7.474; and *China – X-Ray Equipment*, para. 7.41; and Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 113 (discussing the related issue of the investigating authority's examination of the volume of imports).

<sup>120</sup> Appellate Body Report, *China – GOES*, para. 137 (The inquiries regarding price undercutting and price depression and suppression set out in the second sentence of Article 3.2 "are separated by the words "or" and "otherwise". This indicates that the elements relevant to the consideration of significant price undercutting may differ from those relevant to the consideration of significant price depression and suppression".)

<sup>121</sup> Appellate Body Report, *China – GOES*, para. 137, ("even if prices of subject imports do not significantly undercut those of like domestic products, subject imports could still have a price-depressing or price-suppressing effect on domestic prices").

Similarly, in *China – HP-SSST*, the panel noted:

The fact that Article 3.2 identifies three distinct price effects, and distinguishes between price undercutting on the one hand, and price depression and price suppression on the other, suggests that there is no need to establish price depression or suppression when considering the existence of price undercutting, or indeed, vice versa.

(Panel Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 7.129)

on the record before it suggesting that one or both of the other price effects suggests a different result.

7.64. As discussed above, consideration of the effects of dumped imports on prices is a step in the logical progression toward a determination whether injury is caused by dumped imports.<sup>122</sup> However, even significant price undercutting, depression, or suppression may not, standing alone, suffice to demonstrate that dumped imports are causing material injury to the domestic industry. The impact of those price effects over the POI on the condition of the domestic industry will have to be considered before that ultimate question can be answered. However, even if the consideration of the effects of dumped imports on prices shows no, or insignificant, price undercutting, depression, or suppression, this does not mean a determination that dumped imports are causing material injury is precluded.

7.65. The need for a contextual analysis in respect of prices derives from the requirement to consider the *effects* of dumped imports on prices in the second sentence of Article 3.2. Simply to observe the trends in prices does not suffice, as those trends may be the effect of different factors other than dumped imports, as well as of the dumped imports. However, it is difficult to undertake a consideration of the effects of dumped imports on prices from the effects of other factors which may be affecting those prices in isolation from the ultimate question whether the dumped imports are causing injury to the domestic industry. This is because Article 3.5 specifically provides that the demonstration that dumped imports are causing injury is, in part, dependent on the effects of dumped imports on prices. In our view, it would be entirely appropriate for an investigating authority to observe the levels and trends of dumped import and domestic prices in the first instance without addressing the effect of dumped imports on those levels and trends.<sup>123</sup> But, of course, the investigating authority cannot stop there. The investigating authority must examine these levels and trends in the context of the domestic market and connect them to the effects of the dumped imports – that is, assess the explanatory force of dumped imports for the observed levels and trends in domestic prices – in reaching its ultimate determination regarding whether dumped imports are causing material injury through their effects on prices.<sup>124</sup>

### 7.5.3 MOFCOM's consideration of parallel price trends

7.66. Canada contends that MOFCOM failed to conduct an objective examination of positive evidence of allegedly parallel price trends between the dumped imports and the domestic like product, and failed to explain the relevance of the allegedly parallel price trends to its finding of price depression.<sup>125</sup> Canada submits that prices did not move in parallel during part of the POI, specifically in 2010, and that even when prices moved in the same direction the rates of change were different.<sup>126</sup> Canada further submits that price trends were different, because the prices of the dumped imports were lower than those of the domestic like product in the first part of the POI, while the dumped imports were priced higher in the second part of the POI, when the price depression was found to be occurring.<sup>127</sup> Canada argues that when prices were increasing in the first part of the POI, dumped import prices were increasing at faster rate; however when prices started to fall in the second part of the POI, domestic like product prices declined faster than the prices of the dumped imports.<sup>128</sup>

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<sup>122</sup> It seems clear that the greater the effect of dumped imports in terms of price undercutting, price depression, or price suppression, the greater the likely impact of those dumped imports with respect to factors such as lost sales and market share and consequent financial effects such as deteriorating company profits and profitability, as well as on factors such as inventories, production capacity, and so on.

<sup>123</sup> Indeed, this may well be important, if not actually necessary to comply with the requirements of Article 12.2.

<sup>124</sup> As the Appellate Body has observed, this is different from the ultimate analysis of causation under Article 3.5, as it focuses on the effect of the dumped imports on individual factors that may, or may not, be vectors or pathways by which the dumped imports are causing injury to the domestic industry. The Article 3.5 analysis focuses on the evaluation of all relevant evidence, including these individual vectors, in making the ultimate determination whether dumped imports cause material injury to the domestic industry.

<sup>125</sup> Canada's first written submission, paras. 83-87; second written submission; paras. 46-58.

<sup>126</sup> Canada's second written submission, paras. 47 and 48; opening statement at the first meeting of the Panel, paras. 30 and 31; and opening statement at the second meeting of the Panel, para. 21.

<sup>127</sup> Canada's second written submission, para. 47; opening statement at the first meeting of the Panel, paras. 29-32.

<sup>128</sup> Canada's second written submission, paras. 48 and 49; opening statement at the first meeting of the Panel, paras. 31 and 32.

7.67. China submits that MOFCOM based its finding of parallel price trends on substantial record evidence. China argues that Canada inappropriately focuses on a single point of the POI, when the price trends crossed, whereas MOFCOM examined price trends throughout the POI.<sup>129</sup> China objects to Canada's argument that the prices of the domestic like product declined much faster, arguing that during the second half of the POI the prices of both the dumped imports and the domestic like product declined at almost the same rate.<sup>130</sup> For China, the existence of parallel price trends can indicate the link between prices for imported and domestic products, and can support the conclusion that decreases in the prices of dumped imports lead to decreases in the prices of domestic like product.<sup>131</sup> China submits that MOFCOM explained the relevance of the parallel price trends, referring to pricing documents and meeting minutes, which China contends demonstrated that it was the dumped subject imports that forced down the prices of the domestic like product, as domestic producers had difficulty selling the domestic like product and were repeatedly forced to lower prices to meet subject import competition.<sup>132</sup>

7.68. The relevance of parallel prices for a price depression analysis was addressed by the Appellate Body in *China – GOES*. In that appeal, China argued that the panel had failed to consider a key element of MOFCOM's price effects analysis, namely that dumped import prices and domestic prices followed the same trends. The Appellate Body stated that parallel price trends might support a price depression analysis, e.g. such trends "might indicate the nature of competition between the products" and "may explain the extent to which factors relating to the pricing behaviour of importers have an effect on domestic prices".<sup>133</sup> However, in that case, the Appellate Body noted that there was no basis on which to draw such conclusions, as MOFCOM did not provide a meaningful description of the price trends or any explanation or reasoning regarding the role such trends played in MOFCOM's price effects analysis and findings.<sup>134</sup>

7.69. In the case before us, MOFCOM considered that the effect of the dumped imports was to depress prices to a significant degree. MOFCOM found that the continued decline of prices and increasing volume of the dumped imports in the second part of the POI forced the prices of the domestic like product to fall. The Final Determination states:

From the second half of 2011 to the second half of 2012, the continued decline of the Price of the Dumped Imported Product and the quick increase of the quantity of the dumped imported product forced the Domestic Industry to compete with them in terms of prices, leading to a fast and continuous decline of the Price of the Like Product of the Domestic Industry. Based on these facts, the Investigating authority determined that the dumped imported product had a depressing effect on the Price of the Like Product of the Domestic Industry.<sup>135</sup>

7.70. Canada's claim raises the question whether MOFCOM's finding of parallel price trends is supported by the evidence, and whether MOFCOM provided a reasoned explanation of the relevance of the parallel prices for its finding of price depression.

7.71. MOFCOM relied on the information shown in Table 1 and depicted graphically in Chart 1 below with regard to the prices of the dumped imports and the domestic like product:

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<sup>129</sup> China's second written submission, para. 51.

<sup>130</sup> In particular, China argues that over the second part of the POI the prices of the dumped imports and the domestic like product declined by the same amount, 46% and 47% respectively. (China's second written submission, para. 52).

<sup>131</sup> China's first written submission, paras. 67 and 68; second written submission, paras. 55 and 56 (referring to Appellate Body Report, *China – GOES*, para. 210).

<sup>132</sup> China's first written submission, paras. 69-71; second written submission, paras. 57 and 58 (referring to Final Determination, (Exhibit CHN-1), p. 65; and Pricing documents and meeting minutes, (Exhibit CHN-2) (BCI)).

<sup>133</sup> Appellate Body Report, *China – GOES*, para. 210.

<sup>134</sup> Appellate Body Report, *China – GOES*, para. 210.

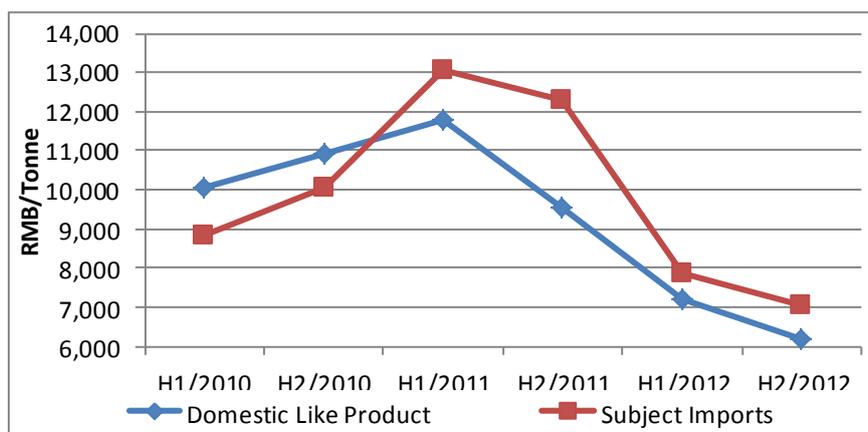
<sup>135</sup> Final Determination, (Exhibit CHN-1), pp. 65 and 66.

**Table 1: Trends in average prices of the dumped imports and the domestic like product**

POI	2010		2011		2012	
	H1 2010	H2 2010	H1 2011	H2 2011	H1 2012	H2 2012
Prices of dumped imports (RMB/tonne)	8,819.96	10,050.44	13,040.55	12,313.21	7,877.85	7,024.13
Rate of change		+13.95%	+29.75%	-5.58%	-36.02%	-10.84%
Prices of the like domestic product (RMB/tonne)	10,037.87	10,926.06	11,767.68	9,534.11	7,202.34	6,192.68
Rate of change		+8.85%	+7.70%	-18.98%	-24.46%	-14.02%

Source: Final Determination, (Exhibit CHN-1), pp. 63 and 64.

**Chart 1: Price Trends of Domestic Like Product and Dumped Imports**



Source: Canada's opening statement at the first meeting of the Panel, figure 1

7.72. Based on the above, MOFCOM concluded that prices of both the dumped imports and of the domestic like product "first increased and then decreased, showing a decreasing trend in general".<sup>136</sup> Further MOFCOM observed that prices of the dumped imports and of the domestic like product showed the "same trend of changes", namely from the first half of 2010 to the first half of 2011 both had "the same increasing trend" and from the second half of 2011 to the second half of 2012 – "continuous decreasing trend".<sup>137</sup>

7.73. The product subject to the underlying anti-dumping investigation, cellulose pulp, is a commodity and there is no dispute between the parties that the imported and domestic products were competitive with and substitutable for each other. Hence, their prices might be expected to follow similar trends. On this point MOFCOM observed:

[T]he dumped imported product and the like product of the Domestic Industry were basically identical in terms of the product performance, the quality, the sales areas and the groups of clients, the two were competitive and substitutable to each other and there was a certain relevance between the Price of the Dumped Imported Product and the Price of the Like Product of the Domestic Industry.<sup>138</sup>

7.74. Canada alleges that MOFCOM's finding of parallel price trends is without support in the evidence on the record, contending that the price trends were not parallel because they crossed at the end of 2010 (see Chart 1 above).<sup>139</sup> However, even though the trend lines did cross in the second half of 2010, overall, the trend lines moved generally in the same direction. We do not

<sup>136</sup> Final Determination, (Exhibit CHN-1), p. 63.

<sup>137</sup> Final Determination, (Exhibit CHN-1), p. 64.

<sup>138</sup> Final Determination, (Exhibit CHN-1), p. 65.

<sup>139</sup> Canada's opening statement at the first meeting of the Panel, para. 32 and figure 1 (referring to Apparent Market and Domestic Production Tables, (Exhibit CAN-28), p. 1).

consider it unreasonable to view these price trends as being generally parallel. Furthermore, even at the time they crossed, they were moving in the same direction – both domestic and import prices were increasing.

7.75. This is unlike the facts in *China – Autos (US)*, where the domestic and import price trends moved in opposing directions during part of the POI.<sup>140</sup> It is noteworthy that, even in that case, the panel did not find that parallel price trends could not be found in the factual circumstance, but stated that "a situation of diverging trends during a part of the period examined requires explanation before those trends can be characterized as 'parallel'".<sup>141</sup> Therefore, we do not consider that the fact that price trends crossed at one point during the POI undermines MOFCOM's conclusion that the prices of dumped imports and the domestic like product followed the same or parallel trends.

7.76. Canada also asserts that the different rates of change in prices of the dumped imports and the domestic industry, particularly in 2011 were not considered by MOFCOM, and undermine its finding of parallel price trends. In the first half of 2011, the prices of the dumped imports increased by almost 30%, whereas the prices of the domestic like product increased by about 8%. In the second part of 2011, when prices began to decline, the dumped imports' prices declined by about 6%, while the domestic like product's prices declined by 19%. We are not persuaded that these different rates of change undermine the finding of the parallel trends in prices *per se*, given that the prices still moved in the same direction and quickly adjusted to the price decline in the market, showing the close competition between the domestic and imported dumped products.

7.77. At the same time, however, we recognize that the fact of simultaneous declines in the prices of both dumped imports and the domestic like product does not necessarily mean that the domestic prices were pushed down by the declining prices of the dumped imports. As discussed below, the prices of the dumped imports, although declining, were higher than the prices of the domestic like product over the second part of the POI, when MOFCOM considered domestic prices were depressed by the dumped imports. In addition, during the investigation interested parties argued that in fact it was the domestic like product prices that led prices of the dumped imports to decline.<sup>142</sup> The absence of any explanation in the Final Determination of how, in MOFCOM's view, parallel price trends showed the existence of price depression leads us to conclude that the fact of parallel price trends provides little if any support for MOFCOM's conclusion that dumped imports had the effect of depressing the prices of the domestic like product.<sup>143</sup>

7.78. MOFCOM also referred to the coincidence of a "continuous increasing trend" in the volume of dumped imports and a "continuous decreasing trend" in the prices of both dumped imports and the domestic like product from the second half of 2011 to the second half of 2012, the period during which MOFCOM found significant price depression. The Final Determination states:

The quantity of the dumped imported product was 220,000 tons in the second half of 2011, 295,100 tons in the first half of 2012 and 310,400 tons in the second half of 2012, showing a continuous increasing trend. In the same periods, both the Price of

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<sup>140</sup> Panel Report, *China – Autos (US)*, para. 7.262. In that case, the record showed that from 2006 to 2007, the average unit values (AUVs were used as a proxy for prices) of imports and of the domestic like product moved in different directions: import AUVs decreased by 8.47%, while the AUV of the domestic like product rose by 11.08%. The panel concluded that this information undermined the factual conclusion of parallel prices reached by the investigating authority, and should have been addressed in the investigating authority's determination. In the absence of any explanation the panel stated that it could not conclude that MOFCOM even considered this divergence of price trends, much less how it was resolved, and any finding of parallel prices in these factual circumstances would require some indication of the investigating authority's reasoning in support of a conclusion of parallel prices.

<sup>141</sup> Panel Report, *China – Autos (US)*, para. 7.264.

<sup>142</sup> Canada's second written submission, para. 49 (referring to Fortress Specialty Cellulose Inc., Response to MOFCOM's Preliminary Determination on the Anti-Dumping Investigation against Imported Dissolving Pulp, (Exhibit CAN-17), p. 9; and Rayonier Performance Fibers, LLC., Anti-Dumping Investigation on Imports of Cellulose Pulp, Comments Regarding Material Injury and Causality, 29 July 2013, (Exhibit CAN-12), pp. 38-45).

<sup>143</sup> We also note China's argument that the pricing documents and meeting minutes collected by MOFCOM during the verification showed that the decline of import prices for pulp had led to the domestic industry having difficulty selling the domestic like product and had forced the domestic producers to reduce prices. We address MOFCOM's consideration of the pricing documents and meeting minutes in paras. 7.101-7.108 below.

the Dumped Imported Product and the Price of the Like Product of the Domestic Industry showed a continuous decreasing trend. The Price of the Dumped Imported Product was 12,313.21 RMB/ton in the second half of 2011, decreased to 7,877.85 RMB/ton in the first half of 2012 and further decreased to 7,024.13 RMB/ton in the second half of 2012. From the second half of 2011 to the second half of 2012, under the situations that the quantity of the dumped imported product continuously increased and the market share of the dumped imported products continuously increased compared with the first half of 2011, the Price of the Dumped Imported Product continuously decreased and the Price of the Like Product of the Domestic Industry also decreased, from 9,534.11 RMB/ton in the second half of 2011 to 7202.34 RMB/ton in the first half of 2012 and further decreased to 6,192.68 RMB/ton in the second half of 2012, at the lowest during the Period of investigation.<sup>144</sup>

7.79. We consider that this assessment is insufficient to allow us to conclude that MOFCOM adequately explained how parallel declining price trends were taken into account in conjunction with the increased volume of dumped imports in its consideration of price depression. While MOFCOM referred to the trends in volume and prices of the dumped imports and prices of the domestic like product, MOFCOM did not provide any explanation of how the prices and volume of the dumped imports interacted to have a depressing effect on domestic prices.

7.80. Without such explanation, the identification of parallel price trends does no more than recognize that two variables, domestic and dumped import prices, move together. Given that the product in question in this dispute is a commodity, and both dumped imports and the domestic like product are sold in similar quantities, at the same level of trade, with few if any discernible differences in quality or other relevant competitive factors<sup>145</sup>, and are in the same market and therefore influenced by the same market pressures and factors, this is hardly surprising. It may be that one of the factors affecting domestic prices is competition with dumped imports, but the mere identification of such a parallel trend cannot alone suffice to show that the decline in the price of the domestic like product is an effect of the dumped imports.

7.81. We therefore conclude that while MOFCOM reasonably found that there were parallel trends between dumped import and domestic like product prices, it failed to explain the role of those parallel price trends in the decline of domestic like product prices and how changes in the prices and volume of the dumped imports affected the domestic like product prices.

#### **7.5.4 MOFCOM's consideration of the fact that dumped imports were sold at higher prices than the domestic like product**

7.82. Canada argues that MOFCOM failed to conduct an objective examination of positive evidence that the dumped imports were sold at higher prices than the domestic like product during the period in which MOFCOM identified price depression.<sup>146</sup> Canada contends that MOFCOM did not provide any explanation how dumped imports priced between 9% and 29% higher than the domestic like product could have explanatory force for price depression.<sup>147</sup> China responds that MOFCOM is not required to make a finding of price undercutting to conclude that price depression has occurred.<sup>148</sup> Article 3.2 allows an investigating authority to base its finding on one of three possible price effects: price undercutting, price depression, or price suppression.<sup>149</sup> China considers that prices of domestic like products can be depressed by competition with dumped imports, even if the prices of the dumped imports are higher than those of the domestic like product.<sup>150</sup>

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<sup>144</sup> Final Determination, (Exhibit CHN-1), pp. 64 and 65.

<sup>145</sup> MOFCOM found the dumped imports and the domestic like product to be "competitive and substitutable to each other". (Final Determination, (Exhibit CHN-1), p. 65).

<sup>146</sup> Canada's first written submission, paras. 88-94; second written submission, paras. 59-66.

<sup>147</sup> Canada's second written submission, paras. 59 and 60; first written submission, para. 93 (referring to Panel Report, *China – Autos (US)*, para. 7.272).

<sup>148</sup> China's first written submission, paras. 75 and 77 (referring to Panel Reports, *EC – Salmon (Norway)*, para. 7.638; and *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 7.129; and Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, paras. 5.149 and 5.156); second written submission, paras. 71 and 72.

<sup>149</sup> China's first written submission, paras. 75 and 76 (referring to Panel Report, *Korea – Certain Paper*, para. 7.242).

<sup>150</sup> China's first written submission, para. 78.

7.83. In the Final Determination, MOFCOM relied on the following information concerning the prices of the dumped imports and the domestic like product:

**Table 2: Average prices of the dumped imports and like domestic product**

POI	2010		2011		2012	
	H1 2010	H2 2010	H1 2011	H2 2011	H1 2012	H2 2012
Prices of dumped imports (RMB/tonne)	8,819.96	10,050.44	13,040.55	12,313.21	7,877.85	7,024.13
Prices of the like domestic product (RMB/tonne)	10,037.87	10,926.06	11,767.68	9,534.11	7,202.34	6,192.68
Margin of difference	-12.13%	-8.01%	+10.82%	+29.15%	+9.38%	+13.43%

Source: Final Determination, (Exhibit CHN-1), pp. 64 and 65.<sup>151</sup>

7.84. At the beginning of the POI, in the first half of 2010, the dumped imports undersold the domestic like product by 12%. In the second half of 2010, the prices of both the dumped imports and the domestic like product increased, but the prices of the dumped imports increased faster, and the underselling difference fell to 8%. Prices further increased in the first half of 2011, with dumped import prices again increasing faster to levels above those of the domestic like product. Thus, during the rest of the POI, the prices of the dumped imports were higher than those of the domestic like product. In the first half of 2011, the dumped imports were priced nearly 11% higher than the domestic like product, while in the second half of 2011 the prices of the dumped imports were almost 30% higher. In 2012, the dumped imports were priced higher than the domestic like products by 9% and 13% in the first and second half respectively.

7.85. Several interested parties, including Cosmo Specialty Fibers, Inc. (Cosmo) and Fortress, raised the issue of higher priced dumped imports during the investigation.<sup>152</sup> They argued that because dumped import prices were consistently higher than the prices of the domestic like product, the dumped imports did not have any effect on domestic prices. In the Final Determination, MOFCOM addressed the interested parties' arguments by noting that it had assessed the effect of dumped imports from all exporting countries subject to the investigation cumulatively, and would not conduct a separate price analysis for each exporting country.<sup>153</sup>

7.86. The question whether a consideration of price depression may be warranted where the prices of dumped imports are higher than the prices of the domestic like product was discussed by the panel in *China – Autos (US)*. In that case, the panel confirmed that price depression is not contingent on the existence of price undercutting, and may be found in a situation where the prices of dumped imports is higher than the price of the domestic like product.<sup>154</sup> However, such a finding requires an explanation of how the investigating authorities reached a conclusion of price depression in a situation where the prices of dumped imports are higher during most of the POI.<sup>155</sup> The panel in *China – Autos (US)* stated:

<sup>151</sup> See Japan's third-party submission, annex II. China confirmed the accuracy of the figures reported by Japan. China's response to Panel question No. 3, para. 3.

<sup>152</sup> Cosmo Specialty Fibers, Inc., Anti-Dumping Investigation on Imports of Cellulose Pulp, Argument of no Injury, 4 July 2013, (Exhibit CAN-11), p. 17. Canada's first written submission, para. 92 (referring to Fortress Specialty Cellulose Inc., Injury Brief, Industry Injury Investigation for the Anti-Dumping Investigations Against Cellulose Pulp, 5 September 2013, (Exhibit CAN-13), p. 7; Cosmo Specialty Fibers, Inc., Anti-Dumping Investigation on Imports of Cellulose Pulp, Argument of no Injury, 4 July 2013, (Exhibit CAN-11), pp. 8 and 9, and 17-21; Rayonier Performance Fibers, LLC., Anti-Dumping Investigation on Imports of Cellulose Pulp, Comments Regarding Material Injury and Causality, 29 July 2013, (Exhibit CAN-12), pp. 39-45; and American Forest and Paper Association, Anti-Dumping Investigation on Imports of Cellulose Pulp, Comments on Industry Injury Investigation, 24 September 2013, (Exhibit CAN-10), p. 7); second written submission, para. 61.

<sup>153</sup> Final Determination, (Exhibit CHN-1), p. 71. China's second written submission, para. 74.

<sup>154</sup> See also Appellate Body Report, *China – GOES*, para. 137:

[E]ven if prices of subject imports do not significantly undercut those of like domestic products, subject imports could still have a price-depressing or price-suppressing effect on domestic prices.

<sup>155</sup> Panel Report, *China – Autos (US)*, paras. 7.272 and 7.274.

We do not preclude the possibility that price depression may be found to exist in a case where there is overselling by subject imports. However, absent analysis and explanation by the investigating authority, it is difficult to understand how a conclusion of price depression was reached in a situation where prices of imports were, for the most part, significantly higher than those of the domestic like product whose prices were purportedly being depressed during the POI.<sup>156</sup>

We agree. This is particularly true where, as here, the issue has been raised by interested parties, the respective products are competitive and substitutable, and the domestic demand is increasing. The mere fact that domestic prices were below dumped import prices and did not remain stable or increase is insufficient to warrant considering that the dumped imports had "explanatory force" for the decline in domestic prices.

7.87. In our view, MOFCOM's reference to the cumulative assessment of the effects of dumped imports does not address the interested parties' arguments concerning the absence of price undercutting, which referred to the average prices of the dumped imports as well as the prices of imports from the individual investigated countries.<sup>157</sup> MOFCOM did not adequately explain its conclusion that, despite the higher prices of dumped imports, particularly in the latter part of the POI when prices were declining for both dumped imports and the domestic like product, the dumped imports had the effect of significant price depression.

7.88. We therefore conclude that MOFCOM failed to provide an adequate explanation of its consideration of price depression in light of the undisputed fact that the prices of the dumped imports were higher than those of the domestic like product during the latter part of the POI.

#### **7.5.5 MOFCOM's consideration of changes in the dumped imports' market share**

7.89. Canada argues that MOFCOM failed to explain how price depression could be an effect of the dumped imports in light of evidence that the market share of the dumped imports remained essentially stable.<sup>158</sup> Canada argues that MOFCOM failed to explain how the essentially stable market share of dumped imports, which increased only 2.66 percentage points from 19.91% to 22.57% from the second half of 2011 to the second half of 2012, could have had any downward pressure on the prices of the domestic like product, which actually gained 7.09 percentage points of market share during this period, from 18.64% of the domestic market in the second half of 2011 to 25.73% in the second half of 2012.<sup>159</sup>

7.90. China responds that MOFCOM focused on the absolute increase in dumped imports in the volume aspect of its price effects analysis, and was not required to consider the changes in market share. China argues that the possibility provided for in the first sentence of Article 3.2 to consider an increase in dumped imports in either absolute or relative terms extends to the consideration of the price effects of those same imports under the second sentence of the same provision. In China's view, this means that since consideration of market share is not obligatory with regard to consideration of the volume of imports, it cannot be compulsory when considering the price effects of those same imports.<sup>160</sup> Nevertheless, China submits that MOFCOM considered changes in market share and found that the dumped imports' market share did not in fact remain stable, but rather increased.<sup>161</sup>

7.91. We begin by addressing China's argument that MOFCOM properly based the volume aspect of its price effects analysis on the increased volume of the dumped imports in absolute terms and was not required, as a matter of law, to also examine the changes in the dumped imports' market share. Article 3.2 requires the investigating authorities to consider the volume of the dumped imports and the effect of these imports on the prices of the domestic like product. As discussed above, the first sentence of Article 3.2 sets out three options for the consideration of the dumped

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<sup>156</sup> Panel Report, *China – Autos (US)*, para. 7.272.

<sup>157</sup> Cosmo Specialty Fibers, Inc., Anti-Dumping Investigation on Imports of Cellulose Pulp, Argument of no Injury, 4 July 2013, (Exhibit CAN-11), p. 17.

<sup>158</sup> Canada's first written submission, para. 95; second written submission, paras. 67 and 74.

<sup>159</sup> Canada's first written submission, paras. 97 and 98; second written submission, paras. 67 and 68.

<sup>160</sup> China's first written submission, para. 84.

<sup>161</sup> China's first written submission, paras. 83 and 87 (referring to Final Determination, (Exhibit CHN-1), pp. 59, 61, and 64); second written submission, paras. 78 and 79.

import volume: in absolute terms, or relative to production, or consumption in the importing Member. Under the second sentence of Article 3.2, the investigating authorities shall consider the effect of the dumped imports on the prices of the domestic like product. The effect of dumped imports on domestic prices may be considered "through the vector of subject import prices, subject import volumes, or both".<sup>162</sup> We recall that the provisions of Article 3 "contemplate a logical progression of inquiry leading to an investigating authority's ultimate injury and causation determination".<sup>163</sup> We consider that the investigating authorities' volume analysis under the first sentence of Article 3.2 also informs the price effects analysis under the second sentence of the same provision. If an investigating authority finds that the dumped imports have increased either in absolute or relative terms, it is likely to consider the effect of such increased volume in its price effects analysis. Nevertheless, we do not consider that by relying on one of the options for volume analysis provided in the first sentence of Article 3.2, the investigating authorities limit the evidence they can rely upon in their further inquiries under Article 3.

7.92. In the investigation at hand, MOFCOM based the price effects analysis on developments in both the prices and the volume of the dumped imports. MOFCOM concluded that the dumped imports had a "depressing effect" on prices of the domestic like product, based on the continued decline of dumped imports' prices and the rapid increase in volume of the dumped imports.<sup>164</sup> In its overall analysis MOFCOM considered the changes in volume of the dumped imports together with price movements of the imported and domestic products over the POI in assessing price depression in the context of injury and causation. This suggests to us that MOFCOM's main focus with respect to the volume aspect of the price effects analysis was the effect of the change in volume of the dumped imports in absolute terms, which it had found increased by 43.82% over the POI.

7.93. At the same time, MOFCOM also took into account the change in market share, observing that the market share of the dumped imports "showed an increasing trend in general". Further, when looking at the price trends of the imported and domestic products together with the increased absolute volume of dumped imports, MOFCOM noted that the dumped imports "accounted for a certain market share in China" from the first half of 2010 to the first half of 2011. In the context of discussing the changes in volume and prices of the dumped imports and the prices of the domestic like product in the second part of the POI, i.e. from the second half of 2011 to the second half of 2012, MOFCOM observed that the market share of the dumped imports "continuously increased compared with the first half of 2011". MOFCOM also considered developments in the domestic industry's market share, which it found had increased.

7.94. The Final Determination contains the following data with regard to market shares of the dumped imports and the domestic like product:

**Table 3: Market shares of the dumped imports and the domestic like product**

POI	2010		2011		2012	
	H1 2010	H2 2010	H1 2011	H2 2011	H1 2012	H2 2012
Market share of dumped imports	20.53%	20.88%	18.02%	19.91%	21.45%	22.57%
change from previous		+0.35	-2.86	+1.89	+1.54	+1.12
Market share of the like domestic product	18.00%	21.36%	17.54%	18.64%	26.71%	25.73%
change from previous		+3.36	-3.82	+1.1	+8.07	-0.98

Source: Final Determination, (Exhibit CHN-1), pp. 63 and 64.

<sup>162</sup> Appellate Body Report, *China – GOES*, para. 216.

<sup>163</sup> Appellate Body Report, *China – GOES*, para. 128.

<sup>164</sup> Final Determination, (Exhibit CHN-1), pp. 65 and 66. We note that this is unlike the facts in *China – Autos (US)*, where MOFCOM emphasized that market share gains of the dumped imports caused the downward pressure on domestic prices. In that case, the domestic industry lost 4.04 percentage points and the dumped imports gained 3.52 percentage points of the market share over the POI. The panel found that MOFCOM acted inconsistently with Articles 3.1 and 3.2 by failing to explain the linkage between the dumped import market share gains and its finding of price depression, in light of changes in market share of other market participants and the timing of the changes in market share and prices. (Panel Report, *China – Autos (US)*, paras. 7.287 and 7.288). In the present case, MOFCOM found that downward pressure was caused by the volume and decline in prices of the dumped imports.

7.95. Looking at this data, it is apparent that during the POI both the dumped imports and the domestic like product gained market share. The market share of the domestic like product increased from 18% to 25.73%, a gain of almost 8 percentage points, over the POI. The market share of the dumped imports also increased, but by a lesser degree, from 20.53% to 22.57%, a gain of 2 percentage points over the same period. Canada argues that the market share of the dumped imports remained "essentially stable" and thus could not have depressed the prices of the domestic like product. The question whether an increase in market share of 2 percentage points over the POI is described as an increase or as market share remaining essentially stable is a question of judgment and interpretation, not a question of fact. It is a fact that the dumped import market share did increase, albeit less overall than the domestic industry market share. We consider that MOFCOM did not err in referring to an increase in dumped import market share in its consideration of price effects.

7.96. The existence of price depression does not necessarily require that there be a concurrent decrease in the domestic industry's market share. Price depression can exist "in a situation where there is no increase, or even in some circumstances a decrease, in the volume or market share of dumped imports".<sup>165</sup> Canada does not disagree that price depression can be found without an increase in volume or market share; however Canada argues that MOFCOM clearly based the volume part of the price depression analysis on the increase of both volume and market share and contends that MOFCOM was under obligation to objectively examine the market share but failed to do so.<sup>166</sup> We do not agree. In the Final Determination, MOFCOM explained that in the second half of 2011, due to the increased demand, the domestic industry increased its output and sales. As a result, the market share of the domestic like product increased by 1.10 percentage points compared to the first half of 2011. MOFCOM considered that in the same period, the prices of the dumped imports decreased "in order to increase its market share". The prices of the dumped imports decreased by 5.58% in the second half of 2011 compared to the first half of 2011, and market share increased by 1.89 percentage points. In addition, MOFCOM observed that in the second part of 2012 the domestic like product lost 0.98 percentage points of market share to the dumped imports, and the domestic industry reduced its prices in order to prevent further declines in market share. We also observe that the domestic industry's market share increased by 8 percentage points in the first half of 2012, but this development was not addressed in MOFCOM's analysis. Although the Final Determination would have benefitted from an explanation regarding the effect of the increase of the domestic industry's market share by 8 percentage points in the first half of 2012, we consider that overall MOFCOM's description and examination of the change in dumped imports' market share was both reasonable and objective, particularly in view of the fact that it relied primarily on the increase in the absolute volume of imports in its consideration of price effects.

7.97. Finally, Canada submits that MOFCOM did not consider market dynamics and changes in the market share of the dumped imports in relation to market shares of the domestic industry and the non-dumped imports.<sup>167</sup> In particular, Canada refers to similar movements in market shares of the domestic industry, increases from 18% to 26%, and the market share of the non-dumped imports, increased from 21% to 28%, during the POI.<sup>168</sup>

7.98. The market shares were as follows:

**Table 4: Market Shares**<sup>169</sup>

	2010	2011	2012
Domestic industry	19.68%	18.09%	26.22%
Other Chinese producers	38.35%	37.57%	23.71%
Dumped imports	20.70%	18.96%	22.01%
Non-dumped imports	21.27%	25.38%	28.06%

Source: Apparent Market and Domestic Production Tables, (Exhibit CAN-28), p. 2.

<sup>165</sup> Panel Report, *EC – Bed Linen (Article 21.5 – India)*, para. 6.230.

<sup>166</sup> Canada's second written submission, para. 75.

<sup>167</sup> Canada's opening statement at the first meeting of the Panel, paras. 35-37. See also Canada's first written submission, para. 99 (referring to Panel Report, *China – Autos (US)*, para. 7.289).

<sup>168</sup> Canada's opening statement at the first meeting of the Panel, paras. 35 and 36.

<sup>169</sup> Apparent Market and Domestic Production Tables, (Exhibit CAN-28), p. 2; Canada's opening statement at the first meeting of the Panel, para. 36; and China's response to Panel question No. 37, table B.

7.99. Looking at this data, we observe that both the domestic like product and the non-dumped imports gained market share, 6.5 and 6.7 percentage points respectively, the dumped imports gained 1.3 percentage points of market share, and other Chinese producers lost 14.6 percentage points of market share. Canada refers to the *China – Autos (US)* dispute in its argument regarding the need to consider changes in market share of various participants in the market. However, while it is true that the panel in that case faulted MOFCOM for relying on a decline in domestic industry market share without considering and addressing the role and impact of other participants in the market before reaching its conclusions, the facts in *China – Autos (US)* are different from those in this case.<sup>170</sup> In *China – Autos (US)*, the domestic industry had lost market share, and most of that lost market share was gained by non-industry producers and non-dumped imports. MOFCOM had relied on that decline in its analysis of price effects. In the case before us, both the domestic industry and the dumped imports gained market share. Thus, MOFCOM in this case did not rely on lost domestic market share in its consideration of price effects, and a need to explain the relevance of such a loss in the light of the gains of other participants in the market does not arise.

7.100. We therefore conclude that Canada has failed to demonstrate that MOFCOM acted inconsistently with Articles 3.1 and 3.2 of the Anti-Dumping Agreement in considering changes in the market share of dumped imports in its consideration of price effects.

#### **7.5.6 MOFCOM's consideration of certain business information**

7.101. Canada argues that MOFCOM failed to base its findings of price depression on an objective examination of positive evidence by relying on the minutes of business analysis meetings and pricing reports obtained during on-site verifications.<sup>171</sup>

7.102. MOFCOM referred to certain information obtained during on-site verifications in its consideration of price depression, as follows:

Investigating authority had collected evidences from many domestic producers during its on-site verifications, including the minutes of the business analysis meetings and the pricing reports, which showed that since the second half of 2011, the decline of the import prices of foreign dissolving pulp had led to the difficulty in the sale of the like product of the Domestic Industry, forcing the Domestic Industry to reduce the price. This showed that the domestic producers were affected by the decrease of the Price of the Dumped Imported Product when they set the price of the like product of the Domestic Industry.<sup>172</sup>

7.103. The minutes of the business analysis meetings and the pricing reports referred by MOFCOM in the Final Determination include:

- a. meeting minutes for reporting sales of cellulose pulp by [\*\*\*];
- b. meeting minutes regarding sales of cellulose pulp by [\*\*\*];
- c. the proposal for price adjustment of [\*\*\*].<sup>173</sup>

In response to a question from the Panel, China clarified that these documents represent approximately one-third of the total domestic production and were dated throughout the price depression period.<sup>174</sup>

7.104. Canada asserts that the meeting minutes and pricing documents of [\*\*\*] are not positive evidence because they refer to imported cellulose pulp in general, without specifying exporting countries, and do not provide reliable data with regard to prices of the dumped imports and their relationship with the domestic like product. Five of the meeting minutes from [\*\*\*], and one

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<sup>170</sup> Canada's first written submission, para. 99 (referring to Panel Report, *China – Autos (US)*, para. 7,289).

<sup>171</sup> Canada's first written submission, paras. 101-103.

<sup>172</sup> Final Determination, (Exhibit CHN-1), para. 65.

<sup>173</sup> Pricing documents and meeting minutes, (Exhibit CHN-2) (BCI).

<sup>174</sup> China's response to Panel question No. 14, para. 40.

proposal for price adjustment of [\*\*\*], do not specifically refer to imports from investigated countries, i.e. Brazil, Canada, and the United States, but to the prices of imported dissolving pulp without specification of origin. Having examined these documents, we consider that although they support MOFCOM's conclusion that the domestic producers had to lower their prices due to the intense competition with imported cellulose pulp, the probative value of these documents is limited, because they refer to imported cellulose pulp in general. This means that these documents might refer to price competition with the dumped imports as well as non-dumped imports. Nonetheless, in our view, it was not improper for MOFCOM to have taken this information into account, given the obligation under Article 3.2 is to consider the effect of the dumped imports on prices, rather than to conclude that the price depression was caused by the dumped imports. As well, there is no obligation to conduct a non-attribution analysis under Article 3.2. However, the absence of any indication of the specific source of the imported cellulose pulp referred to in those documents calls into question the weight they should be given in considering the explanatory force of the dumped imports for the existence of price depression, as opposed to the effect of non-dumped imports.

7.105. Further, the meeting minutes and pricing documents of [\*\*\*] do name investigated exporting countries in referring to competition with imported cellulose pulp from Brazil, Canada and the United States.<sup>175</sup> In this regard, Canada maintains that the remaining documents from [\*\*\*] are not representative of the domestic industry, because they originate from only one petitioner, which accounted for less than [\*\*\*] of total domestic output.<sup>176</sup> China responds that that there is no requirement that the specific examples of price depression must account for a certain percentage of overall sales during the investigation.<sup>177</sup> China asserts these pricing documents and meeting minutes illustrate specific instances over the POI in which domestic producers were forced to reduce prices due to price pressure from the dumped imports.<sup>178</sup> In our view, MOFCOM's consideration of price effects was primarily driven by the data on the volume and prices of the dumped imports and the prices of the domestic like product. While not determinative, the documents in question do corroborate MOFCOM's view that the domestic prices were depressed by the declining prices and increased volume of the dumped imports. Therefore, we consider that a reasonable and objective investigating authority could have taken this information into account in its consideration of price effects.

7.106. Canada also submits that MOFCOM neither verified the pricing documents against relevant sales contracts, purchase orders, and VAT invoices, nor did it verify this information with purchasers or data collected from the interested parties, e.g. downstream viscose staple fibre (VSF) producers.<sup>179</sup> The Final Determination explicitly states that these documents were obtained during on-site verifications, the very purpose of which is to verify information obtained during the investigation. We note in this regard that while an investigating authority is required to satisfy itself as to the accuracy of the information supplied by interested parties pursuant to Article 6.6 of the Anti-Dumping Agreement, there is no particular means by which it is required to do so. Verification, as provided for in Article 6.7 of the Anti-Dumping Agreement, which may include such steps as suggested by Canada is not a requirement in any case. Moreover, Canada does not even allege any errors or lack of accuracy in the pricing documents or meeting minutes. In these

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<sup>175</sup> The parties disagree whether the list of exporting countries in these documents is exhaustive. Canada submits that the translation into English omits the word "*deng*", which it asserts means "et cetera" and suggests that the list includes other countries. China responds that the word "*deng*" has two meanings in English: one is "et cetera", and the other is "namely" or "as such". China submits that in the context of these documents the second meaning is more accurate, because the list of countries is followed by the specific percentage of imports, i.e. "more than half of China's total imports of cellulose pulp". China further submits that this is confirmed by import data, because imports from Brazil, Canada, and the United States represent approximately half of total imports. The dumped imports accounted for 49% in 2010, 43% in 2011, and 44% in 2012 of the total imports of cellulose pulp to China, or approximately half of total imports. While some of the imports discussed in the documents may have been from other sources, in our view, the specific references to Brazil, Canada, and the United States are sufficient for MOFCOM to have used the word "*deng*" as meaning "namely" or "as such". (Canada's opening statement at the first meeting of the Panel, para. 41; response to Panel question No. 12, para. 41; second written submission, para. 85 and fn 105; China's response to Panel question No. 14, paras. 35-38; second written submission, paras. 61-63; and opening statement at the second meeting of the Panel, paras. 37 and 38).

<sup>176</sup> Canada's second written submission, paras. 83 and 84.

<sup>177</sup> China's response to Panel question No. 14, para. 41.

<sup>178</sup> China's response to Panel question No. 14, para. 33.

<sup>179</sup> Canada's second written submission, paras. 85 and 90.

circumstances, and given that Canada has made no claim in this regard, we do not consider that the failure of MOFCOM to undertake "verification" as suggested by Canada was erroneous.

7.107. Canada also contends that MOFCOM failed to explain how the domestic industry could have had difficulty in making sales of the like product, given that the volume of domestic sales increased, as did the domestic market share.<sup>180</sup> In this regard, we note that MOFCOM found that domestic prices declined while market share increased, which is consistent with the domestic industry having achieved increased sales only by lowering prices, which in our view suggest that the industry had difficulty making sales of the like product – until it lowered its prices. The pricing documents and meeting minutes also lend support to this view. In the price effects analysis, MOFCOM specifically found that due to increased demand, in the second half of 2011 the domestic industry increased its output and sales of the like product leading to an increase in market share, but decreased its prices, which again is consistent with a conclusion that the domestic industry had to lower prices to make sales.<sup>181</sup> We note that China has relied heavily on the meeting reports in arguing that MOFCOM did not err in its consideration of price effects. In the circumstances of this case, we are of the view that these documents, on their own, cannot suffice to show that dumped imports had the effect of depressing domestic prices. However, this is a different question from whether taking these documents into account in the consideration of the price effects of dumped imports is, in itself, inconsistent with Articles 3.1 and 3.2.

7.108. We therefore find that Canada has failed to demonstrate that MOFCOM acted inconsistently with Articles 3.1 and 3.2 by taking into account pricing documents and meeting minutes in its consideration of the price effects.

#### **7.5.7 MOFCOM's consideration of evidence and factors collectively**

7.109. China argues that MOFCOM based its conclusion that the dumped imports had an effect to depress prices of the domestic like product on a "variety of evidence", specifically: (a) intense price competition between dumped imports and domestic like product; (b) a dramatic 43% increase in the dumped import volume; (c) a drastic decline in domestic like product prices; (d) parallel price trends; (e) pricing documents and meeting minutes; and (f) significant dumping margins.<sup>182</sup> China asserts that MOFCOM examined these factors "collectively" and did not rely "solely on any single factor".

7.110. We have found that MOFCOM failed to adequately explain the role of parallel price trends in its consideration of price depression and how parallel declining price trends in conjunction with the increased volume of dumped imports explained its consideration of price depression, and how it found price depression in a situation where dumped import prices were higher than those of the domestic like product during the second part of the POI. The fact of price competition between the dumped imports and the domestic like product, even if that competition was intense, may explain the observation of parallel price trends, but goes no further to explain how dumped import prices had the effect of depressing the domestic industry's prices.

7.111. An increase in the volume of dumped imports might lead the domestic industry to lower prices to maintain market share. This would be a rational response if the dumped imports were entering at lower prices than those of the domestic industry, which was not the case during the second half of the POI. Moreover, the increased volume of dumped imports entered a growing and highly price competitive market which further calls into question the explanatory force of dumped imports for the decline in domestic like product prices. Thus, as with the observed parallel price trends, the mere fact that prices declined dramatically in the second half of the POI does not suffice, on its own, to explain how dumped import prices had the effect of depressing the domestic industry's prices.

7.112. We conclude that MOFCOM's consideration of price effects was not consistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement.

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<sup>180</sup> Canada's first written submission, para. 102.

<sup>181</sup> Final Determination, (Exhibit CHN-1), para. 65.

<sup>182</sup> China's first written submission, para. 93; second written submission, paras. 41-47; response to Panel question No. 13, paras. 24-31. We note that China refers to the significant dumping margins as one of the factors considered in MOFCOM's consideration of price effects, but we find no mention of the margin of dumping in connection with price effects in the Final Determination.

## **7.6 Whether MOFCOM's examination of the impact of dumped imports was consistent with Articles 3.1 and 3.4 of the Anti-Dumping Agreement**

### **7.6.1 Introduction**

7.113. Canada claims that MOFCOM's examination of the impact of the dumped imports on the domestic industry is inconsistent with Articles 3.1 and 3.4 of the Anti-Dumping Agreement, because:

- a. MOFCOM failed to objectively examine the domestic industry's market share; and
- b. MOFCOM failed to properly analyse and interpret data relating to factors that showed an improvement in the state of the domestic industry.<sup>183</sup>

7.114. We will first address the legal standard under Article 3.4 and then examine each of Canada's allegations in turn.

### **7.6.2 Legal standard under Articles 3.1 and 3.4**

7.115. The text of Article 3.1 of the Anti-Dumping Agreement is set out in paragraph 7.12 above. Article 3.4 reads as follows:

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.

7.116. Article 3.4 requires an investigating authority to examine the impact of the dumped imports on the domestic industry on the basis of an evaluation of all relevant economic factors and indices having a bearing on the state of the industry. The evaluation of the relevant factors must respect the overarching principle set out in Article 3.1 concerning the objective examination of positive evidence.<sup>184</sup> Neither Article 3.4 nor any other provision of the Anti-Dumping Agreement provides any guidance regarding a specific methodology on how these factors and indices shall be evaluated.

7.117. The "evaluation" required under Article 3.4 suggests that an investigating authority must undertake an analysis and assessment of all relevant economic factors and indices.<sup>185</sup> At the same time, there is no requirement that all relevant factors, or even most or a majority of them, reflect negative developments in order to point to an overall assessment of negative impact on the relevant domestic industry.<sup>186</sup> The last sentence of Article 3.4 specifies that no one or several of the relevant factors can necessarily "give decisive guidance". Article 3.4 requires an overall

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<sup>183</sup> Canada's second written submission, paras. 95-117. In its first written submission, Canada refers to the Appellate Body's interpretation of Article 3.4 in *China – GOES* to claim that MOFCOM failed to evaluate the relationship between the dumped imports and the state of the domestic industry, and to examine whether subject imports explained the state of the domestic industry. (Canada's first written submission, paras. 108, 110, and 111). From Canada's response to Panel question number 18, we understand that Canada refers to the interpretation of Article 3.4 developed in *China – GOES* to support its claims under Articles 3.1 and 3.4 that MOFCOM failed both to objectively evaluate the domestic industry's market share, and to properly analyse and interpret data relating to factors that showed an improvement in the state of the domestic industry.

<sup>184</sup> Appellate Body Reports, *US – Hot-Rolled Steel*, paras. 196 and 197; and *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.203.

<sup>185</sup> Panel Report, *China – X-Ray Equipment*, para. 7.180 (referring to Panel Report, *EC – Bed Linen (Article 21.5 – India)*, para. 6.162).

<sup>186</sup> Panel Report, *EU – Footwear (China)*, para. 7.413 (referring to Panel Reports, *EC – Tube or Pipe Fittings*, para. 7.329; and *EC – Bed Linen (Article 21.5 – India)*, para. 6.163).

evaluation of the information, in context, as well as an explanation of how the facts considered by an investigating authority support its assessment.<sup>187</sup>

7.118. Article 3.4 does not require merely an examination of the state of the domestic industry in the abstract. Rather, it contemplates that an investigating authority must also "derive an understanding of *the impact of* subject imports on the basis of such an examination".<sup>188</sup> Article 3.4 "[is] concerned with the relationship between subject imports and the state of the domestic industry".<sup>189</sup> In other words, Article 3.4 requires an examination of "the explanatory force" of the subject imports for the state of the domestic industry.<sup>190</sup>

7.119. The examination under Article 3.4 is necessary to provide a "meaningful basis" for the authority's determination under Article 3.5 as to whether dumped imports are causing injury to the domestic industry.<sup>191</sup> The examination under Article 3.4 "*contributes to*, rather than duplicates", the determination required under Article 3.5.<sup>192</sup> For this reason, "an investigating authority is required to *examine* the impact of subject imports on the domestic industry", but it "is not required to *demonstrate* that subject imports are causing injury to the domestic industry", which is an analysis specifically mandated by Article 3.5.<sup>193</sup> The demonstration of the causal relationship under Article 3.5 requires the examination of "all relevant evidence" as well as other factors causing injury to the domestic industry, and thus covers a broader scope than the examination under Article 3.4.<sup>194</sup>

### 7.6.3 MOFCOM's evaluation of market share

7.120. Canada contends that MOFCOM's evaluation of actual and potential decline in market share was inconsistent with Articles 3.1 and 3.4. Therefore, the question before us is whether MOFCOM's evaluation of the domestic industry's market share, in the context of its overall examination of the state of the industry, was reasonable and objective.

7.121. In the Final Determination, in its evaluation of relevant economic factors and indices, MOFCOM examined the domestic industry's market share and found that:

During the Period of investigation, the market share of the Like Product of the Domestic Industry was 19.68% in 2010; 18.09% in 2011, 1.59 percentage points less than 2010; and 26.22% in 2012, 8.13 percentage points more than 2011.<sup>195</sup>

Further, in its examination of the state of the domestic industry, MOFCOM described the domestic industry's market share as having "remained low".<sup>196, 197</sup>

7.122. There is no disagreement between the parties on the level of the market share held by the domestic industry. Canada however takes issue with MOFCOM's characterization of that level of

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<sup>187</sup> Panel Report, *EU – Footwear (China)*, para. 7.413 (referring to Panel Reports, *Mexico – Olive Oil*, para. 7.372; *EC – Bed Linen*, paras. 6.163 and 6.213; and *EC – Tube or Pipe Fittings*, para. 7.329).

<sup>188</sup> Appellate Body Reports, *China – GOES*, para. 149; and *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.205. (emphasis original)

<sup>189</sup> Appellate Body Reports, *China – GOES*, para. 149; and *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.205.

<sup>190</sup> Appellate Body Reports, *China – GOES*, para. 149; and *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.205.

<sup>191</sup> Appellate Body Reports, *China – GOES*, para. 154; and *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.205.

<sup>192</sup> Appellate Body Reports, *China – GOES*, para. 149; and *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.205. (emphasis original)

<sup>193</sup> Appellate Body Reports, *China – GOES*, para. 150; and *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.205. (emphasis original)

<sup>194</sup> Appellate Body Report, *China – GOES*, para. 150.

<sup>195</sup> Final Determination, (Exhibit CHN-1), p. 72.

<sup>196</sup> Final Determination, (Exhibit CHN-1), p. 76.

<sup>197</sup> We note that the parties disagree whether the correct translation of the description of market share in the original Chinese, "*shizhong ... dimi*", is "remained low" (China's version) or "consistently depressed" (Canada's version). The Panel considers that it does not have to decide on which of the two translations is correct, given that Canada disagrees with MOFCOM's characterization of the market share regardless of the translation. (China's first written submission, paras. 108 and 109; and Canada's second written submission, paras. 100 and 101).

market share as having "remained low". Canada refers to MOFCOM's own findings that the domestic industry's market share increased by 6.54 percentage points during the POI.<sup>198</sup> Canada also argues that MOFCOM assessed the amount or level of market share, but failed to consider trends in the market share and to evaluate whether there was actual and potential decline in market share, as required by Article 3.4.<sup>199</sup> China responds that MOFCOM did examine trends in market share, referring to MOFCOM's finding that during the POI the market share of the like domestic product was "19.68% in 2010; 18.09% in 2011, 1.59 percentage points less than 2010; and 26.22% in 2012, 8.13 percentage points more than 2011".<sup>200</sup> China further submits that it was not unreasonable for MOFCOM to characterize the market share as having "remained low", given that the domestic industry held approximately one quarter or less of the market during the POI.<sup>201</sup>

7.123. Having considered MOFCOM's finding regarding the market share as mentioned above, we make the following observations. MOFCOM examined trends and developments in market share over the POI on a year-on-year basis, stating that in 2011 market share slightly decreased, and in 2012 increased by 8 percentage points compared with 2010. In its discussion of price effects, MOFCOM looked at developments in market share on a half-yearly basis, acknowledged that the domestic industry's market share was generally increasing, and provided the following assessment of the changes in market share over the POI:

The domestic market share of the like product of the Domestic Industry was generally in an increasing trend: 18.00% in the first half of 2010; 21.36% in the second half of 2010, 3.36 percentage points more than the first half of 2010; 17.54% in the first half of 2011, 3.82 percentage points less than the second half of 2010; 18.64% in the second half of 2011, 1.1 percentage points more than the first half of 2011; 26.71% in the first half of 2012, 8.07 percentage points more than the second half of 2011; and 25.73% in the second half of 2012, 0.98 percentage points less than the first half of 2012 and 7.73 percentage points more than the first half of 2010 at the beginning of the Period of investigation.<sup>202</sup>

In the same context, MOFCOM noted that in the second part of 2011 the domestic industry increased its output in order to meet the growing demand for cellulose pulp in China, leading to an increase in domestic industry's sales, and consequently to an increase in market share. Further, MOFCOM stated that at the end of the POI, in the second part of 2012, the dumped imports "squeezed" the market share of the domestic like product, which declined from 26.71% to 25.73%.<sup>203</sup> Given these findings and explanations by MOFCOM, we consider that MOFCOM did evaluate the trends and developments of the market share over the POI.

7.124. Canada argues however that MOFCOM's characterization of the market share as having "remained low"<sup>204</sup> is not an objective evaluation of the facts. MOFCOM states:

During the Period of investigation, the market share of the Like Product of the Domestic Industry remained low and its operation rate stayed at a low level.<sup>205</sup>

7.125. Moreover, MOFCOM also observed that the market for cellulose pulp in China had expanded.<sup>206</sup> Demand had been growing over the POI, and this had induced the domestic industry to increase its production capacity, output and sales. We consider that the characterization of the domestic market share as "remained low" is not unreasonable in light of the fact that the demand for cellulose pulp had grown considerably, by 35.26% over the POI. In addition, although domestic

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<sup>198</sup> Canada's first written submission, paras. 112-114; second written submission, para. 105; and opening statement at the first meeting of the Panel, paras. 50 and 51.

<sup>199</sup> Canada's second written submission, paras. 103 and 104 (referring to Panel Report in *China – X-Ray Equipment*, paras. 7.201 and 7.216); opening statement at the first meeting of the Panel, para. 49; and opening statement at the second meeting of the Panel, para. 31.

<sup>200</sup> China's second written submission, para. 86 (referring to Final Determination, (Exhibit CHN-1), p. 72); opening statement at the second meeting of the Panel, paras. 40 and 41.

<sup>201</sup> China's second written submission, para. 87.

<sup>202</sup> Final Determination, (Exhibit CHN-1), p. 63.

<sup>203</sup> Final Determination, (Exhibit CHN-1), p. 65.

<sup>204</sup> Final Determination, (Exhibit CHN-1), p. 76.

<sup>205</sup> Final Determination, (Exhibit CHN-1), p. 76.

<sup>206</sup> Final Determination, (Exhibit CHN-1), pp. 65, 72, and 76.

production capacity had been increased to meet the increased demand, the domestic industry's market share had not increased commensurate with the available production capacity. In this respect, by the end of the POI, the domestic industry was using only half of its production capacity, its capacity utilization rate decreased from 66.01% in 2010 to 53.77% in 2011 and to 52.35% in 2012.<sup>207</sup> In these circumstances, we consider that MOFCOM's characterization of domestic industry market share as having "remained low" is one a reasonable and objective investigating authority could reach in light of the evidence before it.

7.126. We therefore we conclude that Canada has failed to demonstrate that MOFCOM acted inconsistently with Articles 3.1 and 3.4 of the Anti-Dumping Agreement in its evaluation of the domestic industry's market share.

#### **7.6.4 MOFCOM's evaluation of injury factors showing positive trends**

7.127. Canada contends that MOFCOM failed to evaluate factors that showed an improvement in the state of the domestic industry.<sup>208</sup> Canada argues that, while MOFCOM mentioned these factors, it failed to assess them and explain the role, relevance and weight each factor had in the investigation.<sup>209</sup> Canada asserts that apart from the discussion on the relationship between domestic demand and the construction and renovation of production facilities, MOFCOM did not explain the trends of the positive factors and how they related to each other and to the negative factors.<sup>210</sup> In addition, Canada submits that MOFCOM failed to properly assess the role of "market share" and "investing and financing ability" in its overall evaluation of the state of the domestic industry.<sup>211</sup>

7.128. China responds that MOFCOM recognized that trends in several factors were positive, but concluded that dumped imports forced prices to fall, leading to declines in profits, return on investments, and net cash flow.<sup>212</sup> China submits that Article 3.4 calls for overall examination of the impact of the dumped imports on the domestic industry.<sup>213</sup> However, while this examination includes an evaluation of all relevant factors and indices, it does not require examination of the role, relevance, and weight of each individual factor.<sup>214</sup> China refers to the last sentence of Article 3.4 to argue that the existence of positive factors of injury did not preclude MOFCOM from concluding imports had an overall negative impact on the domestic industry.

7.129. We recall that Article 3.4 requires an investigating authority to derive an understanding of the impact of the dumped imports on the state of the domestic industry based on examination of all relevant factors and indices having a bearing on the state of the domestic industry. There is no requirement in Article 3.4 that all relevant factors, or even most or a majority of them, have to show negative developments in order to arrive at an understanding that dumped imports are having a negative impact on the domestic industry.<sup>215</sup> At the same time, positive developments in other factors would require an investigating authority to provide a compelling explanation of why and how, despite such positive trends, it ultimately concludes under Article 3.5 that the domestic industry is injured.<sup>216</sup> The question before us is whether MOFCOM's evaluation of the positive and negative trends in examining the state of the domestic industry under Article 3.4 was reasonable and sufficiently explained in the Final Determination.

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<sup>207</sup> Final Determination, (Exhibit CHN-1), p. 73.

<sup>208</sup> Canada's first written submission, para. 118.

<sup>209</sup> Canada's first written submission, para. 119 (referring to Panel Report, *China – X-Ray Equipment*, para. 7.216).

<sup>210</sup> Canada's second written submission, para. 111.

<sup>211</sup> Canada's argument, which refers to MOFCOM's failure to properly assess the role of factors "such as" those mentioned, suggests that MOFCOM's analysis was deficient in other respects. However, Canada only specifically addressed the two factors mentioned, and therefore we will only make findings with respect to them.

<sup>212</sup> China's first written submission, para. 114; second written submission, paras. 90-92 (referring to Final Determination, (Exhibit CHN-1), p. 76).

<sup>213</sup> China's second written submission, para. 96.

<sup>214</sup> China's second written submission, para. 96.

<sup>215</sup> Panel Report, *EU – Footwear (China)*, para. 7.413 (referring to Panel Reports, *EC – Tube or Pipe Fittings*, para. 7.329; and *EC – Bed Linen (Article 21.5 – India)*, para. 6.163).

<sup>216</sup> Panel Report, *Thailand – H-Beams*, para. 7.249.

7.130. In its examination of impact MOFCOM specifically examined the following factors: domestic demand, production capacity, output, sales volume, market share, sales revenue, employment, labour productivity, and salary per capita showed an increasing trend; selling price, pre-tax profit, return on investment, operation rate, net cash flow from operating activities were decreasing; ending inventories grew, and investing and financing abilities were weakened.<sup>217</sup> MOFCOM then provided an overall assessment of the state of the domestic industry<sup>218</sup>, in which it acknowledged that several injury factors showed positive developments, stating:

[D]uring the Period of investigation, the demand of the domestic cellulose pulp market was strong: the demand in 2011 was 8.67% more than 2010 and the demand in 2012 was 24.47% more than 2011; the demand at the end of the Period of investigation was 35.26% more than that at the beginning of the Period of investigation. With the increase of the demand of the domestic cellulose pulp market, the Domestic Industry constructed and renovated a number of production facilities; the production capacity, output, sales volume and sales revenue of the Domestic Industry all showed an increasing trend and the employment, labor productivity and salary per capita all showed a small increase.<sup>219</sup>

7.131. We cannot agree with Canada's view that MOFCOM failed to provide any explanation regarding positive trends in some factors.<sup>220</sup> MOFCOM's Final Determination states that, due to the increase in demand, the domestic industry constructed and renovated a number of production facilities, which led to increases in production capacity, output, sales volume, sales revenue, employment, labour productivity, and salary per capita. Thus, MOFCOM provided a plausible and reasonable explanation of the positive trends in several factors in that they were driven by the expansion of the market for cellulose pulp in China and the domestic industry's expansion.

7.132. Next, MOFCOM observed that prices of the domestic like product continued to decrease and the unit sales cost was in a decreasing trend generally. However, the degree of decline in prices was greater than the decline in the unit sales costs, leading to a significant decline in the gross profits of the domestic industry.<sup>221</sup> As a consequence, the domestic industry showed significant declines in pre-tax profits, and in fact suffered significant losses, declines in return on investments and net cash flow, and also significant increases in ending inventories.<sup>222</sup> MOFCOM stated that domestic producers that submitted questionnaire responses reported reductions of output or shutdowns to some degree. Some of the companies had to sell their assets in order to maintain the operations, and some of them had closed down.<sup>223</sup> MOFCOM noted that the domestic industry's market share remained low, and capacity utilization rate also remained at a low level.<sup>224</sup> Thus, MOFCOM explained its overall assessment of dumped imports' negative impact on the domestic industry notwithstanding positive trends in some factors.

7.133. Canada submits that MOFCOM failed to properly assess the role of two "critical" injury factors, namely market share and ability to raise capital and investments in its overall evaluation of the state of the domestic industry.<sup>225</sup> Canada argues that MOFCOM improperly considered that these two factors supported a finding of injury. We have addressed Canada's arguments regarding the market share above and found that MOFCOM's evaluation of market share complies with the requirements of Articles 3.1 and 3.4. Regarding the ability to raise capital and investment, Canada argues that this factor should have been assessed through the prism of the increased production capacity of the domestic industry and the investments that increase implies.<sup>226</sup> According to Canada, had this been done, MOFCOM could not have found this factor to be indicative of injury.

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<sup>217</sup> Final Determination, (Exhibit CHN-1), pp. 71-74.

<sup>218</sup> Final Determination, (Exhibit CHN-1), pp. 74-76.

<sup>219</sup> Final Determination, (Exhibit CHN-1), p. 76.

<sup>220</sup> Canada's second written submission, para. 111.

<sup>221</sup> Final Determination, (Exhibit CHN-1), p. 76. The gross profit of the domestic industry was 1,775.31 RMB/tonne in the first half of 2011; -23.16 RMB/tonne (loss) in the second half of 2011; 770.94 RMB/tonne in the first half of 2012; and -327.49 RMB/tonne (loss) in the second half of 2012.

<sup>222</sup> Final Determination, (Exhibit CHN-1), p. 76.

<sup>223</sup> Final Determination, (Exhibit CHN-1), p. 76.

<sup>224</sup> Final Determination, (Exhibit CHN-1), p. 76.

<sup>225</sup> Canada's second written submission, para. 114.

<sup>226</sup> Canada's second written submission, para. 114.

7.134. MOFCOM noted in examining the impact of the dumped imports the information received from the domestic industry during on-site verifications, and in the responses to questionnaires which indicated that some companies had to sell their assets in order to stay in operation, and some of them had to close down. MOFCOM also noted that the investing and financing abilities of some companies were weakened and plans for capacity expansion were put aside, because banks terminated credits for investment plans due to declining profitability and increasingly worsened business situations.<sup>227</sup> In our view, it was not unreasonable for MOFCOM to consider that the shutdown of companies and selling of assets were negative developments in the state of the domestic industry, even in a situation of the domestic industry's increased capacity. Thus, in our view, MOFCOM's examination in this respect was that of a reasonable and objective investigating authority.<sup>228</sup>

7.135. We recall that under Article 3.4 the investigating authorities are not required to *demonstrate* that the dumped imports are causing injury to the domestic industry, which is an analysis specifically mandated by Article 3.5. The evaluation of all relevant economic factors and indices under Article 3.4, including market share and the ability to raise capital and investments, must provide a meaningful basis for the final determination whether injury is caused by dumped imports under Article 3.5.

7.136. Finally, we note China's argument that certain parts of the examination of the impact of the dumped imports on the state of the domestic industry can be found in the causation analysis.<sup>229</sup> We recall that Article 3 "does not prescribe a specific methodology to be relied on by an investigating authority in its determination of injury".<sup>230</sup> Article 3 also does not provide a "prescribed template or format that an investigating authority must adhere to in making its determination of injury, provided that its determination comports with the disciplines that apply under the discrete paragraphs of Article 3".<sup>231</sup> Thus, "it is for the investigating authorities in the first instance to determine the analytical methodologies that will be applied in the course of an investigation."<sup>232</sup>

7.137. We have found above that MOFCOM evaluated the mandatory economic factors and indices set forth in Article 3.4. In doing so, it noted that some of the factors were negative and some were positive. MOFCOM further considered these factors and indices in its demonstration of the causation relationship between dumped imports and material injury.<sup>233</sup> We recall that Article 3 contemplates "a logical progression of inquiry leading to an investigating authority's ultimate injury and causation determination".<sup>234</sup> Thus, it is unsurprising that the outcome of the investigating authorities' examination under Article 3.4 is further discussed in the causation section of a final determination.

7.138. We therefore conclude that Canada has not established that MOFCOM acted inconsistently with Articles 3.1 and 3.4 of the Anti-Dumping Agreement in its examination of the impact of the dumped imports on the state of the domestic industry.

## **7.7 Whether MOFCOM's demonstration of causation and examination of other factors causing injury were consistent with Articles 3.1 and 3.5 of the Anti-Dumping Agreement**

### **7.7.1 Introduction**

7.139. Canada claims that MOFCOM's demonstration of a causal relationship between the dumped imports and the injury to the domestic industry is inconsistent with Articles 3.1 and 3.5 of the Anti-Dumping Agreement. Canada also claims that MOFCOM failed to objectively examine several

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<sup>227</sup> Final Determination, (Exhibit CHN-1), pp. 73 and 74.

<sup>228</sup> We also note that increased production capacity and overexpansion of the domestic industry is raised by Canada as an alleged "other factor" causing injury to the domestic industry under Article 3.5 of the Anti-Dumping Agreement. We address this issue further in paragraphs 7.173-7.185 of the Report.

<sup>229</sup> China's first written submission, paras. 102-107; China's response to Panel question No. 17, paras. 54-62.

<sup>230</sup> Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.141; see also *EC – Bed Linen (Article 21.5 – India)*, paras. 113 and 118.

<sup>231</sup> Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.141.

<sup>232</sup> Panel Report, *Thailand – H-Beams*, para. 7.159.

<sup>233</sup> Part VI.1 "Causal Relationship" (Final Determination, (Exhibit CHN-1), pp. 77 and 78).

<sup>234</sup> Appellate Body Report, *China – GOES*, para. 128.

other factors allegedly causing injury to the domestic industry simultaneously with the dumped imports, namely: (a) changes in cotton and VSF prices; (b) domestic industry overexpansion, overproduction and inventory build-up; (c) non-dumped imports; and (d) shortage of cotton linter.

7.140. We will first address the legal standard under Article 3.5 and then examine each of Canada's allegations in turn.

### 7.7.2 Legal standard under Articles 3.1 and 3.5

7.141. As discussed above, Article 3.5 of the Anti-Dumping Agreement requires the demonstration of a causal relationship between the dumped imports and the material injury.<sup>235</sup> It provides specifically that it must be "demonstrated that the dumped imports are, through the effects of dumping, as set forth in paragraphs 2 and 4, causing injury with the meaning of this Agreement". Article 3.5 further requires that the demonstration of the causal relationship "shall be based on an examination of all relevant evidence before the authorities". Article 3.5 also requires the investigating authority to examine any other known factors that may be simultaneously causing injury to the domestic industry and to ensure that the injuries caused by those other factors are not attributed to the dumped imports.<sup>236</sup> It is well established that there are three relevant elements for determining when such a "non-attribution" analysis is required: the "other factor" allegedly causing injury must be: (a) known to the investigating authority; (b) a factor other than dumped imports; and (c) injuring the domestic industry at the same time as the dumped imports.<sup>237</sup> If these elements are satisfied, the investigating authority "must appropriately assess the injurious effects of those other factors", which "must involve separating and distinguishing the injurious effects of the other factors from the injurious effects of the dumped imports".<sup>238</sup>

7.142. Article 3.5 does not provide any guidance on methodology for either of these requirements. Thus, there is no specific guidance as to how an investigating authority can or should demonstrate that there is a causal link between dumped imports and injury, or how it can or should ensure that it does not attribute to the dumped imports injuries caused by a known "other factor".<sup>239</sup> Various methods are used by investigating authorities for the required demonstration of a causal link and examination of other factors and assurance of non-attribution. While a number of panel and Appellate Body reports have reviewed the decisions of investigating authorities in these respects, they have focused on the specific facts, analysis and conclusions, rather than on the methods of analysis relied upon, in the abstract. Thus, in the context of non-attribution, prior decisions have generally focused on "a careful and in depth scrutiny" of the determinations made by the investigating authority in order to evaluate whether the investigating authority's explanations and conclusions are "such reasonable conclusions as could be reached by an unbiased and objective investigating authority in light of the facts and arguments before it and explanations given".<sup>240</sup>

### 7.7.3 MOFCOM's demonstration of causation

7.143. In its Final Determination, MOFCOM found that significantly increased volumes of the dumped imports at decreasing prices depressed the prices of the domestic like product. In turn, the depressed price of the domestic like product led to a continuous decline in the domestic industry's pre-tax profit, return on investments and net cash flow from operating activities. Since the degree of decline in the domestic like product's prices was greater than the degree of decline in unit sales costs, profitability declined, and at the end of the POI the domestic industry was showing serious losses. In addition, the domestic industry's market share and capacity utilization rate were low, and inventories increased over the POI. Based on all of these factors, MOFCOM

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<sup>235</sup> See above paras. 7.23-7.27.

<sup>236</sup> Panel Report, *EU – Biodiesel (Argentina)*, para. 7.438; Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.125 (referring to Appellate Body Reports in *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.283; and *China – GOES*, para. 151).

<sup>237</sup> Panel Report, *EU – Biodiesel (Argentina)*, para. 7.438 (referring to Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 175).

<sup>238</sup> Panel Report, *EU – Biodiesel (Argentina)*, para. 7.438 (referring to Appellate Body Reports, *US – Hot-Rolled Steel*, para. 223; *EC – Tube or Pipe Fittings*, para. 188; *China – GOES*, para. 151; and *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.283).

<sup>239</sup> Panel Report, *EU – Biodiesel (Argentina)*, para. 7.439.

<sup>240</sup> Panel Report, *EU – Biodiesel (Argentina)*, para. 7.439 (referring to Panel Reports, *EU – Footwear (China)*, para. 7.483; and *EC – Salmon (Norway)*, para. 7.655).

determined that during the POI the dumped imports of cellulose pulp caused material injury to the domestic industry producing the like product.<sup>241</sup>

7.144. Canada argues that MOFCOM's causation analysis is based on flawed volume and price effects analyses and therefore is necessarily inconsistent with Articles 3.1 and 3.5.<sup>242</sup> In the alternative, Canada submits that MOFCOM failed to demonstrate how dumped imports actually caused injury to the domestic industry, given that the dumped imports' market share did not change considerably, the prices of dumped imports were significantly higher than those of the domestic like product and the volume of sales of the domestic like product increased more than those of the dumped imports.<sup>243</sup>

7.145. China responds that MOFCOM's causation analysis was based on an objective examination of positive evidence demonstrating a dramatic increase in the volume of dumped imports in absolute terms, increased market share of the dumped imports and declining prices of the domestic like product, in parallel with the declining prices of the dumped imports.<sup>244</sup> China submits that documents examined by MOFCOM during the verification showed that domestic producers were forced to lower their prices to maintain sales in the Chinese market.<sup>245</sup> China argues that MOFCOM also carefully considered the economic factors and indices concerning the state of the domestic industry that showed the domestic industry suffered material injury. It found that, due to the dumped imports, the domestic industry had to reduce significantly the prices of the like product, resulting in a significant decline in the profitability and a sharp decline in the pre-tax profit and return on investments of the domestic industry.<sup>246</sup>

7.146. Canada's claim under Article 3.5 regarding MOFCOM's causation analysis is dependent in part on its claims under Articles 3.2 and 3.4. We have found above that China acted inconsistently with Articles 3.1 and 3.2 of the Anti-Dumping Agreement in its consideration of the effect of the dumped imports on prices.<sup>247</sup> In particular, we found that MOFCOM failed to adequately explain both the role of parallel price trends in its consideration of price depression and how the effect of dumped imports was to depress domestic prices in a situation where dumped import prices were higher than those of the domestic like product during the second part of the POI. Thus, to the extent that MOFCOM merely relied on its consideration of price effects under Article 3.2 in demonstrating causation, we conclude that its demonstration of causation was inconsistent with Articles 3.5 and 3.1.<sup>248</sup>

7.147. In its demonstration of causation, MOFCOM specifically acknowledged that the price of the dumped imports was higher than the price of the domestic like product.<sup>249</sup> MOFCOM found that starting from the second half of 2011 until the end of the POI, the prices of the dumped imports decreased continuously and the volume of the dumped imports increased quickly, which forced the domestic industry to decrease its prices, and concluded that the dumped imports depressed the price of the like domestic product.<sup>250</sup> Even though MOFCOM acknowledged that the dumped imports were priced higher in the first half of 2011, it did not explain how, the dumped imports depressed domestic like product prices, thereby contributed to causing material injury to the domestic industry, when the decreasing prices of the dumped imports remained higher than the price of the domestic like product during the remainder of the POI. Therefore, in light its flawed price effects analysis and conclusions, MOFCOM has failed to demonstrate that the dumped imports caused injury to the domestic industry through their price effects.

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<sup>241</sup> Final Determination, (Exhibit CHN-1), p. 77.

<sup>242</sup> Canada's first written submission, paras. 10 and 48; second written submission, paras. 119-121.

<sup>243</sup> Canada's first written submission, paras. 125-138; second written submission, para. 122.

<sup>244</sup> China's first written submission, paras. 123, 127, 128, and 129 (referring to Final Determination, (Exhibit CHN-1), pp. 59, 63-66, 77, and 78); second written submission, paras. 9, 79, and 80.

<sup>245</sup> China's first written submission, para. 129 (referring to Final Determination, (Exhibit CHN-1), p. 65).

<sup>246</sup> China's first written submission, paras. 127-134; second written submission, para. 82.

<sup>247</sup> See section 7.5 above.

<sup>248</sup> In this regard, we recall the panel's statement in *China – Autos (US)* that "it would be difficult, if not impossible, to make a determination of causation consistent with the requirements of the Articles 3 ... in a situation where an important element of that determination, the underlying price effects analysis, is itself inconsistent with the provisions of [the Anti-Dumping Agreement]." (Panel Report, *China – Autos (US)*, para. 7.327).

<sup>249</sup> Final Determination, (Exhibit CHN-1), p. 77.

<sup>250</sup> Final Determination, (Exhibit CHN-1), pp. 77 and 78.

7.148. Turning to the role of the volume of dumped imports in MOFCOM's demonstration of causation, we recall our conclusion above that MOFCOM did not act inconsistently with Article 3.2 of the Anti-Dumping Agreement in its consideration of whether there was a significant increase in the volume of dumped imports.<sup>251</sup> In our view, MOFCOM did not rely on the increased volume of imports as an independent causal factor. Rather, we understand MOFCOM to have relied on a significant increase in the volume of dumped imports in absolute terms in its consideration of the effects of dumped imports on prices, and its conclusion that the dumped imports caused material injury.<sup>252</sup> However, MOFCOM failed to explain how parallel declining price trends, even considered in conjunction with the increased volume of dumped imports, played a role in price depression and thus contributed to causing material injury.

7.149. In its demonstration of causation, MOFCOM noted the "significant growth" in the volume of the dumped imports, and that the proportion of the dumped imports in the total imports was high.<sup>253</sup> MOFCOM relied on the "impact brought by the significant growth of the quantity" of the dumped imports to explain the continuous price decline of the domestic like product since the second half of 2011, which in turn led to negative developments in the state of the domestic industry, including decline in profitability, return on investment and net cash flow from operating activities.<sup>254</sup> Thus, MOFCOM's causation determination relies on both the volume and price effects of dumped imports. Nothing in MOFCOM's Final Determination suggests that it took the view that the significantly increased volume of dumped imports alone was a sufficient basis to conclude that those imports caused material injury. We fail to see, and MOFCOM failed to explain, the relevance of the "high proportion" of total imports accounted for by the dumped imports, to its causation demonstration.<sup>255</sup> In this context, we note that while the volume of dumped imports increased by 43.82% over the POI, demand for cellulose pulp in the Chinese market also increased, by 35.26% in the same period.<sup>256</sup> Had MOFCOM considered the increased volume of dumped imports alone to be sufficient to demonstrate a causal relationship to material injury, we would have expected some discussion of the significance of that increase in the context of increasing market demand.

7.150. MOFCOM also referred to the increase in the market share of the dumped imports over the POI in its assessment of causal link, an increase of 1.3 percentage points.<sup>257</sup> In this regard, we note that the domestic industry's market share also increased, by 6.5 percentage points<sup>258</sup>, while the market share of non-dumped imports increased by 6.7 percentage points during the same period.<sup>259</sup> The increase in the market share of non-dumped imports, which were sold at prices close to those of the dumped imports, was not addressed by MOFCOM in the context of its demonstration of a causal relationship between dumped imports and material injury.<sup>260</sup> However, we would have expected a reasonable and objective investigating authority to at least consider in these circumstances the possible role of non-dumped imports in the price depression MOFCOM found to have been contributing to causing material injury to the domestic industry.

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<sup>251</sup> See section 7.4 above.

<sup>252</sup> Final Determination, (Exhibit CHN-1), pp. 63-66.

<sup>253</sup> Specifically, MOFCOM stated:

The statistical data of China Customs showed that during the Period of investigation, the quantity of the dumped imported product showed the significant growth in general, 43.82% more at the end of the Period of investigation than at the beginning of the Period of investigation. In addition to the continuous growth of the quantity of import, the proportion of the quantity of the dumped imported product to the total quantity of the imported cellulose pulp in China always remained high: 49.32% in 2010, 42.77% in 2011 and 43.96% in 2012.

(Final Determination, (Exhibit CHN-1), p. 77)

<sup>254</sup> Final Determination, (Exhibit CHN-1), p. 78.

<sup>255</sup> In this regard, we note that dumped imports accounted for just under half of total imports throughout the POI, and the volume of non-dumped imports was argued to be, and considered by MOFCOM, as an "other factor" causing injury to the domestic industry simultaneously with the dumped imports.

<sup>256</sup> Final Determination, (Exhibit CHN-1), pp. 76 and 77.

<sup>257</sup> Final Determination, (Exhibit CHN-1), p. 77.

<sup>258</sup> Final Determination, (Exhibit CHN-1), p. 72.

<sup>259</sup> Apparent Market and Domestic Production Tables, (Exhibit CAN-28), p. 2; Canada's opening statement at the first meeting of the Panel, para. 36; and China's response to Panel question No. 37, table B.

<sup>260</sup> MOFCOM did address the allegedly injurious impact of the non-dumped imports on the domestic industry as an "other factor" in its non-attribution analysis. Canada's claim in this regard is discussed below.

7.151. We therefore conclude that MOFCOM failed to demonstrate a causal relationship between the dumped imports and the injury to the domestic industry consistently with Articles 3.1 and 3.5 of the Anti-Dumping Agreement.

7.152. We consider that the above findings are a sufficient basis for us to conclude that China has failed to act consistently with its obligations under the Anti-Dumping Agreement in connection with the anti-dumping measure at issue in this dispute. However, as it may provide some useful guidance in the context of implementation of any DSB recommendation in this dispute, we go on to consider Canada's claims regarding non-attribution.

#### **7.7.4 MOFCOM's examination of other known factors allegedly causing injury and non-attribution**

##### **7.7.4.1 Cotton and VSF prices**

###### **7.7.4.1.1 Introduction**

7.153. Canada contends that MOFCOM failed to properly examine positive evidence submitted by the interested parties concerning the effects of changes in cotton and VSF prices and failed to separate and distinguish their injurious effect on the domestic industry from the impact of the dumped imports.<sup>261</sup>

7.154. The imported product at issue in the underlying investigation, cellulose pulp, is made from wood, cotton, or bamboo as a principal input, and is in turn the primary raw material in the production of VSF, which is used by the textile industry. The interested parties argued that since VSF is a close substitute for cotton fibre, the price of VSF is highly correlated with the price of cotton.<sup>262</sup> In 2010-2011, due to a global supply shortage of cotton caused by cotton crop failures, global cotton price increased significantly, to historically high levels, leading to high demand for VSF and a similar increase in VSF prices.<sup>263</sup> The increased demand for VSF stimulated demand for cellulose pulp and an increase in prices of cellulose pulp during the first part of the POI.<sup>264</sup> The Chinese government introduced a policy, based on environmental concerns, limiting cotton production in China and favouring VSF production, which also contributed to increased demand for VSF in China.<sup>265</sup> However, in the second part of the POI, starting from the second half of 2011, additional supplies of cotton became available and global cotton prices started to decline.<sup>266</sup> Consequently, the price of VSF also began to fall, leading to a decline in the price of cellulose

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<sup>261</sup> Canada's first written submission, para. 159.

<sup>262</sup> Fortress Specialty Cellulose Inc., Response to MOFCOM's Preliminary Determination on the Anti-Dumping Investigation against Imported Dissolving Pulp, (Exhibit CAN-17), p. 12; Fortress Specialty Cellulose Inc., Injury Brief, Industry Injury Investigation for the Anti-Dumping Investigations Against Cellulose Pulp, 5 September 2013, (Exhibit CAN-13), p. 2; and American Forest and Paper Association, Anti-Dumping Investigation on Imports of Cellulose Pulp, Comments on Industry Injury Investigation, 24 September 2013, (Exhibit CAN-10), p. 8.

<sup>263</sup> Fortress Specialty Cellulose Inc., Response to MOFCOM's Preliminary Determination on the Anti-Dumping Investigation against Imported Dissolving Pulp, (Exhibit CAN-17), p. 12; Fortress Specialty Cellulose Inc., Injury Brief, Industry Injury Investigation for the Anti-Dumping Investigations Against Cellulose Pulp, 5 September 2013, (Exhibit CAN-13), p. 2; American Forest and Paper Association, Anti-Dumping Investigation on Imports of Cellulose Pulp, Comments on Industry Injury Investigation, 24 September 2013, (Exhibit CAN-10), pp. 9 and 10; and Rayonier Performance Fibers, LLC., Anti-Dumping Investigation on Imports of Cellulose Pulp, Comments Regarding Material Injury and Causality, 29 July 2013, (Exhibit CAN-12), p. 16.

<sup>264</sup> Fortress Specialty Cellulose Inc., Response to MOFCOM's Preliminary Determination on the Anti-Dumping Investigation against Imported Dissolving Pulp, (Exhibit CAN-17), p. 12; and Rayonier Performance Fibers, LLC., Anti-Dumping Investigation on Imports of Cellulose Pulp, Comments Regarding Material Injury and Causality, 29 July 2013, (Exhibit CAN-12), p. 17.

<sup>265</sup> Rayonier Performance Fibers, LLC., Anti-Dumping Investigation on Imports of Cellulose Pulp, Comments Regarding Material Injury and Causality, 29 July 2013, (Exhibit CAN-12), p. 16; and American Forest and Paper Association, Anti-Dumping Investigation on Imports of Cellulose Pulp, Comments on Industry Injury Investigation, 24 September 2013, (Exhibit CAN-10), p. 10.

<sup>266</sup> American Forest and Paper Association, Anti-Dumping Investigation on Imports of Cellulose Pulp, Comments on Industry Injury Investigation, 24 September 2013, (Exhibit CAN-10), pp. 11 and 12; and Multi-Client Study: Outlook for Global Dissolving Pulp Market 2011, (Exhibit CAN-6) (BCI), p. 3.

pulp.<sup>267</sup> Interested parties argued that the dramatic decline in prices of cotton and VSF from 2011 to the second half of 2012 pulled down the price of the cellulose pulp in the domestic market.<sup>268</sup>

7.155. MOFCOM discussed the effect of both cotton and VSF prices in the section of the Final Determination concerning its consideration of the effect of dumped imports on domestic prices, and did not specifically address these prices in the section of the Final Determination concerning non-attribution of injury to "other factors" allegedly causing injury to the domestic industry. The Anti-Dumping Agreement does not provide any guidance as to the structure of an investigating authority's final determination. Nor does compliance with the requirements of the Anti-Dumping Agreement require any particular order of analysis, or that aspects of an investigating authority's analysis and determination be specifically linked to the specific requirements of that Agreement. In our view, while it is clear that an investigating authority must comply with the legal requirements set out in the Anti-Dumping Agreement, and that if challenged in dispute settlement, such compliance must be demonstrable based on the relevant determinations and underlying information in the record, a Member may rely on the entirety of the challenged determination, and refer to supporting information in the record, in doing so, regardless of where the relevant discussion, analysis, or conclusion appears in the determination.<sup>269</sup> Of course, this does not mean that a reviewing panel can be expected to comb through the determination to find the relevant aspects of the investigating authority's discussion, analysis, or conclusion, or that a defending Member can cobble together an analysis from disparate elements in the determination. But it does mean that simply because an explanation for a particular analytical approach or conclusion is set out in one part of a determination in the context of one aspect of the analysis does not mean that it cannot be considered, if relevant, with respect to a different aspect of the analysis addressed principally in another part of the determination. Therefore, the question before us is whether MOFCOM complied with the non-attribution requirements of the Anti-Dumping Agreement, regardless of where the discussion China relies on in defending MOFCOM's determination explicitly appears in the Final Determination.

#### 7.7.4.1.2 Cotton prices

7.156. MOFCOM found that "the cotton price was not the main factor that determined the price of viscose fiber".<sup>270</sup> MOFCOM based its conclusion on several considerations. First, MOFCOM found that, due to differences in the properties of the products, there is no necessary connection between VSF and cotton prices. Second, MOFCOM found that due to government intervention in the Chinese market for cotton, specifically quotas and policies to protect cotton prices, changes in the price of cotton were not the main factor affecting the price of VSF or cotton cellulose pulp. As a result of these interventions, while cotton prices fluctuated on the international market, cotton prices in China were higher and more stable than the international prices.<sup>271</sup> Finally, MOFCOM determined that because the cellulose pulp under investigation included all cellulose pulp products, including wood- and bamboo-based cellulose pulp, and not only cotton-based cellulose pulp, the price of cotton was not the primary factor affecting the prices of the domestic like product. In this regard, MOFCOM noted that during the POI sales of wood and bamboo cellulose pulp reached nearly 70% of the total sales volume of the like product.<sup>272</sup>

7.157. Canada argues that MOFCOM failed to objectively examine the relationship between the prices of cotton, VSF, and cellulose pulp.<sup>273</sup> Canada contends that MOFCOM failed to consider evidence submitted by several interested parties regarding the effect of global cotton prices; instead MOFCOM focused on government-supported domestic cotton prices in China.<sup>274</sup> Canada

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<sup>267</sup> Cosmo Specialty Fibers, Inc., Anti-Dumping Investigation on Imports of Cellulose Pulp, Argument of no Injury, 4 July 2013, (Exhibit CAN-11), p. 29; and Rayonier Performance Fibers, LLC., Anti-Dumping Investigation on Imports of Cellulose Pulp, Comments Regarding Material Injury and Causality, 29 July 2013, (Exhibit CAN-12), p. 18.

<sup>268</sup> Fortress Specialty Cellulose Inc., Response to MOFCOM's Preliminary Determination on the Anti-Dumping Investigation against Imported Dissolving Pulp, (Exhibit CAN-17), p. 13; and American Forest and Paper Association, Anti-Dumping Investigation on Imports of Cellulose Pulp, Comments on Industry Injury Investigation, 24 September 2013, (Exhibit CAN-10), p. 9.

<sup>269</sup> E.g. Panel Report, *EU – Biodiesel (Argentina)*, para. 7.526.

<sup>270</sup> Final Determination, (Exhibit CHN-1), p. 67.

<sup>271</sup> Final Determination, (Exhibit CHN-1), p. 67.

<sup>272</sup> Final Determination, (Exhibit CHN-1), p. 67.

<sup>273</sup> Canada's second written submission, paras. 131-133.

<sup>274</sup> Canada's first written submission, para. 150.

submits that MOFCOM failed to explain how any distinction between products is relevant to the question of whether viscose fibre is a substitute for cotton, referring to the submissions of interested parties suggesting that viscose fibre is a close substitute for cotton fibre.<sup>275</sup> Canada argues that cotton prices affected VSF prices, and in turn, prices of all cellulose pulp, regardless of whether it was produced using wood, bamboo, or cotton linter. Therefore Canada contends that the fact that sales of bamboo- and wood- based cellulose pulp, at their peak, accounted for 70% of the total sales volume of cellulose pulp does not support MOFCOM's finding with respect to the effect of cotton prices.<sup>276</sup>

7.158. China submits that MOFCOM examined the impact of cotton prices, even though it did not have to since the relevant question before it was whether VSF prices impacted the prices of cellulose pulp, and therefore MOFCOM did not have to consider further upstream factors that may have affected the prices of VSF.<sup>277</sup> China asserts that MOFCOM properly relied on domestic cotton prices, rather than on international cotton prices, because the Chinese cotton market was affected by government intervention leading to domestic cotton prices that were higher and more stable than the international prices.<sup>278</sup> China argues that MOFCOM reasonably concluded that there is no necessary relationship between VSF and cotton prices due to the different properties of the products and "non-substitutability", noting that VSF has superior dyeing and moisture absorption properties as compared to cotton fibre.<sup>279</sup> China submits that cotton prices could not constitute the main factor affecting the domestic like product overall, because the domestic cellulose pulp industry includes not only cotton-based pulp, but also wood- and bamboo-based pulp.<sup>280</sup>

7.159. As noted above, there is no prescribed methodology as to how a non-attribution analysis is to be conducted. Thus, the question before us with respect to Canada's claim regarding the allegedly injurious effect of cotton prices is whether a reasonable and objective investigating authority could have concluded that changes in international cotton prices were not the main factor that determined the price of VSF, and therefore were not the main factor affecting the prices of cellulose pulp.

7.160. We begin by addressing Canada's argument that MOFCOM wrongly confined its analysis to the trends in cotton prices in China, while the interested parties argued that VSF prices in China were affected by fluctuations of international cotton prices. MOFCOM found that cotton prices in China were more stable, and higher, than international cotton prices.

7.161. In this regard, MOFCOM reported the prices of cotton, VSF and cotton-based cellulose pulp in China during POI to be as follows:

**Table 5: Average annual prices of cotton, VSF, and cotton-based cellulose pulp in China**

POI	2010	2011	2012
Cotton price (RMB/tonne)	19,563	24,269	19,327
VSF price (RMB/tonne)	20,726	21,524	15,442
Price of cotton cellulose pulp produced by domestic industry (RMB/tonne)	14,610	14,639	8,010

Source: Final Determination, (Exhibit CHN-1), p. 67.

MOFCOM stated that the prices of cotton in China "first increased and then decreased and basically remained unchanged", while prices of both VSF and cotton pulp were "in decreasing trend in

<sup>275</sup> Canada's first written submission, paras. 148 and 149; second written submission, paras. 134 and 135.

<sup>276</sup> Canada's second written submission, para. 140.

<sup>277</sup> China's second written submission, para. 114.

<sup>278</sup> China's first written submission, para. 148; second written submission, paras. 117 and 118 (referring to Final Determination, (Exhibit CHN-1), p. 67).

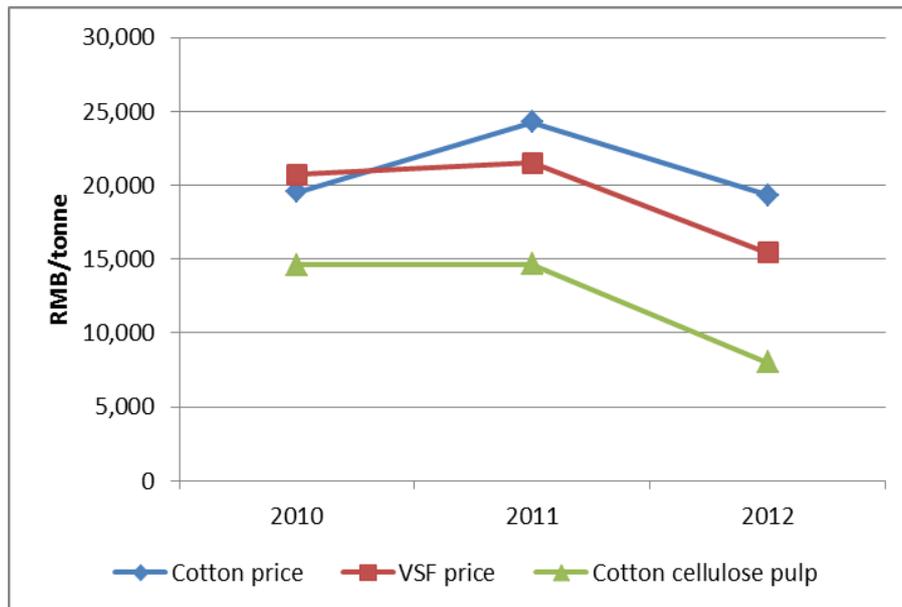
<sup>279</sup> China's first written submission, para. 146; second written submission, para. 115 (referring to Final Determination, (Exhibit CHN-1), p. 67).

<sup>280</sup> China's first written submission, para. 150 (referring to Final Determination, (Exhibit CHN-1), p. 67).

general". MOFCOM concluded that during the POI "the cotton price was not the main factor that determined the price of viscose fiber, and it was not the main factor that affect the price of cotton pulp of the Domestic Industry in Chinese market".<sup>281</sup>

7.162. China contends that these findings suggest that domestic VSF and cotton pulp prices did not follow the trends in domestic cotton prices.<sup>282</sup> We do not consider it inappropriate for MOFCOM to have focussed on domestic prices in its analysis. However, we do not agree that a reasonable and objective investigating authority could reach the conclusion reached by MOFCOM on the basis of the domestic price information before it. It is clear from the data shown in Table 5 and depicted graphically in Chart 2 that the Chinese prices of cotton, VSF and cotton cellulose pulp were closely correlated, especially in the second part of the POI, declining in 2012, at the same time as the prices of domestic like product were allegedly depressed by the dumped imports:

**Chart 2: Average annual prices of cotton, VSF, and cotton-based cellulose pulp in China**



Source: Final Determination, (Exhibit CHN-1), p. 67.

Cotton prices in China, like international cotton prices, increased significantly in 2011 and then dropped in 2012 to about the level they had been at the beginning of the POI. This could be viewed as suggesting that cotton prices in China were affected by the global cotton shortage and consequent price increase, at least to some extent. Yet MOFCOM simply did not address this possible impact of international cotton prices. Furthermore, even accepting that there are some differences in the physical properties of the products, the data suggests that prices of VSF and cotton followed similar trends, especially in the second half of the POI. In our view, this suggests that there is at least some relationship between the prices of these products, which casts doubt on MOFCOM's conclusion, which rests on the finding that there is no necessary relationship between prices of cotton and VSF. China's assertion that there was no general correlation between domestic cotton prices, VSF prices, and cotton cellulose pulp prices is belied by the data. The domestic data that China relied on, in our view, shows the same general trend as international prices – cotton, VSF and cellulose pulp prices rose in the first half of the POI and declined in the second half. The correlation between the domestic prices is less pronounced than that between the international market prices relied on by Canada in its arguments, but is by no means insignificant.

7.163. In addition, we note that although the Chinese cotton market was regulated by the government, international cotton prices would nonetheless appear relevant to MOFCOM's analysis, because Chinese producers of the downstream product, VSF, competed globally and thus would seem likely to be affected by the international market prices for cotton, as it affected other VSF

<sup>281</sup> Final Determination, (Exhibit CHN-1), p. 67.

<sup>282</sup> China's first written submission, para. 149; second written submission, para. 118 (referring to Final Determination, (Exhibit CHN-1), p. 67).

producers and thus the world market in which Chinese VSF producers competed. Even though export sales were only [\*\*\*] of VSF production in China<sup>283</sup>, given the size of the Chinese market<sup>284</sup> this is not insignificant. Moreover, export sales of VSF increased rapidly over the POI, by [\*\*\*].<sup>285</sup> To the extent that Chinese VSF producers purchasing domestic cellulose pulp for VSF production sought lower prices to enable them to compete better in export markets with producers whose input costs directly benefitted from the decline in international cotton prices, Chinese prices for cellulose pulp may have been affected by those declines as well. MOFCOM's analysis fails to consider these interconnections at all.

7.164. In addition, MOFCOM considered that since cotton is the raw material for cotton-based cellulose pulp only, prices for cotton had no effect on the prices of wood- and bamboo-based pulp. However, as MOFCOM recognized, all cellulose pulp, regardless of whether it is cotton-, wood- or bamboo-based, is used in the production of VSF.<sup>286</sup> It seems to us likely that there is some correlation, or at least a connection between the prices of cellulose pulp made from the different inputs, as the cellulose pulp, regardless of input, all competes for sales to VSF producers. Thus, while prices for cotton may not have a direct effect on the prices of wood- and bamboo-based pulp as a raw material, the possible indirect effect through the competition for sales to downstream users, would seem to merit consideration, which MOFCOM did not undertake.

7.165. To conclude, we consider that while MOFCOM may have been justified in concluding that the international price of cotton was not the *main* factor affecting the prices of the downstream product VSF, MOFCOM's explanations are insufficient to demonstrate, in light of the arguments and evidence concerning international cotton prices, that they were not a factor affecting VSF prices, and consequently cellulose pulp prices. Thus, MOFCOM failed to properly examine whether cotton prices were another factor causing injury to the domestic industry.

#### 7.7.4.1.3 VSF prices

7.166. MOFCOM found that "the change of the price of viscose fiber as a downstream product was not the direct cause of the decline of the Price of the Like Product of the Domestic Industry."<sup>287</sup>

7.167. Canada argues that cellulose pulp is primarily used to produce VSF, which creates a *prima facie* presumption that the price of VSF has a causal impact on the price of cellulose pulp.<sup>288</sup> Canada submits that MOFCOM failed to explain how its discussion regarding growth in VSF output and subsequent growth in demand for cellulose pulp related to correlations between prices of viscose fibre and cellulose pulp.<sup>289</sup> Canada contends that interested parties submitted evidence showing that there is a close link between cellulose pulp and VSF prices; therefore MOFCOM's conclusion that interested parties failed to provide evidence of a direct link between decline in prices of VSF and cellulose pulp cannot stand.<sup>290</sup>

7.168. China responds that MOFCOM properly considered evidence submitted by interested parties, but after objectively examining both this evidence and the supply and demand relationship between VSF and cellulose pulp, determined that VSF prices were not the direct cause of the changes in cellulose pulp prices.<sup>291</sup> China submits that parallel trends in VSF and cellulose pulp prices on their own do not demonstrate that the downward trend in VSF prices led to the

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<sup>283</sup> CCFGroup, China Viscose Industry Chain Report 2012, (February 2013), (Exhibit CAN-4) (BCI), p. 35, table 20.

<sup>284</sup> China is "the predominant global producer and user of VSF". (Canada's response to Panel question No. 56, paras. 61-66).

<sup>285</sup> Source: CCFGroup, China Viscose Industry Chain Report 2012, (February 2013), (Exhibit CAN-4) (BCI), p. 35, table 20.

<sup>286</sup> "The comments and opinions submitted by the downstream companies showed that wood pulp, cotton pulp and bamboo pulp were substitutable to each other when used as raw materials for the production of viscose fibers and the quality of viscose fibers made from any of the three types of pulp was the same." (Final Determination, (Exhibit CHN-1), p. 62).

<sup>287</sup> Final Determination, (Exhibit CHN-1), p. 69.

<sup>288</sup> Canada's second written submission, para. 145.

<sup>289</sup> Canada's first written submission, para. 154; second written submission, paras. 147 and 148.

<sup>290</sup> Canada's first written submission; para. 152; second written submission, paras. 143 and 144; response to Panel question No. 28, paras. 55-63.

<sup>291</sup> China's first written submission, para. 152; second written submission, para. 119.

downward trend in cellulose pulp prices.<sup>292</sup> For China, MOFCOM reasonably considered that the relationship between VSF output and domestic demand for cellulose pulp is relevant to the analysis of the impact of VSF prices on cellulose pulp prices, and in this context, considering that domestic demand for cellulose pulp was strong as VSF output increased, and cellulose pulp supply could not meet the demand, the price of cellulose pulp should have remained stable or increased, but instead the price had declined.<sup>293</sup>

7.169. MOFCOM observed that VSF prices declined while VSF output increased rapidly, leading to increased demand for cellulose pulp. It noted that while total domestic production capacity for cellulose pulp was equal to the total demand, total output could not meet that demand.<sup>294</sup> MOFCOM relied on the following data:

**Table 6: Chinese VSF output, demand for cellulose pulp, and total output of cellulose pulp**

POI	2010	2011	2012
VSF output (tonnes)	1,955,500	2,125,000	2,645,000
Total domestic demand for cellulose pulp (tonnes)	2,033,700	2,210,000	2,750,800
Total output of all domestic producers of cellulose pulp (tonnes)	1,329,800	1,397,600	1,641,500

Source: Final Determination, (Exhibit CHN-1), pp. 68 and 69.

7.170. MOFCOM concluded that since there was strong demand for cellulose pulp in China and domestic supply could not meet the demand, the price for cellulose pulp should have been stable, but instead it had declined.<sup>295</sup> Therefore, the decline in VSF prices was not the direct cause of the decline in cellulose pulp prices. However, MOFCOM's analysis is based on the assumption that because domestic supply could not satisfy demand for cellulose pulp, prices should have remained stable, which ignores the presence of a significant supply of imported cellulose pulp in the Chinese market, which might itself be expected to affect domestic prices. Moreover, MOFCOM failed to explain how its conclusion diminishes the relevance of declines in VSF prices at the same time as cellulose pulp prices declined as a possible factor contributing to the decline in Chinese cellulose pulp prices.

7.171. Overall, we are of the view that MOFCOM's explanations fail to engage satisfactorily the arguments of the interested parties concerning the allegedly injurious impact of international cotton prices and VSF prices. Given the fact that MOFCOM's determination of causation was to a large extent driven by the declining price of cellulose pulp, MOFCOM's explanations are thus insufficient to allow us to find that MOFCOM's conclusions in this regard were those of a reasonable and objective investigating authority in light of the evidence and arguments before it.

7.172. We therefore conclude that MOFCOM failed to properly examine the effects of cotton and VSF prices and failed to ensure that any injuries caused by cotton and VSF prices were not attributed to the dumped imports and therefore acted inconsistently with Articles 3.1 and 3.5 of the Anti-Dumping Agreement.

**7.7.4.2 Domestic industry overexpansion, overproduction, and inventory build-up**

7.173. MOFCOM considered the impact of the expansion of domestic production capacity as an "other factor" causing injury to the domestic industry. It concluded that the possible impact of the increased production capacity on the domestic cellulose pulp industry "cannot be excluded", but that the effect of this factor was not sufficient to break the causal link between the dumped

<sup>292</sup> China's first written submission, para. 153 (referring to Canada's first written submission, para. 157); second written submission, para. 120.  
<sup>293</sup> China's first written submission, paras. 155 and 156; second written submission, paras. 121-124.  
<sup>294</sup> Final Determination, (Exhibit CHN-1), pp. 68 and 69.  
<sup>295</sup> Final Determination, (Exhibit CHN-1), pp. 68 and 69.

imports and material injury to the domestic industry.<sup>296</sup> In making this conclusion, MOFCOM observed that total production capacity of all domestic cellulose pulp producers increased during the POI, but "there was no serious excessive production capacity", since the increased production capacity was almost equal to the demand for cellulose pulp in China.<sup>297</sup> MOFCOM also examined the domestic industry's unit production costs and inventories, finding that unit production costs of the like domestic product decreased due mainly to declines in raw material costs, and that while the domestic industry's inventories increased, this was not directly caused by the increased output and expanded production capacity.<sup>298</sup>

7.174. Canada submits that MOFCOM acted inconsistently with Articles 3.1 and 3.5 by relying on data pertaining to all domestic cellulose pulp producers, which included data for domestic producers that were not part of the domestic industry as defined by MOFCOM, in addressing the issue of domestic production capacity.<sup>299</sup> Canada argues that this is not permissible under Article 3.5 and distorted the true magnitude of the capacity expansion of the domestic industry.<sup>300</sup> Canada submits that regardless of the data used, production capacity increased far in excess of growth in demand. Canada submits that the examination of manufacturing costs reflects expenses incurred due to increased capacity, and that other costs are irrelevant for this analysis. Finally, Canada argues that the increased inventories and low capacity utilization rate shows that domestic industry's overexpansion resulted in surplus capacity.<sup>301</sup>

7.175. China notes that MOFCOM acknowledged the significant growth of the domestic industry's production capacity and examined the effect of this growth by assessing the domestic industry's costs. MOFCOM found that the unit production costs declined over the POI<sup>302</sup>, showing that expenditures for increased production capacity did not injure the financial performance of the domestic industry.<sup>303</sup> China acknowledges that MOFCOM looked at both the production capacity of the domestic industry as defined by MOFCOM, and that of all Chinese producers of cellulose pulp.<sup>304</sup> China submits that it was reasonable for MOFCOM to examine the relationship between the production capacity of all Chinese producers of cellulose pulp and total domestic demand: since prices for cellulose pulp would be driven by total output and total demand, an overall expansion of production capacity could impact the domestic industry, if it caused the prices of the domestic industry to decline.<sup>305</sup>

7.176. We begin by considering whether it was permissible for MOFCOM to rely on data pertaining to all Chinese cellulose pulp producers in the context of examining production capacity as an alleged other factor causing injury to the domestic industry. We recall that Article 3.5 of the Anti-Dumping Agreement requires the investigating authorities to examine any known factors other than the dumped imports which are injuring the domestic industry at the same time as dumped imports, and not attribute the injuries caused by these other factors to the dumped imports. It is clear to us that the domestic industry referred to in this aspect of Article 3.5 is the same domestic industry as to which material injury must be demonstrated to be caused by the dumped imports, that is, the domestic industry producing the like product, as defined by the investigating authority in the investigation at issue. It is also clear to us that both the demonstration of causation of material injury to the domestic industry and the ensuring that injury caused by other causal factors is not attributed to dumped imports should be based on information

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<sup>296</sup> Final Determination, (Exhibit CHN-1), p. 82.

<sup>297</sup> Final Determination, (Exhibit CHN-1), p. 81.

<sup>298</sup> Final Determination, (Exhibit CHN-1), p. 82.

<sup>299</sup> Canada's first written submission, para. 164; second written submission, para. 161.

<sup>300</sup> Canada's second written submission, para. 164. Canada notes that, according to MOFCOM figures, total domestic demand increased by 35.26% during the POI, while the production capacity of the domestic industry increased by 122.49% and production capacity of all Chinese producers increased by 72.41%. Canada emphasizes that in 2011 the production capacity of the domestic industry increased by 62.98%, whereas the production capacity of other domestic producers declined by 6.71%. Canada also notes that the domestic industry's production capacity increased by 62.98% during 2011-2012, when the prices of the domestic industry were falling and being allegedly depressed and causing injury to the domestic industry. (Canada's first written submission, paras. 163-165; second written submission, paras. 165 and 166 (referring to Final Determination, (Exhibit CAN-3), p. 74)).

<sup>301</sup> Canada's second written submission, para. 169.

<sup>302</sup> There was a small increase in manufacturing expenses in 2012, but this represented only 4% of total per unit sales costs. (China's response to Panel question No. 31, para. 96).

<sup>303</sup> China's first written submission, para. 164; second written submission, paras. 137-139.

<sup>304</sup> China's second written submission, paras. 135 and 136.

<sup>305</sup> China's second written submission, paras. 141-143; response to Panel question No. 59.

related to that same domestic industry, as defined.<sup>306</sup> However, this basic principle does not preclude investigating authorities from considering and, in appropriate circumstances, relying on information pertaining to a larger group of domestic producers than the domestic industry as defined, so long as that reliance is properly justified.<sup>307</sup>

7.177. Considering the above, we have examined the particular arguments raised by the interested parties concerning the expanded production capacity of the domestic industry as an "other factor" of injury to see whether there was a justification for MOFCOM to consider data for the larger group of domestic producers. It is apparent that interested parties raised two sets of arguments. First, that the expansion of production capacity caused the cellulose pulp market to slow down, and second, that overcapacity affected domestic producers' costs. It is not clear, however, that these arguments are necessarily limited to only the situation of the domestic industry as defined by MOFCOM.<sup>308</sup> In our view, it was not unreasonable for MOFCOM to consider the data pertaining to changes in the production capacity of all domestic cellulose pulp producers in addressing the first argument of the interested parties' regarding the slowdown in the Chinese cellulose pulp market. Indeed, to focus only on the capacity of the domestic industry as defined in considering the impact of capacity expansion of the Chinese market for cellulose pulp would be to ignore capacity that would necessarily be affecting that market overall. Thus, we do not consider that MOFCOM erred in considering overall domestic capacity in this context.

7.178. However, turning to the conclusion MOFCOM drew on the basis of that information, it is not clear to us how the fact that, despite having increased, production capacity of all domestic producers was generally in balance with domestic demand, explains how any injury caused by that increase was not attributed to dumped imports. In this regard, we recall that MOFCOM recognized the increased capacity may have had "a certain impact" on the domestic industry, but discounted this impact because "during the Period of investigation, the total output of the domestic cellulose pulp industry was always far less than the total domestic demand" and the situation that total supply of the domestic cellulose pulp industry exceeded the total demand did not occur.<sup>309</sup> Again,

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<sup>306</sup> In *EC – Bed Linen*, the panel observed that in the context of Article 3.4:

[I]nformation concerning companies that are not within the domestic industry is irrelevant to the evaluation of the "relevant economic factors and indices having a bearing on the state of the industry" required under Article 3.4. This is true even though those companies may presently produce, or may have in the past produced, the like product, bed linen.

(Panel Report, *EC – Bed Linen*, para. 6.182)

Similarly, in *EC – Fasteners (China)*, in the context of a non-attribution analysis under Article 3.5, the panel noted the "fundamental principle" expressed in the above-quoted statement in *EC – Bed Linen* and concluded:

We see no reason why the same fundamental principle should not be adhered to in the context of analysis of causation, including the examination of other factors which may be causing injury to the domestic industry at the same time as imports.

(Panel Report, *EC – Fasteners (China)*, para. 7.437)

<sup>307</sup> Like the panel in *EC-Fasteners (China)*:

We do not preclude the possibility that information for all producers might, in some circumstances, be an appropriate proxy for information specific to the domestic industry at issue, for instance where information for the industry is not available or not provided. However, in such a situation, we would consider it imperative that the investigating authority explain why, in the particular case, it considers reliance on information to be appropriate, and how any weaknesses in the information have been taken into account.

(Panel Report, *EC – Fasteners (China)*, fn 912)

<sup>308</sup> For instance, Fortress argued before MOFCOM that "over-expansion of production capacity of domestic producers further increased their marginal cost and resulted in the market slump". (Fortress Specialty Cellulose Inc., Response to MOFCOM's Preliminary Determination on the Anti-Dumping Investigation against Imported Dissolving Pulp, (Exhibit CAN-17), p. 11). Cosmo submitted that "the increase in actual DC Pulp production capacity and potential production capacity added new supply or potential new supply to the global DC Pulp market which placed downward pressure on global prices for DC Pulp." (American Forest and Paper Association, Anti-Dumping Investigation on Imports of Cellulose Pulp, Comments on Industry Injury Investigation, 24 September 2013, (Exhibit CAN-10), p. 12). Weyerhaeuser argued that by the second quarter of 2011 "capacity increases resulted in an almost immediate softening of the market". (Weyerhaeuser, MOFCOM Presentation, 4 June 2013, (Exhibit CAN-21), p. 6). Weyerhaeuser added that "as additional capacity came on, the market became heavily oversupplied and pricing continued to decrease down to the point where higher cost producers were losing money." (Weyerhaeuser, MOFCOM Presentation, 4 June 2013, (Exhibit CAN-21), p. 7).

<sup>309</sup> Final Determination, (Exhibit CHN-1), p. 81.

MOFCOM appears to have ignored the presence of substantial volumes of imports on the Chinese market, which supply could be expected to affect prices, and thus exacerbate the effect of increased capacity, resulting in a general situation of over-supply, with a consequent potential negative effect on prices.

7.179. Second, interested parties argued that overcapacity affected the domestic producers' costs. With regard to this argument, MOFCOM relied on information concerning the unit production costs of the domestic industry as defined. MOFCOM found that the unit production costs for the domestic like product declined over the POI, mainly as a result of declines in raw material costs:

[D]uring the Period of investigation, the unit production cost of the Like Product of the Domestic Industry increased first and then dropped, showing a decline in general. Through the analysis of the questionnaire responses *for Domestic Producers*, the Investigating authority found that compared to 2010, the unit production cost of the Like Product of the Domestic Industry reduced by 2,462.72 RMB/ton in 2012; among it, the direct material cost reduced by 2,597.03 RMB/ton, the direct labor cost reduced by 37.12 RMB/ton, the fuel and power cost reduced by 87.99 RMB/ton, and the manufacturing cost increased by 259.42 RMB/ton. It showed that the reduction of the raw material cost was the main cause of the decline of the unit production cost of the Like Product of the Domestic Industry.<sup>310</sup>

7.180. Canada argues that evidence before MOFCOM shows that manufacturing costs (which include capital expenses) increased, and asserts that other costs are irrelevant to the question of whether the increased production capacity of the domestic industry had an injurious impact on manufacturing costs.<sup>311</sup> China responds that MOFCOM considered total per unit costs of the domestic industry and found that the total costs declined. China submits that MOFCOM also considered the cost structure of the domestic industry, including manufacturing costs, finding that the increase in manufacturing costs in 2012 represented only 4% of total per unit sales costs. According to China, it reasonably concluded that an increase in costs accounting for such a small proportion of the total costs could not have broken the causal link between the dumped imports and material injury.<sup>312</sup>

7.181. China submitted data from the record of the investigation regarding the components of unit production costs, including manufacturing costs:

**Table 7: Components of production cost of cellulose pulp in China**

POI	2010	2011	2012
A. Direct Materials (RMB/ton)	[***]	[***]	[***]
B. Direct Labour (RMB/ton)	[***]	[***]	[***]
C. Fuel and Power (RMB/ton)	[***]	[***]	[***]
D. Manufacturing Costs (RMB/ton)	[***]	[***]	[***]
A+B+C+D =Total Production Cost (RMB/ton)	[***]	[***]	[***]

Source: China's response to Panel question No. 60, para. 38.

7.182. In our view, it was not unreasonable of MOFCOM to have focused on the decline in total production costs, rather than increase in manufacturing costs in 2012, which represented only a small proportion of total production costs, and did not affect the fact that total production costs declined by almost one third over the POI. Canada may be correct that manufacturing costs are most directly relevant to the question of the effect of increased production capacity on the domestic industry. On the facts of this case, Canada's argument does not persuade us that

<sup>310</sup> Final Determination, (Exhibit CHN-1), pp. 81 and 82. (italics original, underlining added)

<sup>311</sup> Canada's second written submission, para. 168.

<sup>312</sup> China's second written submission, paras. 138 and 139; response to Panel question Nos. 31, paras. 95 and 96 and 60, para. 39.

MOFCOM erred in focusing on the overall decline in production costs, and we therefore consider that MOFCOM's conclusions in this regard are such as could have been reached by a reasonable and objective investigating authority in light of the evidence and arguments before it.

7.183. MOFCOM also examined the increase in the domestic industry's inventories based on the data provided by the domestic producers:

[T]he ending inventory of the Like Product of the Domestic Industry in 2012 was 118,000 tons higher than 2011. Although the production capacity of the Like Product of the Domestic Industry in 2012 increased by 687,800 tons compared to 2011, the output of the Like Product of the Domestic Industry in 2012 increased by merely 344,600 tons compared to 2011, while the domestic sales volume of the Like Product of the Domestic Industry in 2012 increased by 321,500 tons compared to 2011. It showed that, encouraged by the increase of 540,800 tons of the domestic demand in 2012 compared to 2011, the Domestic Industry increased the output, but the increased part of the output due to the expansion of the production capacity was not the direct cause of the increase of the ending inventory of the Like Product of the Domestic Industry.<sup>313</sup>

MOFCOM set out the following information regarding domestic demand, production capacity, capacity utilization, output, sales, and inventories:

**Table 8: Domestic demand, capacity, output, sales volume, operating rate, and ending inventories**

POI	2010	2011	2012
Total domestic demand for cellulose pulp (tonnes)	2,033,700	2,210,000 +8.67%	2,750,800 +24.47%
Production capacity (tonnes)	800,000	1,092,100 +36.51%	1,779,900 +62.98%
Output (tonnes)	528,100	587,200 +11.19%	931,800 +58.69%
Domestic sales volume (tonnes)	400,200	399,800 -0.1%	721,300 +80.42%
Operating rate	66.01%	53.77% -12.24	52.35% -1.42
Ending Inventories (tonnes)	66,400	102,300 +54.07%	220,300 +115.35%

Source: Final Determination, (Exhibit CHN-1), pp. 72 and 73.

7.184. In the overall evaluation of the state of the domestic industry, MOFCOM noted the significant increase in inventories, by 231.78% over the POI, as one of the "negative factors" showing material injury to the domestic industry. In the causation analysis, MOFCOM also stated that "the ending inventory increased continuously".<sup>314</sup> In this respect, Canada submits that MOFCOM's data shows that the domestic industry's output was exceeding the volume of sales, and that this caused an increase in inventories.<sup>315</sup> Indeed, the data shows that throughout the POI, the domestic industry's output increased roughly in line with increases in capacity, and exceeded its sales, resulting in continued and significant increases in inventories. Thus, the data indicates that the domestic industry increased production capacity in excess of the increase in total domestic demand, which suggests that to the extent injury was manifested in increased inventories, capacity expansion played a role in that injury. MOFCOM failed to address this possibility, and indeed dismissed it altogether.

7.185. We therefore conclude that MOFCOM failed to adequately examine the domestic industry's overcapacity, overexpansion, and inventory build-up as other factors causing injury and failed to ensure that the injuries caused by these other factors were not attributed to the dumped imports, and therefore acted inconsistently with Articles 3.1 and 3.5 of the Anti-Dumping Agreement.

<sup>313</sup> Final Determination, (Exhibit CHN-1), p. 82.

<sup>314</sup> Final Determination, (Exhibit CHN-1), pp. 76-78.

<sup>315</sup> Canada's second written submission, para. 169.

#### 7.7.4.3 Impact of non-dumped imports

7.186. With respect to the allegedly injurious impact of non-dumped imports<sup>316</sup>, MOFCOM looked at prices of dumped and non-dumped imports, and found that there were no large differences between imported dumped and non-dumped products in terms of price and quantity, but acknowledged that the dumped imports were generally better quality. MOFCOM noted that non-dumped imports constituted a significant proportion of total imports, and specifically discussed non-dumped imports from the largest sources, i.e. South Africa, Indonesia, and Sweden. MOFCOM concluded that non-dumped imports did not break the causal link between the dumped imports and the material injury to the Chinese domestic industry.<sup>317</sup>

7.187. Canada argues that MOFCOM's analysis is based on a consideration of non-dumped imports in relation to the dumped imports.<sup>318</sup> Canada submits that Article 3.5 requires an investigating authority to examine the effect of the non-dumped imports on the domestic industry, not in relation to dumped imports.<sup>319</sup> Canada contends that MOFCOM's analysis was subjective and biased, and asserts that MOFCOM should have considered data on sales volumes, market share and prices of non-dumped imports and compared this data with those for the dumped imports and the domestic industry. In addition, Canada submits that MOFCOM's examination of the non-dumped imports is flawed because MOFCOM failed to present any quantity or price data with regard to non-dumped imports, failed to support its statement regarding a quality difference between dumped and non-dumped imports with "positive evidence", and failed to present any explicit data to support its assertions with regard to imports from South Africa, Sweden, and Indonesia.<sup>320</sup>

7.188. China responds that MOFCOM conducted an objective examination of positive evidence with regard to the impact of non-dumped imports on the state of the domestic industry. In particular, MOFCOM observed that non-dumped imports constituted a significant proportion of total imports.<sup>321</sup> It further examined the relationship between the prices of dumped imports and non-dumped imports and concluded that there were no significant differences, albeit the dumped imports were generally of better quality.<sup>322</sup> MOFCOM specifically addressed the relative prices and volume of non-dumped imports from South Africa, Sweden, and Indonesia, major producers of cellulose pulp.<sup>323</sup>

7.189. We recall that Article 3.5 does not provide any guidance regarding how a non-attribution analysis is to be conducted. Therefore, we see no basis in the text to support Canada's view that the methodology used by MOFCOM was impermissible. Nor do we see any basis in the text that would require an investigating authority to examine the effect of non-dumped imports on the domestic industry, and not in relation to dumped imports. As discussed above, in the absence of any particular methodological requirements, the question before us is whether MOFCOM sufficiently explained its conclusion that the effect of non-dumped imports did not break the causal link between the dumped imports and the material injury to the domestic industry, and thus whether this was a conclusion that could be reached by a reasonable and objective investigating authority on the basis of the evidence before it, and in light of the arguments made by the interested parties.

7.190. MOFCOM found that the share of the non-dumped imports in total imports was 50.68% in 2010, 57.23% in 2011 and 56.04% in 2012.<sup>324</sup> MOFCOM observed that there were no large differences in the quantity and prices of non-dumped imports and dumped imports. While the actual data regarding the volume and prices of non-dumped and dumped imports are not set out in the Final Determination, China provided the following information on the record in this regard:

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<sup>316</sup> Imports of cellulose pulp not found to be dumped pursuant to the investigation.

<sup>317</sup> Final Determination, (Exhibit CHN-1), pp. 84 and 85.

<sup>318</sup> Canada's second written submission, para. 178.

<sup>319</sup> Canada's second written submission, para. 178.

<sup>320</sup> Canada's first written submission, paras. 172-174; second written submission, para. 179.

<sup>321</sup> China's first written submission, para. 169; second written submission, paras. 153 and 154.

<sup>322</sup> China's first written submission, para. 169; second written submission, paras. 153-156.

<sup>323</sup> China's first written submission, para. 171.

<sup>324</sup> Final Determination, (Exhibit CHN-1), p. 84.

**Table 9: Volume and prices of dumped and non-dumped imports**

POI	2010	2011	2012
Dumped imports (tonnes)	421,009.93	419,050.31	605,470.23
Non-dumped imports (tonnes)	432,584.92	560,720.54	771,971.03
Prices of dumped imports (US dollars)	1384.05	1946.96	1165.33
Prices of non-dumped imports (US dollars)	1378.17	1721.21	1051.75

Source: China's response to Panel question No. 35, paras. 103 and 105.

We observe that in 2010 the quantity of dumped and non-dumped imports was almost identical. During the rest of the POI, the volume of non-dumped imports was greater than that of dumped imports, while the prices of the non-dumped imports were lower. MOFCOM also stated that the dumped imports were generally of better quality than the non-dumped imports, which, China contends, suggests that the dumped imports were in a stronger competitive position relative to the domestic like product than the non-dumped imports and the differences in prices would be mitigated by quality differences.<sup>325</sup> While this explanation is not unreasonable, it does not appear in MOFCOM's Final Determination, which does not discuss this alleged relationship between competition, price, and quality. Thus, it is an *ex post* explanation which we cannot take it into account in our evaluation of MOFCOM's determination.

7.191. MOFCOM specifically discussed the quantity and prices of non-dumped imports only from South Africa, Indonesia, and Sweden.<sup>326</sup> China explains that these were the three largest sources of non-dumped imports.<sup>327</sup> China provided data from the record of the investigation on the volume of non-dumped imports from all sources in support of MOFCOM's conclusions on the impact of non-dumped imports.<sup>328</sup> In our view, given that the non-dumped imports MOFCOM did not specifically discuss accounted for between 18% and 25% of total imports over the POI, a reasonable and objective investigating authority would have to take these imports into account in its non-attribution analysis, which MOFCOM appears to have done in considering the total volume and prices of non-dumped imports. While it might have been preferable had MOFCOM set out and discussed the data on the volumes and prices of non-dumped imports in its Final Determination in greater detail, the failure to do so is not in itself erroneous, as the data were in the record.

**Table 10: Volume of Dumped and Non-Dumped imports and share of total imports accounted for by countries other than South Africa, Sweden, and Indonesia**

POI	2010	2011	2012
Volume of dumped imports	421,009.93	419,050.31	605,470.23
Volume of non-dumped imports <sup>329</sup>	432,584.92	560,720.54	771,971.03
Volume of non-dumped imports from South Africa, Sweden, and Indonesia*	273,363.38	321,713.66	419,322.73
Volume of non-dumped imports from countries other than South Africa, Sweden, and Indonesia	159,221.54	239,006.88	352,648.30
Total imports*	853,594.85	979,770.85	1,377,441.26
Share of total imports accounted of by countries other than South Africa, Sweden, and Indonesia*	18.65%	24.40%	25.60%

Source: China's response to Panel question No. 37, table A.

\* calculated by the Secretariat

<sup>325</sup> China's response to Panel question No. 65, para. 56.

<sup>326</sup> Final Determination, (Exhibit CHN-1), p. 85.

<sup>327</sup> China's response to Panel question No. 67, para. 60.

<sup>328</sup> China's response to Panel question No. 37, table A.

<sup>329</sup> China's response to Panel question No. 35, para. 103.

7.192. The data before MOFCOM suggests that the effect of the non-dumped imports on prices and consequently on the domestic industry was similar to that of the dumped imports – the volumes and prices were similar, and moved similarly over the POI. MOFCOM found that the dumped imports were causing injury to the domestic industry. It would seem that non-dumped imports might therefore be having a similarly injurious effect on the domestic industry. Indeed, MOFCOM did not find that non-dumped imports did not have such an effect, but rather concluded that they did not break the causal link between the dumped imports and the injury to the domestic industry. However, there is little explanation of how MOFCOM reached this conclusion. Simply to state that MOFCOM did indeed separate and distinguish the injury or that non-dumped imports did not break the causal link, without further explanation, does not suffice to persuade us that the investigating authority did in fact undertake the necessary examination and reach an objective conclusion warranted by the evidence and arguments before it that injuries caused by non-dumped imports were not attributed to the dumped imports. Taken together, the failure to specifically discuss non-dumped imports accounting for between 18% and 25% of total imports over the POI, and the failure to explain how MOFCOM reached the conclusion that non-dumped imports, whose volume was greater than that of dumped imports throughout the POI and whose prices were below those of the dumped imports in 2011 and 2012 when MOFCOM found that dumped imports were depressing domestic prices and causing injury, did not break the causal link between dumped imports and material injury, leads us to the view that MOFCOM's conclusions were not such as could have been reached by a reasonable and objective investigating authority in light of the evidence and arguments before it.

**Table 11: Market shares of domestic industry, dumped and non-dumped imports**

POI	H1/2010	H2/2010	H1/2011	H2/2011	H1/2012	H2/2012
Market share of like product of the domestic industry	18%	21.36%	17.54%	18.64%	26.71%	25.73%
Market share of dumped imports	20.53%	20.88%	18.02%	19.91%	21.45%	22.57%
Market share of other Chinese producers	38.35%		37.58%		23.71%	
Market share of non-dumped imports*	21.27%		25.36%		28.06%	
Total	100%	100%	100%	100%	100%	100%

Source: China's response to Panel question No. 37, table B.

\* calculated by the Secretariat

**Table 12: Prices of dumped and non-dumped imports**

	2010	2011	2012
Prices of dumped imports (USD Annual)	1384.05	1946.96	1165.33
Prices of imports from South Africa (USD Annual)	1049	1397	948
Prices of imports from Indonesia (USD Annual)	1487	1717	1039
Prices of imports from Sweden (USD Annual)	1404	1883	1104
Prices of non-dumped imports from other countries (USD Annual)	1436.75	1810.02	1084.35

Source: China's response to Panel question No. 37, table C.

7.193. We therefore conclude that MOFCOM failed to adequately examine the non-dumped imports as a factor other than dumped imports causing injury and failed to ensure that the injuries caused by these imports were not attributed to the dumped imports, and therefore acted inconsistently with Articles 3.1 and 3.5 of the Anti-Dumping Agreement.

#### 7.7.4.4 Shortage of cotton linter

7.194. During the investigation, interested parties argued that the domestic industry had a low rate of capacity utilization due to an insufficient supply of cotton linter, the main raw material for production of cotton-based cellulose pulp.<sup>330</sup> MOFCOM addressed these arguments in its examination of the impact of the dumped imports on the domestic industry and concluded that the low capacity utilization rate, which MOFCOM considered an aspect of injury, was not caused by an insufficient supply of cotton linter.<sup>331</sup>

7.195. Canada argues that MOFCOM's conclusion that a shortage of cotton linter was not a cause of the domestic industry's low capacity utilization rate was erroneous because MOFCOM failed to objectively examine positive evidence indicating that there were producers of other products using cotton linter as a input, and that total cotton linter demand surpassed total cotton linter supply.<sup>332</sup> China asserts that MOFCOM conducted an objective examination of positive evidence regarding the supply of cotton linter and found that the supply was sufficient and that the changes in supply of cotton linter were not the cause of the domestic industry's low capacity utilization rate and thus there was no need to separate and distinguish the effect of this factor from the injurious effect of dumped imports.<sup>333</sup>

7.196. MOFCOM noted that the domestic industry produced three types of cellulose pulp: wood-, bamboo-, and cotton-based cellulose pulp. Cotton linter is a raw material for the production of cotton-based cellulose pulp only.<sup>334</sup> MOFCOM found that in 2012, the volume of wood- and bamboo-based cellulose pulp accounted for 70% to total sales of cellulose pulp. MOFCOM acknowledged that the output and price of cotton linter had a direct effect on production of cotton-based cellulose pulp, and that cotton linter was mainly used by producers of cotton-based cellulose pulp. MOFCOM examined the total production capacity, output, and capacity utilization of cotton cellulose pulp producers and the domestic supply of cotton linter over the POI.<sup>335</sup> Having considered the supply of cotton linter available on the market MOFCOM found that the capacity utilization rate of the producers of cotton-based cellulose pulp could have been higher had the full production of cotton linter available been used by those pulp producers, however, it stayed at a

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<sup>330</sup> Canada's first written submission, para. 178 (referring to Final Determination, (Exhibit CAN-3), pp. 75 and 76; Cosmo Specialty Fibers, Inc., Anti-Dumping Investigation on Imports of Cellulose Pulp, Argument of no Injury, 4 July 2013, (Exhibit CAN-11), pp. 37 and 38; Rayonier Performance Fibers, LLC., Anti-Dumping Investigation on Imports of Cellulose Pulp, Comments Regarding Material Injury and Causality, 29 July 2013, (Exhibit CAN-12), p. 18; American Forest and Paper Association, Anti-Dumping Investigation on Imports of Cellulose Pulp, Comments on Industry Injury Investigation, 24 September 2013, (Exhibit CAN-10), p. 11; Weyerhaeuser, MOFCOM Presentation, 4 June 2013, (Exhibit CAN-21), p. 8; Tangshan Sanyou Group Company Limited, *Impact of "Anti-Dumping [Measures]" Against Imported Dissolving Pulp on the Viscose Industry*, (Exhibit CAN-18), p. 3; and Xingda Chemical Fiber Co., Ltd. of the Tangshan Sanyou Group, *Report on the Impact of Anti-Dumping Measures Applied to Imported Dissolving Pulp*, (5 December 2013), (Exhibit CAN-15), pp. 3 and 4).

<sup>331</sup> Final Determination, (Exhibit CHN-1), pp. 74-76.

<sup>332</sup> Canada's first written submission, paras. 181, 182, and 185 (referring to CCFGroup, China Viscose Industry Chain Report 2011, (March 2012), (Exhibit CAN-5) (BCI), p. 6; Multi-Client Study: Outlook for Global Dissolving Pulp Market 2011, (Exhibit CAN-6) (BCI), pp. 4 and 8; and CCFGroup, China Viscose Industry Chain Report 2012, (February 2013), (Exhibit CAN-4) (BCI), p. 6); second written submission, paras. 189 and 190.

<sup>333</sup> China's first written submission, paras. 175-180; second written submission, paras. 160-167.

<sup>334</sup> In this regard, we note that MOFCOM relied in its analysis on a unit consumption ratio of 1 tonne of cotton-based cellulose pulp from approximately 1.3 tonnes of cotton linter. Canada disagrees with this ratio, and argues that the ratio should have been 1 tonne of cotton-based cellulose pulp from approximately [\*\*\*] tonnes of cotton linter. (Canada's first written submission, para. 186). We consider that the difference between the two ratios is so small that the use of Canada's proposed ratio would not have an impact on MOFCOM's analysis, and Canada has not demonstrated otherwise.

<sup>335</sup> MOFCOM found that total production capacity of the domestic cotton cellulose pulp industry was 1.4 million tonnes in 2010, 1.4 million tonnes in 2011, and 1.8 million tonnes in 2012; total output of the domestic cotton cellulose pulp industry was 720,000 tonnes in 2010, 810,000 tonnes in 2011, and 830,000 tonnes in 2012; capacity utilization rate of cotton cellulose pulp industry was 51.43% in 2010, 57.86% in 2011, and 46.11% in 2012. The total domestic supply of cotton linter was 1.44 million tonnes in 2010, 1.35 million tonnes in 2011, and 1.64 million tonnes in 2012. (Final Determination, (Exhibit CHN-1), p. 75).

lower rate.<sup>336</sup> MOFCOM concluded that the low capacity utilization rate of the domestic industry was therefore not caused by an insufficient supply of cotton linter.<sup>337</sup>

7.197. Canada argues that MOFCOM failed to consider a report that had been submitted during the investigation indicating that there were producers of products other than cotton-based cellulose pulp using cotton linter as an input, and that overall, cotton linter demand was higher than available supply.<sup>338</sup> China asserts that MOFCOM considered this evidence and found that the supply of cotton linter was sufficient. China notes that the report referred to by Canada supports this conclusion, stating that the shortage of cotton linters was covered by linters made of waste cotton and that "the supply in 2012 was relatively sufficient".<sup>339</sup>

7.198. According to the data referred by Canada, the proportion of total demand for cotton linter from other producers, namely producers of specialty pulp and refined cotton, was approximately [\*\*\*] in 2010, [\*\*\*] in 2011, and [\*\*\*] in 2012.<sup>340</sup> In our view, although it might have been preferable had MOFCOM specifically recognized that there was demand for cotton linter from other producers in its discussion, this omission does not undermine MOFCOM's overall conclusion that a shortage of cotton linter was not a cause of the domestic cellulose pulp industry's low capacity utilization rate. We recall in this regard that the domestic industry produced cellulose pulp from three different raw materials, and cotton linters are used only in the production of cotton-based cellulose pulp. China provided data regarding the shares of cotton-, wood-, and bamboo-based cellulose pulp in total sales of cellulose pulp during the POI:

**Table 13: Share of cotton- based and wood- and bamboo-based cellulose pulp in total sales of cellulose pulp**

Year	Share of Cotton Pulp Sales	Share of Wood and Bamboo Pulp Sales
2010	[***]%	[***]%
2011	[***]%	[***]%
2012	[***]%	[***]%

Source: China's response to Panel question No. 69, para. 70.<sup>341</sup>

7.199. In our view, this data could suggest that the shortage of cotton linter led to increased sales of cellulose pulp made from wood and bamboo. We recall that the sales of the domestic like product increased in general during the POI by 80% and specifically in 2012<sup>342</sup>, when the sales of wood- and bamboo-based cellulose pulp, which had accounted for less than 30% of total sales at the beginning of the POI, accounted for 70% of total sales of the domestic industry. Therefore, it would appear that the domestic industry reacted to any shortage of cotton linter by increasing sales of the other two types of cellulose pulp.

7.200. Canada also argues that MOFCOM failed to examine the proportion of sales of different types of cellulose pulp over the entire POI, but rather focused on the proportion of sales of wood and bamboo cellulose pulp in 2012.<sup>343</sup> The 70% proportion of sales of wood- and bamboo-based cellulose pulp was the highest level during the POI, and occurred during the period in which MOFCOM found material injury caused by dumped imports. Furthermore, MOFCOM found the prices of the domestic like product were depressed by the dumped imports in the second part of the POI, starting from the second part of 2011 until the end of 2012. Therefore, in our view, it was

<sup>336</sup> Final Determination, (Exhibit CHN-1), p. 75.

<sup>337</sup> Final Determination, (Exhibit CHN-1), p. 76.

<sup>338</sup> Canada's first written submission paras. 181 and 185, and table 4 (referring to CCFGroup, China Viscose Industry Chain Report 2012, (February 2013), (Exhibit CAN-4) (BCI), p. 6); second written submission, para. 193.

<sup>339</sup> China's first written submission, para. 176 (referring to CCFGroup, China Viscose Industry Chain Report 2012, (February 2013), (Exhibit CAN-4) (BCI), p. 5); second written submission, para. 161.

<sup>340</sup> Canada's first written submission, table 4 (referring to CCFGroup, China Viscose Industry Chain Report 2012, (February 2013), (Exhibit CAN-4) (BCI), p. 6).

<sup>341</sup> China clarified that this data was derived by MOFCOM from the responses to questionnaires provided by the domestic industry. (China's response to Panel question No. 69, para. 70).

<sup>342</sup> Sales of the domestic like product were 400,200 tonnes in 2010; 399,800 tonnes in 2011; 721,300 tonnes in 2012. (Final Determination, (Exhibit CHN-1), p. 72).

<sup>343</sup> Canada's second written submission, paras. 191 and 192.

not unreasonable for MOFCOM to focus on the fact that in 2012 the main proportion of domestic sales included cellulose pulp made of wood and bamboo.

7.201. In addition, Canada submits that the low capacity utilization rate of cotton pulp producers was driving down the overall capacity utilization rate of the domestic industry.<sup>344</sup> Although the capacity utilization rate of cotton-based cellulose pulp producers was lower than that of the domestic industry during certain parts of the POI, it did not differ considerably.<sup>345</sup> Even granting that the lower rates for the cotton-based cellulose pulp producers accounted for part of the decline in the domestic industry's capacity utilization rate, we note that cotton-based cellulose pulp producers' capacity utilization rate was higher than the domestic industry's rate in 2011, when cotton-based cellulose pulp producers accounted for more than half of production of cellulose pulp, and declined more in 2012 than the capacity utilization rate of the domestic industry, when their share in total domestic production also declined significantly. This does not suggest to us that the decline in cotton-based cellulose pulp producers' capacity utilization drove down the overall capacity utilization rate of the domestic industry.

7.202. We therefore conclude that MOFCOM did not fail to adequately examine the injury allegedly caused by the shortage of cotton linter and did not fail to ensure that such injury was not attributed to the dumped imports, and therefore did not act inconsistently with Articles 3.1 and 3.5 of the Anti-Dumping Agreement.

## **7.8 Consequential claims**

7.203. Canada claims that the MOFCOM acted inconsistently with Article 1 of the Anti-Dumping Agreement and Article VI of the GATT 1994, as a consequence of the alleged violations of the Anti-Dumping Agreement.<sup>346</sup>

7.204. Canada's claims under Article 1 of the Anti-Dumping Agreement and Article VI of the GATT 1994 are purely consequential, in the sense that they depend on the outcome of other claims brought by Canada under other provisions of the Anti-Dumping Agreement. As a consequence of the inconsistencies with the Anti-Dumping Agreement above, we find that China acted inconsistently with Article 1 of the Anti-Dumping Agreement and Article VI of the GATT 1994.

## **8 CONCLUSIONS AND RECOMMENDATION**

8.1. For the reasons set forth in this Report, we conclude that Canada has failed to establish that China acted inconsistently with:

- a. Articles 3.1 and 3.2 of the Anti-Dumping Agreement with respect to MOFCOM's consideration of the volume of the dumped imports;
- b. Articles 3.1 and 3.2 of the Anti-Dumping Agreement with respect to MOFCOM's consideration of price effects in light of changes in dumped imports' market share, and by taking into account pricing documents and meeting minutes in that consideration;
- c. Articles 3.1 and 3.4 of the Anti-Dumping Agreement with respect to MOFCOM's examination of the impact of the dumped imports on the domestic industry; and
- d. Articles 3.1 and 3.5 of the Anti-Dumping Agreement with respect to MOFCOM's examination of the shortage of cotton linter as an allegedly known factor other than the dumped imports allegedly causing injury to the domestic industry.

8.2. For the reasons set forth in this Report, we further conclude that Canada has established that China acted inconsistently with:

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<sup>344</sup> Canada's first written submission, para. 182.

<sup>345</sup> The capacity utilization rate for cotton-based cellulose pulp producers was 51.43% in 2010, 57.86% in 2011, and 46.11% in 2012, while the capacity utilization rate for the domestic industry was 66.01% in 2010, 53.77% in 2011, and 52.35% in 2012. (Final Determination, (Exhibit CHN-1), pp. 73 and 75).

<sup>346</sup> Canada's first written submission, para. 189; second written submission, para. 196.

- a. Articles 3.1 and 3.2 of the Anti-Dumping Agreement with respect to MOFCOM's consideration of price effects by failing to adequately explain both the role of parallel price trends and the fact that dumped import prices were higher than those of the domestic like product;
- b. Articles 3.1 and 3.5 of the Anti-Dumping Agreement with respect to MOFCOM's demonstration of a causal relationship between the dumped imports and injury; and
- c. Articles 3.1 and 3.5 in connection with MOFCOM's examination of the effects of changes in cotton and VSF prices; domestic industry overexpansion, overproduction and inventory build-up; and the impact of non-dumped imports as allegedly known factors other than the dumped imports causing injury to the domestic industry, and MOFCOM's failure to ensure that injuries caused by these factors were not attributed to the dumped imports.

8.3. As a consequence of the inconsistencies we have found, we further conclude that Canada has established that China acted inconsistently with Article 1 of the Anti-Dumping Agreement and Article VI of the GATT 1994.

8.4. 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 measure at issue has been found to be inconsistent with the Anti-Dumping Agreement and GATT 1994, it has nullified or impaired benefits accruing to Canada under these agreements.

8.5. Pursuant to Article 19.1 of the DSU, we recommend that China bring its measure into conformity with its obligations under the Anti-Dumping Agreement and GATT 1994.

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