VVGB ADVOCATEN | AVOCATS

AD0021

ANTI-DUMPING INVESTIGATION CONCERNING IMPORTS OF OPTICAL FIBRE CABLES ORIGINATING IN CHINA

Request for information concerning the

The Statement of Essential Facts and The Preliminary Affirmative Determination

By the

China Chamber of Commerce for Import and Export of Machinery and Electronic Products ["CCCME"]

26 June 2023

Non-confidential

TABLE OF CONTENTS

1 Introduction

1. We refer to the Preliminary Affirmative Determination ["PAD"] and the Statement of Essential Facts ["SEF"] issued by the UK Trade Remedies Authority ["TRA"] on 9 June 2023[1] in the context of the anti-dumping ["AD"] investigation No. AD0021 concerning imports of single-mode optical fibre cables ["OFC"] originating in the People's Republic of China ["PRC"].

2. In this context, first, as explained below, the TRA's approach of issuing the PAD, which is the TRA's notice of its decision to impose provisional AD measures, at the same time as the SEF, which concerns the intended final AD determination, prevents interested parties from fully exercising their rights of defence and commenting on the PAD. Moreover, the provisional AD duty being proposed by the TRA is WTO-inconsistent.

3. Second, the SEF which is the disclosure of essential facts -- within the meaning of Article 6.9 of the Anti-Dumping Agreement ["ADA"] -- concerning the intended final AD determination, does not provide interested parties the essential facts underlying the TRA's determination of injurious dumping and the proposed AD measures to file proper comments in the defence of their interests.

4. Likewise, the PAD which serves as the public notice and explanation of the preliminary determination within the meaning of Articles 12.2 and 12.2.1 of the ADA, does not provide sufficient details as regards the TRA's findings and conclusions on matters of fact and law for interested parties to understand and comment on the proposed provisional AD measures.

5. Thus, through the present submission, the CCCME respectfully urges the TRA to provide the essential facts and clarifications with respect to the SEF and the PAD, so that interested parties can fully exercise their rights of defence by submitting meaningful comments on all aspects of the TRA's findings. Furthermore,

[1] An updated version of the SEF was issued on 12 June 2023.

the CCCME requests the TRA to accordingly also extend the deadline of 16 July 2023 to comment on the SEF and the PAD so that the additional information provided by the TRA can be properly assessed and commented upon by the CCCME.

6. The CCCME recalls that as noted by the Panel in *China – X-Ray Equipment*, "*[t]he second sentence of Article 6.9 provides that the disclosure of essential facts "should take place in sufficient time for the parties to defend their interests".*"[2]

2 Lack of opportunity to comment on the PAD and imposition of an incorrect provisional duty

7. First, as alluded to above, the PAD lays out the provisional determination and the SEF issued in parallel is the final disclosure within the meaning of Article 6.9 of the ADA. However, between the PAD and the SEF, several matters of fact and law which are essential to the findings of dumping and injury have changed, and that too without any information or reasons being provided to the interested parties let alone any opportunity to comment on the same. For instance, with regard to the dumping margin calculation, the cost adjustment for the optical fibres has changed.[3] This is a core issue underlying the calculation of the dumping margin. The methodological changes are also reflected in the fact that between the PAD and SEF, the dumping and injury margins calculated for the cooperating and non-cooperating exporting producers have changed.

8. Thus, the supposed availability of the time for interested parties to comment on the PAD is rather redundant as the SEF is based on certain different facts and evidence. Hence, the TRA's approach is inconsistent with Article 6.2 of the ADA which provides that throughout an AD investigation all interested parties shall have full opportunity for the defence of their interests.

[2] Panel Report, *China – X-Ray Equipment*, para. 7.400.
[3] PAD, para. 13; and SEF, para. 23.

9. Moreover, Article 12.2.1 of the ADA foresees that the public notice of the imposition of the provisional measures should set forth "*sufficiently detailed explanations for the preliminary determinations on dumping and injury and shall refer to the matters of fact and law which have led to arguments being accepted or rejected.*" However, the first time that the interested parties were informed of the basis and methodology of the finding of a particular market situation, the calculation of dumping, the definition of the UK industry, the data underlying the injury assessment and the injury margin calculation was in the PAD. Thus, interested parties could not have possibly commented on that data before the publication of the PAD. Added to this, as noted above, the data and methodology relied upon by the TRA for the dumping and injury margins has changed between the PAD and the SEF. Thus, commenting on the methodology in the PAD is redundant or water under the bridge.

10. Moreover, it is also not clear to what extent and how the TRA would consider the comments on the PAD, and to how will they be given effect.

11. Indeed, in almost all jurisdictions including those of the most frequent users of the AD instrument such as the European Union, the United States, India, and Canada, interested parties are provided the opportunity to comment on the affirmative provisional determination/disclosure in an AD investigation. The provisional disclosure/determination related comments are considered in making the final determination, and then the interested parties are given a second opportunity to offer additional comments on the final determination. The reason is that preliminary and final determinations are distinct phases in an AD investigation as made clear by the various provisions of the ADA including Articles 7, 9, 10 and 12, among others. Moreover, facts can and generally do evolve between the provisional and definitive determinations -- as also seen in the present case -- and calculations are most often revisited in light of the comments of the interested parties and other evidence on the record.

12. Seen from this perspective, the TRA's approach is fundamentally unfair and not only violates the right to a fair hearing but also the principle of legal certainty.

Furthermore, it conflates two distinct stages of an AD investigation while clearly depriving interested parties of one clear opportunity to comment on the legal and factual matters forming the basis of the preliminary and subsequently final measures.

13. Second, and following from the above-mentioned blurring of the distinction between preliminary and definitive stages of an AD case, the imposition of the provisional duty as proposed by the TRA is WTO-inconsistent. As the facts at hand show, the dumping margin in the SEF is slightly lower than the one in the PAD,[4] yet the TRA has proposed the imposition of the provisional measure at the level of the higher rate.[5] Indeed, at the time of proposing the higher provisional duty, the TRA has already changed the methodology for the final dumping margin assessment and itself calculated a lower rate.

14. Furthermore, the cooperating exporting producer and other interested parties had no opportunity to check the provisional dumping margin calculations. Any mistakes in the provisional dumping margin calculation which, if corrected, would result in a lower dumping margin at the provisional stage cannot be corrected. Moreover, even if the calculation errors in the provisional dumping margin calculation are corrected, they may be overshadowed by the change in methodology for the final dumping margin calculation, implying that the provisional dumping margin-based duty would be erroneously high and would subsequently not be corrected as the final estimated dumping margin of 31.3% for the cooperating exporting producers is lower than the 31.5% dumping margin calculated at the provisional stage. As a result, all the mistakes in the provisional dumping margin calculation will flow into the provisional AD duty rate. To give a practical example: let us assume that the provisional dumping margin is 10% based on method ‘A’ and it had mathematical and other errors, which if corrected, would result in a 5% provisional dumping margin. The final dumping margin is 9.9% but based on another method ‘B’. As a result of the TRA’s approach, the provisional duty collected on the 9.9% basis, albeit lower than 10%,

[4] PAD, para. 13; and SEF, para. 23.
[5] PAD, para. 13 and Section J.

is higher than the actual dumping margin of 5% at the provisional stage implying a violation of Articles 7.2 and 10.3 of the ADA.

15. Furthermore, as the TRA's own assessment in the SEF rightly shows, an adjustment of the loan interest costs of the cooperating exporting producer was not required. Thus, there are no legal and factual bases for the TRA to adjust these costs for the purpose of the provisional dumping margin calculation which is being issued in parallel to the SEF. Such an approach cannot be justified under WTO law or the UK Regulations.

16. Any provisional measures imposed on such a basis and confirmed by the final affirmative determination would be inconsistent with Articles 7.2 and 10.3 of the ADA.

17. For the reasons mentioned above, the TRA should not impose the provisional AD duty in this case and the imposition of provisional measures will be inconsistent with Articles 6.2, 7.2, 10.3, 12.2, and 12.2.1of the ADA.

3 Inadequate disclosure of information in the SEF

18. Article 6.9 of the ADA provides that, "*[t]he authorities shall, before a final determination is made, inform all interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures. Such disclosure should take place in sufficient time for the parties to defend their interests*."

19. With regard to the nature, and extent of the disclosure required, as noted by the Panel in *EC – Salmon (Norway)*, the disclosure of essential facts made pursuant to Article 6.9 of the ADA must "*provide the interested parties with the necessary information to enable them to comment on the completeness and correctness of the facts being considered by the investigating authority, provide additional*

information or correct perceived errors, and comment on or make arguments as to the proper interpretation of those facts."[6]

20. As also noted by the Panel in *China – Broiler Products*, in order to apply definitive measures at the conclusion of an AD investigation, an investigating authority must find three key elements: (i) dumping, (ii) injury, and (iii) a causal link. According to that Panel, "*the "essential facts" underlying the findings and conclusions relating to these elements form the basis of the decision to apply definitive measures and must be disclosed*."[7]

21. The CCCME considers that the SEF as it stands, does not comply with the requirements of Article 6.9 of the ADA.

22. The CCCME notes that – as discussed below in detail -- several of the key facts have not been disclosed in the SEF. Furthermore, with regard to the injury assessment it is neither evident nor explained by the TRA why the data for UK consumption and Chinese market shares is disclosed in the PAD[8] but then indexed in the SEF.[9] The general statement by the TRA that the PAD and SEF respectively should be read in light of information on the file does not really resolve these problems as interested parties cannot second guess and reengineer the data used by the TRA. Indeed, as noted by the Panel in *Ukraine – Ammonium Nitrate*, "*interested parties are not expected to engage in back-calculations and inferential reasoning, or piece together a puzzle to derive the essential facts*."[10]

23. In this regard, as held by the Panel in *China – GOES*, "*[Article 6.9 ADA] allow[s] interested parties "to defend their interests" through review and response to the essential facts under consideration disclosed by the investigating authorities.*

[6] Panel Report*, EC – Salmon (Norway)*, para. 7.805.
[7] Panel Report, *China – Broiler Products*, para. 7.86.
[8] PAD, p. 42, Table 7.
[9] SEF, para. 229, Table 6.
[10] Panel Report, *Ukraine – Ammonium Nitrate*, at para. 7.227.

Indeed, the ability of an interested party to submit arguments on the facts under consideration is dependent upon adequate disclosure of those facts."[11]

24. The Appellate Body in in *China – GOES* further held that:

> "*[W]e understand the "essential facts" to refer to those facts that are significant in the process of reaching a decision as to whether or not to apply definitive measures. Such facts are those that are salient for a decision to apply definitive measures, as well as those that are salient for a contrary outcome. An authority must disclose such facts, in a coherent way, so as to permit an interested party to understand the basis for the decision whether or not to apply definitive measures. In our view, disclosing the essential facts under consideration pursuant to Articles 6.9 and 12.8 is paramount for ensuring the ability of the parties concerned to defend their interests*."[12] (Underlining added)

25. Thus, the non-disclosure of the essential facts underlying the TRA's considerations and conclusions, is not only inconsistent with Article 6.9 of the ADA but also Article 6.2 of the ADA as clearly the CCCME and other interested parties cannot defend their interests based on the current level of disclosure.

26. The above having been said, the CCCME requests the TRA for the disclosure of the below-mentioned essential facts.

3.1 The determination of a particular market situation and the dumping margin calculation

27. The CCCME notes that in the SEF, the TRA has provided summary statements for its determination of a particular market situation ["PMS"] without providing the essential facts underlying its intermediate findings and the determination itself. For instance, several policy documents and findings of third country authorities have been referred to in specific instances,[13] without actually identifying

[11] Panel Report, *China – GOES*, para. 7.651.
[12] Appellate Body Report, *China – GOES*, para. 240.
[13] See, for example, SEF, paras. 118, 132, 133, 134, 137, 138, 141, 151, 156, 158, 163, and 168.

the factual information relevant to the OFC producers and the finding of PMS for the OFC producers and industry.

28. In this regard, the CCCME notes that the Panel in *US – Supercalendered Paper* held that "*[t]he word "fact" is defined inter alia as "[a] thing known for certain to have occurred or to be true""*. In that case, according to the Panel, *"[t]he relevant essential fact [was] therefore not, as suggested by the United States, the Public Utilities Act. The Public Utilities Act is itself not a thing that is known to have occurred or to be true. Nor does the Public Utilities Act, taken as a whole and viewed in the abstract, comprise a fact forming the basis for the USDOC's determination. In our view, Canada's claim concerns the essential fact that, according to the USDOC, the public service obligation enshrined in Section 52 of the Public Utilities Act entrusted or directed the NSPI to provide electricity to PHP. It is this fact that the USDOC took to be true, and [...] there is no evidence to suggest that this essential fact was disclosed to interested parties.*"[14]

29. Furthermore, as noted by the Panel in *US – Ripe Olives from Spain,* the disclosure of essential facts under Article 12.8 of the SCM Agreement -- which is the functional equivalent of Article 6.9 of the ADA -- "*must be done in such a way that permits an interested party to understand how they have been used and potentially relied upon by an investigating authority*."[15]

30. In view of the above, and without prejudice to the company-specific disclosure that may have been provided by the TRA to the SDG group, the CCCME requests the TRA to provide the following essential facts on the basis of which the finding of PMS has been made:

i. The facts including data, underpinning the country-wide assessment that there is "*government support to producers of OFCs in direct forms*";[16]

[14] Panel Report, *US – Supercalendered Paper*, paras. 7.82-7.83.
[15] Panel Report, *US – Ripe Olives from Spain*, para. 7.386.
[16] SEF, para. 116.

ii. The "*various GOC plans and industrial strategies"* that according to the TRA form the basis of the supposed government support in China;[17]

iii. Facts underpinning the findings that Chinese OFC producers receive indirect government support "*through broadband strategies such as "Dual Gigabit*";[18] that the Notice concerning the action plan for the coordinated development of the Dual Gigabit networks "*will guide regional authorities to invest their budget to meet those goals and their own performance benchmarks, which will involve funds being transferred to producers of OFCs,"* and that *"Government support in this form causes the market to reflect non-commercial factors by increasing the domestic supply beyond that demanded by the market, lowering the normal value and encouraging export*";[19]

iv. The factual basis for the finding that the listing of OFC in the Catalogue of Industries for Foreign Investment Guidance 2017 and the Catalogue of Guidance for Industrial Structure Adjustment Guidance 2019, amounts to OFC producers receiving state support;[20]

v. The facts on the basis of which the TRA determined that "*there is evidence that the OFC companies within the PRC received substantial state support in a variety of forms*;" [21]

vi. Facts underpinning the TRA's reasoning and consideration that the GOC's controlling stake in two OFC producers and the supposed purchases of OFC by SOEs resulted in the Chinese OFC producers' costs and sales prices being influenced by the GOC and the conclusion in paragraph 129 of the SEF that the "*government influence and control has caused the price of OFC to reflect non-commercial factors*"; [22]

vii. The facts relied upon from the "*market analysis provided by CRU's 'Telecom Cables Market Outlook 2021'"* [23] underpinning the finding of state influence in the OFC sector. The specific page numbers of the CRU

[17] SEF, para. 117.
[18] SEF, para. 116.
[19] SEF, para. 119.
[20] SEF, para. 121.
[21] SEF, para. 122.
[22] SEF, paras. 123-129.
[23] SEF, para. 127.

report, and a non-confidential summary of the factual information relied upon by the TRA should be provided. As noted by the Appellate Body in *Russia – Commercial Vehicles*, "*[t]he treatment of information as confidential under Article 6.5 does not absolve the investigating authority from its obligation to disclose essential facts as required under Article 6.9. When information treated as confidential under Article 6.5 constitutes essential facts within the meaning of Article 6.9, the disclosure obligations under these provisions should be met by disclosing non-confidential summaries of those facts*.";[24]

viii. Facts and data that underlying the TRA's finding that "*when companies sell large proportions of their product to SOEs, a high percentage of these sales are not in the Ordinary Course of Trade (OCOT) since profit margin is not driven by market forces*" and that this results from the Chinese OFC sector "*being driven by GOC strategic goals*";[25]

ix. The data on which the "*weighted average profit margin* […] *used to account for the fluctuation in profit margins*"[26] was based and whether it was the same as used for the construction of the normal value in section F6 of the SEF;

x. The facts underlying the conclusion that "*land market in the PRC reflects non-commercial factors*";[27]

xi. The facts relied upon by the TRA to consider that, all funds including those given to the OFC industry are "*raised … in line with the national industrial policy" indicating that they are not issued according to market demand*";[28]

xii. The facts on the basis of which the TRA considered that "*the loan interest rates reflect non-commercial factors and as such there is a PMS within the OFC industry*";[29]

[24] Panel Report, *Russia – Commercial Vehicles*, para. 5.183.
[25] SEF, para. 129.
[26] SEF, para. 129 and Section F6.
[27] SEF, para. 136.
[28] SEF, para. 140.
[29] SEF, para. 145.

xiii. The facts underlying the determination that "*energy prices in the PRC reflected non-commercial factors during the POI and as such there is a PMS within the OFC industry*";[30]

xiv. Factual considerations for holding that government influence had led to the hiring or dismissal of employees for Chinese OFC companies; and that "*the impact of the hukou system is external to the hiring practices of any given company*";[31]

xv. The factual determination that the movement for rural workers in the PRC was restricted during the POI,[32] and that as the labour unions are not independent, the domestic labour costs within the domestic OFC market in the PRC are subject to non-commercial factors;

xvi. The basic factual point, i.e., which raw materials were in fact considered for the assessment of PMS;

xvii. The factual basis underlying the essential consideration and conclusions in paragraph 172 of the SEF on the basis of which the TRA determined that "*optical fibre costs are subject to non-commercial factors*;"[33] and

xviii. The essential facts underlying the determination under Article 2.2 of the ADA that the sales prices of OFC in China, and that of the OFC producers "*do not permit a proper comparison*". There is no factual information on this essential consideration without which the normal value cannot be constructed. Mere general conclusory statements and reference to historic laws and policies that have no connection to OFC are not facts.

31. With regard to the dumping margin calculation, the CCCME requests the following information:

i. The factual basis on which the TRA considered that Turkey meets the legal requirements of Regulation 13(6) of the Regulations. As the Panel

[30] SEF, paras. 150 and 154. In this connection, the CCCME notes that the WTO Trade Policy Review of the PRC published in September 2021 concerns the period 2019-2020 and is thus not relevant for the POI.
[31] SEF, para. 160.
[32] SEF, paras. 155-158.
[33] SEF, para. 172.

in *China – X-Ray Equipment* confirmed, "*the data underlying the determinations of normal value and export price constitute "essential facts"*.";[34]

ii. The source relied upon to conclude that China and Türkiye "*have a similar level of GDP per capita, life expectancy at birth, and literacy rate*";[35]

iii. The factual aspect as to whether or not the fibre types used by the cooperating exporting producer and the Turkish producers were comparable to begin with;

iv. The factual basis and data on which the fiber cost of the Turkish producers was calculated; and the average fibre cost of the Turkish producers used for comparison. It is noted that the Appellate Body in *China – HP-SSST (Japan) / China – HP-SSST (EU)* held that a "*narrative description of the data used*" does not constitute sufficient disclosure of essential facts.[36] In "*all cases*", investigating authorities must disclose the facts "*in such a manner that an interested party can understand clearly <u>what</u> data the investigating authority has used, and <u>how</u> those data were used to determine the margin of dumping*";[37]

v. Adjustments, if any, made to calculate the Turkish producers' fibre cost or to the fibre cost of the cooperating exporting producer. The CCCME recalls here that, as noted by the Appellate Body in *China – HP-SSST (Japan) / China – HP-SSST (EU)*, with respect to the determination of dumping, an investigating authority is expected "*to disclose, inter alia, the home market and export sales being used, the adjustments made thereto, and the calculation methodology applied by the investigating authority to determine the margin of dumping*."[38] According to the Appellate Body in that case, as further confirmed by the Appellate Body in *Russia – Commercial Vehicles*, "*the calculation methodology used by the investigating authority to determine the margin of dumping constituted an*

[34] Panel Report, *China – X-Ray Equipment*, para. 7.419.
[35] SEF, para 185.
[36] Appellate Body Reports, *China – HP-SSST (Japan)* and *China – HP-SSST (EU)*, para. 5.133.
[37] Appellate Body Reports, *China – HP-SSST (Japan)* and *China – HP-SSST (EU)*, para. 5.131. (Underlining added).
[38] Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.131.

essential fact within the meaning of Article 6.9 of the Anti-Dumping Agreement";[39] and

vi. The "*annual average mid-rate for the POI from the Central Bank of the Republic of Türkiye"* used to convert the Turkish producers' average fibre cost per unit to RMB for the purposes of the SEF.[40]

3.2 The UK industry standing

32. The CCCME requests the TRA to kindly disclose the below-mentioned essential facts:

i. Whether the TRA undertook a standing exercise, and if it did, whether the other UK producers listed by the Applicant in the Application were contacted by the TRA. These are essential facts concerning the definition of the UK industry which forms the basis of the injury assessment;

ii. The total UK production calculated/estimated by the TRA. This essential fact underpinning the TRA's calculation of the total UK production is not provided in the SEF;

iii. The facts underlying the TRA's conclusion that the Applicant represented more than 50% of the overall UK production during the POI;

iv. The data concerning the estimated production of the other UK producers as well as the Applicant. The CCCME recalls that, in the Application, the Applicant itself disclosed its production in ranges so clearly there can be no defence of confidentiality of that data and elsewhere in the SEF[41] (and the PAD)[42] the TRA has disclosed the CRU data.

33. The CCCME recalls that, as noted by the Panel in *Ukraine – Ammonium Nitrate*, investigating authorities are required to disclose "*facts necessary to understand*

[39] Appellate Body Report, *Russia – Commercial Vehicles*, para. 5.218.
[40] SEF, para. 197.
[41] SEF, para. 85.
[42] PAD, p. 42, Table 7.

the basis of intermediate findings or analysis on which this determination is based."[43]

3.3 The total UK consumption

34. The CCCME requests the TRA to clarify the factual basis of the total UK consumption and how it was calculated. In particular, were the UK consumption figures based on the CRU data as noted in paragraph 85 of the SEF, or were they based on the "*HMRC import volumes of like goods from all countries and the domestic sales volumes provided by the UK industry*" as noted in paragraph 230 of the SEF. Without this factual clarification interested parties cannot understand the establishment of the UK OFC consumption noted in the SEF on the basis of which, the Chinese and domestic industry market shares were calculated and several injury findings were made.

35. It is recalled here that, as noted by the Appellate Body in *Russia – Commercial Vehicles*, "*in certain circumstances, knowledge of the data itself may not be sufficient to enable an interested party to properly defend itself, unless that party is also informed of the source of such data and how it was used by the investigating authority. Thus, knowing the* source *of data may be pivotal to the ability of an interested party to defend itself. In particular, knowing the source of information may enable the party to comment on the accuracy or reliability of the relevant information and allow it to propose alternative sources for that information. This may be particularly important in the circumstances where the investigating authority uses data that was not submitted by an interested party, but obtained from other sources*."[44]

3.4 The determination of injury and the injury margin calculation

36. The CCCME recalls that the TRA's conclusion of injury by the Chinese OFC imports is based on the volume and value effects of the Chinese imports into

[43] Panel Report, *Ukraine – Ammonium Nitrate*, para. 7.217.
[44] Appellate Body Report, *Russia – Commercial Vehicles*, para. 5.220.

the UK over the injury investigation period [“IIP”] and the data regarding the UK domestic industry. It is recalled here that as noted by the Panel in *China – Broiler Products*, “"*essential facts" are not simply the disclosure that a determination has been made, but rather the data that are the basis of the determination*.”[45]

37. In this regard, the CCCME, therefore, requests the TRA to disclose the below-mentioned essential facts:

i. The factual point as to which injury parameters or economic factors were assessed in fkm and ckm respectively;[46] and to the extent the data was calculated in ckm or kfm how the specific conversions were made from one unit of measurement to another, if at all;

ii. The HMRC import statistics used by the TRA to calculate the Chinese import volumes of OFC into the UK and the ratio of Chinese OFC imports in the total imports calculated per year of the IIP. The SEF provides this information only for the POI;[47]

iii. The average prices of the Chinese OFC imports per year in the IIP used for the price depression analysis and the price data underlying these average prices as also the data on any adjustments made to these prices for price comparability. In this context, it is deemed relevant to recall that the Appellate Body held in *China – GOES* that, “*[I]n the context of the second sentence of Article[] 3.2 …, we consider that the essential facts that investigating authorities need to disclose are those that are required to understand the basis for their price effects examination, leading to the decision whether or not to apply definitive measures, so that interested parties can defend their interests*.”[48] As further noted by the Panel in *China – X-Ray Equipment*, average unit values determined by an investigating authority and the price data underlying those average unit values, are factual in nature[49] and qualify as essential facts under consideration

[45] Panel Report, *China – Broiler Products*, para. 7.90
[46] See, for example, SEF paras. 63 and 262.
[47] SEF, paras. 88 and 222.
[48] Appellate Body Report, *China – GOES*, para. 242.
[49] Panel Report, *China – X-Ray Equipment*, para. 7.403.

which form the basis for the decision whether to apply definitive measures, and should be disclosed pursuant to Article 6.9:

"*We consider that the AUVs and underlying price data were essential to at least one of the determinations made by MOFCOM before it could decide whether to apply definitive measures, i.e. the determination that dumped imports had the effect of price undercutting and price suppression. The AUVs and underlying price data constituted the body of facts on which MOFCOM's determination of price effects was based. Since this body of facts was therefore required to understand the basis for MOFCOM's price effects analysis, we consider that it should have been disclosed by MOFCOM pursuant to Article 6.9*."[50]

In the present case, table 7 of the SEF does not provide the average prices of the Chinese OFC imports nor the price data underlying the indexed data. As the average Chinese OFC import prices are noted as being based on the HMRC data[51] which is non-confidential, there is no basis to treat such data as confidential. Furthermore, there is no information whatsoever on the actual price data used, and whether landed prices were used and whether any adjustments were made to make the Chinese prices comparable to the UK industry prices;

iv. The factual information as regards the representativity of the undercutting margin calculation. The SEF merely states that the comparable PCNs represented 78% of the total import volume and 89% of the import value of the UK sales of the overseas exporter.[52] The CCCME requests the TRA to provide the factual information regarding the percentage of sales in volume and value terms of the UK industry represented by the comparable PCNs. Without this basic factual information, interested parties cannot comment on the relevance of the undercutting and injury margin calculations. Moreover, it is only natural and fair that this information be disclosed for the domestic industry when such information has been disclosed in the SEF for the sole cooperating exporting producer. There

[50] *Ibid*., para. 7.404.
[51] SEF, para. 240, Table 7.
[52] SEF, para. 236.

can be no excuse for confidentiality in this regard. Moreover, as discussed elsewhere in this submission, as noted by the Appellate Body in *Russia – Commercial Vehicles*, "*[t]he treatment of information as confidential under Article 6.5 does not absolve the investigating authority from its obligation to disclose essential facts as required under Article 6.9.*";[53]

v. The average OFC sales prices of the domestic industry in ranges and any adjustments made and the quantum thereof, for the purpose of the price undercutting and price depression assessments. While no information has been provided in the context of price depression, in the context of price undercutting the SEF presently merely states that "*to ensure price comparability, we adjusted where needed*."[54] To recall, as noted by the Appellate Body, a "*narrative description*" does not constitute sufficient disclosure of essential facts;[55]

vi. The sales volumes of the other UK producers as a market share has been calculated for these producers in table 10 of the SEF; and the market share data in percentages as that was also calculated by the domestic industry and disclosed in the Application, implying that there is no need for the confidential treatment of this data;

vii. The domestic industry's correct production data and clarification as regards the conflicting data for the domestic industry's production between tables 5 and 14 of the SEF. As noted most recently by the Panel in *China – Stainless Steel Products from Japan,* "*under the terms of Article 6.9, essential facts must be disclosed in a coherent way so as to permit an interested party to understand the basis for an investigating authority's decision*."[56] As the table below shows, the indexation of the domestic industry's production/output differs in different tables of the SEF. The CCCME requests the TRA to provide the production data in ranges as that was also disclosed by the Applicant on page 143 of the Application. Thus, there can be no problem of confidentiality in this regard.

	2018	**2019**	**2020**	**POI**

[53] Appellate Body Report, *Russia – Commercial Vehicles*, para. 5.183.
[54] SEF, para. 235.
[55] Appellate Body Reports, *China – HP-SSST (Japan)* and *China – HP-SSST (EU)*, para. 5.133.
[56] Panel Report, *China – Stainless Steel Products from Japan*, para. 7.357.

Table 5 of the SEF	100	92	84	93
Table 14 of the SEF	100	68	72	92

viii. The domestic industry's unit production costs over the IIP in ranges, as this data is the factual basis for the injury margin calculation and essentially the findings concerning profitability, among other factors;

ix. The data in ranges for all the economic indicators of the domestic industry including the sales volumes, sales value, market share, employment, wages, productivity, return on investments, cash flow, production capacity, capacity utilization and profit margin. These data have been disclosed by the Applicant in the Application in ranges. Therefore, clearly, the Applicant itself agrees to the provision of ranges and the TRA cannot unilaterally grant more confidentiality to the data than requested by the Applicant; and

x. The unit import prices of the third country imports and how they were calculated considering that this factual information is the basis of the TRA's finding that third country imports did not break the causal link between the Chinese OFC imports and the injury to the domestic industry.[57]

4 Request for additional information with respect to the PAD

38. With regard to the PAD, the CCCME recalls that Article 12.2 of the ADA provides in the relevant part that, a "*[p]ublic notice shall be given of any preliminary … determination"* and *"**[e]**ach 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.*"

39. Article 12.2.1 of the ADA further provides that a public notice of the imposition of provisional measures *"shall set forth, or otherwise make available through a separate report, sufficiently detailed explanations for the preliminary*

[57] SEF, Section G7.1.

determinations on dumping and injury and shall refer to the matters of fact and law which have led to arguments being accepted or rejected." It also specifies that the public notice should provide, among others "[t]he margins of dumping established and a full explanation of the reasons for the methodology used in the establishment and comparison of the export price and the normal value under Article 2", the "*considerations relevant to the injury determination as set out in Article 3*", and "*the main reasons leading to the determination*."

40. Thus, Articles 12.2 and 12.2.1 of the ADA require detailed explanations and reasoning regarding the findings and conclusions reached and on matters of fact and law considered by the TRA. To avoid repetition, the information indicated in section 3 above to the extent considered in the PAD is also not disclosed in the PAD, Thus, the PAD is inconsistent with Articles 12.2 and 12.2.1 of the ADA in that regard.

41. Furthermore, as noted by the Panel in *EC – Tube or Pipe Fittings*, the ADA, a ""*material" issue is an issue that has arisen in the course of the investigation that must necessarily be resolved in order for the investigating authorities to be able to reach their determination*."[58] There are several material issues that have arisen in the present investigation and on which the PDA simply lacks information.

42. In this regard, the CCCME requests the TRA to provide reasoned and adequate explanations and all relevant information on the matters of fact and law and reasons for its decision concerning the existence of a PMS for the OFC industry. The PDA simply refers to country-wide assessments[59] and does not provide any detail, let alone sufficient details or explanations, as regards PMS in the OFC industry. The CCCME notes that the Panel in *China – HP-SSST (Japan) / China – HP-SSST (EU)* held that "*[w]hile the sufficiency of the detail of the description may depend on the precise nature of the findings made by the investigating authority, it should in any event be sufficient to ensure that the investigating*

[58] Panel Report, *EC – Tube or Pipe Fittings*, para. 7.424.
[59] PAD, Section G2.

authority's reasons for concluding as it did can be discerned and understood by the public."[60]

43. The non-disclosure or provision of the information in the PAD as requested by the CCCME above, which concerns issues of fact and law considered material by the TRA, would be inconsistent with Articles 6.2 and 6.4 of the ADA. Indeed, the CCCME is explicitly requesting the relevant information for the defence of its interests and there is no other report providing additional information on the TRA's provisional determination.

5 Conclusions

44. The CCCME trusts that the TRA will make available the essential facts and information requested at the earliest and extend the deadline for submitting comments on the SEF and PAD accordingly.

[60] Panel Report, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 7.270.