

AD0021 and AS0022

ANTI-DUMPING AND ANTI-SUBSIDY INVESTIGATIONS CONCERNING
IMPORTS OF OPTICAL FIBRE CABLES
ORIGINATING IN
THE PEOPLE'S REPUBLIC OF CHINA

Comments by the
China Chamber of Commerce for Import and Export of Machinery and Electronic Products

18 July 2023

OPEN

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1 INTRODUCTION

1. The China Chamber of Commerce for Import and Export of Machinery and Electronic Products ("CCCME") refers to the Provisional Affirmative Determination ("PAD"), and the Statement of Essential Facts ("SEF") issued by UK Trade Remedies Authority ("TRA") in the context of the anti-dumping ("AD") investigation and the SEF issued in the anti-subsidy ("AS") investigation respectively concerning imports of single-mode optical fibre cables ("OFC") originating in the People's Republic of China ("China"). The SEF relating to the AD investigation ("AD SEF") was published on 9 June 2023,¹ and the SEF concerning the AS investigation ("AS SEF") was published on 20 June 2023.
2. We also refer to the TRA's email of 27 June 2023 whereby the CCCME was granted an extension to submit comments on the AD and AS SEF, and the AD PAD until 18 July 2023. The CCCME thanks the TRA for the extension granted but considers that it has not been provided adequate time to respond to the three documents. The present submission provides the CCCME's comments on the AD SEF and the AS SEF as also on the AD PAD to the extent possible.
3. As explained below, the CCCME (i) disagrees with the TRA's findings of injurious dumping and injurious subsidisation, and (ii) submits that the proposed AD and AS measures are inconsistent with the requirements of Schedule 4 of the UK Taxation (Cross-Border Trade) Act 2018 ("the Act"), the UK Trade Remedies (Dumping and Subsidisation) (EU Exit) Regulations 2019 ("basic Regulations"), the WTO Anti-Dumping Agreement ("ADA"), and the WTO Agreement on Subsidies and Countervailing Measures ("SCM Agreement").
4. For the sake of completeness and to avoid repetition, the present submission incorporates the initial comments submitted by the CCCME on 5 August 2022 ("Initial Comments"), the additional comments submitted on 19 May 2023 ("Additional Comments"), and the request for further information submitted on 26 June 2023 ("Request for Information").

¹ An updated version of the AD SEF was published on 12 June 2023.

2 PROCEDURAL ISSUES

2.1 Violation of Articles 6.2, 6.4, 6.9 ADA and Articles 12.3 and 12.8 SCM Agreement for failure to disclose all essential facts which formed the basis of the TRA's decision to recommend the imposition of definitive measures

5. To avoid repetition, the CCCME incorporates by reference its comments regarding the insufficient and incomplete disclosure of essential facts by the TRA, as stated in the CCCME's Request for Information submission of 26 June 2023.² The very limited clarification provided by the TRA on 30 June 2023 in response to the CCCME's request does not resolve the fundamental problem being faced by the CCCME, *i.e.*, the lack of disclosure of essential facts underlying the TRA's determination and the inability of the CCCME to comment on the AD and AS SEF.³ The TRA's statement that much of the information requested will be provided in the published determinations does not rectify the failure to comply with Article 6.9 ADA and Article 12.8 SCM Agreement as these provisions require the disclosure of the essential facts "*before a final determination is made*" not afterwards. Moreover, the second sentence of Article 6.9 makes clear that the disclosure of essential facts must be in sufficient time to allow parties to defend their interests.⁴
6. Clearly the TRA's failure to disclose the essential facts notwithstanding the detailed request by the CCCME has precluded the CCCME from exercising its right of defence in violation of Articles 6.2 and 6.4 ADA and Article 12.3 SCM Agreement.

3 WTO-INCONSISTENT FINDINGS OF A PARTICULAR MARKET SITUATION AND CONSTRUCTION OF THE NORMAL VALUE

3.1 The TRA's finding of a particular market situation is not based on evidence

7. The TRA has essentially relied on facts available to find the existence of a PMS⁵ for the OFC domestic market and based on this erroneous finding, constructed the normal value with adjustments for the fibre costs of the SDG Group.

² Request for Information, Section 3.

³ The injury determination is common to the AD and AS SEF.

⁴ Panel Report, *EC – Salmon (Norway)*, para. 7.799.

⁵ AD SEF, para. 114.

8. As confirmed by several WTO reports, in the application of facts available, the "*alternative facts*" used by the investigating authorities (i) must "*reasonably replace*" the allegedly missing information,⁶ and (ii) must be correct information, as the authorities are required to reach an "*accurate*" determination.⁷
9. While the AD SEF fails to disclose the essential facts underpinning the TRA's finding of a PMS in violation of Article 6.9 ADA, it makes clear that the supposed facts relied upon by the TRA are neither accurate nor correct. Furthermore, the TRA's conclusion of a PMS seems to be based on mere assumptions or on general policies, some of which are no longer in place. To recall, every determination by an authority has to be based on "*facts ... and not mere inferences*".⁸ When applying facts available, an authority is not at liberty to "*assume a lot from very little*".⁹
10. Against this background, as discussed below, (i) there is basically no evidence – let alone positive evidence – of the existence of a PMS for OFC in the domestic market, and (ii) to the extent that there is evidence, it points in the opposite direction: *i.e.*, it shows that there is no PMS affecting OFC domestic market costs and prices.

3.1.1 Findings of PMS based on assumptions and unrelated and obsolete policies

11. The TRA's findings of a PMS are based on supposed government support to OFC producers and supposed state influence and control over OFC producers. However, these findings are not based on facts and positive evidence.
12. First, the AD SEF erroneously relies on general infrastructure/public policy laws/regulations as a basis for finding PMS. For instance, the SEF states that government support comes in "*through broadband strategies such as "Dual Gigabit"*".¹⁰ However, the Dual Gigabit strategy

⁶ Panel Report, *US – Anti-Dumping and Countervailing Duties (Korea)*, para. 7.41. See also: Appellate Body Report, *US – Carbon Steel (India)*, para. 4.416, citing Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 294; and Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.178.

⁷ Appellate Body Report, *US – Carbon Steel (India)*, para. 4.416, citing Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 294; and Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.178.

⁸ Panel Report, *EC – Countervailing Measures on DRAM Chips*, para. 7.80.

⁹ Panel Report, *EC – Countervailing Measures on DRAM Chips*, para. 7.109.

¹⁰ AD SEF, para. 116.

is simply an infrastructure development plan and is not indicative of government support to the OFC industry in any manner. In fact, it is similar to the UK's Project Gigabit plan.¹¹

13. Likewise, the TRA also appears to rely on the 2013 Broadband China Strategy as evidence to support its findings that (i) *"there is evidence that OFC companies within the PRC received substantial state support in a variety of forms,"* and (ii) *"government support affects OFC producers' costs of production and contributes to the prices associated with such costs reflecting non-commercial factors."*¹²
14. However, the 2013 Broadband China Strategy is a non-binding document setting out general infrastructure development goals like the UK's targets for broadband and 5G expansion. In any event, as also admitted by the TRA, *"the goals of this strategy document culminated in 2020."*¹³ This document, therefore, is not evidence, let alone positive evidence, to support a finding of a PMS for OFC in the domestic market.
15. Second, the TRA itself acknowledges that the policies in question *"are generally phrased in terms of aims and ambitions for the GOC rather than explicit actions"*.¹⁴ However, it then asserts that *"they form the basis of government support in the PRC"*, without adducing any evidence in support of this assertion.¹⁵ The contradiction is stark and puzzling: indeed, how can policies that do not envisage any *"explicit action"* result (concretely) in any *"government support"*? The CCCME would like to emphasise that there is nothing *"distinct, individual, single, specific"* about the situation of the OFC industry or producers in China, for it to be classified as a PMS.¹⁶
16. Similarly, the statement that all administrative units in China *"have the power to issue subsidies and other support programs on an ad hoc basis as they see fit to meet the targets outlined in the industrial and other political plans"* lacks evidentiary basis.¹⁷

¹¹ UK Department for Science, Innovation & Technology, "Policy paper: Project Gigabit Winter Update 2022 to 2023" (27 February 2023), available at <www.gov.uk/government/publications/project-gigabit-delivery-plan-winter-update-2022-to-2023/project-gigabit-winter-update-2022-to-2023#ministerial-foreword>.

¹² AD SEF, para. 122.

¹³ AD SEF, para. 119.

¹⁴ AD SEF, para. 117.

¹⁵ AD SEF, para. 117.

¹⁶ Panel Report, *Australia – Anti-Dumping Measures on Paper*, para. 7.22.

¹⁷ AD SEF, para. 120.

17. Moreover, even if the TRA's analysis were to be considered, *quod non*, there is nothing connecting it to the OFC industry. The TRA's statement that "*OFCs are listed in numerous catalogues issued by the GOC, including the Catalogue of Industries for Foreign Investment Guidance 2017 and the Catalogue of Guidance for Industrial Structure Adjustment Guidance 2019*" evidences that OFC producers receive state support¹⁸ is simply an inadequate basis for a finding of state support allegedly affecting OFC producers' prices and costs. There is simply no link between the GOC policies discussed by the TRA and the OFC sectors and the OFC producers' costs and prices. The CCCME notes that the ADA, particularly, the text of Article 5.2 makes a clear difference between evidence and assertions in stating that "*simple assertion, unsubstantiated by relevant evidence*" is insufficient to meet the requirements of that provision. Thus, the "evidence" for a determination on a specific issue, *i.e.*, a PMS for OFC in the domestic market, needs to be more than mere assertions and statements and needs to include material information and data establishing the factual issue.¹⁹ Evidence must have probative value,²⁰ and be related to the specific aspect, *i.e.*, a PMS and particularly for the OFC domestic market.
18. Third, the TRA's finding that "*[g]overnment influence and control has led to the production of OFCs being dictated by industrial strategy*" is also completely unsubstantiated.²¹
19. That finding rests entirely on (i) "*evidence that the GOC has a controlling stake in at least two of the overseas exporters within the PRC*", and (ii) the unproven assertion that the GOC would also influence "*the other side of the competitive market with its influence on purchasing OFC*".²²
20. To begin with, the TRA has not provided any evidence that the GOC's supposed shareholding in YOFC and SDGI make them state-controlled and state-influenced, *i.e.*, the effect of shareholding and ownership in terms of state control has not been established. With respect to SDGI, other than looking at state ownership, the TRA has not addressed or established whether state ownership affected its activities and operations, particularly concerning OFC, *i.e.*, the TRA did not assess whether the GOC in fact exercised control over SDGI and its conduct. The TRA simply assumed that "*the GOC would have influence and control over company decisions*".²³

¹⁸ AD SEF, para. 121.

¹⁹ Panel Report, *Pakistan – BOPP Film (UAE)*, para. 7.19.

²⁰ Panel Report, *Morocco – Definitive AD Measures on Exercise Books (Tunisia)*, para. 7.352.

²¹ AD SEF, para. 130.

²² AD SEF, paras. 123 and 128.

²³ AD SEF, para. 124.

The choice of the TRA's words that the GOC would have influence is also reflective of the fact that the TRA did not have any actual evidence.

21. With regard to YOFC, it is recalled that the Applicant's group company DrakaComteq B.V. has a 23.73%²⁴ shareholding in YOFC, *i.e.*, equivalent to the shareholding of China Huaxin Posts and Telecom Technologies Co. Ltd. which the TRA considers as the GOC's shareholding. Moreover, according to YOFC's annual report, YOFC sells OFC to members of the Prysmian Group.²⁵ Even in the context of YOFC, the TRA has made presumptive statements but not based itself on any evidence of actual control of the GOC shareholders on YOFC's operations, conduct and activities. Indeed, as confirmed by WTO case law, in AS cases, government ownership is not evidence of meaningful control by the government over an entity²⁶ or of entrustment or direction. Indeed, with regard to private entities, notwithstanding governmental ownership, there must be "*evidence of an affirmative act of delegation or command before a finding of entrustment or direction may be made*".²⁷ As in the case of AS investigations, to consider that the GOC "*influences*" a private entity, the TRA is required to demonstrate "*evidence of entrustment and direction*", which – as held by the Panel in *US – Countervailing Duty Investigation on DRAMs* – "*must in all cases be probative and compelling*".²⁸ Government influence cannot be assumed to exist.
22. Moreover, even if the GOC has shares in two OFC producers that are exporting OFC, this is not evidence of control or influence by the GOC over all OFC producers such that the whole OFC sector's costs and prices would be influenced by non-commercial factors thereby reflective of a PMS. Thus, there are several legal and factual gaps in the TRA's analysis.
23. As regards ZTT, once again, the TRA assumes the existence of state influence merely because ZTT made a press statement. This is insufficient to conclude that ZTT is under government control.
24. Next, the TRA mentions the market analysis provided by the CRU's "Telecom Cables Market Outlook 2021" as evidence of its finding of "*state influence*".²⁹ However, no confidential

²⁴ Yangtze Optical Fibre and Cable Joint Stock Ltd, Annual Report 2021, p. 136, available at <<https://www1.hkexnews.hk/listedco/listconews/sehk/2022/0428/2022042800706.pdf>>.

²⁵ *Ibid*, p. 93.

²⁶ Appellate Body Report, *US – Carbon Steel (India)*, paras. 4.36-4.43.

²⁷ Panel Report, *Korea – Commercial Vehicles*, para. 7.406.

²⁸ Panel Report, *US – Countervailing Duty Investigation on DRAMs*, para. 7.35. [Emphasis added]

²⁹ AD SEF, paras. 123 and 127.

summary of the information/data from that report relied upon by the TRA has been provided to interested parties and no comments can be made on the supposed evidence in that document. Aside from a violation of Articles 6.9 and 6.5.1 ADA and Regulation 45(6)(a) basic Regulations, the failure to provide such a summary implies that the CCCME cannot adequately exercise its rights of defence because it is prevented from challenging the factual information upon which the TRA reached its findings.³⁰

25. Furthermore, the TRA's finding that "*[n]ot only does the GOC influence the OFC manufacturers but also the other side of the competitive market with its influence on purchasing OFC*"³¹ is pure conjecture and is not supported by facts. That the major buyers of OFC in China, according to the CRU's report, are SOEs is again an inadequate evidentiary basis to find government control on OFC sales prices in China. In fact, even in the EU,³² the majority of the buyers of OFC are telecom companies with state shareholding, such as Deutsche Telekom. In 2022, the German government had a 30.5% stake in Deutsche Telekom.³³ If the TRA's approach were to be applied, Deutsche Telekom is state-owned/controlled/influenced and is buying OFC at state-influenced prices.
26. Added to the above, a finding of state influence on OFC sales prices cannot be made in the absence of OFC sales price data. However, the TRA did not assess any pricing data on the Chinese OFC market. Added to this, the TRA simply relied on a historical 2019 tender of China Mobile without information on the type and quantum of OFC supplied, the prices and conditions attached to the supply and the supplier(s) involved among other key factors to make any reasoned assessment. The CCCME recalls that, when relying on facts available, investigating authorities cannot base their findings on adverse and baseless inferences.³⁴
27. Thus, in sum, the TRA has not established on the basis of evidence that (i) "*[g]overnment influence and control has led to the production of OFC being dictated by industrial strategy*", (ii) that "*OFC companies within the PRC received substantial state support in a variety of forms*";

³⁰ Panel Report, *Argentina – Ceramic Tiles*, para. 6.39.

³¹ AD SEF, para.128.

³² Commission Implementing Regulation (EU) 2022/72 of 18 January 2022 imposing definitive countervailing duties on imports of optical fibre cables originating in the People's Republic of China and amending Implementing Regulation (EU) 2021/2011 imposing a definitive anti-dumping duty on imports of optical fibre cables originating in the People's Republic of China, recital (668).

³³ Deutsche Telekom, 2022 Annual Report, p. 23., available at <<https://report.telekom.com/annual-report-2022/assets/downloads/entire-dtag-ar22.pdf>>.

³⁴ Panel Report, *EC – Countervailing measures on DRAMs Chips*, para. 7.80.

and (iii) "government support affects OFC producers' costs of production and contributes to the prices associated with such costs reflecting non-commercial factors."³⁵

3.1.2 Excessive reliance on the findings of the European Commission

28. The assessment of a PMS in the SEF, particularly that (i) "*the land market in the PRC reflects non-commercial factors*,"³⁶ and (ii) "*optical fibre costs are subject to non-commercial factors*,"³⁷ are based on old findings of the European Commission ("Commission") that were made on the basis of adverse inferences and that too for unrelated products.
29. In fact, the TRA's finding that the land market in China reflects non-commercial factors is entirely based on the Commission's historical AD investigations concerning imports of (i) certain organic coated steel products from China pertaining to 2013, (ii) certain filament glass fibre products from China completed in 2014, and (iii) aspartame from China completed in 2016. The most recent of these investigations was, therefore, concluded in 2016 and the oldest was concluded as far back as 10 years ago, in 2013. The TRA has not even mentioned, let alone established, how the findings in those cases relate to the POI.
30. Additionally, these investigations concerned completely different products. The conclusions reached by the Commission in those investigations are, therefore, totally irrelevant for the purposes of the present proceedings, which concern a different product and entirely different factual and legal circumstances. Indeed, all the above investigations concern different markets and different products that have no connection with the product under consideration. Moreover, all the findings of the Commission in those cases were based on adverse inferences.
31. The TRA cannot replace its investigation and the evidence it must gather by simply referring to the findings of the Commission.
32. It is for the TRA to determine, on the basis of positive evidence and through an objective examination, the existence of a PMS pursuant to Regulation 7(4) basic Regulations and Article 2.2 ADA. Mere references to old, irrelevant EU investigations cannot substitute the requirement imposed on the TRA to make determinations based on positive evidence.

³⁵ AD SEF, paras. 130 and 122.

³⁶ AD SEF, para. 136.

³⁷ AD SEF, para. 172.

33. As regards the alleged distortion of costs of raw materials found by the TRA, the SEF does not even mention *which* raw materials were investigated and were allegedly found to be distorted.
34. Additionally, the TRA's reliance on the Commission's Working Document on Significant Distortions in the Chinese Economy ("EC Working Document") is misplaced.³⁸ Aside from the various analytical and methodological problems in the EC Working Document, the latter is an erroneous and historical view of certain Chinese policies, market conditions and supposed government intervention in certain sectors and only reflects the result-oriented and cherry-picked information considered by the Commission. Moreover, that document is based on decades-old information. The EC Working Document does not even contain any discussion of the OFC sector. It cannot be concluded on the basis of such a document that all inputs used in the production of OFC and OFC sales prices in China are influenced by non-commercial factors as the TRA states.
35. Likewise, the reliance on the general, countrywide "*Made in China 2025*" plan and the "*Internet Plus*" strategy is irrelevant and does not support the finding of distortion of OFC raw material costs.

3.1.3 Findings of PMS is contradicted by evidence available to the TRA

36. The TRA's assumptions underpinning the finding of a PMS are also contradicted by the data submitted by the SDG Group and TRA's own finding in the AD investigation concerning *Aluminium Extrusions* (investigation No. AD0012). This is particularly relevant in the context of the TRA's findings concerning bank loans, and the labour and energy costs reflecting alleged non-commercial factors.
37. The CCCME recalls that, in applying facts available, an authority must "*take into account all substantiated facts on the record*".³⁹ All facts that are properly before an authority must be considered when it selects the appropriate replacement facts.⁴⁰ Thus, an authority cannot

³⁸ AD SEF, para. 168.

³⁹ Appellate Body Report, *US – Carbon Steel (India)*, para. 4.419. See also: Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.178 and Appellate Body Report, *US – Anti-Dumping Methodologies (China)*, para. 5.172.

⁴⁰ Panel Report, *US – Anti-Dumping and Countervailing Duties (Korea)*, para. 7.302.

"ignore" any "relevant and available information" or "improperly close[] its eyes to information before it".⁴¹

38. Against this background, as regards the provision of bank loans, in the OFC investigation, *"the TRA determined that there is evidence that loan interest rates reflect non-commercial factors."*⁴² However, the legal and evidentiary bases of this determination are absent in the SEF. The mere reliance on the EC Working Document and a few general documents does not establish the existence of non-commercial factors. In fact, the SDG Group refuted the UK industry's allegation that the loan market in China reflects non-commercial factors, and explained that (i) the cited governmental policies have no legal effect,⁴³ and (ii) the SDG Group did not have any knowledge of interest rates being influenced by non-market forces.⁴⁴ In response, the TRA contends that (i) *"if government policies offer guidance that may not be adhered to in particular instances, this does not mean that this guidance does not end up distorting the market in general,"*⁴⁵ and (ii) *"the fact that SDG were unaware of distortions, does not mean that they do not exist."*⁴⁶ However, the TRA's response cannot substitute evidence and does not prove the existence of alleged non-commercial factors. Indeed, it is the TRA's responsibility to prove that such distortions exist; it is not sufficient to claim that SDG did not prove the absence of non-commercial factors.
39. The TRA does not provide any factual basis for its conclusion that the GOC's policies would supposedly *"distort the market in general"*. This is indeed pure speculation and not based on any factual evidence.
40. In this connection, the CCCME again recalls that the burden is on the TRA to *establish*, based on positive evidence, that there is a PMS for OFC in the domestic market; it cannot *assume* that a PMS exists merely on the basis that there is no evidence to the contrary. To expect interested parties to prove a negative (*i.e.*, that the GOC's policies and guidance *do not* affect/influence OFC costs and prices) would imply a reversal of the burden of proof – a practice that the Appellate Body has strongly condemned.⁴⁷

⁴¹ Panel Report, *US – Supercalendered Paper*, paras. 7.182-7.185.

⁴² AD SEF, para. 145.

⁴³ AD SEF, para. 143.

⁴⁴ AD SEF, para. 144.

⁴⁵ AD SEF, para. 143.

⁴⁶ AD SEF, para. 144.

⁴⁷ See for example: Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 352.

41. Moreover, the TRA's subsequent finding of the low materiality of the loans in contributing to SG&A also reflects that even if there were non-commercial factors at play, *quod non*, they had no impact on the production and sales of OFC by the exporting producers and therefore, cannot be evidence of a PMS.
42. As regards the alleged distortion of labour costs, the TRA's final determination in the *Aluminium Extrusions* investigation provides completely opposite findings even though the same country-wide situation is under consideration (as the TRA did not make a sectoral analysis). In *Aluminium Extrusions*, the TRA determined as follows:

*"The TRA assessed relevant legislation including the Labour Law of the PRC. We did not identify any evidence to suggest that employers in the relevant market do not act as independent entities when hiring and dismissing employees. During verification of the sampled overseas exporters we did not identify any evidence to suggest that government influence had led to the hiring or dismissal of employees for those companies. The TRA did not identify any evidence to suggest the cost of labour was distorted in the relevant market. Minimum wage requirements are set out in the Labour Law of the PRC, and there is evidence of an increase in annual wages in manufacturing during the POI. The TRA determined that whilst the Trade Union Law of the PRC permits the existence of trade unions, these cannot operate independently and do not permit strike action. Although this is the case, there have been incidences of strike action occurring in the manufacturing industry for metallic products within the PRC. We have therefore determined that we do not have evidence to demonstrate that the Trade Union Laws impact labour costs or the final price of the Goods Concerned."*⁴⁸ [Footnotes omitted]

43. In the OFC investigation, however, the TRA has reached the opposite conclusions in Section F3.6 of the AD SEF, despite having relied on the same sources for the same countrywide analysis as in the *Aluminium Extrusions* investigation. This inconsistent approach reveals a lack of objectivity and reasonableness.
44. That said, looking at the assessment of the TRA, first, the SEF acknowledges that the historical *hukou* registration system, which separated the population into agricultural and non-agricultural workers, was reformed in 2020.⁴⁹ The SEF also acknowledges that "*there does not appear to be any publicly available research after the 2020 reforms*".⁵⁰ However, it then asserts that "*even with recent reforms, the same structure still applies*" without adducing any proof or basis for

⁴⁸ TRA, Final Determination, Case AD0012 Investigation into alleged dumping of aluminium extrusions from the People's Republic of China, paras. 149-151.

⁴⁹ AD SEF, paras. 156-157.

⁵⁰ AD SEF, para. 158.

such an assertion.⁵¹ The contradiction here is again stark in that while for loans, governmental policies and guidance are treated as binding laws by the TRA, for labour, the legal reform is considered irrelevant.

45. Second, the TRA assumes that there would be a difference in pay between agricultural and non-agricultural workers on the basis of documents "*from 2013-2015*".⁵² Clearly, such old documents do not – and cannot – constitute positive evidence of a situation that does not exist anymore. In *Aluminium Extrusions*, the TRA had correctly found that Article 48 of the Chinese Labour Law sets out minimum wage requirements for all kinds of workers. But in the present case the TRA contradicts its own previous finding without providing any evidence, explanation, or reasoning.
46. Third, the TRA dismissed the SGD Group's submission that its workers have the right to participate in labour unions and can stage activities on the basis that, in China, trade unions cannot act independently and have no express right to strike. However, in the *Aluminium Extrusions* case, the TRA had correctly concluded that there was no evidence "*to demonstrate that the Trade Union Laws impact labour costs*".⁵³ In the present case, the TRA assumes that the law itself constitutes evidence for the finding that labour costs "*within the domestic OFC market in the PRC*" would be subject to non-commercial factors.⁵⁴
47. Fourth, without prejudice to the above, the TRA did not find labour costs of the SDG group to be below the selected benchmark, yet it concluded that the Chinese labour market is distorted and there is a PMS for OFC. Clearly, deductive reasoning and assumptions in the SEF which are controverted by evidence on the record cannot form the basis of a finding of a PMS.
48. Finally, regarding energy costs, the TRA found that "*the SDG Group's energy costs did not appear to be artificially low in comparison to the selected benchmark*".⁵⁵ This again proves that there was no evidentiary basis for the finding that energy prices reflect non-commercial factors.

⁵¹ AD SEF, para. 158.

⁵² AD SEF, para. 158.

⁵³ TRA, Final Determination, Case AD0012 Investigation into alleged dumping of aluminium extrusions from the People's Republic of China, para. 151.

⁵⁴ AD SEF, paras. 161-162.

⁵⁵ AD SEF, para. 194.

49. Indeed, the SEF also acknowledges that "[e]vidence provided during the investigation indicates that [...] free market conditions should [...] prevail within the energy sector of the PRC,"⁵⁶ yet, the TRA erroneously held that energy prices reflect non-commercial factors.

3.1.4 Interim conclusion

50. For the reasons given above, the CCCME respectfully submits that the TRA's finding of a PMS seems to be based on assertions and not supported by positive evidence. Furthermore, the TRA's finding is contradicted by the evidence on the record of this case and the TRA's own findings in the recent AD *Aluminium Extrusions* investigation. Accordingly, the CCCME respectfully requests the TRA to review and modify its findings in that there was no PMS for OFC in the domestic market.

3.2 Even if there was a PMS, *quod non*, this would not prevent a proper comparison between the normal value and export price

51. In order to disregard domestic sales for the determination of the normal value on account of the existence of a "*particular market situation*", an investigating authority has not only to demonstrate the existence of a PMS, but it must also prove that a PMS "*do[es] not permit a proper comparison*" between the normal value and export prices. Indeed, as per Regulation 7(2)(b) of the basic Regulations and Article 2.2 ADA, an investigating authority has to demonstrate that the inability to conduct a "*proper comparison*" between home- and foreign-prices is "*because of*" the existence of a PMS. This was expressly noted by the WTO Panel in *Australia – Anti-Dumping Measures on Paper*⁵⁷ and by the GATT Panel in *EEC – Cotton Yarn*.⁵⁸ Particularly, in *Australia – Anti-Dumping Measures on Paper*, the Panel held that:

*"While the proper comparison in Article 2.2 refers to the comparison between the domestic and export prices, a purely numerical comparison between the two prices may not reveal anything about whether the domestic price can be properly compared with the export price. Rather, it is necessary to conduct a **qualitative comparison** of the domestic and export **prices**. The phrase "**because of** the particular market situation" makes clear that the qualitative assessment of whether the domestic and export prices can be properly compared **should focus on how the particular market situation affects that comparison**. We therefore consider that the "*proper comparison*" language calls for an assessment of the relative effect of the particular market situation on domestic and*

⁵⁶ AD SEF, para. 150.

⁵⁷ Panel Report, *Australia – Anti-Dumping Measures on Paper*, paras. 7.63-7.73.

⁵⁸ GATT Panel Report, *EEC – Cotton Yarn*, paras. 478-479.

export prices. We understand that, in certain circumstances, as a result of this assessment, the investigating authority may conclude that the particular market situation has no effect on the export prices."⁵⁹ [Emphasis added]

52. However, in the OFC investigation, the TRA has simply omitted this step of the legal analysis requiring an assessment of how the PMS affected that price comparison.
53. The SEF essentially focuses on the alleged differences in "*conditions of competition*" between the UK and Chinese OFC market.⁶⁰ Apart from being irrelevant, this assessment is flawed.
54. First, the situation of the UK market is irrelevant to the issue of a PMS in China. Rather, what is relevant, is the domestic market: *i.e. (only) the Chinese market*, as also confirmed by the Panel in *Australia – Anti-Dumping Measures on Paper*. The Panel in that case held that "*the word 'market' in 'the particular market situation' refers to the 'market of the exporting country', i.e. the domestic market.*"⁶¹
55. Second, without prejudice to the fact that the UK market is irrelevant for a PMS finding, no two markets are alike. Thus, if the standard to demonstrate an impossibility to compare normal value and export prices in the country of origin could rest only on the identification of any difference in competitive conditions between the exporting country and third country markets, Article 2.2 ADA would be rendered inutile, and an investigating authority could satisfy this step with respect to just about any product by comparing it to any random market.
56. In any case, there are bound to be differences in competitive conditions between two markets. Moreover, the TRA also overlooks that the UK also subsidises electricity and provides cheap loans to OFC producers (including to the Applicant, whose monopolistic position and anti-competitive behaviour is well-documented). Moreover, while the TRA emphasises the "*relatively large amount of competition through imports*" in the UK market, it fails to adequately capture or give weight to the fact that the number of producers in the Chinese market is much more compared to the UK, where, according to the SEF, there is only one producer, *i.e.*, the Applicant.
57. In any event, as noted above, the question is not whether there are, *quod non*, differences in the conditions of competition between the UK and Chinese OFC markets, rather, the issue is about

⁵⁹ Panel Report, *Australia – Anti-Dumping Measures on Paper*, para. 7.75.

⁶⁰ AD SEF, paras. 103-104.

⁶¹ Panel Report, *Australia – Anti-Dumping Measures on Paper*, para. 7.38. [Emphasis added]

a proper price comparison in the country of origin. As noted by the Panel in *Australia – Anti-Dumping Measures on Paper*:

*"Turning to the assessment of whether "a proper comparison" is not permitted because of the particular market situation, we note that the focus of the analysis is on whether the effect of the particular market situation is such that a proper comparison between domestic sales **prices** and export **prices** under examination is not permitted. In other words, the investigating authority must examine the domestic sales in order to determine whether a proper **comparison between the two prices** is permitted in spite of the effect of the particular market situation. The point is to determine if there is a **comparable domestic price** (i.e. if there is "the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country" in the sense of GATT 1994 Article VI:1(b) and Article 2.1 of the Anti-Dumping Agreement)." ⁶² [Emphasis added]*

58. This assessment is necessarily "*fact-specific*" and needs to be made on a case-by-case basis in order to ascertain "the effect of particular market situation on the domestic **price** in relation to the effect on the export **price**, if any." ⁶³
59. In the OFC investigation, the TRA did not undertake such an analysis and did not establish this legal step as a result of which the construction of the normal value in the present case is inconsistent with Article 2.2 ADA. Indeed, a similar approach adopted by Australia and at issue in *Australia – Anti-Dumping Measures on Paper* was found to be WTO inconsistent by the Panel:

*"We find that Australia did not examine whether domestic sales permitted a **proper comparison between** the domestic **prices** found to be affected by the decreased cost of pulp with the export **prices** for which the pulp cost was presumably equally decreased, despite assertions in the underlying proceeding which called for such an examination. In reviewing the ADC's determination, we are not to conduct a de novo review of the evidence, nor substitute our judgment for that of the investigating authority. As such, we make no determination whether the domestic sales permitted a proper comparison of the domestic prices and the export prices. Rather, we conclude that the ADC was obligated to undertake the **necessary additional examination** to determine whether, **because of** the particular market situation, the domestic sales of the individual exporters do not permit a proper comparison of the domestic **prices** and the export **prices**." ⁶⁴ [Emphasis added]*

60. Third, the TRA's assessment does not match (much less support) its eventual conclusion. For example, the TRA found that the raw material cost issue impacts both domestic and export sales

⁶² Panel Report, *Australia – Anti-Dumping Measures on Paper*, para. 7.76.

⁶³ Panel Report, *Australia – Anti-Dumping Measures on Paper*, para. 7.76. [Emphasis added]

⁶⁴ Panel Report, *Australia – Anti-Dumping Measures on Paper*, para. 7.89.

equally. Thus, the TRA seems to acknowledge that if the same raw materials are used and the same producer sells in both, the home- and export-markets, then costs will be affected on both sides of the equation. Therefore, there will be no impact on the comparison of normal value and export price on account of a PMS.

61. That said, if the TRA were to take the position that it did undertake the required examination as discussed above, clearly, the TRA has failed to provide a "*reasoned and adequate*" explanation of its assessment. As a rule, an authority must provide a "*reasoned and adequate explanation*" as to "(i) how the evidence on the record supported its factual findings; and (ii) how those factual findings supported its overall determination".⁶⁵ The Appellate Body in *US – Softwood Lumber VI (Article 21.5 – Canada)* has adeptly explained what is expected of the investigating authorities:

*"A panel must examine whether, in the light of the evidence on the record, the conclusions reached by the investigating authority are **reasoned and adequate**. ... 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. [...]"*

*This task may also require a panel to consider whether, in analyzing the record before it, the investigating authority evaluated all of the relevant evidence in an objective and unbiased manner, so as to reach its findings "without favoring the interests of any interested party, or group of interested parties, in the investigation."*⁶⁶ [Emphasis added]

62. Indeed, the Panel in *Australia – Anti-Dumping Measures on Paper* also held that, "[i]f the investigating authority finds that because of a particular market situation a proper comparison of the domestic price and the export price is not permitted, it is required to give a **reasoned and adequate explanation of its conclusion**."⁶⁷

⁶⁵ Appellate Body Report, *US – Countervailing Duty Investigation on DRAMs*, para. 186; and Appellate Body Report, *US – Lamb*, para. 103. [Emphasis added]

⁶⁶ Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93, referring to Appellate Body Report, *US – Lamb*, para. 106; and Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 97, referring to Appellate Body Report, *US – Hot-Rolled Steel*, para. 193.

⁶⁷ Panel Report, *Australia – Anti-Dumping Measures on Paper*, para. 7.76. [Emphasis added]

63. The CCCME respectfully submits that by entirely omitting to address the issue of domestic prices and the impact of a PMS on price comparability, the TRA has failed in its obligation to provide the interested parties with a "*reasoned and adequate*" explanation regarding its decision to reject the SDG Groups' OFC costs and prices.

3.3 The rejection of the Chinese OFC producers' actual costs and prices as well as the adjustment of the Chinese OFC producers' fibre costs is WTO-inconsistent

64. The CCCME notes that, first, the rejection of the SDG Group's domestic sales prices, and the adjustment of its production costs for the determination of profits and the construction of the normal value, on the basis of a countrywide assessment of non-commercial factors affecting OFC costs seems inconsistent with the concept of "dumping" which, as noted by the Appellate Body, concerns the pricing behaviour of individual exporters/foreign producers.⁶⁸
65. Second, the CCCME considers that the rejection of the recorded fibre costs of the SDG Group is inconsistent with the first sentence of Article 2.2.1.1 ADA.
66. The SEF notes that the SDG Group's records were GAAP-consistent and reasonably reflected costs associated with the production and sale of OFC in China, but those recorded costs do not "*reflect normal circumstances with the OFC market in the PRC,*" and "*we believe the price of optical fibre; land use rights; loan interest rates; energy and labour to reflect non-commercial factors, which is reflected in a PMS in the optical cable market. As such this is not considered normal circumstances...*"⁶⁹
67. However, the TRA's own findings showed that the labour and energy costs of the SDG group were not affected by non-commercial factors, and the land use rights and loans were inconsequential/immaterial to the production costs of OFC. Thus, any supposed lack of normal circumstances with regard to these factors could not have affected the OFC production costs and domestic sales prices of the SDG Group. Furthermore, with regard to the fibre costs of the SDG Group, the TRA did not even assess those costs in relation to the sales prices of optical fibres and optical fibre cables in China.

⁶⁸ Appellate Body Report, *US –Stainless Steel from Mexico*, para. 86.

⁶⁹ AD SEF, para. 177.

68. To recall, in the context of optical fibres, the TRA narrowly looked at only a general supposed plan concerning the chemical fibre manufacturing industry which did not even exist in the POI – and indeed, no evidence of its existence has been provided by the TRA – and a 2002 local document from Shenzhen. The TRA has also not provided any evidence whatsoever for the supposed "*elevated optical fibre inventories that existed in the period leading to the POI.*" The mere comparison to the Turkish producers' fibre costs to prove non-commercial factors is doing the analysis the other way around, *i.e.*, resorting to a benchmark before proving a PMS. However, as noted above, the finding of PMS and its impact on the price comparability and inability to use domestic prices should emanate from the domestic market.
69. Furthermore, the finding of the supposed non-commercial factors for optical fibres by comparison to the Turkish producers' fibre costs is patently incorrect and result oriented. As a starting point, the TRA did not establish that the Turkish fibre and Chinese fibre production and costs are comparable in terms of technologies, scale, and inputs, among others. Apart from the fact that the fibre production costs in Turkey would be significantly affected by inflation and currency devaluation in 2021, the CCCME also understands from publicly available information that the Turkish producers mainly import optical fibres from the United States.⁷⁰ In contrast, the SDG Group purchases fibres domestically as noted in the SEF. Moreover, compared to Turkey, China has highly advanced technologies, as well as a large number of companies operating on the fibre and OFC market and benefiting from economies of scale.
70. Thus, the TRA's approach is inconsistent with Article 2.2.1.1 ADA.
71. Third, Article 2.2 ADA provides that "*[w]hen there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country or when, because of the particular market situation or the low volume of the sales in the domestic market of the exporting country, such sales do not permit a proper comparison, the margin of dumping shall be determined by comparison with a comparable price of the like product when exported to an appropriate third country, provided that this price is representative, or with the cost of*

⁷⁰ Commission Implementing Regulation of 17 November 2021 imposing a definitive anti-dumping duty on imports of optical fibre cables originating in the People's Republic of China, recital (236).

production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits." [Emphasis added]

72. The last phrase, of Article 2.2 of the ADA (emphasised above) is essentially the umbrella provision or chapeau (to be read along with Articles 2.2.1.1 and 2.2.2 ADA)⁷¹ for the establishment of the normal value and cannot be disregarded in the construction of the normal value as done by the TRA.
73. As noted by the Appellate Body in *EU – Biodiesel (Argentina)* and *Ukraine – Ammonium Nitrate*, an investigating authority cannot simply substitute costs from outside the country of origin for the cost of production in the country of origin for the investigated product.⁷² The fundamental and mandatory rule remains that an investigating authority has to determine the cost of production in the country of origin.
74. Therefore, when relying on any out-of-country information to determine the cost of fibres as done in the present case, pursuant to the requirement in Article 2.2 ADA, an investigating authority has to ensure that such information is used to arrive at the cost of production in the country of origin.⁷³
75. In particular, the Appellate Body in *EU – Biodiesel (Argentina)* noted as follows:
- "Indeed, Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994 make clear that the determination is of the "cost of production [...] in the country of origin". Thus, whatever the information that it uses, an investigating authority has to ensure that such information is used to arrive at the "cost of production in the country of origin". Compliance with this obligation may require the investigating authority to adapt the information that it collects."*⁷⁴ [Emphasis added]
76. The Appellate Body in *Ukraine – Ammonium Nitrate* further confirmed and clarified as follows:
- "With regard to the construction of normal value, the fact that "the cost of production" is that "in the country of origin" defines the parameters of that inquiry. This phrase*

⁷¹ Appellate Body Report, *Ukraine – Ammonium Nitrate*, para. 6.84: "Articles 2.2.1, 2.2.1.1, and 2.2.2 of the Anti-Dumping Agreement elaborate on various aspects of Article 2.2. ... For its part, Article 2.2.1.1 deals with "costs" while Article 2.2.2 concerns the determination of the amounts for administrative, selling and general costs and for profits."

⁷² Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.73; and Appellate Body Report, *Ukraine – Ammonium Nitrate*, para. 6.83.

⁷³ Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.73.

⁷⁴ Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.73.

indicates that whatever information or evidence is used to determine the "cost of production", it must be apt to yield or capable of yielding a cost of production "in the country of origin". Therefore, an investigating authority must ensure that the information it collects is used to arrive at the "cost of production in the country of origin", and compliance with this obligation may require the investigating authority to adapt that information."⁷⁵ [Emphasis added]

77. However, the TRA did not even consider the aspect of adapting the Turkish producers' fibre costs by making adjustments for the facts that the Chinese OFC producers, contrary to the Turkish producers, do not import fibres and also do not have the related into factory costs of international transport, import clearance and post importation costs, among others. Thus, the TRA has likely used the into factory fibre costs of the Turkish producers without making any adjustments. Additionally, the TRA does not seem to have assessed whether the Turkish producers purchased fibres from related parties inside/outside of Turkey and whether those prices were not excessive on account of profit-shifting activities between related companies and influenced by the relationship between the related parties involved (if any). Likewise, the TRA did not assess if the Turkish producers' fibre costs had to be adjusted for other factors in comparison to SDG's fibre costs if the fibres were produced by the Turkish producers in Turkey. Indeed, during 2021, inflation in Türkiye reached a peak of 37% (at the end of the year) and, more generally, has been dramatically above the typical inflation rate that Türkiye experienced in previous years.⁷⁶ Similarly, the Turkish Lira devalued significantly against the GBP between 2018 and the POI.⁷⁷ Thus, the Turkish fibre costs were bound to be affected by the high inflation and correspondingly higher costs.
78. Moreover, with regard to the fibre costs of the Turkish producers, the CCCME did not consider that the Turkish and Chinese fibre markets are incomparable. The number of producers in China making optical fibres, the economies of scale of those producers, and the technological advancement at those companies resulting in lower costs, are factors which the TRA has not considered and adjusted for when using the Turkish OFC producers' fibre costs as the benchmark.

⁷⁵ Appellate Body Report, *Ukraine – Ammonium Nitrate*, para. 6.83.

⁷⁶ Trading Economics, "Turkey Inflation Rate", available at <<https://tradingeconomics.com/turkey/inflation-cpi>>.

⁷⁷ PoundSterlingLIVE, "British Pound / Turkish Lira Historical Reference Rates from Bank of England for 2005 to 2023", available at <www.poundsterlinglive.com/bank-of-england-spot/historical-spot-exchange-rates/gbp/GBP-to-TRY>

79. Thus, the use of the Turkish producers' fibre costs as the benchmark and replacing SDG's fibre costs or increasing SDG's fibre costs to the level of the Turkish producers' costs is plainly inconsistent with Article 2.2 ADA.⁷⁸
80. Additionally, while the TRA's explanation regarding the methodology used for the determination of the profit for the constructed normal value is absolutely unclear, to the extent that the cost of production of the SDG Group adjusted for the optical fibre costs was used to:
- (a) conduct the ordinary course of trade test and to resort to other methods for profit establishment,⁷⁹ it is inconsistent with Article 2.2.1 ADA and the chapeau of Article 2.2.2 ADA; and
 - (b) establish the PCN-wise profit pursuant to Regulation 12(3)(a) of the basic Regulations,⁸⁰ it is inconsistent with Article 2.2.2(a) ADA.

4 INJURY COMMENTS

4.1 The definition of UK industry is inconsistent with Articles 3.1 and 4.1 ADA and Articles 15.1 and 16.1 SCM Agreement

81. The "*domestic industry*" – defined under Articles 4.1 ADA and 16.1 SCM Agreement, and thus also paragraph 6(1) of Schedule 4 to the Act – forms the basis of an investigating authority's injury determination, which in turn is governed by Articles 3.1 ADA and 15.1 SCM Agreement.⁸¹ Therefore, an assessment of whether the production of the domestic industry represents

⁷⁸ Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.23. In para. 6.24, the Appellate Body further noted as follows: "... in our view, Article 2.2 of the Anti-Dumping Agreement concerns the establishment of the normal value through an appropriate proxy for the price of the like product in the ordinary course of trade in the domestic market of the exporting country when the normal value cannot be determined on the basis of domestic sales.¹²⁹ The costs calculated pursuant to Article 2.2.1.1 of the Anti-Dumping Agreement must be capable of generating such a proxy. This supports the view that the "costs associated with the production and sale of the product under consideration" in Article 2.2.1.1 are those costs that have a genuine relationship with the production and sale of the product under consideration. This is because these are the costs that, together with other elements, would otherwise form the basis for the price of the like product if it were sold in the ordinary course of trade in the domestic market."

⁷⁹ AD SEF, para. 200.

⁸⁰ AD SEF, paras. 202-203.

⁸¹ See for example.: Appellate Body Report, *EC – Fasteners (China)*, para. 413 (citing footnote 9 to Article 3 ADA); Appellate Body Report, *Russia – Commercial Vehicles*, para. 5.160; Appellate Body Report, *Thailand – H-Beams*, para. 106; and Panel Report, *China – Broiler Products*, paras. 7.408-7.413.

a "*major proportion*" of total domestic production must be based on positive evidence and must involve an objective examination by the authorities.

82. In this context, the Appellate Body in *EC – Fasteners (China)* held that, to ensure the accuracy of an injury determination, an investigating authority must not act so as to give rise to a material risk of distortion in defining the domestic industry:

*"[A]n investigating authority bears the obligation to ensure that the way in which it defines the domestic industry does not introduce a material risk of skewing the economic data and, consequently, distorting its analysis of the state of the industry."*⁸²

83. Furthermore, as explained by the Panel in *China – Broiler Products*:

*"It is only after establishing total domestic production that an investigating authority can determine whether it can define the domestic industry as [...] those producers that represent a major proportion of total domestic production [...] within the meaning of Articles 4.1 and 16.1. This holds even if the petitioners claim to represent a major proportion of total domestic production, as without an understanding of the total universe of production an investigating authority will not be able to verify such an assertion. In light of the links between the definition of the domestic industry and the substantive provisions which require an analysis of that domestic industry, it is our view that the investigating authority must establish total domestic production in the same manner it would conduct any other aspect of the investigation, by actively seeking out pertinent information and not remaining passive in the face of possible shortcomings in the evidence submitted."*⁸³ [Emphasis added]

84. The CCCME considers that (i) the TRA's finding that "*the Applicant meets the definition of "UK industry" under paragraph 6(1)(b) of Schedule 4 to the Act*"⁸⁴ is not based on positive evidence; and (ii) in defining the domestic industry, the TRA acted in a way that gave rise to a material risk of distortion.
85. To elaborate, first, the AD SEF contains different data concerning the Applicant's production/output levels:

	2018	2019	2020	POI
Tables 5 of the AD SEF and AS SEF	100	92	84	93
Table 14 of the AD SEF and Table 25 of the AS SEF	100	68	72	92

⁸² Appellate Body Report, *EC – Fasteners (China)*, paras. 416. See also: Appellate Body Report, *Korea – Pneumatic Valves*, para. 5.41.

⁸³ Panel Report, *China – Broiler Products*, para. 7.421.

⁸⁴ SEFs, Section E1.

86. The TRA clarified that one indexation reflects the data in fkm, while the other in ckm.⁸⁵ However, the issue of lack of clarity persists in that without a disclosure of actual figures or at least data-ranges, there is no way for the CCCME to effectively comment on the TRA's assessment. As noted in the Request for Information,⁸⁶ the AD and AS SEF fail to disclose not only the Applicant's production in ranges -- even though ranges were provided by the Applicant itself in the Application implying that there is no issue of confidentiality -- but also the calculated/estimated production of the other three UK producers and the calculated/estimated total UK production -- in violation of Articles 6.5.1 and 6.9 ADA and Articles 12.4.1 and 12.8 SCM Agreement. The failure to disclose such data prevents interested parties from commenting on the completeness and correctness of the facts considered and conclusions reached by the TRA.⁸⁷
87. Second, the CRU data relied upon by the TRA to estimate the total UK production is based on a different logic compared to the Applicant's production data. The denominator and numerator for the 50% calculation indeed do not derive from the same sources, data, and methodology and were thus not on the same basis. Consequently, the TRA's assessment cannot be simply considered to be based on positive evidence or an objective examination of all the evidence on the record.
88. Third, the TRA states that it was "*unable to confirm [the] UK based production levels*" of the other three UK producers identified in the Application.⁸⁸ In this regard, in the 30 June 2023 reply to the CCCME, the TRA noted that the other "*producers were contacted on initiation of the investigation but have failed to register any interest in the case.*" However, the TRA should have actively contacted the other producers prior to the initiation of the investigation. In any event, nothing in the AD and AS SEF as well as the open file evidence that the TRA contacted and sent questionnaires to the three UK producers or to any possible industry association. Furthermore, the TRA should have at least verified the accuracy and reliability of the CRU data. Clearly, no producer gives complete data regarding production and other factors to the CRU due to, among others, confidentiality and antitrust concerns. The CRU data is, to a large extent, based on estimations and is most often built on historical data. All the above aspects indicate

⁸⁵ TRA, Reply to the CCCME, p. 2.

⁸⁶ Request for Information, pgs. 15, 19-20.

⁸⁷ Panel Report, *Argentina – Ceramic Tiles*, para. 6.125.

⁸⁸ AD SEF, para. 70; and AS SEF, para. 78.

that in defining the domestic industry, the TRA acted in a way that gave rise to a material risk of distortion and the TRA's assessment is not based on positive evidence.

89. The CCCME recalls that, as explained by the Appellate Body in *Korea – Pneumatic Valves*:

*"[T]he term "major proportion" has "both quantitative and qualitative connotations", and [...] the process by which an investigating authority defines the domestic industry, including the degree of efforts made by the investigating authority in obtaining information, is also relevant in assessing the qualitative aspect of the requirement."*⁸⁹ [Emphasis added]

90. An authority has an "active role" to play in the "search of the information" required to make the determination(s) at issue.⁹⁰ A "*passive investigatory approach*" has been rejected by past Panels,⁹¹ as has a "*restrictive reading*" of the obligations imposed on the authority with respect to fact-finding.⁹² As per the Appellate Body, an authority cannot be "*passive*" in the information- and evidence-gathering process.⁹³
91. The TRA's failure to attempt to collect the data necessary and to verify the data that it relied upon to establish the total UK production and the production of the other UK producers demonstrates that the "*UK industry*" as defined by the TRA may not be representative of the UK OFC producers as a whole.
92. Based on the above, the CCCME respectfully submits that the TRA's definition of the UK industry is inconsistent with Articles 3.1 and 4.1 ADA, Articles 15.1 and 16.1 SCM Agreement, as well as paragraph 6(1) of Schedule 4 to the Act.

4.2 The assessment of the Chinese OFC import volumes is not based on positive evidence

93. First, the TRA's assessment of the Chinese import volumes of OFC for the IIP is based on pure assumptions and cannot be considered positive evidence. Indeed, the TRA simply calculated

⁸⁹ Appellate Body Report, *Korea – Pneumatic Valves*, para. 5.41, citing with approval Appellate Body Report, *EC – Fasteners (China)*, paras. 414 and 427. See also: Appellate Body Report, *EC – Fasteners (China) (Article 21.5 – China)*, paras. 5.300 and 5.314; and Appellate Body Report, *Russia – Commercial Vehicles*, paras. 5.13 and 5.21-5.22.

⁹⁰ Panel Report, *Mexico – Anti-Dumping Measures on Rice*, para. 7.185. [Emphasis added]

⁹¹ Panel Report, *Mexico – Anti-Dumping Measures on Rice*, para. 7.188.

⁹² Panel Report, *Mexico – Anti-Dumping Measures on Rice*, footnote 187; and Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.132, stating that "all reasonable efforts" need to be made, in this regard, by the authority.

⁹³ Appellate Body Report, *EU – PET (Pakistan)*, para. 5.130; and Appellate Body Report, *US – Wheat Gluten*, para. 55.

import volumes which have no connection or link to the actual Chinese imports of OFC into the UK. The TRA calculated the Chinese OFC imports by applying the percentage of the import volume represented by the Chinese imports for the tariff code 8544 70 00 -- that includes not only OFC but also other non-subject products -- and applied it to the CRU UK consumption -- which is based on unverified sources and estimates -- to arrive at the yearly Chinese OFC imports. The TRA did not use any other basis or means to cross-check or verify the credibility of this approach which involves mixing units of measurements (as the tariff code has data in Kg and the CRU in fkm) and products (as the tariff code includes non-products concerned), as well as data that derives from completely incomparable basis, *i.e.*, the HRMC import volumes based on actual imports and the CRU data which is basically based on unverifiable estimates.

94. Second, the CCCME recalls that in its Request for Information, it requested the TRA for the HMRC import statistics used 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. However, the TRA did not provide this information. In the absence of this essential information, the CCCME cannot comment on the accuracy of the TRA's already unverifiable assessment of a sharp increase in Chinese imports.
95. In particular, the Chinese OFC import volume calculated by the TRA matches that in the Application for the POI but differs for the other years even though the same HMRC statistics and the CRU data as well as the same methodology of using the import share of the Chinese OFC in the total imports were used by the TRA and the Applicant. The TRA's calculation seems to show lower Chinese OFC imports in 2018 and, consequently, a sharper increase in the import volume but the same market share as claimed by the Applicant. Thus, the accuracy and consistency of the Chinese OFC import volumes, the CRU data used, and the UK consumption are clearly questionable, and the TRA's calculation of the Chinese import volumes and market share is not positive evidence as required by Articles 3.1 and 3.2 ADA, Articles 15.1 and 15.2 SCM Agreement.

		2018	2019	2020	POI
Table 2 of the Application	Chinese import volumes in fkm	170,348	133,716	175,376	535,637
	Index	100	78	103	314

Table 4 of the AD SEF and Table 15 of the AS SEF	Chinese import volumes in fkm	120,962	102,868	159,417	535,565
	Index	100	85	132	443
Table 5 of the Application	Market share of all UK producers	48%	50%	50%	50%
	Index	100	104	104	104
	Market share of the complaining UK industry	[40-45]%	[45-50]%	[42-47]%	[35-40]%
	Index	100	116	107	90
	Market share of Chinese imports	4.3%	3.1%	4.2%	9.4%
	Index	100	73	100	221
	Market share of third country imports	47.7%	46.9%	45.8%	40.6%
	Index	100	98	96	104 [should be 85]
Paragraph 373 of the AD SEF and Paragraph 480 of the AS SEF	Market share of Chinese imports	4.3%	-	-	9.4%
	Index	100	-	-	219

4.3 The price undercutting and depression analyses are inconsistent with Articles 3.1 and 3.2 ADA and Articles 15.1 and 15.2 SCM Agreement

96. In examining the effects of the allegedly dumped/subsidised imports on the prices of the domestic industry pursuant to Articles 3.2 ADA and 15.2 SCM Agreement investigating authorities must comply with the overarching requirement in Article 3.1 ADA and 15.1 SCM Agreement that a determination of injury be based on positive evidence and involve an objective examination. To "*perform an objective examination, an investigating authority must support its findings with reasoning that is coherent and internally consistent.*"⁹⁴
97. This was also confirmed by the Appellate Body in *China – GOES*:

⁹⁴ See for example: Panel Report, *US – Ripe Olives from Spain*, para. 7.268; Appellate Body Report, *Korea – Pneumatic Valves*, para. 5.323; Panel Report, *China – Cellulose Pulp*, para. 7.62; and Panel Report, *China – Broiler Products*, para. 7.474.

*"To the extent the panel used the words "show" and "demonstrate" to mean that the authority's consideration of price effects must be reflected in relevant documentation produced by the authority in its investigation, and must be based on positive evidence and involve an objective examination, this is consistent with the interpretation that the consideration of price effects must conform to the standard in Article 3.1 and be reflected in relevant documentation."*⁹⁵ [Emphasis added]

98. The Appellate Body further noted that "[t]he requirement to consider whether subject imports have explanatory force for significant price depression or suppression occurring in the domestic market, pursuant to Articles 3.2 and 15.2, is not within the "discretion" of the investigating authority. Rather, it is an obligation that stems from the language of the provisions and forms part of the framework and relevant disciplines set out in Articles 3 and 15 for the authority's injury and causation determination."⁹⁶

99. Furthermore, as held by the Panel in *Pakistan – BOPP Film (UAE)*:

"With regard to price undercutting, Article 3.2 requires authorities to "consider whether there has been a significant price undercutting by the dumped imports as compared with the price of a like product of the importing Member". That is, Article 3.2 requires a comparison between the prices of the dumped imports and those of a domestic like product. As has been observed in the past, when the investigating authority must compare prices, "price comparability necessarily arises as an issue". The text of Article 3.2, which uses the present perfect ("has been") and the present participle ("undercutting"), in its context, suggests that what is at issue are price effects that continue over time, and are not limited to an isolated instance.

With regard to price depression, the question is "whether the effect of [the dumped] imports is ... to depress prices to a significant degree". The ordinary meaning of "depress" includes "[t]o press down ... to lower", while the ordinary meaning of "depression" includes "[t]he action of pressing down, or fact of being pressed down". In the context of Article 3.2, an investigating authority is thus required to consider whether the prices of domestic like products are being pressed down by the dumped imports.

*For both types of price effects at issue here, the investigating authority must consider whether they are "significant", i.e. "important, notable, consequential". This will depend on the circumstances of the case. Further, the question under the second sentence of Article 3.2 is whether "the effect of the dumped imports" has been one (or more) of these price phenomena. Article 3.2 thus links the dumped imports and the price depression and contemplates consideration of the relationship between the two."*⁹⁷ [Footnotes omitted and emphasis added]

⁹⁵ Appellate Body Report, *China – GOES*, para. 158.

⁹⁶ *Ibid*, para. 153.

⁹⁷ Panel Report, *Pakistan – BOPP Film (UAE)*, paras. 7.293-7.297, citing Appellate Body Reports, *China – GOES*, paras. 136, 144, 152 and 200; and *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.158-5.159 and 5.161; Panel Report, *China – GOES*, para. 7.530; Panel Report, *China – Broiler Products*, paras. 7.475-7.478.

100. Against this background, the CCCME wishes to make the following observations.
101. First, the CCCME reiterates that the AD and AS SEF fail to disclose the essential facts underpinning the TRA's findings of price undercutting and price depression. As a result, the CCCME is limited in its ability to provide detailed comments and fully exercise its rights of defence. In fact, as noted in the Request for Information,⁹⁸ neither "*the average landed price*" / "*average import price*" of the OFC imports from China nor the ranges of "*the average [UK] sales prices of the like goods*" calculated/estimated by the TRA for the purposes of the price effects analyses were disclosed in the SEFs.⁹⁹
102. Second, for the price undercutting and price depression analysis, the TRA has relied on different data sets as far as the Chinese OFC imports are concerned. As can be discerned from the AD and AS SEF, the price undercutting calculation seems to be based on the data of the cooperating exporting producer and the price depression analysis seems to be based on the total estimated Chinese OFC imports into the UK. The TRA does not explain the reason for the use of different data sets but in any event, the use of divergent data sets is inconsistent with the positive evidence obligation in Article 3.1 ADA and Article 15.1 SCM Agreement. Furthermore, the TRA also does not explain the basis and the method of calculating the Chinese import prices used for price depression calculation.
103. Third, the TRA failed to ensure price comparability in making the price comparisons. The AD and AS SEF state that "[t]o ensure price comparability, [it] adjusted where needed".¹⁰⁰ However, no adjustments seem to have been made to the Chinese OFC import prices for any differences in quality and post-importation costs to ensure the comparability of the level of trade among others.
104. The critical importance of ensuring price comparability was highlighted by the Panel in *Pakistan – BOPP Film (UAE)*:

"[W]hether the prices under comparison are comparable is core to the objectivity of the analysis. Therefore, investigating authorities are required to ensure that prices are comparable, whether or not investigated exporters raise such concerns during the

⁹⁸ Request for Information, p. 18.

⁹⁹ AD SEF, paras. 234-241; and AS SEF, paras. 341-348.

¹⁰⁰ AD SEF, para. 235; and AS SEF, para. 342.

investigation. Failure to do so falls short of an objective examination of price undercutting."¹⁰¹ [Footnotes omitted and emphasis added]

105. As further noted by the Appellate Body in *China – GOES*, "the obligations under Articles 3.1 and 3.2 "must be met by every investigating authority in every injury determination", meaning that the requirement to ensure price comparability does not depend on the respondents having raised the issue before the investigating authorities."¹⁰²
106. Fourth, as far as the undercutting margin calculation is concerned, there is no evidence whatsoever that the calculation made by the TRA is positive evidence of injurious price effects. Indeed, the TRA indicates the representativeness of the PCNs in the context of the export sales but the crucial aspect is how representative the undercutting calculation is in terms of the sales of the UK industry and to what extent the PCNs of the OFC imported from China and that sold by the UK industry were comparable such that the undercutting margin calculation could be an indicator of injury. Notwithstanding the CCCME's request, the TRA did not provide this information and this further puts into question the objectivity of the TRA's assessment.
107. Fifth, by limiting itself to conducting the price undercutting analysis only for one year of the IIP, i.e., the POI, the TRA violated Article 3.1 ADA and Article 15.1 SCM Agreement as the TRA did not consider the evidence of the interaction between domestic and import prices over the period of four years that had been placed on the record. Indeed, as noted by the Panel in *Morocco – Definitive AD Measures on Exercise Books (Tunisia)*, an undercutting margin calculation for the POI alone is insufficient and in order to determine whether imports cause, through the effects of dumping (including price effects) injury, the price effects analysed must, in principle, relate to the period selected for the examination of the economic situation of the domestic industry:

"We note that the title of Article 3 "Determination of Injury" and the wording of Article 3.5 ("[i]t must be demonstrated that the dumped imports are, through the effects of dumping, as set forth in paragraphs 2 and 4, causing injury within the meaning of this Agreement") confirm that consideration of price effects is one of the steps in the determination of injury. As Tunisia recalls, this inquiry is part of a "logical progression ... leading to an investigating authority's ultimate injury and causation determination". Therefore, in order to determine whether imports cause, through the effects of dumping (including price effects) injury, the effects analysed must, in principle, relate to the

¹⁰¹ Panel Report, *Pakistan – BOPP Film (UAE)*, para. 7.309.

¹⁰² Appellate Body Report, *China – GOES*, para. 201.

period selected for the examination of the economic situation of the domestic industry. [...]

The record shows that MIICEN indicated that the period from 1 January 2013 to 30 April 2017 was the period of data collection for the purposes of the injury assessment; however, it made the price comparison for the purposes of the price undercutting analysis only on the basis of the last 12 months of that period. For the reasons outlined above, we consider that MIICEN failed to conduct an objective examination, as it selected a different period of price undercutting analysis from the one used for the rest of the injury analysis and did not show good cause in its report for selecting a different period.

*We note that, because it limited itself to a one-year period, MIICEN did not consider the evidence of the interaction between domestic and import prices over the period of four years and four months that had been placed on the record. [...] We consider that the requirements of Article 3.1 mean that an investigating authority is obliged to ensure that the data on which it bases its injury determination accurately and credibly reflect the state of the domestic industry."*¹⁰³ [Footnotes omitted and emphasis added]

108. Sixth, the CCCME recalls that the Appellate Body in *China – HP-SSST (Japan)* and *China – HP-SSST (EU)* held that an investigating authority's obligation under Article 3.2 ADA and Article 15.2 SCM Agreement is not satisfied by a static examination of whether there is a mathematical difference at any point in time between the import prices and the domestic industry's sales prices without any assessment of whether or how these prices interact over time:

*"As discussed above, while price undercutting involves situations where imports are being sold at prices lower than the domestic like products, an inquiry into price undercutting under Article 3.2 is not satisfied by a static examination of whether there is a mathematical difference at any point in time during the POI without any assessment of whether or how these prices interact over time. Rather, as noted above, Article 3.2 requires a dynamic assessment of price developments and trends in the relationship between the prices of the dumped imports and those of domestic like products over the duration of the POI."*¹⁰⁴

109. In the case at hand, the TRA did not conduct an analysis of the price effects over the IIP as far as price undercutting is concerned. Moreover, when considering price depression, the TRA did not take into consideration, among others, that in 2019 the average UK industry prices declined by 7%, while the average Chinese import price increased by 30%. This further indicates that the Chinese OFC import prices were not the explanatory force for the price depression found.

¹⁰³ Panel Report, *Morocco – Definitive AD Measures on Exercise Books (Tunisia)*, paras. 7.216, 7.217, 7.220.

¹⁰⁴ Appellate Body Report, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.160.

110. Finally, the CCCME notes that the Appellate Body in *China – HP-SSST (Japan)* and *China – HP-SSST (EU)* noted that whether the observed price undercutting is significant will depend on the circumstances of each case, but the investigating authorities must always consider whether the effects of the allegedly dumped/subsidised imports on the domestic prices are significant:

*"The significance of the price undercutting found on the basis of that dynamic assessment is a question of the magnitude of the price undercutting. What amounts to significant price undercutting that is, whether the undercutting is important, notable, or consequential will therefore necessarily depend on the circumstances of each case. In order to assess whether the observed price undercutting is significant, an investigating authority may, depending on the case, rely on all positive evidence relating to the nature of the product or product types at issue, **how long the price undercutting has been taking place and to what extent**, and, as appropriate, the relative market shares of the product types with respect to which the authority has made a finding of price undercutting. In all cases, an investigating authority must, pursuant to Article 3.1, objectively examine all positive evidence, and may not disregard relevant evidence suggesting that prices of dumped imports have no, or only a limited, effect on domestic prices."¹⁰⁵ [Footnotes omitted and emphasis added]*

111. The TRA, however, made no assessment of the significance of the price undercutting found.
112. For the above-mentioned reasons, the CCCME submits that the TRA's findings of price undercutting and price depression on account of the OFC imports from China are inconsistent with Articles 3.1 and 3.2 ADA, and Articles 15.1 and 15.2 SCM Agreement, and Regulation 32 basic Regulations.

4.4 Incomplete and incorrect analysis of the state of the UK industry

113. The CCCME respectfully disagrees with the TRA's determination regarding injury to the domestic industry on account of the Chinese OFC imports.
114. At the outset, the CCCME recalls that the Appellate Body in *China – GOES* made it clear that Article 3.4 ADA and 15.4 SCM Agreement require an examination of the explanatory force of subject imports for the state of the domestic industry:

"Articles 3.4 and 15.4 thus do not merely require an examination of the state of the domestic industry, but contemplate that an investigating authority must derive an understanding of the impact of subject imports on the basis of such an examination. Consequently, Articles 3.4 and 15.4 are concerned with the relationship between subject

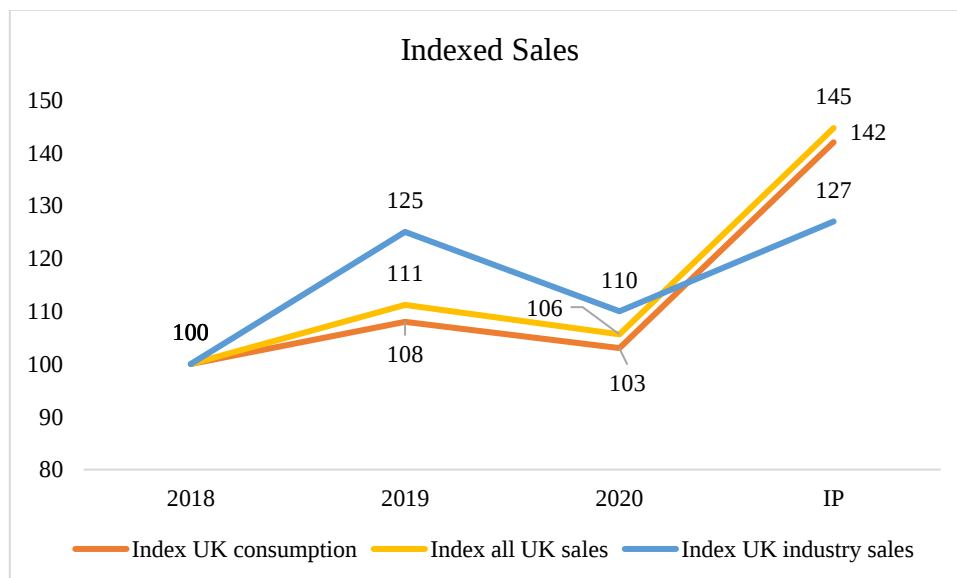
¹⁰⁵ Appellate Body Report, *China – HP-SSST (Japan)* / *China – HP-SSST (EU)*, paras. 5.161 and 5.180.

*imports and the state of the domestic industry, and this relationship is analytically akin to the type of link contemplated by the term "the effect of" under Articles 3.2 and 15.2. In other words, Articles 3.4 and 15.4 require an examination of the explanatory force of subject imports for the state of the domestic industry."*¹⁰⁶

115. The TRA's assessment, however, does not establish that the Chinese OFC imports were the explanatory force for the domestic industry's injury to the extent that it existed.
116. Moreover, the TRA's finding of injury to the domestic industry is not based on positive evidence and an objective examination of all the evidence, as discussed below.

4.4.1 Sales volumes and prices of the domestic industry were not affected by the Chinese OFC imports

117. First, overall, the sales of the domestic industry increased over the IIP and were 27% higher in the POI compared to 2018.
118. Second, as can be observed from the graph below, which is based on the information contained in Table 7 of the PAD, the sales of all the UK producers increased at a higher rate than the total UK consumption and it was only the UK industry's sales (*i.e.*, the Applicant's sales) that did not increase at the same rate as that of the other producers.



119. The TRA, however, did not consider in its assessment that (i) notwithstanding the Chinese OFC imports, the other UK producers were able to increase sales, and (ii) the much higher increase

¹⁰⁶ Appellate Body Report, *China – GOES*, para. 149. [Emphasis original]

in the sales of the other UK producers could have been the explanatory force for the situation of the UK industry. In other words, the TRA should have considered whether the injury to the Applicant stemmed from the higher increase in sales and market share of *other domestic producers*, and not the OFC imports from China. In this regard, the Panel in *China – Broiler Products* held that:

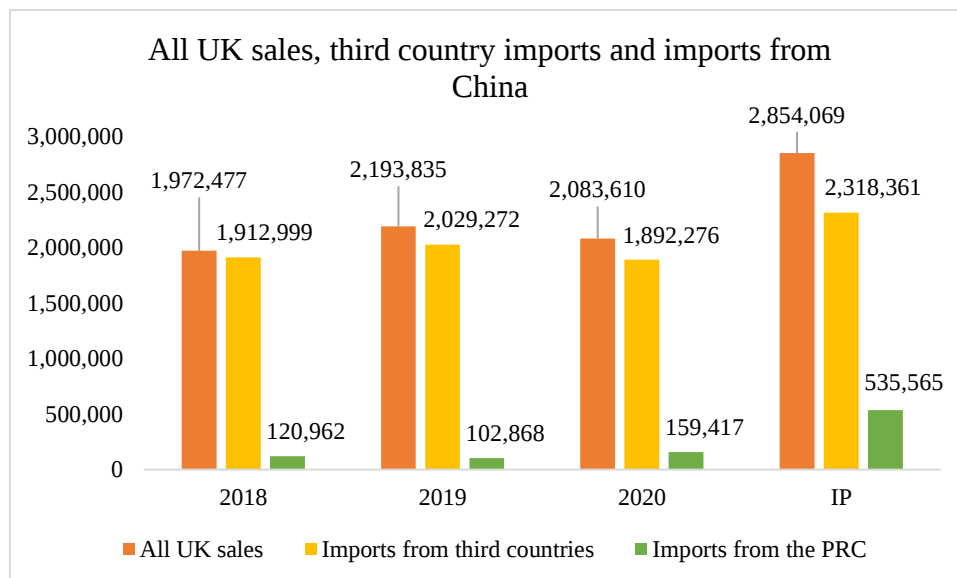
"[A]n investigating authority is not allowed to ignore the situation of other domestic producers in its injury determination. An investigating authority will make its analysis under Articles 3.2 and 3.4 with reference to the defined domestic industry, but will *still need to assess the situation of other domestic producers in its evaluation of whether it is the impact of the subject imports that have explanatory force for the changes in the various economic factors and whether the strength of other domestic producers could be a possible separate cause of injury to the defined "domestic industry."*"¹⁰⁷

120. The CCCME also reiterates that the TRA should have disclosed the UK industry's and the other UK producers' sale volumes and values in ranges, these being "essential facts" within the meaning of Article 6.9 ADA and 12.8 SCM Agreement.¹⁰⁸ Such data was also provided by the UK industry in the Application, implying that there is clearly no issue of confidentiality. The CCCME notes (and disagrees with) the TRA's position that the disclosure of such ranges would not "enhance interested parties understanding of the trend experienced in these areas".¹⁰⁹
121. Third, the TRA found that during the POI, the UK industry's sale volumes increased "*but the increase was significantly less than the increase in overall consumption of [42%] in the UK.*" However, as discussed above, the total UK production, and accordingly also the total UK consumption is not based on positive evidence, *i.e.*, evidence that is variable and credible. Moreover, the sales volumes of the domestic industry representing actuals and the CRU consumption data which are unverifiable estimates are entirely different data sets and cannot be compared as such.
122. Fourth, as noted in the Additional Comments, the Chinese OFC imports were small in volume compared to the total UK sales and third country import volumes and could not have injured the Applicant. Indeed, the TRA has also not established how the limited volume of Chinese imports could have injured the domestic industry.

¹⁰⁷ Panel Report, *China – Broiler Products*, para. 7.419. [Emphasis added]

¹⁰⁸ Request for Information, pgs. 19-20.

¹⁰⁹ TRA, Reply to the CCCME, p. 2.



123. With regard to the Applicant's sales value, the TRA found that "[t]he lack of increase in value" of the UK industry's sales during the POI was an indicator of injury. This assessment is not reflective of an objective examination envisaged in Article 3.1 ADA and Article 15.1 SCM Agreement. Between 2018 and the POI, the domestic industry's sales value declined by a mere 2% but this is not reflective of injury in isolation. The TRA did not consider/provide any reasoned explanation as regards the development of the production costs and whether during the period considered, the domestic could have passed on higher costs the customers. Indeed, if the production costs fell in this period, customers would not accept price increases.
124. Moreover, during the IIP, it was only in the POI that the sales value of the Applicant declined. However, an isolated development in one year of the IIP is insufficient to establish injury and the focus of an investigating authority on that isolated development is also inconsistent with Article 3.1 ADA and Article 15.1 SCM Agreement. Indeed, as noted by the Panel in *Pakistan – BOPP Film (UAE)*, the "text of Article 3.2, which uses the present perfect ("has been") and the present participle ("undercutting"), in its context, suggests that what is at issue are price effects that continue over time, and are not limited to an isolated instance."¹¹⁰
125. The fact that during the IIP, the value of Draka Cometeq Limited's ("Draka") sales – which is also part of Prysmian UK Group¹¹¹ – increased by 79% also puts into question the TRA's finding of a decline in the sales value of the UK industry.

¹¹⁰ Panel Report, *Pakistan – BOPP Film (UAE)*, para. 7.294.

¹¹¹ Annex A.3.2, AD questionnaire response of the Applicant.

4.4.2 Profit

126. The CCCME maintains that the TRA should have disclosed the UK industry's net profit margin and net operating profit for interested parties to understand the essential facts underpinning the TRA's findings, and a failure to disclose this information violates Articles 6.9 ADA and 12.8 SCM Agreement.¹¹²
127. That said, the SEFs state that *"the decline in profits during the injury period is a clear indicator of injury."*¹¹³ However, there are several flaws in this assessment which is not based on positive evidence and an objective examination of the UK industry's data.
128. First, the TRA has simply relied on an end-point-to-end point analysis without considering the acknowledged significant increase in the profitability (%) of the Applicant between 2018 and 2020. Moreover, the TRA was required to explain how conflicting trends in the data (*i.e.*, between 2018-2020 and 2021) were considered in its analysis.¹¹⁴ Indeed, as noted by the Panel in *Pakistan – BOPP Film (UAE)*, *"Article 3.4 requires an investigating authority to examine the impact of the dumped imports on the domestic industry. Thus, the text of Article 3.4 creates a link between dumped imports and the state of the domestic industry. Therefore, in our view, an investigating authority is required to identify the trends in the injury factors and place those trends in the relevant context that is informative of the injury suffered by the domestic industry, taking into account the relevant evidence and explanations that are on its record."*¹¹⁵
129. Second, the AD questionnaire response of the Applicant shows that the actual profits (in GBP) of the Applicant from the sales of OFC increased over the IIP by 104%.¹¹⁶

¹¹² Request for Information, pgs. 12 and 20.

¹¹³ AD SEF, para. 253; and AS SEF, para. 360.

¹¹⁴ Panel Reports, *Pakistan - BOPP Film (UAE)*, para. 7.352; *China – X-Ray Equipment*, paras. 7.215-7.216; *EU – Footwear (China)*, para. 7.413; and *Korea - Pneumatic Valves*, para. 7.179.

¹¹⁵ Panel Report, *Pakistan – BOPP Film (UAE)*, para. 7.352.

¹¹⁶ Annex 12, AD questionnaire response of the Applicant.

Profitability					
Total net operating profit after tax (NOPAT) for whole company (£)	Net operating profit after tax (NOPAT) from like goods (£)	Fibre Restatement	Average net operating profit after tax (NOPAT) margin of like goods (%)	Total interest expense incurred for whole company (£)	Finance costs (e.g. interest) incurred for like goods (GBP)
100	100	100	100	100	100
40	216	122	124	150	173
-112	321	48	110	76	81
191	204	0	43	70	59

130. Indeed, the TRA also acknowledged this in Table 20 of the AD SEF:

	Upstream businesses	UK producers
Total known businesses	3	4
Total selected	3	1
Estimated importance of OFC to this group	Not very important (UK producer raw material costs vs upstream business turnover)	Somewhat important (OFC sales revenue vs whole business turnover)
Total employment of selected businesses	N/A	1,035
Total GVA of selected businesses (£m)	N/A	88.0
Total turnover of selected businesses (£m)	N/A	543.3
Average EBITDA margin for selected businesses (%)	N/A	6.9
Vulnerability to economic shocks	Low – company profitable across the IP, with profits increasing in 2021	Low – producer remained profitable throughout the IP, with profits increasing in 2021

131. However, the TRA did not consider this positive development and the staggering 104% increase in the Applicant's profit and instead referred to the same profit expressed as a % of the salves value. This is simply unobjective. The CCCME recalls that, as held by the Panel in *Pakistan – BOPP Film (UAE)*, "faced with evidence that contradicts its conclusions, an investigating authority must at least explain how it took that evidence into account in reaching its conclusions."¹¹⁷ As further noted by the Appellate Body in *US – Softwood Lumber VI (Article 21.5 – Canada)*, the explanations provided by an authority must "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**

¹¹⁷ Panel Report, *Pakistan – BOPP Film (UAE)*, paras 7.420.

*of the record evidence"; an authority must "take[] sufficient account of **conflicting** evidence and respond[] to **competing** plausible explanations of that evidence".¹¹⁸*

132. The failure of the TRA to take into account the actual increase in the net operating profit of the UK industry is inconsistent with Articles 3.1 and 3.4 ADA and Articles 15.1 and 15.4 SCM Agreement.
133. Third, according to the AD and AS SEF, "[t]he UK industry aim[s] for a minimum 15% net profit year-on-year".¹¹⁹ However, there is no evidence that the TRA considered whether the UK industry would be able to reach such profitability levels in the first place. The AD and AS SEF merely assert that "[t]here is a requirement within the OFC industry to have a comfortable profit margin due to the industry being heavily investment driven" and that "[t]he UK industry state within its application (page 145) that it has had to accept loss-making parts of tenders to maintain its presence in the UK market". However, the TRA failed to provide any evidence, let alone positive evidence, to support the counterfactual that it bases itself on.¹²⁰
134. It cannot be assumed that, but for the OFC imports from China, the UK industry's average net operating profit margin would have been 15%. Indeed, as held by the Panel in *China – X-Ray Equipment*, "an objective and even-handed examination of the expected level of profit, by which the industry's actual profit level was assessed, needs to be based on more than an assertion that the "company expected to be profitable". Some form of estimation, calculation or explanation regarding why profitability in the absence of subject imports was a reasonable expectation should have been provided as part of an objective examination."¹²¹
135. This issue is particularly relevant given that even in the EU AD investigation concerning OFC, the EU determined that the target profit for domestic OFC sales was lower than 15%.¹²²
136. Fourth, there is no reference to the UK industry's cost of production in the TRA's assessment or elsewhere in the open files, even though an increase in costs could clearly explain the decline in the UK industry's average net profit margin. Moreover, the AD and AS SEF do not address

¹¹⁸ Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, paras. 93 and 97. [Emphasis added]

¹¹⁹ AD SEF, para. 251; and AS SEF, para. 258.

¹²⁰ AD SEF, paras. 251 and 253; and AS SEF, paras. 258 and 260.

¹²¹ Panel Report, *China – X-Ray Equipment*, para. 7.200.

¹²² Commission Implementing Regulation (EU) 2021/2011 imposing a definitive anti-dumping duty on imports of optical fibre cables originating in the People's Republic of China, recitals (548)-(552).

the CCCME's claim that the UK industry's extraordinary expenses, capacity expansion and increase in raw material costs must be considered in the context of the profitability analysis. To recall, in its annual report and client alerts, the UK industry explicitly acknowledged the existence of these factors,¹²³ and in its previous submissions, the CCCME raised these factors as relevant.

137. The CCCME recalls that in *Pakistan – BOPP Film (UAE)*, the Panel found that the Pakistani investigating authority had acted inconsistently with Articles 3.1 and 3.4 ADA by failing to consider whether the increase in raw material costs – which had been acknowledged as a problem in the domestic industry's annual report and raised by interested parties as a relevant factor to consider – was the explanatory force for the decline in the profits of the domestic industry. The Panel considered that the Pakistani authority had "*disregarded this evidence, which conflicted with its own conclusions.*"¹²⁴

4.4.3 Market share

138. First, the AD and AS SEF fail to disclose the market share of the UK industry, other UK producers, OFC imports from China and third country OFC imports in terms of ranges despite these being "*essential facts*" within the meaning of Articles 6.9 ADA and 12.8 SCM Agreement. This is particularly concerning given that the UK industry itself had disclosed such data in the Application and, as noted above, the Chinese OFC import volume and market share do not constitute positive evidence.

¹²³ See for example: Prysmian Group, "Energy Products Price Increase" (23 February 2021), available at <<https://na.prysmiangroup.com/content/en-news-prysmian-group-energy-products-price-increase>>: "The wire and cable industry is facing significant and sustained increases in key material cost inputs used in the manufacturing and distribution of our products. [...] Due to these sustained cost increases, effective March 1, 2021, Prysmian Group is announcing a 5 – 10% price increases on all Energy products. This includes all products associated with our Power Distribution, Trade & Installers, and Specialties business units."; Prysmian Group, "Staying in the course in the UK", available at <www.prysmiangroup.com/staticres/insight-4-2017-en/global-scenario/staying-the-course-in-the-uk.html>: "A side effect of Brexit is that costs are increasing on the back of a devaluing pound as Prysmian UK purchases most of its raw materials (in Euros) from European suppliers. The company has to continue to aggressively manage its cost base in order to maintain competitiveness."; Prysmian Group, "Integrated Annual Report 2022", available at <www.prysmiangroup.com/sites/default/files/pr-2302-rsg-2022-integrated-annual-report-compr_1.pdf>: "[I]n the United Kingdom, (i) profit taxes borne increased by Euro 5 million due to greater profitability in 2021 compared with 2020, a year adversely affected by Covid-19 and Brexit; (ii) product taxes collected increased by Euro 30 million, as a result of higher VAT payments in 2021, which also included the payment of VAT for 2020 following a payment extension granted during the pandemic."; and A.6.3.a, AD questionnaire response of the Applicant, p. 5 (p. 3 of the Annual Report): "In 2021 profit and loss, the Company has reported exceptional costs of GBP 0.7m (2020 GBP 8.5m), this includes a reduction in provision related to the anti-trust legal claim in the year of GBP(0.5)m (2020: GBP 6.3m) included in the total exceptional costs)".

¹²⁴ Panel Report, *Pakistan – BOPP Film (UAE)*, para. 7.383.

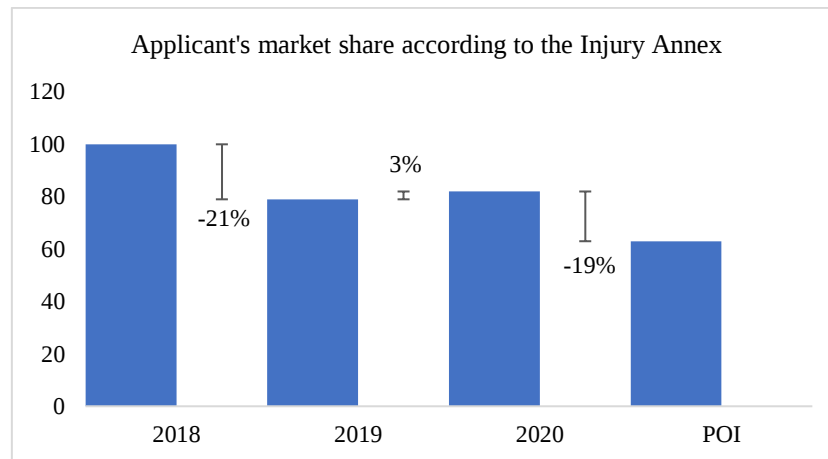
139. Second, the TRA's finding that "*the PRC market share increased considerably at the same time as the UK industry lost 37% share involving UK produced goods*" ¹²⁵ does not seem to be supported by positive evidence and does not seem to be based on an objective examination in violation of Articles 3.1 and 3.4 ADA, 15.1 and 15.4 SCM Agreement, and Regulation 33 basic Regulations. To begin with, according to the Applicant's own data, its market share loss was much lower than that calculated by the TRA. Thus, the Applicant's data seem to contradict the TRA's assessment.

Market share of the UK industry	2018	2019	2020	POI
Table 5 of the Application	[40-45]%	[45-50]%	[42-47]%	[35-40]%
	100	116	107	90
Table 10 of the AD SEF and Table 21 of the AS SEF	100	79	82	63

140. Additionally, during the POI, the market share of third country imports declined by 5.2%, which corresponds in terms of magnitude and timing to the market share gained by the imports from the PRC. Thus, to the extent that the OFC imports from the PRC gained market share, this was at the expense of the third country imports and not the UK industry.
81. Third, even considering the TRA's market share data, based on the limited information provided in the AD and AS SEF, ¹²⁶ it is apparent that the UK industry lost most of its market share (*i.e.*, 21%) in 2019, when the Chinese OFC imports were at their lowest and also lost market share.

¹²⁵ AD SEF, para. 257; and AS SEF, para. 364.

¹²⁶ AD SEF, Table 10; and AS SEF, Table 21.



82. The imports of OFC from China, therefore, could not have possibly had any explanatory force for the Applicant's loss of market share in 2019. The TRA limited itself to noting that "*imports from the PRC have more than doubled their market share [...] while the UK industry lost 37% of the market over the same period*"¹²⁷ but did not take into account the intervening trends and whether the loss in the domestic industry's market share was due to the effect of the Chinese OFC imports. As held by the Panel in *US – Hot-Rolled Steel*, "[a]n end-to-end point analysis, without consideration of intervening trends, is very unlikely to provide a full evaluation of all relevant factors as required."¹²⁸
83. Additionally, as noted by the Panel in *China – Autos (US)*, "*in circumstances where market shares varied significantly during the POI, an IA should analyse developments throughout the entire POI. An analysis of market share limited to consideration of starting and ending levels, would not, in our view, constitute an objective examination of the evidence.*"¹²⁹ In the present case as well, the market share of the UK industry oscillated but the TRA did not consider the relevant facts and focused on an end-point analysis.
84. Fourth, the AD and AS SEF acknowledge that "*other UK producers appear to have increased their market share over the IP and have not been affected by the increase in the goods concerned.*"¹³⁰ Yet, the TRA asserts that it could not reliably conclude whether the UK industry lost market share to these other UK producers, as it was "*unable to verify the components of the data [and] a proportion of these goods may in fact be imports.*"¹³¹ However, this is an

¹²⁷ AD SEF, para. 256; and AS SEF, para 363

¹²⁸ Panel Report, *US – Hot-rolled Steel*, para. 7.234 and footnote 163.

¹²⁹ Panel Report, *China – Autos (US)*, para. 7.334.

¹³⁰ AD SEF, para. 257; and AS SEF, para 364.

¹³¹ AD SEF, para. 257; and AS SEF, para 364.

inadequate legal basis to deduce and assume that the Chinese OFC imports impacted the domestic industry's market share.

141. Additionally, the Applicant itself stated that the UK market for OFC "*is extremely competitive: there are multiple sources of supply within the UK (several producers)*".¹³² Therefore, the UK industry has admittedly been competing with the other UK producers (not part of the domestic industry).
85. Moreover, according to the data in the AD and AS SEF (below),¹³³ the other UK producers gained market share at the expense of the UK industry.

Table 10: Changes to UK market share for the UK industry, PRC imports and third country imports of OFC – 01 January 2018 to 31 December 2021

	2018	2019	2020	POI
Market share of UK industry (Indexed)	100	79	82	63
Market share of other UK producers (Indexed)	100	160	153	193
Market share of Chinese imports (Indexed)	100	72	98	219
Market share of third country imports (Indexed)	100	98	96	85

Source: The Applicant's submissions and HMRC

86. These figures calculated by the TRA cannot be overlooked, and if the TRA is not certain of the market share of the other UK producers, clearly, the total UK production and consumption data is also not reliable or credible (as already mentioned above).

4.4.4 Growth

81. The TRA states that it "*measured growth by comparing trends in total UK consumption of OFC with the UK industry domestic sales, UK industry's market share, production and employment figures.*"¹³⁴

¹³² UK industry's AD questionnaire response, p. 21; and UK industry's AS questionnaire responses, p. 23.

¹³³ AD SEF, para. 254; and AS SEF, para 361.

¹³⁴ AD SEF, para. 259; and AS SEF, para 366.

82. In this regard, first, the TRA's assessment of growth does not take into account the positive development of two (*i.e.*, domestic industry sales and employment) out of the four factors considered as well as the other economic indicators that developed positively over the IIP.
83. Second, the TRA does not explain why the UK industry's employment data should have developed in the same way as the UK consumption of OFC. Moreover, the TRA does not consider the fact that employment by the UK industry increased by 7% during the IIP and by 8% between 2020 and the POI, thus reaching levels that it had never reached during the IIP, and exactly in the period when the OFC imports from China allegedly increased.
84. Third, of the two factors that supposedly developed negatively, with regard to production, the TRA notes that the UK industry's production declined over the IIP. This assessment is unobjective. The TRA does not take into account that the production declined *only* in 2019 when OFC imports from China also declined and were at their lowest, and that production has been continuously increasing since 2019 in parallel with the increase in the OFC imports from China. There is, therefore, no correlation between the UK industry's decline in production and the OFC imports from China and the latter could not have been the explanatory force for the UK industry's situation. As already noted above, ignoring evidence that contradicts an investigating authority's conclusions is inconsistent with the requirements of Articles 3.1 and 3.4 ADA as well as 15.1 and 15.4 SCM Agreement.¹³⁵
85. Thus, the assessment of the TRA does not seem to involve an objective examination, as required under Articles 3.1 and 3.4 ADA and 15.1 and 15.4 SCM Agreement.

4.4.5 Productivity and Employment

86. The TRA's evaluation of employment and productivity of the UK industry is also inconsistent with Articles 3.1 and 3.4 ADA as well as with Articles 15.1 and 15.4 SCM Agreement.
87. First, the TRA found that "*productivity is not a clear indicator of injury in this instance*".¹³⁶ However, in Section G8 of the AD and AS SEF, the TRA listed "*productivity*" among the factors supporting its overall injury determination. Thus, the basis of the injury determination and the TRA's explanations are inconsistent.

¹³⁵ Panel Report, *Pakistan – BOPP Film (UAE)*, paras 7.420.

¹³⁶ AD SEF, para. 266; and AS SEF, para 373.

88. Second, the CCCME notes that the UK industry's productivity data was measured by establishing the output per employee during the IIP in cable-kilometres – rather than in fibre-kilometres. This unexplained methodology and the need to use cable-kilometres is manifestly inappropriate and clearly does not comply with the requirement to conduct an objective analysis based on positive evidence. To recall, an examination can only be "*objective*" if it is based on data "*which provide an accurate and unbiased picture of what it is that one is examining.*"¹³⁷
89. As noted previously and above as well, the use of different units of measurement in the AD and AS SEFs makes it impossible to obtain an accurate picture of the situation of the UK industry. This is not only because the use of different units of measurement renders the data sets relied upon by the TRA incomplete (*i.e.*, productivity data is measured by reference with the UK industry's production in ckm only and other injury data is provided in fkm only), but also because it becomes impossible to evaluate the relevant injury factors "*in context and in connection with one another.*"¹³⁸
90. As regards employment, the AD and AS SEF incorrectly state that the UK industry's employment data shows a "*fairly steady trend.*"¹³⁹ The data provided by the TRA shows that the UK industry's employment for the production of OFC increased by 7% during the IIP and by 8% during the POI alone, *i.e.*, when the OFC imports from China had allegedly increased. This is clearly a factor that points to the absence of injury and certain puts into question the explanatory force of the dumped imports if at all any.
91. Additionally, the TRA acknowledges that productivity increased by 14% during the POI but fails to take into account that this corresponds to the time when imports from China allegedly increased.¹⁴⁰ Likewise, the TRA notes that "*productivity levels had [...] dropped 25% in 2019*"¹⁴¹ but fails to consider that, in 2019, imports of OFC from China also decreased and were at their lowest level during the IIP. The TRA's finding that "*[t]he overall decrease of productivity coincides with the significant increase in PRC imports over the IP*" is thus, factually incorrect.¹⁴²

¹³⁷ Panel Report, *Mexico – Olive Oil*, para. 7.255. [Emphasis added]. See also: Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 180.

¹³⁸ See for example: Panel Report, *Korea – Certain Paper*, para. 7.268.

¹³⁹ AD SEF, para. 263; and AS SEF, para 370.

¹⁴⁰ AD SEF, para. 265; and AS SEF, para 372.

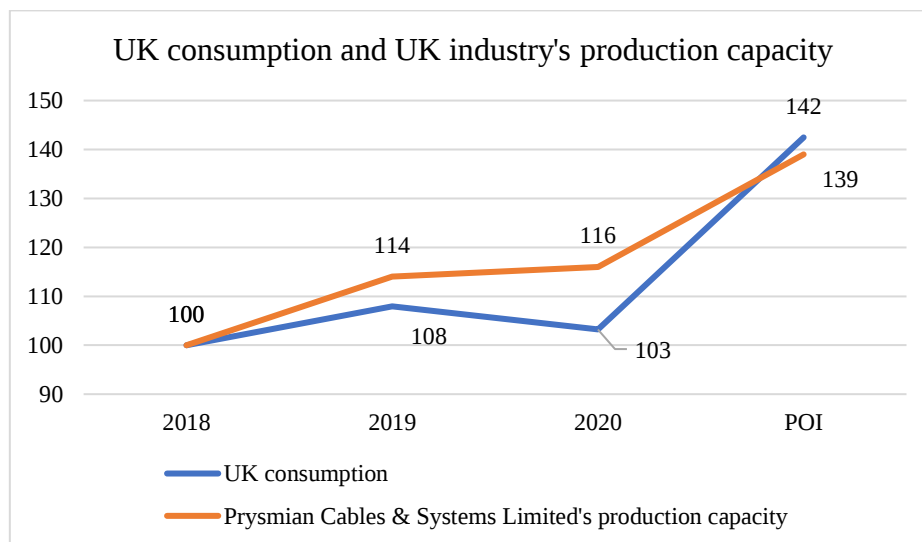
¹⁴¹ AD SEF, para. 266; and AS SEF, para 373.

¹⁴² AD SEF, para. 265; and AS SEF, para 372.

92. Furthermore, the CCCME recalls that the time lag between the increase in production capacity and the actual ramping up of production would also affect the UK industry's employment and productivity levels. Without considering this factual aspect, the statement that, although the UK industry's number of employees increased, "*the capacity for the UK industry increased by a much greater extent*"¹⁴³ is misplaced and unobjective.

4.4.6 Cash flow, investments, return on investments

93. The AD and AS SEF acknowledge that the UK industry's cash flow "*did increase overall during the injury period by 153%*".¹⁴⁴ Likewise, the data in the AD and AS SEF establishes that the UK industry's investment increased by 233% during the IIP. These factors are clearly indicative of the domestic industry's positive situation. However, they were not put into context and accurately considered in the TRA's injury assessment.
94. As regards return on investments ("ROI"), the CCCME notes that "*ROI measures business performance and earnings arising from investments*",¹⁴⁵ and the Applicant made *almost all its investments* to increase its production capacity.¹⁴⁶ Moreover, between 2018 and 2020, the UK industry increased its production capacity well beyond the level of increase in the UK OFC demand between 2018-2020.



¹⁴³ AD SEF, para. 264; and AS SEF, para 371

¹⁴⁴ AD SEF, para. 272; and AS SEF, para 378.

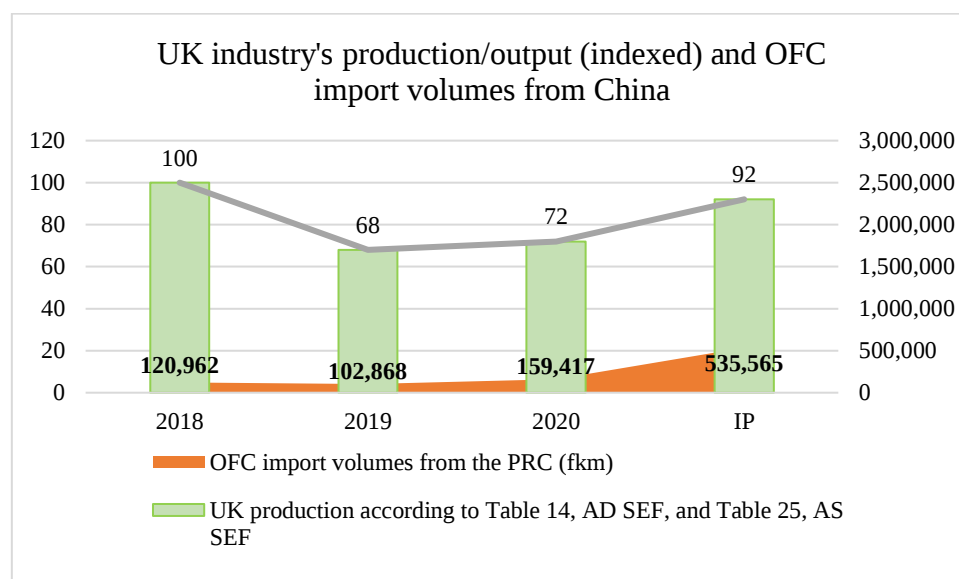
¹⁴⁵ AD SEF, para. 268; and AS SEF, para 375.

¹⁴⁶ Annex 13, AD questionnaire response of the Applicant.

95. Thus, the UK industry's ROI was negative during the IIP on account of its own inappropriate decisions.
96. Moreover, the TRA failed to consider the time lag between the increase in production capacity and the actual ramping up of production, which also likely affected the actual production/output and ROI.
97. For the above reasons, the CCCME maintains that the UK industry's misplaced decision to increase capacity beyond the UK consumption is the explanatory force for the decline in the ROI, and not the OFC imports from China.

4.4.7 Production/output, capacity and capacity utilisation

98. First, the AD and AS SEF show that the UK industry increased production capacity by 39% during the IIP and by 23% during the POI alone. This is clearly evidence that the UK industry was not injured between 2018-2021. Moreover, as noted above, the UK industry increased its capacity well beyond the level of increase in the UK OFC demand.
99. Second, as regards production/output, according to Table 14 in the AD SEF and Table 25 in the AS SEF, the UK industry's production/output levels declined only in 2019, *i.e.*, when OFC imports from China also declined and were at their lowest, while they increased by 20% during the POI, *i.e.*, when imports from China allegedly increased.



100. This clearly shows that there is no correlation between the alleged injury and the OFC imports from China and the latter could not have been the explanatory force for the supposedly lower production of the UK industry.
101. Third, the TRA incorrectly states that the capacity utilisation declined due to the significant rise in the imports from China. The CCCME underlines that the TRA did not consider the decline in capacity utilisation against the backdrop of the significant increase in production capacity by the UK industry during each year of the IIP. Such an assessment is inconsistent with the objective examination requirement. To recall, in *China – Broiler Products (Article 21.5 – US)*, the Panel held that a determination regarding capacity utilisation is inconsistent with Articles 3.1 and 3.4 ADA if an investigating authority, fails to analyse capacity utilisation rates in the context of the continuous increases in production capacity that were observed during the period of investigation, as in the present case.¹⁴⁷ According to the Panel in that case, "[a] capacity utilization rate involves two figures: a numerator (the volume of production) and a denominator (the available production capacity of the domestic industry). Rates may be meaningfully compared for the domestic industry over a period of time where: a. at least one factor is, or is kept, constant; b. if both factors vary over time, at least one factor is controlled or adjusted for any changes; or c. if both factors vary over time and are not controlled or adjusted for any changes, a reasonable explanation of the circumstances and any reliance on the comparison is provided."¹⁴⁸
102. Moreover, as Table 14 AD SEF and Table 25 AS SEF show, the UK industry's capacity utilisation dropped by 40% in 2019 compared to 2018, i.e., when imports from China also declined and were at the lowest level in the IIP, but has been consistently increasing since then, i.e., by 2% in 2020 and by further 5% during the POI, i.e., when the OFC imports from China also allegedly increased.

¹⁴⁷ Panel Report, *China – Broiler Products (Article 21.5 – US)*, para. 7.140.

¹⁴⁸ Panel Report, *China – Broiler Products (Article 21.5 – US)*, para. 7.139.

Table 14: Output, capacity and capacity utilisation for the production of like goods for the UK industry – 01 January 2018 to 31 December 2021

	2018	2019	2020	POI
Output Index	100	68	72	92
Capacity Index	100	114	116	139
Utilisation of capacity Index	100	60	62	67

Source: The Applicant's submissions and HMRC

103. That said, the TRA's evaluation of production/output and capacity utilisation is again limited to an end point-to-end point analysis, which – as already noted above – does not satisfy the standards set by Articles 3.1 and 3.4 ADA and 15.1 and 15.4 SCM Agreement.¹⁴⁹
104. Based on the above, the CCCME submits the TRA's findings that (i) "*the overall decrease in output and utilisation of capacity can be linked to the significant rise in imports from [the] PRC*" and (ii) "*the areas in table 14 indicate strong evidence that the UK industry is suffering injury from increased PRC imports*" are incorrect and contradicted by the evidence on the record.¹⁵⁰

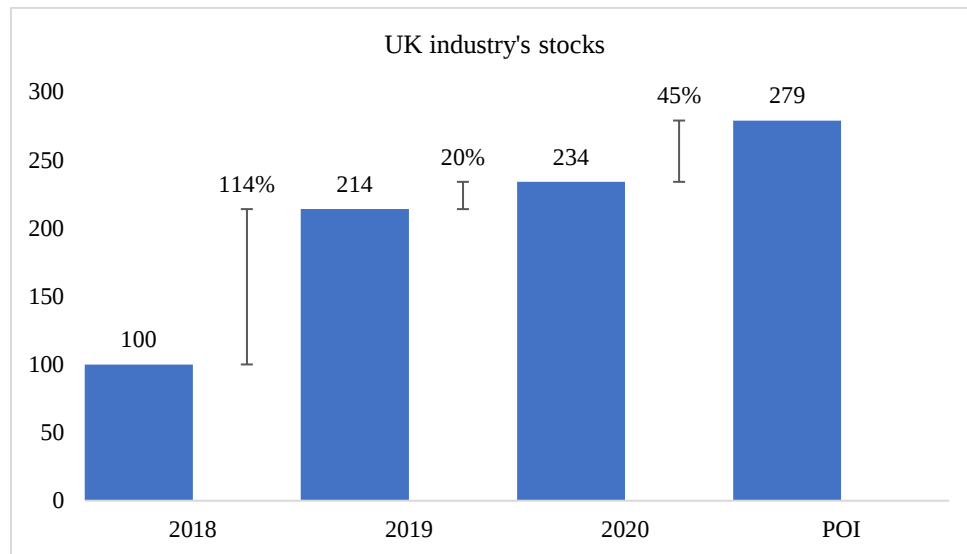
4.4.8 Inventories

105. The TRA's finding that "*increased inventory levels do indicate evidence of the UK industry suffering injury from increased PRC imports*"¹⁵¹ does not seem to represent an objective examination of facts.
106. First, the UK industry's stock levels mainly increased (*i.e.*, by 114%) between 2018 and 2019, when the OFC imports from China decreased and were at their lowest level in the IIP.

¹⁴⁹ Panel Report, *US – Hot-rolled Steel*, para. 7.234 and footnote 163.

¹⁵⁰ AD SEF, para. 278; and AS SEF, para. 385.

¹⁵¹ AD SEF, para. 281; and AS SEF, para. 388.



107. This suggests that, as for other injury factors that showed a decline at the beginning of the IIP, the OFC imports from China could not have been the explanatory force for the UK industry's increased stocks.
108. Second, and without prejudice to the above, the TRA itself acknowledges that "*a large proportion of OFC goods are made to order based on precise specifications through the awarded tendering process.*"¹⁵² Indeed, as also found by the Commission in the context of the EU OFC AD investigation, "*inventories do not constitute a main indicator of injury.*"¹⁵³
109. Third, what is clear is that the increase in the UK industry's inventory levels coincided with and correlate to the increase in the sales and market share of the other UK producers and increased imports from third countries.

		2018	2019	2020	POI
Table 15 of the AD SEF and Table 26 of the AS SEF	UK industry's inventory	100	214	234	279
Table 10 of the AD SEF and Table 21 of the AS SEF	Market share of other UK producers	100	160	153	193
Table 6 of the AD SEF and Table 17 of the AS SEF	Imports from the PRC	100	85	132	443

¹⁵² AD SEF, para. 281; and AS SEF, para. 388.

¹⁵³ Commission Implementing Regulation (EU) 2021/2011 of 17 November 2021 imposing a definitive anti-dumping duty on imports of optical fibre cables originating in the People's Republic of China [2021] OJ L410/51, recital (483).

	Imports from third countries	100	106	99	121
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4.4.9 Wages

110. The TRA decided "*not to consider wage levels as an injury indicator*."¹⁵⁴ In any event, as the data of the UK industry shows, the median average wage remained stable, and wages do not indicate an injured UK industry.

4.4.10 Failure to consider the interaction between the positive and negative factors

111. The CCCME recalls that several of the economic factors pertaining to the UK industry reflected positive developments such as the sales volume, production capacity, profitability in GBP, investments, cash flow and wages did not show a negative development, such as the sales value. However, these positive developments were not taken into account in making the injury determination.
112. In this regard, as noted by the Panel in *Thailand – H-Beams*, "[p]ositive movements in a number of factors would require a compelling explanation of why and how, in light of such apparent positive trends, the domestic industry was, or remained, injured within the meaning of the Agreement[s]."¹⁵⁵
113. Additionally, as also noted by the Panel in *China – X-Ray Equipment*, an investigating authority ignoring the trends in certain injury factors and failing to explain the basis for some of its conclusions, for instance the basis for 'expected profits', undermines the overall assessment of the state of the industry.¹⁵⁶
114. Given the absence of any such compelling explanation, the TRA's injury determination does not comply with the requirements of Articles 3.1 and 3.4 ADA and Articles 15.1 and 15.4 SCM Agreement.

¹⁵⁴ AD SEF, para. 283; and AS SEF, para. 390.

¹⁵⁵ Panel Report, *Thailand – H-Beams*, para. 7.249. [Emphasis added]

¹⁵⁶ Panel Report, *China – X-Ray Equipment*, paras. 7.214-7.215.

5 FAILURE TO CONDUCT A PROPER CAUSATION ANALYSIS AND TO CONSIDER ALL KNOWN FACTORS IN THE NON-ATTRIBUTION ANALYSIS

5.1 Failure to conduct a proper causation analysis

115. Several WTO reports confirm that the provisions of Article 3 ADA and Article 15 SCM Agreement "*contemplate a logical progression of inquiry leading to an investigating authority's ultimate injury and causation determination.*"¹⁵⁷
116. The wording of Articles 3.5 ADA and 15.5 SCM Agreement make clear that the last stage of this "*logical progression of inquiry*" (*i.e.*, the causation analysis) requires investigating authorities to (i) first, establish the causal link, *i.e.*, demonstrate that the allegedly dumped/subsidised imports caused injury to the domestic industry; and (ii) second, conduct a non-attribution analysis to ensure that injury caused by other known factors is not attributed to the allegedly dumped or subsidised imports.¹⁵⁸
117. That the causation analysis involves two interlinked, yet distinct, steps is also apparent from the wording of the applicable UK law. To recall, Regulation 27(2) basic Regulations provides that:
- "Where the TRA has determined that goods have been or are being dumped (in accordance with Part 2) or goods that have been or are being imported into the United Kingdom benefit from a countervailable subsidy (in accordance with Part 3) it must determine whether —*
- (a) a UK industry has suffered or is suffering injury in accordance with regulation 30(determination of injury); and*
- (b) the dumped goods or subsidised imports, as the case may be, have caused or are causing that injury to that UK industry."* [Emphasis added]
118. Regulation 35 basic Regulations then clarifies that, "*[f]or the purpose of making a determination under regulation 27(2)(b), the TRA must examine whether any known factors other than the dumped goods or subsidised imports ("other known factors") have caused or are causing injury to a UK industry.*"

¹⁵⁷ See for example: Appellate Body Report, *China – GOES*, para 128; Appellate Body Report, *Korea – Pneumatic Valves*, paras. 5.191 and 5.193; Appellate Body, *Russia – Commercial Vehicles*, para 5.49; Panel Report, *US – Ripe Olives from Spain*, para 7.257; Panel Report, *Morocco – Definitive AD Measures on Exercise Books (Tunisia)*, para. 7.216; Panel Report, *Pakistan – BOPP Film (UAE)*, para. 7.430; and Panel Report, *China – Cellulose Pulp*, para. 7.14. [Emphasis added]

¹⁵⁸ See for example: Panel Report, *EC – Countervailing Measures on DRAM Chips*, para. 7.397.

119. Against this background, it is noted that the first sentence of Article 3.5 ADA and Article 15.5 SCM Agreement requires an investigating authority to demonstrate that the allegedly dumped imports are, through their volume, price effects, and impact on the domestic industry,¹⁵⁹ injuring the domestic industry. As noted by the Panel in *Pakistan – BOPP Film (UAE)*:

*"The first sentence of Article 3.5 [ADA] requires that an investigating authority demonstrate that dumped imports are, "through the effects of dumping, as set forth in paragraphs 2 and 4", causing injury. This text thus requires the authority to bring together the findings arrived at under Articles 3.2 and 3.4 to ascertain whether "the dumped imports are ... causing injury"."*¹⁶⁰ [Footnotes omitted and emphasis added]

120. The second sentence of Article 3.5 ADA and Article 15.5 SCM Agreement requires that the establishment of the causal link must be *"based on an examination of all relevant evidence before the authorities"*.¹⁶¹ Moreover, an investigating authority's "reasoning and explanations" regarding its causation determination *"must be reflected in relevant documentation"*.¹⁶²
121. The AD and AS SEF, however, do not provide any such assessment. Clearly, in the present case, the TRA failed to comply with its obligations under the first and second sentences of Article 3.5 ADA and Article 15.5 SCM Agreement as also Regulation 27 basic Regulations. The TRA has not made any causal link determination and the TRA failed to *"bring together the finding arrived under Articles 3.2 and 3.4"* before embarking on the non-attribution analysis. The consideration of the price effects and the impact of the subject imports on the domestic industry cannot replace the requirement to establish the causal link between the dumped imports and injury to the domestic industry.
122. In light of the above, the CCCME respectfully submits that the TRA's overall determination of injury does not comply with Article 3.5 ADA and Article 15.5 SCM Agreement as well as Regulation 27(2)(b) basic Regulations.

¹⁵⁹ Appellate Body Reports, *China – GOES*, para. 143.

¹⁶⁰ Panel Report, *Pakistan – BOPP Film (UAE)*, para. 7.430.

¹⁶¹ Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.225.

¹⁶² Panel Report, *China – Cellulose Pulp*, para. 7.30 citing Appellate Body Report, *China – GOES*, para. 131.

5.2 Failure to properly consider all known factors in the non-attribution analysis

5.2.1 Failure to consider certain known factors in the non-attribution analysis

123. Without prejudice to the above, with regard to the non-attribution analysis, the CCCME submits that, as noted by the Panel in *China – GOES*, once a factor other than the dumped imports becomes known to the authorities, they come under an obligation to investigate the impact of that factor.¹⁶³
124. As further noted by the Panel in *EU – Footwear (China)*, *"known" other factors would, at a minimum, include factors allegedly causing injury that are clearly raised by interested parties during the course of the anti-dumping investigation.*"¹⁶⁴
125. However, the TRA failed to consider the following known factors in its non-attribution analysis which have been explicitly as well as repeatedly raised by the CCCME:
- (i) Intra-UK producer competition;¹⁶⁵
 - (ii) The Applicant's poor export performance;¹⁶⁶ and
 - (iii) The Applicant's proven anti-competitive behaviour.¹⁶⁷
126. The failure of the TRA to consider the above-mentioned other known factors in its non-attribution analysis has resulted in an additional violation of Article 3.5 ADA and Article 15.5 SCM Agreement.
127. Particularly as regards the competition from the other UK producers, the CCCME has repeatedly raised this factor and has also demonstrated in previous sections that the UK industry lost sales and market share to the other UK producers over the IIP. The CCCME underlines that in *China – Autos (US)*, the Panel found that an investigating authority fails to conduct a proper

¹⁶³ Panel Report, *China – GOES*, para. 7.636.

¹⁶⁴ Panel Report, *EU – Footwear (China)*, para. 7.484.

¹⁶⁵ CCCME's AD Initial Comments, Section 5.2.1; CCCME's AS Initial Comments, Section 4.2.1; and CCCME's Additional Comments, Section 4.1.

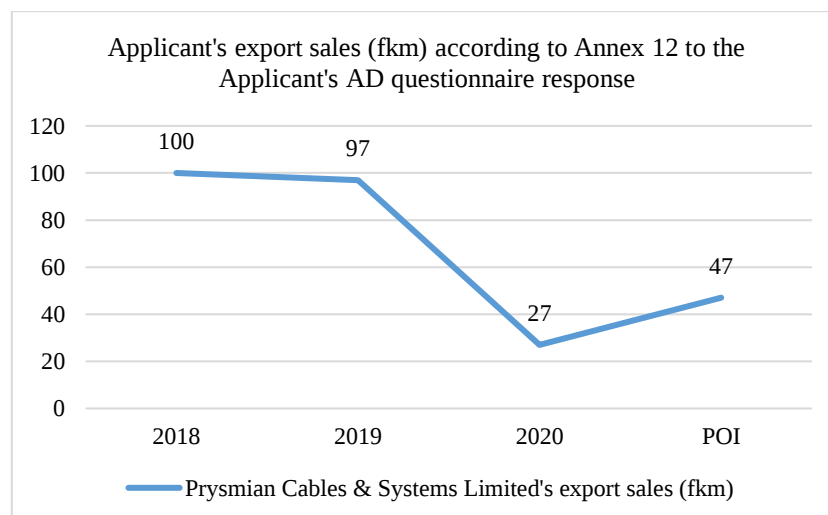
¹⁶⁶ CCCME's Additional Comments, Section 4.4.

¹⁶⁷ CCCME's AD Initial Comments, Section 5.2.6; CCCME's AS Initial Comments, Section 4.2.6; and CCCME's Additional Comments, Section 4.5.

non-attribution analysis if it disregards evidence showing that the domestic industry had lost market share to producers not part of the domestic industry.¹⁶⁸

128. Likewise, in *EU – PET (Pakistan)*, the Panel found that the EU had acted inconsistently with Article 15.5 SCM Agreement with respect to its analysis of competition from non-cooperating producers because *"the increase in market share of the non-cooperating producers [...] warranted more specific examination."*¹⁶⁹ In that case, the Panel noted that: (i) *"the magnitude of the rise in market share of non-cooperating producers [...] was, at least in absolute terms, similar to the drop in market share the Commission observed pursuant to the end-point-to-end-point analysis"*; (ii) the rise in market share of the non-cooperating producers coincided with, *inter alia*, a drop in the market share of the domestic industry; and (iii) *"the domestic industry's loss of market share during the period considered was a significant consideration in the Commission's finding that the domestic industry had suffered injury."*¹⁷⁰

129. Added to the above, the UK industry's export performance is a factor explicitly listed under Regulation 35 basic Regulations and according to the UK industry's questionnaire responses, its export sales decreased substantially throughout the IIP.¹⁷¹



130. The failure to consider this potential injury factor reinforces the WTO-inconsistency of the TRA's causation assessment.

¹⁶⁸ Panel Report, *China – Autos (US)*, paras. 7.331-7.332.

¹⁶⁹ Panel Report, *EU – PET (Pakistan)*, para. 7.150.

¹⁷⁰ Panel Report, *EU – PET (Pakistan)*, paras. 7.150-7.152.

¹⁷¹ Annex 12, AD questionnaire response of the Applicant.

131. Likewise, the TRA did not consider the impact of the UK industry's anti-competitive behaviour on its sales, market share and profits, among other factors. In this context, it is recalled that the Panel in *EC – Countervailing Measures on DRAM Chips* held that "*forces that may have caused certain negative or positive developments*" should be considered by investigating authorities within the context of their causation analysis under Article 3.5 ADA and 15.5 SCM Agreement.¹⁷² In light of the evidence submitted by the CCCME, the TRA should have addressed this factor within its non-attribution analysis.

5.2.2 Unobjective and inadequate consideration of certain factors

132. Next, with regard to the other known factors assessed by the TRA, namely the third country imports, the CCCME reiterates that the AD and AS SEF fail to disclose the unit import prices of the third country imports and how they were calculated. Since 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, it should have been disclosed pursuant to Articles 6.9 ADA and 12.8 SCM Agreement.
133. With regard to the third country imports, the TRA found that "*some injury to the UK industry might be caused by the Polish import volume and prices*".¹⁷³ Having made such a finding, the TRA was under an obligation to ensure that injury caused by the Polish imports was not attributed to the OFC imports from China.
134. The TRA's assertion that "*there is an absence of any available pricing data that would enable further assessment*" is irrelevant. Indeed, simply on this basis the TRA cannot circumvent the non-attribution obligation. As the Panel in *EC – Countervailing Measures on DRAM Chips* stated, "*practical evidence gathering problems [in an investigation] are not an overriding justification*" for disregarding the rules of the WTO Agreements.¹⁷⁴
135. Indeed, as repeatedly held by the Appellate Body, "*Article 3.5 [ADA] also requires an investigating authority to 'examine any known factors other than the dumped imports which at the same time are injuring the domestic industry' and to ensure that 'the injuries caused by these other factors [are not] attributed to the dumped imports'*". The non-attribution language in

¹⁷² Panel Report, *EC – Countervailing Measures on DRAM Chips*, para. 7.364.

¹⁷³ AD SEF, para. 289; and AS SEF, para. 396.

¹⁷⁴ Panel Report, *EC – Countervailing Measures on DRAM Chips*, para. 7.109.

*Article 3.5 calls for an assessment that involves "separating and distinguishing the injurious effects of the other factors from the injurious effects of the dumped imports" and 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".*¹⁷⁵

136. Moreover, the TRA has based its injury determination on the volume effects of the Chinese imports.¹⁷⁶ However, throughout the IIP, the Polish OFC imports were present in much higher volumes on the UK market than the Chinese OFC imports, especially in the POI. Indeed, in the POI, the Polish imports were 33% higher than the Chinese OFC imports. Additionally, the year-on-year increase in the OFC imports from Poland far exceeded the increase in OFC imports from China, and the Polish imports clearly took sales and market share from the UK industry. The growth in the Polish OFC imports also significantly exceeds the growth in the UK consumption over the IIP. Added to the above, the prices of the Polish OFC imports were similar to those of the Chinese OFC imports.

Import volumes and average import prices	2018	2019	2020	POI
Import volumes from the PRC (Table 17 of the AD SEF and 28 of the AS SEF)	120,962	102,868	159,417	535,565
	100	85	132	443
Import volumes from Poland (Table 17 of the AD SEF and 28 of the AS SEF)	265,170	314,184	530,816	716,988
	100	118	200	270
PRC's average import unit prices (HMRC import statistics)	17,720	20,715	17,914	11,939
Index (Table 18 of the AD SEF and Table 29 of the AS SEF)	100	130	86	56
Poland's average import unit prices (HMRC import statistics)	15,859	18,213	18,091	12,461
Index (Table 18 of the AD SEF and Table 29 of the AS SEF)	100	128	97	66

¹⁷⁵ Appellate Body Report, *EU – Biodiesel*, para. 6.125, citing: Appellate Body Reports, *China – HP-SSST (Japan)* / *China – HP-SSST (EU)*, para. 5.283; *China – GOES*, para. 151; *US – Hot Rolled Steel*, para. 223 and 226, and *EC – Tube or Pipe Fittings*, para. 188.

¹⁷⁶ AD SEF, para. 289; and AS SEF, para. 396.

137. Yet, the TRA summarily found that the Polish OFC imports did not break the causal link.
138. The CCCME considers that the non-consideration of compelling evidence on the record concerning the Polish OFC imports that conflicts with the TRA's conclusions is inconsistent with Articles 3.1 and 3.5 ADA and Articles 15.1 and 15.5 SCM Agreement.
139. With regard to Brexit and the raw material costs, the TRA merely referred to the **2017** Annual Report of the Applicant¹⁷⁷ and held that it did not "*find evidence that the Applicant's cost of production has increased significantly throughout the IP.*"¹⁷⁸ However, contrary to the statement of the TRA (and as noted in the Additional Comments), the Applicant's Group Company publicly acknowledged, on 23 February 2021, that "*the wire and cable industry [was] facing significant and sustained increases in key material cost inputs used in the manufacturing and distribution of [their] products.*"¹⁷⁹ The negative effects of Brexit were also acknowledged by the Applicant's Group Company in its latest 2022 Integrated Annual Report, which was provided to the TRA as part of the UK industry's questionnaire responses.¹⁸⁰
140. The TRA's finding concerning the impact of Brexit and increased raw material costs, therefore, is not only unsubstantiated but also contradicted by the evidence on the record.
141. Moreover, the point is not whether the UK industry's raw material cost increased significantly but whether it increased in the first place and whether it negatively affected the sales prices and profitability of the UK industry. The magnitude of the cost increase is not necessarily decisive of whether or not it should be considered in the non-attribution analysis, as suggested in the AD and AS SEF.
142. Next, with regard to COVID, the TRA disregarded the possibility that the COVID-19 pandemic caused injury to the UK industry merely on the basis that, in 2020, the UK consumption of OFC dropped by 5%, while the UK industry's sales dropped by 15%.¹⁸¹ This assessment lacks objectivity. Indeed, the effects of the COVID-19 pandemic were not confined to 2020 but continued

¹⁷⁷ AD SEF, para. 294; and AS SEF, para. 401.

¹⁷⁸ AD SEF, para. 294; and AS SEF, para. 401.

¹⁷⁹ Prysmian Group, "Energy Products Price Increase" (23 February 2021), available at <https://na.prysmiangroup.com/sites/default/files/atoms/files/Prysmian-Group_Price-Announcement-02-23-2020.pdf>

¹⁸⁰ Prysmian Group, "Integrated Annual Report 2022", available at <www.prysmiangroup.com/sites/default/files/pr-2302-rsg-2022-integrated-annual-report-compr_1.pdf>, p. 118.

¹⁸¹ AD SEF, paras. 292-293; and AS SEF, para. 399-400.

well into 2022 and can also not be measured simply by considering only the Applicant's sales volumes.

143. Moreover, as publicly acknowledged by both the UK industry and its Group Company (*i.e.*, the Prysmian Group), the COVID-19 pandemic "*had unprecedented negative impacts [and] severe repercussions [on] the entire manufacturing system.*"¹⁸²
144. The COVID-19 pandemic caused substantial supply-chain disruptions due to the restrictive measures taken by governments worldwide. The pandemic, therefore, is most likely to have impacted the production/output, sales, capacity utilisation, employment, profitability, and investments of the UK industry. Indeed, the sharpest decline in the exports of the UK industry was in 2020, and even in 2021, the UK industry's OFC exports were 53% lower than in 2018.¹⁸³
145. As noted in the Additional Comments by the CCCME, evidence from the UK industry itself shows that the pandemic was another causal factor that adversely affected the UK industry's performance in 2020 and 2021. Thus, the TRA was obliged to properly separate and distinguish the injurious effects of the COVID-19 pandemic and to ensure that these effects are not attributed to the OFC imports from China.
146. In this context, the CCCME recalls that in *Pakistan – BOPP Film (UAE)*, the Panel found that Pakistan had acted inconsistently with the requirements of non-attribution and objective examination based on positive evidence by providing merely "*a bare assertion that the trends in the size of the domestic market showed the financial crisis had not affected the domestic industry...*" and by failing "*to identify – let alone separate and distinguish – the injurious effects of the global financial crisis.*"¹⁸⁴

5.3 Conclusion on causation

147. In summary, the data in the AD and AS SEF demonstrates that, to the extent that the domestic industry suffered any injury (*quod non*), it was clearly not due to the OFC imports from China but was on account of other *known* factors. However, the causation assessment to the extent

¹⁸² Prysmian Group, "Press release results at 31 December 2020", available at <www.prysmiangroup.com/en/media/press-releases/press-release-results-at-31-december-2020>. See also: Prysmian UK's Annual Report 2020, Annex A.6.3.a (2020), AD questionnaire response of the Applicant., p. 2 (*i.e.*, p. 4 of the PDF document).

¹⁸³ Annex 12, AD questionnaire response of the Applicant.

¹⁸⁴ Panel Report, *Pakistan – BOPP Film (UAE)*, para. 7.450.

made in the AD and AS SEF is inconsistent with the requirements of Articles 3.1 and 3.5 ADA, Articles 15.1 and 15.5 SCM Agreement, and Regulations 27(2)(b) and 25 basic Regulations.

6 CONCLUSION

148. For the above reasons, the CCCME requests the TRA to terminate the AD and AS investigations without the imposition of any measures.