

中华人民共和国商务部

MINISTRY OF COMMERCE OF THE PEOPLE'S REPUBLIC OF CHINA

2, DONG CHANG'AN STREET, BEIJING, CHINA 100731

Non-Confidential

The Comments on the Provisional Affirmative Determination and the Statement of Essential Facts regarding AD0021

Submission of the GOC

1 INTRODUCTION

1. The Government of China ("the GOC") refers to the Provisional Affirmative Determination ("PAD"), and the Statement of Essential Facts ("SEF") issued by UK Trade Remedies Authority ("TRA") on 9 June 2023 in the context of the anti-dumping ("AD") investigation concerning imports of single-mode optical fibre cables ("OFC") originating in the People's Republic of China ("PRC").
2. The GOC notes that the SEF which is the disclosure of essential facts -- within the meaning of Article 6.9 of the Anti-Dumping Agreement ("ADA")-- concerning the intended final AD determination, does not provide interested parties the essential facts underlying the TRA's determination of injurious dumping and the proposed AD measures to file proper comments in the defence of their interests.
3. Likewise, the PAD which serves as the public notice and explanation of the preliminary determination within the meaning of Articles 12.2 and 12.2.1 of the ADA, does not provide sufficient details as regards the TRA's findings and conclusions on matters of fact and law for interested parties to understand and comment on the proposed provisional AD measures.

4. Overall, the GOC respectfully disagrees with the TRA's findings of injurious dumping in the PAD and SEF, and through the present comments it will focus on the TRA's finding of a particular market situation ("PMS") for the OFC domestic market and the dumping margin calculation made on that basis.

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

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

5. The TRA has essentially relied on facts available to find the existence of a PMS¹ 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.
6. The use of facts available in the context of an AD investigation is required to be consistent with Article 6.8 and Annex II ADA. As confirmed by a string of WTO reports, in the application of facts available, the "*alternative facts*" used by the investigating authorities (i) must "*reasonably replace*" the allegedly missing information;² and (ii) must be correct information, as the authorities are required to reach an "*accurate*" determination.³
7. 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, when an authority chooses to apply facts available, it does not have a "*blank cheque*" to base its determinations on "*speculative assumptions*", unrelated information, or "*worst information available*".⁴ Every

¹ AD SEF, para. 114.

² 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.

³ 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.

⁴ Panel Report, *EC – Countervailing Measures on DRAM Chips*, para. 7.61.

determination by an authority has to be based on "*facts ... and not mere inferences*".⁵
 When applying facts available, an authority is not at liberty to "*assume a lot from very little*".⁶

8. 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.

2.1.1 Findings of PMS are based on assumptions and unrelated and obsolete policies

9. 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.
10. First, the AD SEF erroneously relies on general infrastructure/public policy laws/regulations as a basis for finding a PMS. For instance, the SEF states that government support comes in "*through broadband strategies such as "Dual Gigabit"*".⁷ However, the Dual Gigabit strategy 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. To illustrate this point, the table below identifies some of the similarities between the two strategies.

Topic	UK's Project Gigabit ⁸	PRC's Dual Gigabit ⁹
Main goal	"Our £5 billion Project Gigabit mission will deliver lightning-fast, reliable broadband to every corner of the United Kingdom, ensuring that everyone has access to the best connectivity wherever they live, work and study."	"The "dual gigabit" network represented by gigabit optical network and 5G can provide a single user with gigabit access capabilities of fixed and mobile networks."
Importance of digital transform	"Because the work of Building Digital UK is more important than ever. "	" The important role of digital transformation and other aspects, accelerate the construction of a new development pattern, and formulate this action plan."

⁵ Panel Report, *EC – Countervailing Measures on DRAM Chips*, para. 7.80.

⁶ Panel Report, *EC – Countervailing Measures on DRAM Chips*, para. 7.109.

⁷ AD SEF, para. 116.

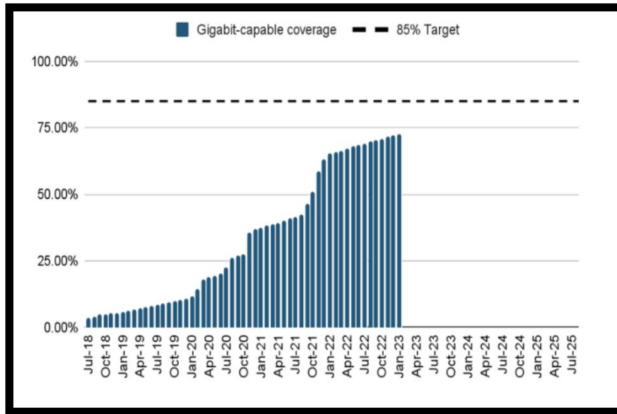
⁸ UK Department for Science, Innovation & Technology, "Policy paper: Project Gigabit Winter Update 2022 to 2023" (27 February 2023), available at <www.gov.uk/government/publications/project-gigabit-delivery-plan-winter-update-2022-to-2023/project-gigabit-winter-update-2022-to-2023#ministerial-foreword>.

⁹ PRC’s Ministry of Industry and Information Technology, "Notice of the Ministry of Industry and Information Technology on Printing and Distributing the "Action Plan for the Coordinated Development of "Double Gigabit" Networks (2021-2023)", available at <www.gov.cn/zhengce/zhengceku/2021-03/25/content_5595693.htm>.

ion		
Rural access	<p>"The graphs and infographics evidence the steady increase in coverage of gigabit-capable and full fibre coverage across the majority of the UK. Most notably, the latest Ofcom coverage datasets show each of the nations benefiting from an uptick in rural coverage of between 2% and 6%, outlining the progress broadband suppliers are making outside urban areas."</p> <p>"Trials will be undertaken in very hard to reach locations across the UK and will assess whether LEO satellites, which so far have not been tested at scale in remote and rural areas in the UK, can deliver faster and more reliable broadband to some of the most remote locations in the UK."</p>	<p>"Deeply promote the construction and upgrading of rural network facilities. Improve the telecommunications universal service compensation mechanism, support basic telecommunications companies to continue to deepen broadband network coverage in areas such as large-scale rural population centers, production and operation areas, and along major transportation routes, and help consolidate and expand the achievements of poverty alleviation and effectively link up with rural revitalization. For rural and remote areas with conditions and needs, gradually promote the construction and coverage of Gigabit networks."</p>
Providing secure technology	<p>"As the first Secretary of State for the Department for Science, Innovation and Technology, I have a mission: to unlock the potential of technology to supercharge growth, delivering prosperity, security, and opportunities for communities in every corner of the country."</p>	<p>"Improve network security protection capabilities. Promote the same planning, construction, and operation of network security capabilities and "dual gigabit" network facilities, and improve network security and data security capabilities. Supervise and urge relevant enterprises to implement the main responsibility of network security, establish and improve security management systems and working mechanisms, carry out network security risk assessment and hidden danger investigation, timely prevent network, equipment, physical environment, management and other security risks, and continuously improve network security protection capabilities."</p> <p>"Do a good job in cross-industry network security protection. Encourage basic telecommunications companies, network security companies, industry units, etc. to strengthen network security work coordination in key industries such as medical care, education, and industry, and strengthen the security risks of Gigabit industry virtual private networks for diversified business scenarios, access methods, and equipment forms. Prevention and response guidance, and promote the realization of network facilities security co-construction and security sharing."</p>
	<p>"The investment in these regions reflects the government's commitment to roll out gigabit-capable broadband nationally and to create a level playing field for hard-to-reach communities and businesses around the country, bringing with it economic and social benefits for local people."</p>	<p>"Market-led, government-guided. Give full play to the role of various market entities, encourage differentiated development and competition, strengthen technological innovation, promote integrated applications, deepen co-construction and sharing and green development, and comprehensively improve the supply level. Make better use of the positive role of the government in planning guidance, policy support, market supervision, etc., and create a favorable environment for the development of "dual gigabit" networks."</p>

Progress in providing households with access

Broadband type	Nation	Take-up	
		(% of UK households with access)	
		May 2022	May 2021
Full-fibre (FTTP)	UK	25	24
	England	25	25
	Northern Ireland	25	19
	Scotland	23	22
	Wales	28	24
Gigabit (>1000 mbits/sec)	UK	38	7



"1. By the end of 2021

- *The gigabit optical fibre network has the ability to cover 200 million households, the port scale of 10G-PON and above exceeds 5 million, and the number of Gigabit broadband users exceeds 10 million.*
- *The 5G network has basically achieved coverage in areas above the county level and some key towns and towns, and more than 600,000 new 5G base stations have been added.*
- *Build more than 20 Gigabit cities.*

2. By the end of 2023

- *The gigabit optical fiber network has the ability to cover 400 million households, the number of 10G-PON and above ports exceeds 10 million, and the number of Gigabit broadband users exceeds 30 million.*
- *The 5G network basically realizes the coverage of areas above the township level and key administrative villages.*
- *Achieve the "Double Hundred" goal: build 100 Gigabit cities, and create 100 Gigabit industrial virtual private network benchmarking projects."*

11. 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."*¹⁰
12. However, the 2013 Broadband China Strategy is a non-binding document setting out general infrastructure development goals similar to 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."*¹¹ This document, therefore, is not evidence,

¹⁰ AD SEF, para. 122.

¹¹ AD SEF, para. 119.

let alone positive evidence, to support a finding of a PMS for OFC in the domestic market.

13. 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*".¹² However, it then asserts that "*they form the basis of government support in the PRC*", without adducing any evidence in support of this assertion.¹³ The contradiction is stark and puzzling: indeed, how can policies that do not envisage any "*explicit action*" result (concretely) in any "*government support*"? The GOC would like to emphasize 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.¹⁴
14. Similarly, the statement that all administrative units of the PRC "*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.¹⁵
15. 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 support¹⁶ 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 GOC 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

¹² AD SEF, para. 117.

¹³ AD SEF, para. 117.

¹⁴ Panel Report, *Australia – Anti-Dumping Measures on Paper*, para. 7.22.

¹⁵ AD SEF, para. 120.

¹⁶ AD SEF, para. 121.

assertions and statements and needs to include material information and data establishing the factual issue.¹⁷ Evidence must have probative value,¹⁸ and be related to the specific aspect, *i.e.*, a PMS and particularly for the OFC domestic market.

16. 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.¹⁹
17. 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".²⁰
18. 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".²¹ 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.
19. With regard to YOFC, it is recalled that the Applicant's group company DrakaComteq B.V. has a 23.73%²² 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

¹⁷ Panel Report, *Pakistan – BOPP Film (UAE)*, para. 7.19.

¹⁸ Panel Report, *Morocco – Definitive AD Measures on Exercise Books (Tunisia)*, para. 7.352.

¹⁹ AD SEF, para. 130.

²⁰ AD SEF, paras. 123 and 128.

²¹ AD SEF, para. 124.

²² 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>>.

OFC to members of the Prysmian Group.²³ 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 anti-subsidy ("AS") cases, government ownership is not evidence of meaningful control by the government over an entity²⁴ 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*".²⁵ 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 – DRAMs (CVD)* – "*must in all cases be probative and compelling*."²⁶ Government influence cannot be assumed to exist.

20. 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 sectors' 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.
21. 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.
22. Next, the TRA mentions the market analysis provided by the CRU's "Telecom Cables Market Outlook 2021" as evidence of its finding of "*government influence*".²⁷ However, no confidential 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 GOC cannot adequately exercise its rights of defense

²³ *Ibid*, p. 93.

²⁴ Appellate Body Report, *US – Carbon Steel (India)*, paras. 4.36-4.43.

²⁵ Panel Report, *Korea – Commercial Vehicles*, para. 7.406.

²⁶ Panel Report, *US – DRAMS (CVD)*, para. 7.35. [Emphasis added]

²⁷ AD SEF, paras. 123 and 127.

because it is prevented from challenging the factual information upon which the TRA reached its findings.²⁸

23. 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*"²⁹ is a 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,³⁰ 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.³¹ If the TRA's approach were to be applied, Deutsche Telekom is state-owned/controlled/influenced and is buying OFC at state-influenced prices.
24. 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 GOC recalls that, when relying on facts available, investigating authorities cannot base their findings on adverse and baseless inferences.³²
25. 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*"; and (iii) "*government support affects OFC*

²⁸ Panel Report, *Argentina – Ceramic Tiles*, para. 6.39.

²⁹ AD SEF, para.128.

³⁰ 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).

³¹ Deutsche Telekom, 2022 Annual Report, p. 23., available at <<https://report.telekom.com/annual-report-2022/assets/downloads/entire-dtag-ar22.pdf>>.

³² Panel Report, *US – DRAMS (CVD)*, para. 7.80.

*producers' costs of production and contributes to the prices associated with such costs reflecting non-commercial factors."*³³

2.1.2 Excessive reliance on the findings of the European Commission

26. The assessment of a PMS in the SEF, particularly that (i) "*the land market in the PRC reflects non-commercial factors*,"³⁴ and (ii) "*optical fibre costs are subject to non-commercial factors*,"³⁵ 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. Instead of conducting its own assessment by actively seeking out pertinent information, the TRA has passively relied on other authorities' assessments.
27. In fact, the TRA's finding that the PRC land market reflects non-commercial factors is entirely based on the Commission's historical AD investigations concerning imports of (i) certain organic coated steel products pertaining to 2013, (ii) certain filament glass fibre products completed in 2014, and (iii) aspartame from the PRC 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.
28. Additionally, these investigations concerned completely different products. These 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.
29. The TRA cannot replace its investigation and the evidence it has to gather by simply referring to the findings of the Commission.

³³ AD SEF, paras. 130 and 122.

³⁴ AD SEF, para. 136.

³⁵ AD SEF, para. 172.

30. 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 on the TRA to make determinations based on positive evidence.
31. 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.
32. Additionally, the TRA's reliance on the European Commission's Working Document on Significant Distortions in the Chinese Economy ("EC Working Document") is misplaced.³⁶ 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.
33. Likewise, the reliance on the general, countrywide "*Made in China 2025*" plan and the "*Internet Plus*" strategy is irrelevant and does not support the TRA's finding of distortion of OFC raw material costs.

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

34. The TRA's assumptions underpinning the finding of a PMS in the PRC 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.

³⁶ AD SEF, para. 168.

35. The GOC recalls that in applying facts available, an authority must "*take into account all substantiated facts on the record*".³⁷ All facts that are properly before an authority must be considered when it selects the appropriate replacement facts.³⁸ Thus, an authority cannot "*ignore*" any "*relevant and available information*" or "*improperly close[] its eyes to information before it*".³⁹
36. 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.*"⁴⁰ 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 of the PRC 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 the PRC reflects non-commercial factors, and explained that (i) the cited governmental policies have no legal effect;⁴¹ and (ii) the SDG Group did not have any knowledge of interest rates being influenced by non-market forces.⁴² 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;*"⁴³ and (ii) "*the fact that SDG were unaware of distortions, does not mean that they do not exist.*"⁴⁴ However, the TRA's response cannot substitute evidence and also 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 for the TRA to claim that SDG did not prove the absence of non-commercial factors.
37. 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.

³⁷ 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.

³⁸ Panel Report, *US – Anti-Dumping and Countervailing Duties (Korea)*, para. 7.302.

³⁹ Panel Report, *US – Supercalendered Paper*, para. 7.182.

⁴⁰ AD SEF, para. 145.

⁴¹ AD SEF, para. 143.

⁴² AD SEF, para. 144.

⁴³ AD SEF, para. 143.

⁴⁴ AD SEF, para. 144.

38. In this connection, the GOC 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.⁴⁵
39. Moreover, the *TRA*'s subsequent finding of the low materiality of the loans in contributing to SG&A also reflects that even 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.
40. 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."*⁴⁶ [Footnotes omitted]

41. 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

⁴⁵ See for example: Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 352.

⁴⁶ *TRA*, Final Determination, Case AD0012 Investigation into alleged dumping of aluminum extrusions from the People's Republic of China, paras. 149-151.

countrywide analysis as in the *Aluminium Extrusions* investigation. This inconsistent approach reveals a lack of objectivity and reasonableness.

42. 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 2020.⁴⁷ The SEF also acknowledges that "*there does not appear to be any publicly available research after the 2020 reforms*".⁴⁸ However, it then asserts that "*even with recent reforms, the same structure still applies*" without adducing any proof or basis for such an assertion.⁴⁹ The contradiction here is again stark in that while for loans, governmental policies and guidance are treated as binding laws by the TRA, for labor, the legal reform is considered irrelevant.
43. 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*".⁵⁰ 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 Labour Law of the PRC 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.
44. 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 the PRC, 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*."⁵¹ In the present case, the TRA assumes that the law itself constitutes evidence for the finding

⁴⁷ AD SEF, paras. 156-157.

⁴⁸ AD SEF, para. 158.

⁴⁹ AD SEF, para. 158.

⁵⁰ AD SEF, para. 158.

⁵¹ TRA, Final Determination, Case AD0012 Investigation into alleged dumping of aluminum extrusions from the People's Republic of China, para. 151.

that labour costs "*within the domestic OFC market in the PRC*" would be subject to non-commercial factors.⁵²

45. 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 PRC 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.
46. 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.*"⁵³ This again proves that there was no evidentiary basis for the finding that energy prices reflect non-commercial factors.
47. 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,*"⁵⁴ yet, the TRA erroneously held that energy prices reflect non-commercial factors.

2.1.4 Interim conclusion

48. For the reasons given above, the GOC 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 GOC respectfully requests the TRA to review and modify its findings in that there was no PMS for OFC in the domestic market.

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

49. 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

⁵² AD SEF, paras. 161-162.

⁵³ AD SEF, para. 194.

⁵⁴ AD SEF, para. 150.

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*⁵⁵ and by the GATT Panel in *EEC – Cotton Yarn*.⁵⁶ 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 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."⁵⁷ [Emphasis added]

50. 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.
51. The SEF essentially focuses on the alleged differences in "*conditions of competition*" between the UK and Chinese OFC market.⁵⁸ Apart from being irrelevant, this assessment is flawed.

⁵⁵ Panel Report, *Australia – Anti-Dumping Measures on Paper*, paras. 7.63, 7.73.

⁵⁶ GATT Panel Report, *EEC – Cotton Yarn*, paras. 478-479.

⁵⁷ Panel Report, *Australia – Anti-Dumping Measures on Paper*, para. 7.75.

⁵⁸ AD SEF, paras. 103-104.

52. First, the situation of the UK market is rather 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.*"⁵⁹
53. 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.
54. In any case, there are bound to be differences in competitive conditions between two markets. Moreover, the TRA also overlooks that the UK also subsidizes 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.
55. 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 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*

⁵⁹ Panel Report, *Australia – Anti-Dumping Measures on Paper*, para. 7.38. [Emphasis added]

*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)."*⁶⁰ [Emphasis added]

56. 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.*"⁶¹
57. 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,***

⁶⁰ Panel Report, *Australia – Anti-Dumping Measures on Paper*, para. 7.76.

⁶¹ Panel Report, *Australia – Anti-Dumping Measures on Paper*, para. 7.76. [Emphasis added]

the domestic sales of the individual exporters do not permit a proper comparison of the domestic **prices** and the export **prices**."⁶² [Emphasis added]

58. Third, the TRA's assessment does not match (much less support) its eventual conclusion. For example, the TRA found that the raw materials' cost issue impacts both domestic and export sales 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.
59. 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".⁶³ 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*

⁶² Panel Report, *Australia – Anti-Dumping Measures on Paper*, para. 7.89.

⁶³ Appellate Body Report, *US – Countervailing Duty Investigation on DRAMs*, para. 186; and Appellate Body Report, *US – Lamb*, para. 103. [Emphasis added]

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."*⁶⁴ (emphasis added)

60. 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.**"⁶⁵

61. The GOC 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.

2.3 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

62. The GOC 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.⁶⁶

⁶⁴ 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.

⁶⁵ Panel Report, *Australia – Anti-Dumping Measures on Paper*, para. 7.76. [Emphasis added]

⁶⁶ Appellate Body Report, *US – Stainless Steel from Mexico*, para. 86.

63. Second, the GOC 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.
64. 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...*"⁶⁷
65. 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.
66. 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.

⁶⁷ AD SEF, para. 177.

67. 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 GOC also understands from publicly available information that the Turkish producers mainly import optical fibres from the United States.⁶⁸ 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.
68. Thus, the TRA's approach is inconsistent with Article 2.2.1.1 ADA.
69. 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 production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits.*" [Emphasis added]
70. The last phrase of Article 2.2 of the ADA (emphasized above) is essentially the umbrella provision or chapeau (to be read along with Articles 2.2.1.1 and 2.2.2 ADA)⁶⁹ for the establishment of the normal value and cannot be disregarded in the construction of the normal value as done by the TRA.

⁶⁸ 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).

⁶⁹ 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.*"

71. 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.⁷⁰ The fundamental and mandatory rule remains that an investigating authority has to determine the cost of production in the country of origin.
72. 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.⁷¹
73. 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."*⁷² [emphasis added]
74. 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 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."*⁷³ [emphasis added]

⁷⁰ Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.73; and Appellate Body Report, *Ukraine – Ammonium Nitrate*, para. 6.83.

⁷¹ Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.73.

⁷² Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.73.

⁷³ Appellate Body Report, *Ukraine – Ammonium Nitrate*, para. 6.83.

75. 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.⁷⁴ Similarly, the Turkish Lira devalued significantly against the GBP between 2018 and the POI.⁷⁵ Thus, the Turkish fibre costs were bound to be affected by the high inflation and correspondingly higher costs.
76. Moreover, with regard to the fibre costs of the Turkish producers, the GOC did not consider that the Turkish and Chinese fibre markets are incomparable. The number of producers in the PRC 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.

⁷⁴ Trading Economics, "Turkey Inflation Rate", available at <<https://tradingeconomics.com/turkey/inflation-cpi>>.

⁷⁵ 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>

77. 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.⁷⁶
78. 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,⁷⁷ 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,⁷⁸ it is inconsistent with Article 2.2.2(a) ADA.

⁷⁶ 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."

⁷⁷ AD SEF, para. 200.

⁷⁸ AD SEF, paras. 202-203.