CHINA – ANTI-DUMPING AND COUNTERVAILING DUTY MEASURES ON CERTAIN AUTOMOBILES FROM THE UNITED STATES
(DS440)

RESPONSES OF THE UNITED STATES TO THE PANEL'S FIRST SET OF QUESTIONS TO THE PARTIES

July 12, 2013

TABLE OF REPORTS

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EC – Bed Linen (Article 21.5) (AB)	Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 by India*, WT/DS141/AB/RW, adopted 24 April 2003
EU – Footwear (China)	Panel Report, *European Union – Anti-Dumping Measures on Certain Footwear from China*, WT/DS405/R, adopted 22 February 2012
Mexico – Anti-Dumping Measures on Rice (Panel)	Panel Report, *Mexico – Definitive Anti-Dumping Measures on Beef and Rice*, Complaint with Respect to Rice, WT/DS295/R, adopted 20 December 2005, as modified by the Appellate Body Report, WT/DS295/AB/R
Mexico – Anti-Dumping Measures on Rice (AB)	Appellate Body Report, *Mexico – Definitive Anti-Dumping Measures on Beef and Rice*, Complaint with Respect to Rice, WT/DS295/AB/R, adopted 20 December 2005
Mexico – Steel Pipes and Tubes	Panel Report, *Mexico – Anti-Dumping Duties on Steel Pipes and Tubes from Guatemala*, WT/DS331/R, adopted 24 July 2007
US – Tyres (China) (AB)	Appellate Body Report, *United States – Measures Affecting Imports of Certain Passenger Vehicle and Light Truck Tyres from China*, WT/DS399/AB/R, adopted 5 October 2011

ALLEGED VIOLATION OF ARTICLE 6.5.1 OF THE ANTI-DUMPING AGREEMENT AND ARTICLE 12.4.1 OF THE SCM AGREEMENT

UNITED STATES

2. In paragraph 45 of its first written submission, the United States argues that for certain data the application contains year-on-year percentage changes for the period of investigation ("POI") but not a non-confidential summary of the actual values associated with the percentage changes.

Please clarify what you mean by a "non-confidential summary of the actual values associated with the percentage changes." Please explain how such a summary would differ from or be more informative than the year-on-year percentage changes?

1. The applicant could summarize absolute figures without disclosing confidential information by reporting the absolute figure as an average. For example, with respect to Table 16 (Exhibit CHN-1), the applicant could have reported production capacity by averaging the production capacity of the individual companies. Respondents would not have been able to identify changes in production capacity by individual company. However, an average would have allowed the respondents to gain a reasonable understanding of the substance of the confidential information.

2. The year-by-year percentage changes by themselves did not allow the respondents to discern the significance of those changes. For example, an increase in production capacity from 1 to 2 is a 100 percent increase, and an increase from 100 to 200 is also a 100 percent increase. The latter increase, however, is far more significant. Nor did the applicant provide a statement of reasons as to why a more detailed summarization was not possible with respect to this information, or for that matter, any other information.

ALLEGED VIOLATION OF ARTICLE 6.9 OF THE ANTI-DUMPING AGREEMENT

UNITED STATES

4. In its arguments on this claim, the United States refers to MOFCOM's Preliminary and Final Determinations.[1] China argues that the United States has failed to make a prima facie case with respect to this claim because the claim is incorrectly linked to MOFCOM's Preliminary and Final Determinations, as opposed to its pre-Final Determination disclosure which, in China's view, is the subject of the disclosure obligation under Article 6.9.[2]

Is it the United States' view that whether the disclosure obligation under Article 6.9 is met is to be assessed with reference to Preliminary or Final Determinations pertaining to the relevant investigation? Please explain, in particular with reference to the timing aspect of the Article 6.9 disclosure obligation.

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[1] U.S. First Written Submission, paras. 67-69.
[2] China First Written Submission, para. 73.

3. China is incorrect in its characterization of the U.S. argument. Article 6.9 of the AD Agreement provides that the essential facts must be disclosed "before a final determination is made" and "in sufficient time for the parties to defend their interests." The essential facts could be disclosed in conjunction with a preliminary determination or other disclosure document, so long as the disclosure is issued before a final determination is made, and in sufficient time to allow parties to defend their interests relative to the facts revealed as essential to the investigating authority's decision to apply measures.

4. Following the disclosure, there must be sufficient time for interested parties to submit comments and then for the investigating authority to analyze and take the comments into account, as deemed appropriate, in the final determination. In this case, timing is not an issue because MOFCOM did not disclose the essential facts to the interested parties at any point in the investigation. For example, as the United States has explained: "*Prior to the final determination*, MOFCOM released its final disclosure to the United States and interested parties. In the final disclosure, MOFCOM reported an all others dumping rate of 21.5 percent, and provided no further information beyond repeating the single sentence contained in its preliminary determination."[3]

6. The Panel notes China's argument, in paragraph 89 of its first written submission, that MOFCOM sent Article 6.9 disclosures to all interested parties in the investigations at issue.[4] The Panel also notes that MOFCOM's Final Determination in the investigations at issue mentions that MOFCOM disclosed essential facts to all interested parties, including the U.S. government.[5]

Please reply with reference to the relevant parts of the record:

5. As a preliminary matter, the United States has noted that, based on all the documents in its possession – the disclosures to the U.S. government, the preliminary determination, and the final determination – MOFCOM failed to disclose the essential facts in the investigations of certain automobiles from the United States at issue in this dispute.[6] The conclusory sentence in MOFCOM's final determination is insufficient.[7] The disclosure documents received by the U.S. government contain narrative discussions of certain information regarding the dumping and subsidy margins and adjustments, but they did not provide the details necessary for the U.S. government to understand MOFCOM's calculations and provide meaningful comments and arguments in response.[8] Similarly, the United States understands that MOFCOM did not issue any disclosures to the U.S. respondents that provided the essential facts relating to the margin rate data as well as calculations performed by MOFCOM to derive each of the individual company rates.

6. The United States is not aware of any place in the record where MOFCOM met its Article 6.9 requirements to disclose the essential facts relating to the margin calculations and the

[3] U.S. First Written Submission, para. 68 (emphasis added, footnote omitted).
[4] China First Written Submission, para. 89.
[5] Exhibit CHN-07, p. 30.
[6] U.S. Opening Statement at the First Panel Meeting ("U.S. First Opening Statement"), para. 40.
[7] Final Determination, pp. 29-30 (Exhibit CHN-07).
[8] Preliminary Disclosure (Exhibit USA-09); Final Disclosure (AD/CVD) (ExhibitUSA-11).

data underlying them. China, in response, has claimed that it disclosed the essential facts, but it points only to a conclusory sentence in its final determination in support of its position. This is not sufficient to establish as fact what China has asserted: that it did, in fact, disclose the essential facts to interested parties.

BOTH PARTIES

b) Was a disclosure document sent to the U.S. government?

7. Yes. The United States received a document titled "Disclosure of Basic Facts upon which the Dumping Margin and Ad Valorem Subsidy Rate are based in the Final Determination of the Auto AD and CVD Investigation against the U.S."[9] This document does not contain the essential facts relating to the all-others rates.

DETERMINATION OF "ALL OTHERS" AD AND CVD RATES

UNITED STATES

7. In the context of its claims regarding the determination of the "all others" rates, the United States asserts that MOFCOM sent questionnaires only to the U.S. producers identified in the petition and did not attempt to identify whether any other U.S. producers might exist.[10] However, China asserts that MOFCOM did in fact make efforts in this regard, and in fact identified four additional U.S. producers not identified in the petition, and sent them questionnaires.[11]

Please address whether the United States accepts that MOFCOM made efforts to identify other U.S. producers, and if so, how this affects the United States' position.

8. The United States respectfully suggests that, in addressing the U.S. claims regarding MOFCOM's "all others" rates, it is not necessary to resolve what additional steps MOFCOM could have taken to identify additional producers. The key fact to consider is that the exporters and producers subject to the all-others rates, including those who did not export subject product during the period of investigation, were not notified by MOFCOM of the information required of them. These parties cannot be said to have refused access to or failed to provide necessary information to the investigating authority, or significantly impeded the investigation. Therefore, MOFCOM's application of apparently adverse facts available to those exporters and producers was inconsistent with China's obligations under Article 6.8 of the AD Agreement and Article 12.7 of the SCM Agreement.

8. Given that all others anti-dumping ("AD") or countervailing duty ("CVD") rates apply to exporters that are unknown to the IA at the time the final determination is made in a given investigation, and that therefore such exporters cannot possibly provide information on the basis of which the IA can make its determinations with respect to

[9] Exhibit USA-11.
[10] U.S. First Written Submission, para. 63.
[11] China First Written Submission, para. 105. China repeated the same argument in paragraph 24 of its opening statement at the first panel meeting.

such exporters, what in your view could be the WTO-consistent basis for the imposition of "all others" duties to those exporters?

9. MOFCOM's determinations of the apparently adverse "all others" rates in these investigations were inconsistent with its obligations under the AD Agreement and the SCM Agreement precisely because companies subject to those rates were not made specifically aware of the information required of them.

10. Article 6.8 of the AD Agreement and Article 12.7 of the SCM Agreement permit investigating authorities to use facts available provided certain conditions are met. These conditions include that an interested party refused access to or otherwise failed to provide necessary information, or significantly impeded the investigation. Additional conditions identified in paragraph 1 of Annex II to the AD Agreement require an investigating authority to specify in detail the information required from a party, as well as notice that a failure to provide the information could result in the authority's use of facts available in making its determination.

11. As noted in the U.S. first written submission, MOFCOM has shown no evidence that these conditions were met, including with respect to parties who did not export during the period of investigation. Indeed, no other U.S. exporters of automobiles existed at the time of the investigations of certain automobiles from the United States.[12]

12. The United States submits that a WTO-consistent basis for an "all others" dumping or subsidy rate could be to base the rate on an average (whether as a simple average or a weighted average) of the dumping and subsidy rates calculated for the investigated companies.

9. The Panel notes that, in response to the United States' claims under Article 6.9 of the Anti-Dumping Agreement and Article 12.8 of the SCM Agreement, China argues, in paragraphs 115-116 and 132-133 of its first written submission, that all pertinent facts regarding the use of facts available in the calculation of the "all others" AD and CVD rates at issue were laid down in MOFCOM's final disclosures to the U.S. government.

Do you agree with China's assertion? If not, please explain why, with reference to the relevant parts of the record. Please explain what specific types of information on the record of the investigations at issue MOFCOM should have included in its final disclosures, but did not do so.

13. The United States does not agree with China's assertion that all pertinent facts regarding the use of facts available in the calculation of the "all-others" dumping and subsidy rates were set forth in the disclosures provided to the United States.

14. China, for example, asserts that "MOFCOM found that all exporters and producers—including any not known to MOFCOM—were notified of its information requirements and had a chance of participating in MOFCOM's investigation."[13] Not only is this conclusion unsupported

[12] U.S. First Written Submission, paras. 64, 87.
[13] China First Written Submission, para. 115.

by record evidence, but it also ignores the fact that a producer who did not ship during the period of investigation is not in a position to participate in the investigation.

15. China also asserts, "[f]or any other exporters and producers that did not respond to MOFCOM's registration notice, MOFCOM found that they did not intend to cooperate, and determined to apply an all others rate based on best information available, *i.e.*, the rate alleged in the petition."[14] China, however, does not provide any facts relating to whether or not other U.S. companies, in fact, refused access to or failed to provide necessary information, or significantly impeded the investigation.

16. China's claims that it disclosed all of the essential facts regarding MOFCOM's imposition of the dumping "all others rate" are equally deficient.[15] For example, MOFCOM did not provide parties with the factual basis for its determination that the 21.5 percent rate was an appropriate rate for "all other" companies. In particular, MOFCOM did not disclose any facts to support an imposition of an all others rate that was far in excess of the dumping rates assigned to the individual respondent companies.

17. As in the dumping investigation, MOFCOM did not identify the essential facts that formed the basis for its imposition of a 12.9 percent all others subsidy rate. For example, missing from MOFCOM's disclosure are any facts relating to whether or not other U.S. companies refused access to or failed to provide necessary information, or significantly impeded the investigation.

10. Similarly, as part of its claims under Articles 12.2/12.2.2 of the Anti-Dumping Agreement and Articles 22.3/22.5 of the SCM Agreement, the United States argues, in paragraphs 78 and 99 of its first written submission, that MOFCOM failed to provide in sufficient detail its findings and conclusions that led to the application of facts available pursuant to Article 21 of its regulations. China argues that "the legal and factual bases for MOFCOM's all others rates are clear and straightforward from the administrative record."[16]

a) Please explain what specific types of information which were on the record of the investigations at issue MOFCOM should have included in its public notices which it did not do.

18. Article 12.2 of the AD Agreement and Article 22.3 of the SCM Agreement require that a public notice be given of any preliminary or final determination and that each such notice set forth, or otherwise make available in a separate report, in sufficient detail "the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities." Article 12.2.2 of the AD Agreement and Article 22.5 of the SCM Agreement require that the public notice of the conclusion of an investigation contain "all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures."

[14] China First Written Submission, para. 115.
[15] China First Written Submission, para. 117.
[16] China Opening Statement at the First Panel Meeting ("China First Opening Statement"), para. 32.

19. MOFCOM failed to explain its use of facts available to calculate the all others rates. The factual and legal bases for MOFCOM's resort to facts available constitute relevant information on matters of fact and law and reasons which have led to the imposition of final measures. Nothing in MOFCOM's determinations provided an explanation for MOFCOM's conclusion that unexamined companies, including those not exporting to China during the period of investigation, should be subjected to all others rates apparently based on adverse facts available. MOFCOM did not explain how a non-exporting producer refused to provide necessary information in the investigation.

20. Nor did MOFCOM adequately explain why the facts available applied were appropriate. For example, although MOFCOM's final determination states that it utilized the petition's dumping rate, it did not explain why a rate that is so much higher than the rate assigned to any individual company is appropriate.

21. Similarly, MOFCOM did not explain its factual and legal bases for its decision to apply facts available in calculating the all others subsidy rate.

BOTH PARTIES

13. The Panel notes that the United States has made claims with respect to both the AD and CVD "all others" rates in this dispute. However, while Article 12.7 of the SCM Agreement largely replicates Article 6.8 of the Anti-Dumping Agreement, there is no corollary to Annex II of the Anti-Dumping Agreement in the SCM Agreement. Nor is there a corollary to Article 9.4 of the Anti-Dumping Agreement in the SCM Agreement. Please explain in detail how your arguments regarding the CVD all others rate are affected, if at all, by these differences.

22. The U.S. arguments are not affected by these differences. In particular, Annex II of the AD Agreement may provide relevant context for the purpose of interpreting Article 12.7 of the SCM Agreement. Annex II of the AD Agreement clarifies the conditions under which resort may be had to facts available in the context of an anti-dumping proceeding. The United States considers that Article 6.8 of the AD Agreement and Article 12.7 of the SCM Agreement provide for similar conditions for the use of facts available.

23. Previous panels and the Appellate Body have noted that it is appropriate to analyze Article 6.8 and Article 12.7 in parallel, despite the absence of an analogue to Annex II in the SCM Agreement. For example, in *Mexico – Anti-Dumping Measures on Rice*, while the Appellate Body considered that there were important textual differences between the two provisions, it found that this did not mean that different conditions for the use of facts available existed in the context of Article 12.7, as compared to those made explicit in Annex II of the AD Agreement.[17]

24. Furthermore, the *Declaration on Dispute Settlement Pursuant to the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 or Part V of*

[17] *Mexico – Anti-Dumping Measures on Rice (AB)*, para. 291.

the Agreement on Subsidies and Countervailing Measures, adopted at Marrakesh at the conclusion of the Uruguay Round, recognized "with respect to dispute settlement pursuant to" the two agreements "the need for the consistent resolution of disputes arising from anti-dumping and countervailing duty measures."[18] This is especially relevant when the provisions are virtually identical and fulfill the same function in the same context, as is the case for Article 6.8 of the AD Agreement and Article 12.7 of the SCM Agreement.

25. Article 6.8 of the AD Agreement and Article 12.7 of the SCM Agreement concern the application of facts available to any interested party that failed to provide necessary information requested by the investigating authority. Article 9.4 of the AD Agreement concerns the application of an antidumping duty to an exporter or producer that was not individually examined by the investigating authority. The United States is not arguing that China acted inconsistently with Article 9.4 of the AD Agreement. Instead, the United States is arguing that China acted inconsistently with Article 12.7 of the SCM Agreement, Article 6.8 of the AD Agreement, and Paragraph 1 of Annex II of the AD Agreement.

DEFINITION OF DOMESTIC INDUSTRY: ALLEGED VIOLATIONS OF ARTICLES 3.1 AND 4.1 OF THE ANTI-DUMPING AGREEMENT AND ARTICLES 15.1 AND 16.1 OF THE SCM AGREEMENT

UNITED STATES

14. The Panel needs clarification on the specific violations alleged by the United States in connection with its claim regarding MOFCOM's domestic industry definition. To this end, please clarify whether the United States is alleging a violation of Article 3.1 of the Anti-Dumping Agreement (independently from Article 4.1 of that Agreement) and a violation of Article 15.1 of the SCM Agreement (independently from Article 16.1 of that Agreement) or whether the alleged violations of Article 3.1 of the Anti-Dumping Agreement and Article 15.1 of the SCM Agreement are dependent on a finding of a violation of Article 4.1 of the Anti-Dumping Agreement and Article 16.1 of the SCM Agreement, respectively.

26. The U.S. claims under Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement that MOFCOM conducted its injury analysis based on an improper and non-objective domestic industry definition are not necessarily dependent upon our arguments that MOFCOM's domestic industry definition did not correspond to the definition set out in Article 4.1 of the AD Agreement and Article 16.1 of the SCM Agreement. A finding by the Panel that MOFCOM's definition of the "domestic industry" does not fit under the definitions in Articles 4.1 and 16.1 would indeed result in a finding of a breach of China's obligations under Articles 3.1 and 15.1 to make an objective examination and base its determination on positive evidence.

27. However, in addition to the breach that results from its failure to define the domestic industry as producers representing a major proportion of domestic production, as set out in Articles 4.1 and 16.1, China separately breached its obligations under Articles 3.1 and 15.1 by

[18] *Declaration on Dispute Settlement Pursuant to the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 or Part V of the Agreement on Subsidies and Countervailing Measures*, adopted by the Trade Negotiations Committee on December 15, 1993.

defining the domestic industry as comprising only those producers who supported the petition. This definition was biased in favor of petitioners, and hence not objective, and did not permit an injury analysis based on positive evidence of the industry's condition. This breach of Articles 3.1 and 15.1 is not dependent on a finding under Articles 4.1 and 16.1.

PRICE EFFECTS ANALYSIS: ALLEGED VIOLATIONS OF ARTICLES 3.1 AND 3.2 OF THE ANTI-DUMPING AGREEMENT AND ARTICLES 15.1 AND 15.2 OF THE SCM AGREEMENT

28. Questions 16 to 20 all appear to be addressed to China. Accordingly, the United States will not respond to these questions, but notes that it will have the opportunity to comment in the U.S. rebuttal submission on China's responses to them.

CAUSATION: ALLEGED VIOLATIONS OF ARTICLES 3.1 AND 3.5 OF THE ANTI-DUMPING AGREEMENT AND ARTICLES 15.1 AND 15.5 OF THE SCM AGREEMENT

UNITED STATES

21. The Panel notes that as part of its claim on causation, in its first written submission, the United States refers to decreased productivity twice, first as a stand-alone element in paragraphs 160-163 and second in conjunction with increased wages in paragraph 174. The Panel also notes that both references to decreased productivity seem to take issue with the non-attribution aspect of MOFCOM's causation analysis.

Is this a correct understanding of the United States' arguments? If so:

a) Please explain why this element is addressed twice in the United States argumentation with respect to this claim?

29. The U.S. first written submission references the decreased productivity of the domestic industry in two different places for two different purposes in connection with the U.S. claims related to MOFCOM's causation analysis.

30. First, the decline in the domestic industry's productivity undercuts MOFCOM's conclusion that subject imports were a cause of injury to the domestic industry by depressing prices, which led to decreased profitability.[19] As the data show, the industry's productivity fell from 3.92 units/person in 2006, to 3.68 units/person in 2007, to 2.92 units/person in 2008. Over the interim periods, productivity fell from 2.56 units/person in interim 2008 to 1.71 units/person in interim 2009, or by 33.24 percent.[20] This sharp drop in productivity in interim 2009 occurred at the same time as the domestic industry expanded its labor force by 68.71 percent.[21] Additionally, most of the decline in the domestic industry's pre-tax profits from interim 2008 to

[19] *See* Final Determination, pp. 140-142 (Exhibit CHN-07); *see also* U.S. First Written Submission, paras. 160-163.
[20] Final Determination, pp. 136-137 (Exhibit CHN-07). The data reflected here are derived from the data for interim 2009 and the percentage change from interim 2008 to interim 2009, which were presented in the final determination.
[21] Final Determination, p. 136 (Exhibit CHN-07).

interim 2009 (a decline of RMB 493 million) can be attributed to the near-doubling of labor costs over this period (an increase of RMB 406 million).[22]

31. In light of these data, and others to which we refer in the U.S. first submission, MOFCOM's causation determination was not based on positive evidence and did not involve an objective examination under Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement. That is, MOFCOM's conclusion was not one that could have been reached "by an unbiased and objective investigating authority in light of the facts and arguments before it and the explanations given."[23] In addition, MOFCOM failed to demonstrate that subject imports were, through the effects of dumping and subsidization, causing injury to the domestic industry, and MOFCOM failed to base its causation determination on an examination of all relevant evidence before it, which was inconsistent with the first two sentences of Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement.

32. Second, the decline in the domestic industry's productivity was a "known factor" other than subject imports that at the same time was injuring the domestic industry, and MOFCOM was obligated by Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement to examine the decline in the domestic industry's productivity and not attribute injury from this factor to subject imports. It appears, however, that MOFCOM failed to examine this factor and did attribute injury from decreased productivity to subject imports. MOFCOM's failure in this regard is a separate and independent basis to find that China acted inconsistently with Articles 3.5 and 15.5.

b) Was the issue of decreased productivity raised by any interested party during the investigations at issue? If so, please refer to the specific part of the record. If not, please explain why MOFCOM should have considered this as a potential other factor in its non-attribution analysis?

33. The record of the investigation does not indicate that any interested party raised the issue of the decreased productivity of the domestic industry during the investigation. Respectfully, however, whether or not any interested party did so is of no moment.

34. While certain provisions in the AD and SCM Agreements contain language limiting an investigating authority's responsibilities to arguments presented to it, Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement contain no such limitation. Indeed, the Appellate Body has characterized the obligations of Article 3.1 as "absolute." "They provide for no exceptions, and they include no qualifications."[24] Similarly, in *Mexico – Steel Pipes and Tubes*, the panel rejected an argument by Mexico that the panel should not consider a claim that the Mexican authority's use of a particular period of investigation violated the objective examination requirement of Article 3.1 because no party complained about the period of investigation during the administrative proceedings. The panel emphasized that, "as the selection of the POI is linked to an investigating authority's obligation under Article 3.1 to conduct an objective examination of positive evidence, that authority is bound to satisfy its

[22] *See* China First Written Submission, para. 238 n. 256.
[23] *EU – Footwear (China) (Panel)*, paras. 7.483; s*ee also US – Tyres (China) (AB)*, para. 280.
[24] *EC – Bed Linen (Article 21.5) (AB)*, para. 109.

obligations whether or not this issue is raised by an interested party in the course of an investigation."[25]

35. The non-attribution obligation in Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement requires an investigating authority to examine "any known factors" other than dumped or subsidized imports, and those provisions specifically identify the "productivity of the domestic industry" as a factor that "may be relevant" to the non-attribution analysis. As we have shown, information about the domestic industry's productivity – and its marked decline during the period of investigation – was on the administrative record before MOFCOM, and was even reported in MOFCOM's final determination. Thus, it was unquestionably a factor "known" to MOFCOM, but MOFCOM failed to take it into account in its causation analysis. MOFCOM was required to do so by Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement.

22. The Panel notes the United States' argument that MOFCOM failed to assess the impact of two other factors, namely an increase in sales tax and an increase in wages coupled with a decrease in productivity, in its causation analysis. The Panel also notes that the issue of the increase in sales tax was addressed in MOFCOM's Final Determination.[26]

a) Please explain, on the basis of the relevant part of the record, why these two other factors should have been considered by MOFCOM as potential other factors to be taken into consideration in its causation analysis. More specifically, please also explain why MOFCOM should have taken into consideration the issue of the increase in wages coupled with the decrease in productivity in its causation analysis, given that, unlike the increase in sales tax, this issue was not raised by interested parties during the investigations. In other words, please explain the reason why MOFCOM should have treated this issue as a potential other factor on its own initiative.

b) Please explain why MOFCOM's assessment of the increase in sales tax was inadequate.

36. Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement require investigating authorities to "examine any known factors other than [subject imports] which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to [subject imports]." This obligation extends to "*any* known factors." Where a factor is "known" to the investigating authority,[27] the investigating authority must examine it and ensure that injury caused by that factor is not attributed to subject imports.

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[25] *Mexico – Steel Pipes and Tubes*, para 7.259. *See also Mexico – Anti-Dumping Measures on Rice (Panel)*, para. 7.114 (even if importers or exporters did not propose alternative to method of computing import volume suggested by applicant, Article 3.1 requires that authority "must actively seek out pertinent information" to conduct an objective examination).

[26] Final Determination, pp. 162-163 (Exhibit CHN-07).

[27] A factor may become "known" to an investigating authority because an interested party has raised it in comments or argument during the investigation.

37. In the investigation of certain automobiles from the United States, both the decline in productivity and increase in wages, on the one hand, and the tax increase on vehicles with larger engines, on the other hand, were factors "known" to MOFCOM.[28] Accordingly, MOFCOM was obligated to examine those factors in connection with its non-attribution analysis.

38. With respect to the decline in productivity and the increase in wages, we have explained how this factor likely explains most of the decline in the domestic industry's profitability, which MOFCOM cited as evidence of material injury that resulted from the depressed price of the domestic like product. MOFCOM's failure to examine this factor and ensure that the injury caused by it was not attributed to subject imports is inconsistent with Articles 3.5 and 15.5.

39. With respect to the tax increase on vehicles with larger engines, it is likely that the tax increase made the vehicles less desirable to consumers, contributing to the steep decline in demand for the domestic like product (the only decline in demand that occurred at any time during the period of investigation), which contributed to the decline in domestic prices. MOFCOM was aware of the tax increase[29] and, accordingly, MOFCOM was obligated to examine this factor and ensure that any injury caused by the tax increase was not attributed to subject imports.

40. In its final determination, MOFCOM merely summarized the argument of a U.S. respondent and the response of the petitioner and then stated, "Therefore, Chinese tax policy is not the factor causing material injury to the domestic industry."[30] This is simply an assertion devoid of any explanation. To the extent that MOFCOM adopted the argument of the petitioners as its own, it did not say that it was doing so, and doing so suggests a lack of objectivity. Furthermore, the petitioner's response that MOFCOM appears to have adopted focused narrowly on a single aspect of the respondent's argument, namely that:

> To the extent MOFCOM finds a decline in the production and sales of the domestic like product between 2008 and 2009, it has an affirmative obligation to explain why the drop was caused by subject imports rather than the change in China's tax policies.[31]

The petitioner argued, and MOFCOM evidently agreed, that "[t]he investigating authority did not state this fact in the preliminary determination"[32] and "the production and sales of the domestic industry increased continuously in general in the first three quarters of 2008 and the first three quarters of 2009, so the change of tax policies had no impact on the domestic industry."[33] However, as we explain above, it is likely that the tax increase injured the domestic industry in a different way, by contributing to the decline in demand, which depressed domestic prices. Regardless of whether the U.S. respondent articulated the concern precisely this way,

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[28] Each factor was reported in MOFCOM's final determination. *See* Final Determination, pp. 136-137 (employment, wages, and productivity) 162-163 (tax increase) (Exhibit CHN-07).
[29] *See* Final Determination, pp. 162-163 (Exhibit CHN-07).
[30] Final Determination, p. 163 (Exhibit CHN-07).
[31] U.S. Respondent Comments on the Preliminary Determination, p. 23 (Exhibit USA-12). *See also* Final Determination, pp. 162-163 (Exhibit CHN-07).
[32] That is, MOFCOM did not find that production and sales of the domestic like product decreased from 2008 to 2009.
[33] Final Determination, pp. 162-163 (Exhibit CHN-07).

MOFCOM was nevertheless obligated to undertake an objective examination of the implications of the tax increase on vehicles with larger engines – and not artificially limit its examination to production and sales – to fulfill its obligation under Articles 3.5 and 15.5 to examine any known factors and ensure that any injury caused by those factors was not attributed to subject imports. MOFCOM failed to do so and, accordingly, acted inconsistently with Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement.

TRANSLATION

UNITED STATES

24. The Panel notes the two translation objections made by China, in paragraphs 197 and 241 of its first written submission, and the alternative translations provided by China. Does the United States have any objections regarding these alternative translations?

41. The United States does not object to the alternative translations submitted by China.[34]

[34] The United States notes, however, that the translation quoted in lines 5-7 of paragraph 197 of China's first written submission is not the same as the relevant text on page 130 of the translation of the Final Determination provided by China (Exhibit CHN-07).