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

EXECUTIVE SUMMARY OF THE OPENING STATEMENT OF THE UNITED STATES OF AMERICA AT THE SECOND SUBSTANTIVE MEETING OF THE PANEL

October 24, 2013

Mr. Chairperson, members of the Panel:

1. The United States appreciates this opportunity to appear again before the Panel to provide further views on the reasons why China's anti-dumping ("AD") and countervailing duty ("CVD") measures on U.S. exports of certain automobiles are inconsistent with WTO rules. Our previous submissions and statements have addressed most of the arguments that China has made in response to our claims, and we continue to rely on the arguments we have presented before. In this statement, we will concentrate on those points that China made for the first time – or chose to re-emphasize – in its second written submission.

I. CHINA CANNOT DEFEND MOFCOM'S FLAWED PROCEDURES

2. We will first turn to the U.S. claims with respect to MOFCOM's failure to follow procedural obligations under the AD and SCM Agreements. We have demonstrated that MOFCOM's actions are inconsistent with Articles 6.5.1, 6.8, 6.9, 12.2, 12.2.2, and paragraph 1 of Annex II of the AD Agreement; and Articles 12.4.1, 12.7, 12.8, 22.3, and 22.5 of the SCM Agreement.

3. In its second written submission, China appears to repeat many of the same arguments it made in prior submissions. Its oral statement today also appears to repeat many of the same arguments it made in prior submissions. We will use our time today to respond to some of the points China emphasizes in its second written submission.

A. China Cannot Defend MOFCOM's Failure to Require Non-Confidential Summaries

4. First, I will discuss China's failure to require adequate non-confidential summaries of confidential information. This failure impaired the ability of the United States and other interested parties to defend their interests throughout the course of the investigation.

5. The United States demonstrated in our submissions that China failed to meet the requirements of Article 12.4.1 of the SCM Agreement and Article 6.5.1 of the AD Agreement. As we have explained, MOFCOM did not require adequate non-confidential summaries of confidential information contained in the petition. And, there is no explanation on the record from the domestic interested parties as to why the information was not susceptible to summarization.

6. In its second written submission and today, China disregards the obligations contained in the covered agreements. China also fails to justify the inadequate non-confidential summaries contained in the petition.

7. The United States has detailed various instances where China's interpretation of the covered agreements is flawed. For instance, China continues to insist that a party needs to dispute the non-confidential summaries provided before China would review the non-confidential summaries for adequacy.

8. As we have explained, however, China has no legal basis for this position. To the contrary, whether an interested party objects to summaries during the underlying proceeding is irrelevant to the question of whether the investigating authority has required summaries that are adequate. As the Panel found in *Mexico – Anti-Dumping Measures on Rice*, "The investigating authority is not allowed to rely on the initiative of the interested parties for the fulfilment of obligations which are really its own." The *China – GOES* panel reached the same conclusion. The United States further refers the Panel to the reasoning used in these reports.

9. China also asserts that whether it has complied with the obligations contained in the covered agreements must be assessed in light of factors as set out in other Articles. As we have explained, this line of reasoning is incorrect. The text of the agreements does not support China's argument. The obligation to provide adequate non-confidential summaries is an independent obligation not limited by other provisions of the covered agreements. Another recent panel – also reviewing a Chinese petition and China's obligation to require non-confidential summaries – came to the same conclusion.

10. The United States has also detailed the flaws in the purported non-confidential summaries offered by China. Not only is China wrong on the law; it is also wrong on the facts. The United States will not at this time review each individual category of confidential information contained in the petition to demonstrate the shortcomings in China's approach. Rather, at this time the United States will respond to a general assertion that China has made. China contends that the unlabeled trend lines contained in the petition are accompanied with percent changes, and that taken together, this information suffices for a non-confidential summary. For instance, this argument is reflected in paragraphs 10-12 of its oral statement delivered today.

11. China's argument has no merit. As the United States has explained, the unlabeled trend lines are inadequate because without a sense of scale, it is impossible to obtain a reasonable understanding of the substance of the confidential information. The United States has also noted that the percentage changes are flawed because they do not reveal the significance in the absolute changes. The same recent panel reviewing China's obligation to require non-confidential summaries agreed on both points.

12. Thus, China is asking the Panel to take inadequate trend lines, add them to defective percent changes – and then somehow the two in combination make China's actions consistent with the covered agreements. China's argument simply doesn't add up. The "very exercise of calculating an approximate figure... through a series of operations" suggests that the purported summaries are inadequate.

13. China's approach to summaries would require interested parties to "infer, derive and piece together a possible summary of confidential information," contrary to the requirements of the covered agreements. For these reasons, China breached Article 6.5.1 of the AD Agreement and Article 12.4.1 of the SCM Agreement.

B. China Cannot Defend MOFCOM's Failure to Disclose the Calculations and Data Used to Determine the Existence of Dumping and to Calculate the Dumping Margins

14. The United States will now turn to MOFCOM's failure to disclose the essential facts underlying its dumping margin calculation. In its previous submissions, the United States showed that China breached Article 6.9 of the AD Agreement because MOFCOM failed to disclose the "essential facts" forming the basis of its decision to apply anti-dumping duties, including the data and calculations it performed to determine the existence and margins of dumping.

15. China offers no new arguments. Rather, China continues to assert that the United States has not established a *prima facie* case solely because the United States has not submitted as exhibits the company-specific disclosure documents. It also asserts that it sent disclosure documents to the U.S. companies, and that these documents contain the essential facts. Despite acknowledging that the documents are in its possession, China failed to submit these documents as exhibits in this dispute. As noted, China highlights that these documents contain BCI, but it fails to indicate why the Panel's agreed-upon BCI procedures are insufficient to allow China to submit these documents for panel review.

16. China argues that "the United States has deprived the Panel of any ability to assess the adequacy of the disclosure letters under Article 6.9." Yet, it is China that is depriving the Panel of any ability to assess the adequacy of its disclosure letters because of its steadfast refusal to submit the documents as exhibits.

17. Now should the Panel wish to test the veracity of China's assertion relating to the content of its disclosure letters, it may exercise its authority under Article 13 of the DSU to request that China present the company disclosure letters that China has – up to this point – refused to submit. China acknowledges that the documents are in its possession; and the Panel's BCI procedures ensure that no party would be prejudiced if China submitted the documents. Furthermore, the reason why China possesses these documents, and that the United States does not, follows from the normal course of an anti-dumping proceeding. MOFCOM itself prepared and issued the disclosures, and provided them directly to the private sector respondents. And, MOFCOM has never provided copies to the United States.

18. China refuses to submit the documents for panel review because MOFCOM failed to make available the dumping calculation, and data underlying those calculations, depriving the interested parties of their ability to defend their interests. At least one private sector respondent noted China's failure to provide the data and calculations underlying the dumping margin in its comments on MOFCOM's final disclosure. This is contained in Exhibit USA-20, which is attached to this statement. Specifically this respondent indicated that "MOFCOM did not provide sufficient information in the final disclosure…MOFCOM failed to explain in detail how the data came from in the final determination without calculation steps, detailed description, formula and program language, nor provided relevant calculation steps in the final disclosure." China's failure to disclose the essential facts is inconsistent with Article 6.9 of the AD Agreement.

C. China Breached its WTO Obligations in Using Facts Available to Determine All Others Rates

19. The United States has also demonstrated that China breached Article 6.8 and Annex II of the AD Agreement and Article 12.7 of the SCM Agreement by applying "facts available" to calculate an adverse dumping margin and subsidy rate for unknown producers or exporters that received no notice. In particular, these parties did not: (1) refuse access to necessary information within a reasonable period; (2) otherwise fail to provide such information within a reasonable period; or (3) significantly impede the investigation. As explained, the unknown (and even non-existent) "other" U.S. producers or exporters could not have been made aware of the information required as a matter of logic, and thus, cannot be said to have failed to cooperate under the covered agreements.

20. In its second written submission and today, China continues to assert that the actions taken by MOFCOM constitute sufficient notice to justify MOFCOM's resort to facts available. The United States has explained why these actions did not provide a reasonable basis for resorting to adverse facts available. It is telling that China does not argue that unknown producers or exporters were made aware of the information required, and thus met the notification requirement for resorting to facts available. And nowhere does China demonstrate with evidence that unknown producers or exporters refused access to or otherwise failed to provide necessary information within a reasonable period or significantly impeded the investigation. For instance, at paragraph 23 of its oral statement today, China states that "it would be futile for an investigating authority to continue to seek information from a party that has decided not to cooperate." But this is an unsubstantiated conclusion. China provides no evidence that unknown parties refused access to information, or significantly impeded the investigation, or otherwise decided not to cooperate.

21. Instead of applying the text of the relevant provisions, China makes a "policy" argument to justify its use of facts available for unknown exporters, stating that it was merely exercising its discretion, and that "it does not matter if the unknown exporters and producers do not exist or have chosen not to make themselves known."

22. China cannot brush off its responsibility to comply with the covered agreements. The United States agrees that investigating authorities may exercise discretion in calculating all others rates for unknown exporters, but as stated by the *China – GOES* panel, "this discretion should not extend to acting inconsistently with the express terms of" the covered agreements.

23. In our submissions, the United States has argued that China inappropriately applied facts available with an adverse inference to unknown producers or exporters. Specifically, China concluded that any company that did not register to participate in the investigation failed to cooperate. Based upon that unsubstantiated conclusion, China applied an adverse dumping margin and subsidy rate to these "other" U.S. companies. This approach is flawed.

24. Moreover, China's attempt to distinguish *China – GOES* from this dispute is unavailing because, contrary to China's suggestions, this dispute is not fundamentally different from *China – GOES.* China asserts that "in *China – GOES*, a key question before the panel was how MOFCOM derived the AD all others rate of 64.8 percent applied in that case." Here, China states, "there is no mystery about MOFCOM's derivation of this rate." China forgets to mention that a key question before the panel in *China – GOES* was whether MOFCOM applied facts available to calculate the all others rates for unknown exporters in a manner consistent with the covered agreements. The identical question is before this Panel.

25. As explained, the *China – GOES* panel rejected the same arguments that China is now offering in this dispute as insufficient for satisfying the preconditions for resorting to facts available. The panel in *China –GOES* analyzed whether there is an obligation on unknown exporters to come forward after a general public notice of initiation. It also analyzed whether evidence existed of unknown exporters refusing access to or failing to provide information, or impeding the investigation. A recent panel reviewing China's use of facts available to calculate the all others rate for unknown exporters took a different approach, as China has noted, but it nonetheless concluded that China acted inconsistently with the covered agreements. Given the soundness of the *China – GOES* panel's reasoning, and the similar underlying facts and legal arguments in *China – GOES* and this dispute, the United States considers the panel's reasoning in *China – GOES* should be considered highly persuasive here.

26. The United States also demonstrated that China breached Article 6.9 of the AD Agreement and Article 12.8 of the SCM Agreement because MOFCOM failed to inform the interested parties of the essential facts under consideration that formed the basis of its calculation of the "all others" dumping margin and subsidy rate.

27. China argues that it disclosed the essential facts by largely repeating the arguments it makes in conjunction with its facts available argument, and then asserts that it disclosed "the totality of the facts on which MOFCOM based its all others rates decisions, and there are no other pertinent facts that MOFCOM could have disclosed."

28. As explained, China has failed to disclose any facts relating to how unknown or non-exporting U.S. companies, in fact, refused access to or failed to provide necessary information, or significantly impeded the investigation. Instead, China states that "MOFCOM found that all exporters and producers – including any not known to MOFCOM – were notified of its information requirements." China also states that "for any other exporters and producers that did not respond to MOFCOM's registration notices, MOFCOM found that they did not intend to cooperate." Yet, these are unsupported conclusions – they are not facts.

29. China also argues that "concerning MOFCOM's selection of the all others rates, all findings as well as conclusions, as well as supporting relevant information, are readily apparent from the record." As noted, in the case of the "all others" anti-dumping rate, China asserts that it applied the margin alleged in the petition. That is not enough. China did not indicate any facts regarding the steps it undertook to check against independent sources the accuracy of the information supplied by the petitioner in the reaching the petition rate. China simply accepted and then applied petitioner's alleged rate. And, as in the AD proceeding, MOFCOM did not identify the essential facts that formed the basis for its imposition of a 12.9 percent all others subsidy rate.

30. China also fails to rebut the U.S. demonstration that China breached its WTO obligations by failing to explain the all others dumping margin and subsidy rates. Rather, as above, China repeats its flawed attempt to distinguish this dispute from the *China – GOES* dispute. And the "straightforward rationale" that China asserts does nothing to explain how unknown exporters could have possibly (1) refused access to necessary information within a reasonable period, (2) otherwise failed to provide such information within a reasonable period, or (3) significantly impeded the investigation.

II. CHINA CANNOT DEFEND MOFCOM'S FLAWED INJURY DETERMINATION

31. The United States has demonstrated that MOFCOM's injury determination is inconsistent with Articles 3.1, 3.2, 3.5, and 4.1 of the AD Agreement and Articles 15.1, 15.2, 15.5, and 16.1 of the SCM Agreement. China has failed to offer the Panel anything that would explain or excuse the shortcomings of MOFCOM's injury determination.

A. MOFCOM's Narrow Definition of the Domestic Industry Is Inconsistent with Articles 3.1 and 4.1 of the AD Agreement and Articles 15.1 and 16.1 of the SCM Agreement

32. MOFCOM's domestic industry definition suffered from two principal flaws. First, it resulted in a definition of the domestic industry that was distorted because it included only producers that supported the petition. Second, it resulted in a definition of the domestic industry that did not include a major proportion of the total production of certain automobiles. This has been our argument from the outset, and that is reflected in the U.S. first written submission.

33. China is mistaken when it asserts that the United States has "shifted its focus" away from joint ventures ("JVs"). In fact, throughout this dispute, only China has "focused" on JVs, in an effort to misrepresent the U.S. argument. The United States drew the Panel's attention to a U.S. respondent's argument that MOFCOM had "apparently" excluded JVs, and we pointed to other data on the record that "cast doubt on MOFCOM's assertion that it included JV producers in the industry." We raised that concern because the proportion of the domestic industry included in MOFCOM's definition was so low. At that point, due to China's lack of transparency, we did not know which companies were included in MOFCOM's domestic industry definition. We still do not know which companies were included, because China has concealed that information. But China now has told the Panel that the domestic industry, as MOFCOM defined it, included four JVs and four domestically owned enterprises. That may resolve the question of whether or not MOFCOM's definition of the domestic industry did or did not include JVs, but it does not get MOFCOM off the hook for defining the domestic industry inconsistently with the definition in Articles 4.1 and 16.1 and for failing to base its injury determination on positive evidence and an objective examination, as required by Articles 3.1 and 15.1.

34. It remains the case that MOFCOM utilized a process that was likely to, and in fact did, result in a material risk of distortion in defining the domestic industry. In *EC – Fasteners (China)*, the Appellate Body said that "to ensure the accuracy of an injury determination, an

investigating authority must not act so as to give rise to a material risk of distortion in defining the domestic industry . . . ." China argues that "MOFCOM took no affirmative action to invite a material risk of distortion . . . ." However, a corollary to the Appellate Body's observation is that an investigating authority must not *fail to act* if doing so would give rise to a material risk of distortion. In this case, "MOFCOM took no affirmative action," and that itself is the problem.

35. MOFCOM's decision to define the domestic industry as including only producers who voluntarily registered for participation in the injury investigations created the very same kind of self-selection process about which the Appellate Body expressed concern in *EC – Fasteners (China)*. That introduced a material risk of distortion, and, despite China's protestations to the contrary, there was indeed a self-selection process. CAAM, the petitioner, was the only domestic entity that responded to MOFCOM's notice, CAAM was the only entity that registered to participate in the injury investigation, CAAM was the only entity that provided domestic industry data to MOFCOM, and, most importantly, CAAM, in fact, self-selected from among its own members, providing to MOFCOM domestic industry data from *only eight of its member companies*. On its website, CAAM identifies *dozens* of companies as being among its members. Yet, CAAM provided data from only eight of those members. "MOFCOM took no affirmative action" in response to CAAM's *self-selection* of data from just those eight companies.

36. The Appellate Body's specific concern in *EC – Fasteners* was that, "by defining the domestic industry on the basis of willingness to be included in the sample, the [investigating authority's] approach imposed a self-selection process among the domestic producers that introduced a material risk of distortion." There is no substantive distinction between what happened in *Fasteners* and what happened in this case.

37. The Appellate Body has also said that "'a major proportion of the total domestic production should be determined so as to ensure that the domestic industry defined on this basis is capable of providing ample data that ensure an accurate injury analysis." Data from just eight companies, handpicked by CAAM from among its members, did not provide MOFCOM with "ample data" sufficient for an "accurate injury analysis." It is very likely that the data selected by CAAM was from domestic producers posting the weakest performance, which would distort the injury analysis. MOFCOM did not even ask CAAM why it provided data only for these particular companies.

38. The Appellate Body has explained that investigating authorities "must actively seek out pertinent information" and may not "remain[] passive in the face of possible shortcomings in the evidence submitted. . . ." The domestic industry definition is central to the price, impact, and causation analyses required under Articles 3.2, 3.4, and 3.5 of the AD Agreement and Articles 15.2, 15.4, and 15.5 of the SCM Agreement, and it is potentially determinative of the injury analysis. It is important that investigating authorities make active efforts to collect the information necessary to define the domestic industry in a comprehensive and objective manner.

39. When MOFCOM received data from only eight companies that were handpicked by the petitioner, CAAM, and which represented less than 40 percent of domestic production for most of the period of investigation, MOFCOM was obligated to seek additional data on the condition of the domestic industry, or, at the very least, explain why it considered that more data was not necessary in light of the particular situation of the auto industry in China. MOFCOM failed to do so.

40. China suggests that the United States argued for the first time at the first panel meeting that "the percentage of domestic production included in MOFCOM's definition of the domestic industry is too low on its face." China is mistaken. This is not a "new argument." It has been our argument from the beginning.

41. What is new is China's confirmation of "the percentages of total domestic production," which were "54% in 2006, 34% in 2007, 34% in 2008, and 42% in Interim 2009." Also new is China's revelation that the domestic industry examined by MOFCOM consisted of only eight of CAAM's member companies. The question is whether the proportion of total domestic production represented by these eight companies meets the definition of "a major proportion" in Article 4.1 of the AD Agreement and Article 16.1 of the SCM Agreement.

42. China argues that "the AD and SCM Agreements nowhere define a specific quantitative threshold required to satisfy the 'major proportion' test . . . ." That is correct, but it is beside the point. The proper inquiry should take into account the percentages in light of the process MOFCOM employed, which resulted in MOFCOM having before it data from only eight domestic producers, themselves just a small part of the membership of the petitioner, CAAM. The inquiry should also consider the absence of any discussion by MOFCOM in the final determination of the nature and composition of the auto industry in China or why MOFCOM could not seek additional information.

43. China maintains that investigating authorities should have "some latitude to adapt their injury analysis to the unique facts of each case." We do not dispute this, but there were no "unique facts" in this case to justify MOFCOM's low level of domestic industry coverage. MOFCOM did not even attempt to suggest that there were.

44. China's explanation that "MOFCOM lacks the authority to compel additional domestic producers to participate in the injury investigation" rings hollow. MOFCOM did not even attempt to collect additional information. Simply posting the questionnaire on a website is precisely the type of "passive" response to "possible shortcomings in the evidence submitted. . ." that panels and the Appellate Body have in the past said is not consistent with the obligation to investigate.

45. The Panel should ask: Did MOFCOM have before it "wide-ranging information concerning the relevant economic factors"? The answer is no. Was MOFCOM's definition of the domestic industry "capable of providing ample data that ensure an accurate injury analysis"? The answer is no. Did the domestic producers MOFCOM examined represent "a relatively high proportion of the total domestic production"? Once again, the answer is no.

46. Thus, the Panel should conclude that MOFCOM's exclusion from the definition of the domestic industry – or its failure to include in the definition of the domestic industry – enterprises accounting for more than 60 percent of domestic production resulted in a definition of the domestic industry that did not include a "major proportion of the total domestic production" within the meaning of Article 4.1 of the AD Agreement and Article 16.1 of the SCM Agreement. Accordingly, MOFCOM's injury determination, which was based on its definition of the domestic industry, was neither objective nor based on "positive evidence," as required by Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement.

B. MOFCOM's Price Effects Analysis Is Inconsistent with Articles 3.1 and 3.2 of the AD Agreement and Articles 15.1 and 15.2 of the SCM Agreement

47. We have demonstrated that there is no support for MOFCOM's price depression finding. There was no price parallelism. Even if there had been price parallelism, there is no evidence showing that the price of subject imports drove the price of the domestic like product. With respect to market share, MOFCOM's original explanation of the relevance of the market share data does not hold up to scrutiny. China has now offered a *post hoc* rationalization, to which the Panel should give no credit, and even this new explanation does not accord with the evidence.

48. China continues to insist that the prices of subject imports and the domestic like product moved in parallel. However, the evidence on the administrative record does not support MOFCOM's conclusions or China's arguments. There was no price parallelism – not "basically," not "in general," not at all. During every time period during the period of investigation, the price of subject imports and the price of the domestic like product were moving in opposite directions or at very different rates in the same direction.

49. China criticizes the chart we presented in the U.S. opening statement at the first panel meeting as being "distorted." But China's own chart tells the same tale. We refer the Panel to exhibit USA-18, which we have passed out today. In this exhibit, we have placed the U.S. chart above China's chart on the same page. Unmistakably, in both graphs, the trend line for the price of subject imports crosses the trend line for the price of the domestic like product twice. That alone demonstrates that, by definition, the lines are not parallel. Indeed, during none of the three time periods for which MOFCOM presented data do the trend lines even approach being parallel. China's own graph confirms the non-existence of price parallelism.

50. It is not the United States, but MOFCOM and China that seek to look at "isolated" data points. China is not looking at the "whole POI;" it is just looking at the beginning and the end. China argues that "[p]erfect correlation in prices is not needed." As we have shown, though, there was no correlation at all. Accordingly, MOFCOM's conclusion that price parallelism existed was not, in the words of a recent panel, a "reasonable conclusion[] [that] could be reached by an unbiased and objective investigating authority in light of the facts and arguments before it and the explanations given."

51. Furthermore, and this may be an even more important point, neither MOFCOM in its final determination nor China in its submissions and statements to the Panel even attempts to explain *how* parallel pricing – even if there had been any – caused the depression of domestic prices. China has steadfastly refused even to address this issue. Neither MOFCOM in its final determination nor China here before the Panel has done anything to describe "what explanatory force parallel price trends had for the depression . . . of domestic prices."

52. Accordingly, because no price parallelism existed and, even if it had, MOFCOM did nothing to explain the relevance of parallel pricing in this case, MOFCOM's reliance on parallel pricing was unfounded and provided no support whatsoever for its price depression finding.

53. The volume and market share data on the administrative record likewise provide no support for MOFCOM's price depression finding. MOFCOM found price depression only during interim 2009. MOFCOM clearly could not have found any price depression for any period *prior* to interim 2009, because the price of the domestic like product was increasing during all of the rest of the period of investigation.

54. Left unanswered in MOFCOM's final determination, though, is the question: *how* did subject imports depress the price of the domestic like product? China suggests that the volume and market share data could explain how subject imports depressed the price of the domestic like product. To show why this is *not* the case, however, we have compiled the volume and market share data on the administrative record into charts in exhibit USA-19.

55. One possibility, since MOFCOM refers to increases in the volume of subject imports, is that, at an "economics 101" level, the market was flooded with volume in interim 2009, and that flood of volume drove down prices. The evidence does not support this theory. In fact, both total domestic production and total import volume were down in interim 2009, as compared to interim 2008. There was no flood of volume, and that cannot explain the price depression.

56. As another possibility, MOFCOM points in the final determination to the "significantly increased" market share of the subject imports "[e]specially at the end of the POI," that is, in interim 2009. As shown in the third chart in exhibit USA-19, though, entitled "Changes in Market Share," the market share of the domestic industry as defined by MOFCOM increased just as significantly as the market share of subject imports. Indeed, the domestic industry and subject imports nearly split in half a market share increase that came at the expense of market share ceded by third country imports and other domestic producers not included in the domestic industry. It is implausible, then, that the increasing market share of subject imports could explain the price depression of the domestic like product in interim 2009.

57. China's new explanation offered during this dispute is not one that MOFCOM presented in its final determination, and the Panel should give China's *post hoc* rationalization no weight. It also lacks any support in the evidence.

58. In its second written submission, China highlights selected data from the 2006 to 2008 period and posits that "[t]he domestic producers' prices went up, and as a result, they lost market share *to surging subject imports*." China goes on to argue that, "[i]n effect, the domestic industry was forced to fight back against the increase in market share of subject imports by decreasing prices at the expense of profits." So, U.S. imports are the villain in China's story. The problem for China, though, is that there is no truth to this whatsoever. As the data show, the domestic industry lost market share to other domestic producers and to third country imports. It never lost any significant amount of market share to subject imports.

59. China argues that "domestic producers faced crippling loss of market share unless they likewise reduced prices in the face of massive import competition." The only massive import competition to which the domestic industry ever lost market share during the period of investigation was competition from third country imports. In interim 2009, the domestic industry took back market share from those third country imports. So, to the extent that there is any truth to China's new explanation that domestic producers lowered their prices in response to import competition over the entire period of investigation, that would establish that third country imports – not subject imports – were the cause of the price depression observed.

60. In its second written submission, China goes on at some length defending MOFCOM's use of average unit values ("AUVs") and MOFCOM's purportedly thorough examination of the issue of competitive overlap. We have shown previously why MOFCOM's use of AUVs was problematic, particularly in light of evidence on the record indicating that the subject imports and the domestic like product were sold in different grades. Despite China's forceful assertions to the contrary, the Appellate Body's emphasis on the importance of price comparability in *China – GOES* was not limited to an examination of price undercutting.

61. China's argument that the sales data submitted by a U.S. respondent was "unreliable" is not a finding MOFCOM made, and this *post hoc* rationalization deserves no credit. The data was provided to the U.S. respondent by CAAM, and MOFCOM itself relied on the sales data as support for its conclusion, so China cannot now ask the Panel to dismiss the data as unreliable.

62. China's insistence that MOFCOM "thoroughly examined the issue of competitive overlap" between the subject imports and the domestic like product does not withstand scrutiny. MOFCOM's mention of competitive overlap in the final determination was at such a level of generality that it failed to establish a degree of competitive overlap that would make an analysis of price effects meaningful.

C. MOFCOM's Causation Analysis Is Inconsistent with Articles 3.1 and 3.5 of the AD Agreement and Articles 15.1 and 15.5 of the SCM Agreement

63. Finally, we have demonstrated that MOFCOM's causation determination in these investigations is inconsistent with Articles 3.1 and 3.5 of the AD Agreement and Articles 15.1 and 15.5 of the SCM Agreement.

64. Fundamentally, the evidence simply does not support MOFCOM's conclusion that subject imports caused injury to the domestic industry. There was no basis for MOFCOM's finding that the price of the domestic like product was depressed by subject imports. All of the arguments we have made relating to MOFCOM's analysis of price effects apply with equal force to our claims relating to MOFCOM's causation determination. MOFCOM's finding that subject imports depressed domestic prices simply is without any foundation and thus cannot serve as a basis for MOFCOM's conclusion that subject imports caused injury to the domestic industry. For that reason alone, the Panel should find that China has breached Articles 3.1 and 3.5 of the AD Agreement and Articles 15.1 and 15.5 of the SCM Agreement.

65. Furthermore, as we have shown, there are still other problems with MOFCOM's causation determination. For example, MOFCOM dismissed without explanation the decline in apparent consumption in interim 2009 as possibly causing injury to the domestic industry. Yet, this was the only instance of demand contraction during the entire period of investigation, and it coincided with the only part of the period of investigation during which the price of the domestic like product dropped. China argues that "Chinese automobile manufacturers produced vehicles in anticipation of sales levels, and did not simply build up production independently." It appears that the domestic industry was taken by surprise when demand contracted and it was forced to lower prices.

66. Similarly, MOFCOM failed to consider the domestic industry's declining productivity and increasing labor cost. An examination of the relevant data shows a nearly one-to-one correspondence between the decline in the domestic industry's pre-tax profits from interim 2008 to interim 2009 and the near-doubling of labor costs over the same period. The domestic industry's sagging productivity cannot simply be dismissed as insignificant without any explanation. Indeed, it is specifically identified in Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement as a factor that "may be relevant" to the causation analysis.

67. The explanations China offers now are not the explanations on which MOFCOM relied in its final determination. Moreover, China's arguments are not convincing. China argues that the domestic industry's profits were "very small" anyway. China cannot have it both ways. MOFCOM relied on its findings that pre-tax profit "fell sharply" and the "profitability of the domestic industry was badly affected" in interim 2009. China cannot now dismiss the declines in pre-tax profits and profitability as unimportant.

68. China also contends that the increase in labor costs in interim 2009 was not significant because overall unit costs declined in interim 2009. The answer to this, which MOFCOM also failed to examine or appreciate, is that overall costs would have declined even more, with a beneficial effect on the industry's profitability, were it not for the sharp increase in labor costs.

69. Lastly, as we have explained, MOFCOM failed to examine a sales tax change and failed to avoid attributing the injury caused by it to the subject imports. MOFCOM merely summarized the positions of the interested parties and then asserted, without explanation, that "Chinese tax policy is not the factor causing material injury to the domestic industry." MOFCOM was obligated to undertake an objective examination of any known factors and ensure that any injury caused by those factors was not attributed to subject imports. MOFCOM failed to do so.