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

EXECUTIVE SUMMARY OF THE SECOND WRITTEN SUBMISSION OF THE UNITED STATES OF AMERICA

August 2, 2013

I. INTRODUCTION

1. The U.S. first written submission demonstrated that China's investigating authority, the Ministry of Commerce for the People's Republic of China ("MOFCOM"), acted inconsistently with China's obligations under the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("AD Agreement") and the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement") when it investigated and imposed antidumping and countervailing duty measures on certain automobiles from the United States.

2. China responds with distraction, avoidance, and unsubstantiated assertion. China appears to argue that because MOFCOM followed its own procedures and exercised its seemingly boundless discretion, everything MOFCOM did in the investigations of certain automobiles was consistent with China's WTO obligations. However, the fact that MOFCOM took certain steps and followed its own procedures is irrelevant to the issue of the WTO-consistency of its actions. MOFCOM failed to meet many of the specific procedural and substantive requirements of the AD and SCM Agreements, and MOFCOM's conclusions fail to meet the standard, as described by a recent panel, of being "such reasonable conclusions as could be reached by an unbiased and objective investigating authority in light of the facts and arguments before it and the explanations given."

II. PROCEDURAL FLAWS IN MOFCOM'S INVESTIGATIONS OF CERTAIN AUTOMOBILES FROM THE UNITED STATES

A. China Breached Article 12.4.1 of the SCM Agreement and Article 6.5.1 of the AD Agreement Through MOFCOM's Failure to Require Non-Confidential Summaries.

3. As the United States has explained, China failed to require adequate non-confidential summaries, breaching Article 12.4.1 of the SCM Agreement and Article 6.5.1 of the AD Agreement. China responds by asserting that, *inter alia*, the respondents never objected to the purported non-confidential summaries, thus relieving China of its obligation to require adequate non-confidential summaries; and that general statements in the petition addressing topics related to the confidential information are, in fact, adequate. In doing so, China disregards the obligations contained in Article 12.4.1 of the SCM Agreement and Article 6.5.1 of the AD Agreement.

4. Relying on an improper interpretation of the SCM Agreement and AD Agreement, China argues that the purported non-confidential summaries are in fact contained in the petition. But a party submitting confidential information is required to provide a non-confidential summary of that information. If that party fails to submit the information, it is not sufficient to have a Member subsequently point to previously unspecified information elsewhere on the record that is not a summary of the specific confidential information at issue and claim that it serves as that non-confidential summary. Moreover, the purported non-confidential summaries in the petition are not, in fact, summaries. Instead, the petition only provides simple redactions, general statements that do not shed light on the redacted information's contents, unlabeled trend lines that provide no context that would allow respondents to provide meaningful comments, and year-over-year percentage changes that could have been adequately summarized without implicating confidentiality concerns. MOFCOM failed to require summaries of this information in a manner permitting a reasonable understanding of the substance of the data and information treated as confidential. Therefore, China breached Article 12.4.1 of the SCM Agreement and Article 6.5.1 of the AD Agreement.

B. China Breached Article 6.9 of the AD Agreement through MOFCOM's Failure to Disclose the Calculations and Data Used to Determine the Existence of Dumping and to Calculate Dumping Margins.

5. As the United States has demonstrated, MOFCOM acted inconsistently with Article 6.9 of the AD Agreement by failing to disclose to interested parties the "essential facts" forming the basis of MOFCOM's decision to apply anti-dumping duties. This included a failure by MOFCOM to make available the data and calculations used to determine the existence and

margins of dumping. China denies that MOFCOM failed to provide the actual data and calculations that formed the basis of its dumping determinations.

6. The United States has shown that the calculations relied on by an investigating authority to determine the normal value and export price, as well as the data underlying those calculations (such as various production costs and sales data), constitute "essential facts" forming the basis of the investigating authority's imposition of final measures within the meaning of Article 6.9. The calculations and data are "essential facts" because they are the "indispensable and necessary" facts considered by the investigating authority in determining whether definitive measures are warranted, *i.e.*: whether dumping has occurred and, if so, the magnitude of such dumping. In other words, without the calculations and data, no affirmative determination could be made and no definitive duties could be imposed. And, without disclosure of the actual calculations and data used, the interested parties cannot check the investigating authority's math for errors or whether the authority did what it purported to do.

7. None of the documents on the record support China's contention that it disclosed the margin calculations and underlying data. In response, China asserts that MOFCOM complied with Article 6.9 because it disclosed the essential facts. China cites the final determination, which only states that China disclosed the essential facts. China also asserts that it sent disclosure documents to the U.S. companies; however, China failed to submit these documents as exhibits in this dispute. China's statements are insufficient to establish as a fact that it did disclose the essential facts to interested parties. Rather, China, asserting as a fact that it did disclose essential facts regarding margin data and calculations to the U.S. companies, must offer evidence proving the fact that it has asserted. China does not, because it cannot, present any evidence showing that it disclosed the actual essential facts – the data and calculations – underlying the dumping margin determination.

C. MOFCOM's Determinations of the "All Others" Rates are Inconsistent with Articles 12.7 of the SCM Agreement, and Article 6.8 and Annex II of the AD Agreement.

8. The United States has demonstrated that MOFCOM applied facts available to calculate, based on adverse facts available, an "all others" dumping margin and subsidy rate for unknown producers or exporters, which were not notified of the investigations, of the information that would be required of them in those investigations, or of the fact that failure to participate and provide certain information in those investigations would result in a determination based on facts available. By applying facts available with an adverse inference to these unknown producers or exporters, including those that did not export subject product during the investigation period, MOFCOM acted inconsistent with China's obligations under Article 6.8 and Annex II of the AD Agreement and Article 12.7 of the SCM Agreement.

9. In response, China argues that MOFCOM attempted to notify all producers or exporters by (1) posting a public notice on MOFCOM's website, (2) placing a copy of the initiation notices in a reading room in Beijing, (3) sending questionnaires to registered companies, and (4) requesting the U.S. Embassy to notify any other producers or exporters.

10. The fact that MOFCOM made certain notification attempts, however, is irrelevant to the WTO-consistency of China's applying adverse facts available to companies subject to "all others" rates in this dispute. As a matter of logic, the unknown (and even non-existent) "other" U.S. producers or exporters were not notified of the information required, and thus cannot be said to have (1) refused access to the necessary information, or (2) otherwise failed to provide access to the necessary information within a reasonable period as required under Articles 12.7 of the SCM Agreement and 6.8 of the AD Agreement.

11. Nor can an exporter that does not exist be said to have (3) significantly impeded an investigation. In response to the U.S. claim that no other exporters existed at the time of the investigation, China asserts that it "does not know if the other U.S. exporters and producers to which the all others rates apply are non-existent." This statement is not credible, and is belied by China's first written submission, in which China exhibits knowledge of the U.S. industry in

describing it as "a mature industry with a relatively settled and small number of U.S. exporters and producers." China, thus, fails to rebut the U.S. argument that no other exporters existed at the time of the investigation. China has no basis to apply adverse facts available to nonexistent entities for significantly impeding an investigation.

12. Nor is it possible for unknown producers or exporters, or those that did not ship subject product during the investigation period, to significantly impede an investigation that they did not know about or could not participate in. These parties cannot be said to have refused or failed to provide necessary information to the investigating authority. As the Appellate Body has noted, an exporter must be given the opportunity to provide information required by an investigating authority before the latter resorts to facts available. An exporter that is unknown to the investigating authority is not notified of the information required, and thus is denied an opportunity to provide the required information.

13. China's own arguments demonstrate that its use of adverse facts available to calculate the "all others" AD rate is particularly unjustifiable. For example, MOFCOM applied the "all others" AD rate to Ford "since Ford did not have any exports during the POI, there was no export price." So, despite never indicating how Ford refused access to or failed to provide necessary information, or significantly impeded the investigation, MOFCOM applied the "all others" AD rate to Ford. Indeed, MOFCOM denied Ford's request for establishing an individual dumping margin in recognition of its cooperation in the investigation, since Ford did not have any exports during the investigation period. Thus, MOFCOM applied the adverse all others rate to Ford, even though MOFCOM acknowledged that it could not have participated in the antidumping investigation.

14. The U.S. first written submission noted that the panel in *China – GOES*, in regard to factual circumstances nearly identical to this dispute, found that China's attempts to notify the "all other" exporters of the necessary information required of them did not satisfy the precondition for resorting to facts available found in paragraph 1 of Annex II of the AD Agreement and, as a result, China acted inconsistently with Article 6.8 of the AD Agreement. The panel reached a similar conclusion with regard to Article 12.7 of the SCM Agreement. In dismissing China's arguments, the panel also rejected the same "policy" arguments that China is now offering in this dispute as insufficient for satisfying the preconditions for resorting to facts available.

15. 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.

16. In addition to not being relevant for the application of adverse facts available, MOFCOM's notification attempts are insufficient to justify its use of facts available to calculate the "all others" rates for four reasons. First, posting a public notice on MOFCOM's website is unlikely to provide sufficient notice to an exporter or producer unless that exporter or producer was actively reviewing MOFCOM's website. Also, China's description of posting its notice on a website as "wide dissemination" is inaccurate. China is using the phrase "wide dissemination" to characterize its mere placement of the notice on MOFCOM's website, as opposed to some other action, such as emailing the notice to potential exporters or producers.

17. Second, placing the initiation notices in a reading room is arguably even less likely to ensure an exporter or producer is notified of the investigations than placing it on MOFCOM's website. Both actions presuppose that the exporter or producer will be aware that there is a reason to check either the website or reading room with some frequency. With the reading room, it is unreasonable to expect an exporter or producer to be provided notice of an investigation by virtue of placing the document in a room, possibly thousands of miles away, with no additional targeted communication indicating that such an action by the investigating authority has taken place.

18. Third, China suggests that requesting the Embassy to contact any other exporters or producers also served to notify "all other" exporters or producers. But the obligation to notify

exporters or producers is on the investigating authority – not the Member where those exporters or producers might be located.

19. The United States considers that Article 6.8 of the AD Agreement and Article 12.7 of the SCM Agreement provide for similar conditions on the use of facts available and, therefore, Annex II may provide relevant context for the purpose of interpreting Article 12.7 of the SCM Agreement. The Appellate Body has previously rejected arguments similar to those China presents here, finding that no obligation exists for an Embassy to make its exporters or producers aware of the investigation.

20. Fourth, China argues that "MOFCOM's above-described notification efforts must have been effective, because additional U.S. producers and exporters beyond those identified in the petition registered for participation in the investigation and received questionnaires." China's assertion is beside the point. China's "all other" rates applies to companies that did not register or were otherwise unknown to MOFCOM, such as exporters and producers that began shipping after MOFCOM initiated or even concluded the investigation. These exporters or producers could not have failed to provide information or impeded MOFCOM's investigations. Nonetheless, under MOFCOM's calculations, they would still be subject to an all others rate based on adverse facts available. Such a calculation is inconsistent with the requirements of Article 6.8 of the AD Agreement and Article 12.7 of the SCM Agreement.

D. MOFCOM Acted Inconsistently with Article 6.9 of the AD Agreement and Article 12.8 of the SCM Agreement by Failing to Inform Interested Parties of the Essential Facts Under Consideration in Calculating the "All Others" Dumping Margin and Subsidy Rate.

21. The United States 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 for its calculation of the "all others" dumping margin and subsidy rate. Regarding the "all others" dumping and subsidy rates, MOFCOM failed to disclose the "essential facts under consideration" that formed the basis for its use of facts available in calculating the "all others" rates. MOFCOM also failed to disclose the "essential facts under consideration" that formed the basis for applying a 21.5 percent "all others" dumping rate, and a 12.9 percent all others" subsidy rate.

22. In response, China claims that "all pertinent facts contributing to MOFCOM's decision to apply facts available are laid out" by MOFCOM. China then rehashes the same arguments it uses to justify its use of facts available, and argues that these points comprise the essential facts under consideration in calculating the "all others" dumping margin and subsidy rate.

23. China's arguments miss the point. The purported facts offered by China are not facts – only conclusions unsupported by the record. Also, China does not provide any facts relating to how unknown U.S. companies, in fact, refused access to or failed to provide necessary information, or significantly impeded the investigation. Reviewing a similar set of facts, the panel in *China – GOES* found that China acted inconsistently with the covered agreements.

24. China's assertions that it disclosed, or that it was under no obligation to disclose, the essential facts relating to the calculation of the "all others" dumping margin are not persuasive. In the case of the "all others" antidumping rate, China simply states that it applied the margin alleged in the petition. That is not enough. Once an authority has determined that use of facts available is necessary in an investigation, further specific conditions are imposed on an authority's use of secondary sources (such as information supplied in an application or petition for initiation of an investigation).

25. Where a petition rate is used as facts available, an investigating authority, where practicable, should use special circumspection, checking the petition rate with other facts in order to ensure that it is appropriate to apply as facts available to the respondents in a given investigation. China did not disclose anywhere on the record the special circumspection applied by MOFCOM in its consideration of the petition rate in this dispute. China did not indicate any

effort that it undertook to check against independent sources the accuracy of the information supplied by the petitioner in the reaching the petition rate. In its first written submission, China contends that because it based the "all others" dumping rate on the dumping margin alleged in the petition, the calculation of the "all others" rate is somehow immune from disclosure and scrutiny. Exactly the opposite is true. A factual description of the steps MOFCOM took to check the accuracy of the petition rate is essential to MOFCOM's use of the petition rate.

26. Also, the antidumping rate, as described in the petition, is incomplete and does not provide a full understanding of how that rate was determined. The record does not reflect any efforts by MOFCOM to identify the missing information and verify the validity or reasonableness of the petition rate.

27. 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. MOFCOM's disclosure of the all others subsidy rate consisted of a single sentence: "For all other U.S. companies, in accordance with Article 21 of the CVD regulations, the Investigating Authority decided, by adopting facts available, to apply the ad valorem subsidy rate of General Motors, LLC to these companies." Noticeably absent from MOFCOM's disclosure are the facts that serve as the basis for MOFCOM's decision regarding the application of the facts available, and in particular, that resorting to the use of General Motors' rate, the highest of the individual company rates, was appropriate.

E. MOFCOM Acted Inconsistently with Articles 12.2 and 12.2.2 of the AD Agreement, and Articles 22.3 and 22.5 of the SCM Agreement, by Failing to Explain its Determinations.

28. The United States also demonstrated that China breached Articles 12.2 and 12.2.2 by failing to explain the "all others" dumping margin in the AD determinations, as well as Articles 22.3 and 22.5 of the SCM Agreement by failing to explain the "all others" subsidy rate in the CVD determinations. China has failed to rebut the United States arguments because it cannot cite to any explanation contained in the record that would be sufficient to satisfy the obligations contained in those articles.

29. Regarding the "all others" dumping margin, China cites to a passage of the final determination, which mirrors the statements contained in MOFCOM's Final AD Disclosure. In other words, MOFCOM did not provide any additional explanation in its final determination. Nowhere does China explain how a non-exporting producer refused to provide necessary information in the investigation. The United States has already explained why this statement fails to provide in sufficient detail the findings and conclusions that led to the application of facts available.

30. For the "all others" subsidy rate, China cites the following statement: "Regarding other companies, in accordance with Article 21 of *Countervailing Regulation*, the investigating authority decided to adopt facts available and applied the *ad valorem* subsidy rate of General Motors to them." This single, conclusory sentence echoes the abbreviated statement contained in MOFCOM's final disclosure. As above, MOFCOM did not provide any additional explanation in its final determination, and nowhere does China explain how a non-exporting producer refused to provide necessary information in the investigation. The United States has explained why this statement fails to provide in sufficient detail the findings and conclusions that led to the application of facts available, thus falling short of the requirements of Articles 22.3 and 22.5 of the SCM Agreement.

31. In *China – GOES*, the panel faulted China for failing to explain its use of facts available to calculate the "all others" rates. In particular, the panel stated that a failure to explain how unknown or non-existent exporters failed to cooperate is inconsistent with the covered agreements. These findings apply equally to the U.S. claims under Article 12 of the AD Agreement and Article 22 of the SCM Agreement. And, because of the similarity of the facts with the instant dispute, these findings are persuasive. Because MOFCOM failed to explain its

use of adverse facts available in calculating the "all others" rates, China breached Articles 12.2 and 12.2.2 of the AD Agreement, and Articles 22.3 and 22.5 of the SCM Agreement.

III. MOFCOM'S FLAWED 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 in the antidumping and countervailing duty investigations of certain automobiles from the United States 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.

33. China responds to the U.S. claim that MOFCOM's definition of the domestic industry was distorted by arguing that the domestic industry as MOFCOM defined it included some joint ventures between international and Chinese-owned companies ("JVs") and MOFCOM did not "exclude," by which China means MOFCOM did not receive and reject any data from any domestic producer. China's responses are beside the point. The basis of the U.S. claim is *not* that MOFCOM excluded all JVs from its definition of the domestic industry or that it rejected data from any particular domestic producer that sought to provide it. The problem is 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.

34. MOFCOM's decision to define the domestic industry as including only producers who voluntarily registered for participation in the injury investigations was similar to the approach in *EC – Fasteners (China)*, with which the Appellate Body found fault. MOFCOM created the very same kind of self-selection process, which introduced a material risk of distortion. There is no substantive difference between the willingness of producers to be included in a sample in *EC – Fasteners (China)* and the willingness of producers to respond to MOFCOM's notice and register to participate in the injury investigation here.

35. China's attempt to distinguish the facts of *EC – Fasteners (China)* fails. There was exactly the same kind of self-selection process among domestic producers here. CAAM, the petitioner, was the only domestic entity that responded to MOFCOM's notice, it was the only entity that registered to participate in the injury investigation, and it was the only entity that provided domestic industry data to MOFCOM. Beyond this, and more importantly still, China has belatedly explained in response to a question from the Panel that CAAM, in fact, self-selected from among its own members, providing to MOFCOM domestic industry data from *only eight of its member companies.*

36. It is highly unlikely that data from just eight companies, handpicked from among the domestic producers that comprise the membership of the petitioner, CAAM, could provide MOFCOM with "ample data" sufficient for an "accurate injury analysis" of the domestic industry. Given that MOFCOM had data from only eight companies that were handpicked by the petitioner, CAAM, and which represented only about 40 percent or less 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.

37. China suggests that "[a]nother critical distinction" between this dispute and *EC – Fasteners (China)* is that, in *EC – Fasteners (China)*, "the Appellate Body confronted the investigating authority's application of a 25% minimum benchmark, derived from the AD Agreement's standing provisions, for determining the existence of a 'major proportion.'" China is conflating two distinct lines of reasoning. The distinction that China attempts to draw between the situation in *EC – Fasteners (China)* and the situation in the underlying investigations is not relevant.

38. In addition to the skewing of the data inherent in MOFCOM's limitation of the domestic industry definition to eight of CAAM's member companies that supported the petition, the collective output of those eight companies represented a relatively small percentage of total domestic production of the like product. As China explained in its first written submission, "the percentages of total domestic production represented by MOFCOM's definition of the domestic industry for the period of investigation" were "54% in 2006, 34% in 2007, 34% in 2008, and 42% in Interim 2009."

39. Assuming these numbers to be correct, and in light of statements by the Appellate Body, relevant questions for the Panel to consider here include: Did MOFCOM have before it "wide-ranging information concerning the relevant economic factors"? Was MOFCOM's definition of the domestic industry "capable of providing ample data that ensure an accurate injury analysis"? Did the domestic producers MOFCOM examined represent "a relatively high proportion of the total domestic production"? The answer to all of these questions is no.

40. 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 for most of the period of investigation resulted in a definition of the domestic industry that did not include a "major proportion of the total 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.

41. In considering the effect of subject imports on the price of the domestic like product, MOFCOM concluded that, due to parallel pricing and the rising market share of subject imports, especially at the end of the period of investigation, subject imports depressed prices for the domestic like product in interim 2009. However, there was no parallel pricing, and any increase in market share of the subject products was not at the expense of the domestic like product, which also increased its market share at the same time. So, there simply is no support for MOFCOM's price depression finding.

42. China explains that MOFCOM found parallel pricing because the price movements of subject imports and the domestic like product were "consistent basically" and both increased from 2006 to 2008 "in general." China describes the price increase from 2006 to 2008 as "remarkably similar," noting that the "prices for subject imports increased approximately 88,000 RMB while prices for domestic like product increased approximately 84,000 RMB over that same time period." Finally, China suggests that the price declines from interim 2008 to interim 2009 were "comparable." The evidence on the administrative record does not support China's arguments. There was no price parallelism.

43. Ultimately, because MOFCOM requested data only for full-year 2006, 2007, and 2008, and the full interim periods for 2008 and 2009, there are only three data points on the record that one can look at to assess whether price parallelism existed. Specifically, there is the change from 2006 to 2007, the change from 2007 to 2008, and the change from interim 2008 to interim 2009. Even with just these three data points, though, the inescapable conclusion is that no price parallelism existed between subject imports and the domestic like product, both because prices did not consistently move in the same direction, and because when they did move together, the magnitude of the changes was significantly different. In light of the data, MOFCOM's conclusion that price parallelism existed was not, in the words of a recent panel, such a "reasonable conclusion[] as could be reached by an unbiased and objective investigating authority in light of the facts and arguments before it and the explanations given."

44. Furthermore, the situation here is identical to that described by the Appellate Body in *China – GOES*. MOFCOM and China have done nothing to elucidate "what explanatory force parallel price trends had for the depression . . . of domestic prices." 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.

45. MOFCOM's reliance on the increasing market share of subject imports during interim 2009 likewise provided no support for its price depression finding. China argues that MOFCOM's finding of price depression in interim 2009 was explained by the increase in the volume or market share of subject imports, both throughout the period of investigation and in interim 2009. China's argument is unpersuasive.

46. The increases in the volume of subject imports in the 2006-2008 period were commensurate with rising consumption of the subject merchandise in the Chinese market. While the domestic industry as defined by MOFCOM lost market share in the 2006-2008 period, this was almost entirely because of gains made by Chinese producers not included in MOFCOM's definition of the domestic industry and third-country imports, not gains by subject imports. The domestic industry may have been lowering its prices in interim 2009 to recapture lost market share, as China suggests, but it was, for the most part, not market share that the domestic industry had lost to subject imports. Even if no party had raised this issue during the investigation, this would not excuse MOFCOM's failure to consider the volume and market share data and ensure that its determination was based on positive evidence and involved an objective examination.

47. An additional problem with MOFCOM's price effects analysis was its use of full-year or full-period average unit values ("AUVs"). China defends MOFCOM's use of AUVs in its price effects analysis by arguing that the relevant WTO agreement provisions do not require any specific methodology when examining price trends. China also argues that because MOFCOM was examining price trends over time and was not comparing absolute prices, adjustments to price to ensure price comparability were not necessary.

48. As the Appellate Body recognized in *China – GOES*, however, while Articles 3.2 and 15.2 do not specify a particular methodology for evaluating price effects, a failure to ensure price comparability would not be consistent with the requirements under Articles 3.1 and 15.1 that a determination of injury be based on "positive evidence" and involve an "objective examination" of the effect of subject imports on the prices of domestic like products. Contrary to China's view, the Appellate Body's emphasis on the importance of price comparability was not limited to an examination of price undercutting.

49. China argues that MOFCOM established that there was a sufficient competitive overlap between subject imports and the domestic like product to warrant the use of AUVs in the price effects analysis. The United States submits that MOFCOM's analysis (much of which occurred in the context of MOFCOM's discussion of the scope of the investigation and the definition of the domestic like product, and not in the context of a discussion of price effects) was at such a level of generality that it failed to establish the degree of competitive overlap that would make an analysis of price effects meaningful.

50. MOFCOM's flawed definition of the domestic industry compromised its analysis of price effects because pricing data from the limited part of the domestic industry from which MOFCOM obtained information cannot provide an understanding of the explanatory force of subject imports on the price of the domestic like product. China characterizes this argument as a "consequential claim" and argues that it must fail because each WTO provision must be examined on its own to determine whether a Member has acted inconsistently with the requirements of that provision.

51. China is mistaken. The United States does not merely rely on MOFCOM's flawed domestic industry definition to establish its claim that China has breached Articles 3.2 and 15.2. The United States has given a number of reasons in support of its claims, one of which is that the price effects analysis was premised on a flawed domestic industry definition. Taken together, the problems the United States has identified provide ample support for the conclusion that China has breached Articles 3.2 and 15.2.

52. In sum, MOFCOM's finding of price depression during interim 2009 is contradicted by the evidence on the record, and its consideration of price effects is not based on "positive evidence" and it did not "involve an objective assessment." Accordingly, MOFCOM acted inconsistently with Articles 3.1 and 3.2 of the AD Agreement, and Articles 15.1 and 15.2 of the SCM Agreement, in conducting its price effects analysis.

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.

53. MOFCOM's causation determination in the antidumping and countervailing duty investigations of certain automobiles from the United States is inconsistent with Articles 3.1 and 3.5 of the AD Agreement and Articles 15.1 and 15.5 of the SCM Agreement. China responds to the U.S. claims by arguing that the focus should not be on interim 2009, though that is the only time in the period of investigation during which MOFCOM found that injury occurred, and that the United States has "selectively cit[ed] isolated data and ignor[ed] the complete picture," which is simply untrue. China's arguments are unpersuasive.

54. The first sentence of Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement provides that "[i]t must be demonstrated that the [dumped or subsidized] imports are, through the effects of [dumping or subsidization] . . . causing injury" to the domestic industry. Pursuant to Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement, this demonstration must be based on positive evidence and involve an objective examination.

55. The causal chain identified by MOFCOM has subject imports, with increased volume and decreased price, causing the price of the domestic like product to decrease, which then caused various economic injuries to the domestic industry, including decreased profits and rate of return on investment. In fact, as we have shown, MOFCOM has failed to establish the requisite causal connection between subject imports and injury to the domestic industry.

56. 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 is without any foundation and cannot serve as a basis for MOFCOM's conclusion that subject imports caused injury to the domestic industry.

57. In its causation analysis, MOFCOM reasoned that, because domestic prices declined, so did "the increase margin of the sales revenue, pre-tax profits and the rate on return of investment of the domestic industry." The economic indicators showing that the domestic industry was suffering injury are all related to the industry's profits declining. Although declining profits can be correlated to declining prices, it seems much more likely that the injury experienced by the domestic industry was caused by the continuous decline in in the domestic industry's productivity and the near doubling of wages from interim 2008 to interim 2009, but MOFCOM simply ignored the role that the sharp drop in the domestic industry's productivity played in its financial performance.

58. The second sentence of Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement provides that "[t]he demonstration of a causal relationship between the dumped imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities." MOFCOM failed to examine all relevant evidence before it. Specifically, MOFCOM did not address evidence that subject imports took market share from non-subject imports and not from the domestic like product, and that the sharp decline in the industry's productivity and a near-doubling of wages from interim 2008 to interim 2009 hurt the domestic industry's profitability. While MOFCOM may have reported this evidence or noted the arguments of the parties in its final determination, MOFCOM failed to grapple with this evidence with any seriousness, and cannot be said to have based its causation determination on an "examination" of it within the meaning of Articles 3.5 and 15.5.

59. The third sentence of Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement provides that "[t]he authorities shall also examine any known factors other than the

[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 the [subject] imports." We have demonstrated that other known factors likely were the cause of the economic difficulties experience by the domestic industry. Specifically, declining productivity coupled with increasing wages and a decision by China to increase the sales tax on larger engine vehicles while reducing the sales tax on smaller engine vehicles were known factors. Each of these factors was reported in MOFCOM's final determination and they likely were causes of the injury to the domestic industry. Yet, MOFCOM failed to examine them in connection with its causation analysis and failed to meet its obligation not to attribute injuries caused by those other factors to subject imports.

IV. CONSEQUENTIAL CLAIMS

60. The U.S. first written submission explains that, in view of the claims we have set forth, the United States considers that China has also acted inconsistently with Article 1 of the AD Agreement and Article 10 of the SCM Agreement, which only permit antidumping or countervailing duty measures to be applied in accordance with the AD Agreement and the SCM Agreement. China argues that the United States has failed to make out a *prima facie* case for these consequential claims. China is incorrect.

61. Since it is impermissible to impose an antidumping measure except "in accordance with" the AD Agreement, if the Panel finds that China has breached any provision of the AD Agreement cited in the U.S. claims, then the Panel should also find that, as a consequence of imposing an antidumping measure not "in accordance with" the AD Agreement, China has also breached Article 1 of the AD Agreement. The same is true if the Panel finds that China has breached any provision of the SCM Agreement cited in the U.S. claims. The Appellate Body has explained that the complaining Member is "not required to advance further arguments to establish a consequential violation of Articles 10 and 32.1" of the SCM Agreement.

V. CONCLUSION

62. For the reasons set forth in the U.S. second written submission, along with those set forth in the other U.S. written filings and oral statements, the United States respectfully requests that the Panel find that China's measures are inconsistent with China's obligations under the AD Agreement and the SCM Agreement. The United States further requests, pursuant to Article 19.1 of the DSU, that the Panel recommend that China bring its measures into conformity with the AD Agreement and the SCM Agreement.