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

SECOND WRITTEN SUBMISSION OF THE UNITED STATES OF AMERICA

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China – GOES (Panel)	Panel Report, *China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States*, WT/DS414/R, adopted 16 November 2012, as modified by the Appellate Body Report, WT/DS414/AB/R
China – GOES (AB)	Appellate Body Report, *China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States*, WT/DS414/AB/R, adopted 16 November 2012
EC – Fasteners (China) (AB)	Appellate Body Report, *European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*, WT/DS/397/AB/R, adopted 28 July 2011
EU – Footwear (China)	Panel Report, *European Union – Anti-Dumping Measures on Certain Footwear from China*, WT/DS405/R, adopted 22 February 2012
Japan – DRAMs (Korea) (AB)	Appellate Body Report, *Japan – Countervailing Duties on Dynamic Random Access Memories from Korea*, WT/DS336/AB/R and Corr.1, adopted 17 December 2007
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 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 – Olive Oil	Panel Report, *Mexico – Definitive Countervailing Measures on Olive Oil from the European Communities*, WT/DS341/R, adopted 21 October 2008
U.S. – Anti-Dumping and Countervailing Duties (China) (Panel)	Panel Report, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/R, adopted 25 March 2011, as modified by Appellate Body Report, WT/DS379/AB/R
U.S. – Anti-Dumping and Countervailing Duties (China) (AB)	Appellate Body Report, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R, adopted 25 March 2011
U.S. – Softwood Lumber IV (AB)	Appellate Body Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WT/DS257/AB/R, adopted 17 February 2004
U.S. – 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

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U.S. – Wheat Gluten (AB)	Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS166/AB/R, 2000, adopted 19 January 2001
U.S. – Wool Shirts (AB)	Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, adopted 23 May 1997, and Corr.1

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. In that submission, the United States also noted our particular concern that this is the third dispute settlement proceeding the United States has commenced against China regarding antidumping and countervailing duty measures targeting U.S. exports, owing to China's repeated failure to abide by the commitments it made when it joined the World Trade Organization (WTO).[1]

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.

3. When the Panel scrutinizes MOFCOM's determinations and China's arguments, we are confident that it will agree that, in the investigations of certain automobiles from the United States, 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."[2]

4. In this submission, we will focus on some of the key issues in this dispute, including issues that have arisen as a result of China's responses to the Panel's questions.

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

5. As demonstrated in the U.S. first written submission,[3] our statements during the first substantive meeting with the Panel,[4] and our responses to the Panel's written questions,[5] MOFCOM's measures are inconsistent with Articles 6.5.1, 6.8, 6.9, 12.2, 12.2.2, and Annex II of the AD Agreement and Articles 12.4.1, 12.7, 12.8, 22.3, and 22.5 of the SCM Agreement. The U.S. opening statement at the first Panel meeting responded to several of China's arguments contained in its first written submission. Here we seek to amplify and clarify the arguments we

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[1] *See China – GOES* (DS414) and *China – Broiler Products* (DS427).
[2] *EU – Footwear (China) (Panel)*, paras. 7.483; s*ee also U.S. – Tyres (China) (AB)*, para. 280.
[3] *See, e.g.,* U.S. First Written Submission, paras. 34-99.
[4] *See, e.g.,* U.S. Opening Statement at the First Substantive Meeting of the Panel with the Parties ("U.S. First Opening Statement"), paras. 6-40.
[5] *See* U.S. Responses to the Panel's First Set of Written Questions ("U.S. Responses to First Panel Questions"), paras. 1-25.

have presented – as well as address arguments introduced by China in its opening statement at the first panel meeting, and answers to panel questions.

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.

6. 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.

1. China Misinterprets Article 12.4.1 of the SCM Agreement and Article 6.5.1 of the AD Agreement.

7. Article 12.4.1 of the SCM Agreement and Article 6.5.1 of the AD Agreement obligate Members to require interested parties participating in the investigation to furnish adequate non-confidential summaries that allow for a reasonable understanding of the substance of the confidential information, so that interested parties can defend their interests. Adequate non-confidential summaries are required in the absence of "exceptional circumstances" where "such information is not susceptible of summary." In the case of "exceptional circumstances," the interested party must provide "a statement of the reasons why summarization is not possible."

8. China misinterprets these straightforward provisions in two ways. First, China suggests in its submissions that it need only require adequate non-confidential summaries if an interested party objects to the manner in which confidential information is summarized. China asserts, for instance, that:

> If interested parties had felt that the public summaries had prejudiced their ability to defend themselves they should have so informed MOFCOM. If a party had objected in this manner, MOFCOM could have reviewed the situation and made a determination as to how to proceed. It is thus unfair to penalize MOFCOM after the fact for not addressing an issue that the parties themselves had not raised during the underlying investigations.[6]

Following this logic, a party would also have to dispute the non-confidential summaries provided before China would review the non-confidential summaries for adequacy.

9. Yet, 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

[6] China First Written Submission, para. 72. *See also* China Opening Statement at the First Substantive Meeting of the Panel with the Parties ("China First Opening Statement"), para. 13.

are adequate. The obligation to "require" adequate non-confidential summaries is an obligation on a Member; by the terms of the agreements, it applies whether or not an interested party objects to their adequacy during the proceeding. As the Panel observed 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."[7]

10. Specifically, the obligations contained in SCM Article 12.4.1 and AD Agreement Article 6.5.1 rest with China, not interested parties. The panel in *China – GOES* affirmed this interpretation:

> Whether or not a respondent makes a substantive challenge regarding the subject matter that has been treated confidentially does not affect the standard for an adequate non-confidential summary under Articles 12.4.1 of the SCM Agreement or 6.5.1 of the Anti-Dumping Agreement. Indeed, without an adequate non-confidential summary, the ability of an interested party to contest the relevant issue is compromised.[8]

The *China – GOES* panel's reasoning is equally applicable to this dispute.[9]

11. Second, China appears to argue that the purported non-confidential summaries contained in the petition provide a reasonable understanding of the substance of the confidential information, in light of the various factors cited in Article 3.4 of the AD Agreement and Article 15.4 of the SCM Agreement.[10] China thus appears to be arguing that its obligation to require adequate non-confidential summaries should be assessed in the context of Article 3.4 of the AD Agreement and Article 15.4 of the SCM Agreements.

12. If this is the case, China's statements would be erroneous, and reflect a fundamental misunderstanding of the obligations contained in the SCM and AD Agreements. The text of the agreements does not support such an argument. Article 6.5.1 of the AD Agreement, for example, does not circumscribe or otherwise define its obligation with reference to Article 3.4 of the AD Agreement.[11] Rather, Article 6.5.1 obliges a Member to "require" an interested party providing confidential information to furnish a non-confidential summary, and that obligation applies to any confidential information whenever supplied. The only limitation on this obligation is in the "exceptional circumstances" situation set out in Article 6.5.1. Thus, the obligation to provide adequate non-confidential summaries is an independent obligation not limited by other provisions of the AD or SCM Agreements.

2. The Purported Non-confidential Summaries are Inadequate.

13. As the United States has explained, moreover, for each category of confidential information, the information contained in the application was inadequate. It failed to contain any

[7] *Mexico – Anti-Dumping Measures on Rice (Panel)*, para. 7.199.
[8] *China – GOES (Panel)*, para. 7.191.
[9] U.S. First Opening Statement, para. 9.
[10] China First Opening Statement, paras. 6-7.
[11] By contrast, *see, e.g.*, Article 3.5 of the AD Agreement, which cross-references Article 3.4 of the AD Agreement.

summary at all, the graphs were unlabeled, and the year-over-year percentage changes lacked the necessary context of absolute values. Also, the applicants failed to justify, in the alternative, that there were exceptional circumstances which precluded more detailed summarization. Because of these errors, the interested parties were unaware of the content of such information and consequently were unable to submit meaningful comments or evidence in response to such information. As a result, China breached Article 12.4.1 of the SCM Agreement and Article 6.5.1 of the AD Agreement.

a. Sales to Output Ratio

14. The United States challenges the missing non-confidential summary for the sales to output ratio of applicants, at Table 19. China's arguments in response fail for many reasons.

15. First, the applicant states that "[s]pecifically, the proportion of products sold by domestic industry, as represented by the petitioner, is xxx (Confidential) in 2006, xxx (Confidential) in 2007, but xxx (Confidential) in 2008."[12] The information is simply redacted. Respondents could not identify the average changes, or even the percentage changes. China insists, however, that the text accompanying Table 19 "provides additional information and context for the redacted information."[13] But the text cited by China does nothing to shed light on the contents of the redacted information – it indicates nothing about the redacted information for sales to output ratio during the years in question.[14]

16. Second, China asserts that a trend line adequately summarizes the information.[15] China, however, fails to mention that the trend line provided is not labeled to indicate scale. China offers no reason as to why the trend line is not labeled to indicate scale. Without a sense of scale, it is impossible to get a reasonable understanding of the substance of the confidential information.[16] Interested parties could not comment meaningfully on the trend line without the label providing context, or provide evidence to rebut the proposition.

17. Third, China argues that matching Table 19 with other sections of the application provides a reasonable understanding of the substance of the information treated as confidential. China, for instance, asserts that Table 19 must be "examined in terms of its relationship with other public data, such as apparent consumption…and inventory shifts." Here, China is making the same argument that the Panel in *China – GOES* rejected: interested parties do not have "to infer, derive and piece together a possible summary of confidential information."[17] Yet, that is precisely what China is arguing, as Table 19 does not contain any cross-references directing the interested reader to these sections now cited by China. Moreover, a cross-reference to *another* set of information would not itself summarize the content of the confidential information not summarized. In other words, the obligation is to furnish a non-confidential summary of the "confidential information" itself.

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[12] Exhibit CHN-01, p. 41.
[13] China First Written Submission, para. 47.
[14] U.S. First Written Submission, para. 43 (citing *China – GOES (Panel)*, para. 7.213).
[15] China First Written Submission, para. 48.
[16] U.S. First Opening Statement, para. 12.
[17] *China – GOES (Panel)*, para. 7.202. *See also* U.S. First Opening Statement, para. 11.

18. Fourth, regarding the applicant's failure to adequately summarize this information, China asserts that the issue was not seriously contested.[18] China's argument that the respondents did not "seriously" contest the issue during the underlying proceeding is irrelevant, as explained above.

b. Return on Investment

19. China repeats its errors regarding the missing non-confidential summary for return on investment. As above, China points to a trend line that is not labeled to indicate scale, and it relies on discussion that indicates nothing about the redacted information during the years in question.[19]

c. Salary

20. Regarding salary, China commits the same errors: pointing to a trend line that is not labeled to indicate scale, and relying on discussion that indicates nothing about the redacted information during the years in question.[20] China also argues that the information in the petition "shows changes in average wages over time; the absolute levels themselves are not relevant." This statement is incorrect; the "absolute levels" or a version of the information that permits "a reasonable understanding of the substance of the information submitted in confidence" are necessary under Article 6.5.1 and 12.4.1, and therefore are relevant. Showing changes alone would not permit such a reasonable understanding of the actual wage data. And, the text in fact does not even show average or percentage changes in wages over time; it only states that changes occurred.[21] China's conclusory statement, rather than an actual non-confidential summary, must be rejected.

d. Apparent Consumption

21. Regarding apparent consumption, China cites percentage changes. But year-over-year percentage changes do not reveal the significance in the absolute changes. Thus, the year-over-year percentage changes that the applicant provided did not give the respondents enough information to defend their interests.[22] Reporting aggregate figures would have been helpful. No reason, however, is given for the failure to report aggregate figures, despite the fact that reporting these figures would not have implicated any confidentiality concerns.

22. As above, China argues that matching Table 21 with other sections of the petition provides a reasonable understanding of the substance of the information treated as confidential. China, for example, writes that demand in the domestic market is discussed "elsewhere" in the petition.[23] But Table 21 does not contain any cross-references directing the interested reader to these sections now cited by China. China is requiring interested parties to "to infer, derive and

[18] China First Written Submission, para. 48.
[19] China First Written Submission, paras. 49-50. *See also* U.S. First Opening Statement, para. 13.
[20] China First Written Submission, paras. 51-52.
[21] Exhibit CHN-01, pp. 49-50.
[22] U.S. Responses to First Panel Questions, paras. 1-2.
[23] China First Written Submission, para. 55.

piece together a possible summary of confidential information." Rather than provide an adequate non-confidential summary, China would require respondents to engage in guesswork to surmise an understanding of the substance of the confidential information.

e. Other Economic Indicators

23. To justify the purported non-confidential summaries of a range of data, China argues that year-over-year percentage changes are "functionally equivalent to the use of trend lines."[24] This statement is puzzling. As noted above, the trend lines in the application are unlabeled. Thus, respondents could not identify the average changes, or even the percentage changes, based solely on viewing the trend line.

24. Whatever China means by this statement, the purported summaries fail to meet the requirements of the AD and SCM Agreements. In an attempt to repair these deficiencies, China misleadingly cites a U.S. point from the *China – GOES* dispute that trend lines are an acceptable form of summarization.[25] Nowhere did the United States indicate that *unlabeled* trend lines would be acceptable. And, nowhere in *China – GOES* did the United States endorse using year-over-year percentage changes – barring exceptional circumstances – in a manner that could possibly be read as consistent with China's arguments in this dispute.[26]

25. China's arguments cannot cure the defects in the summaries provided. As above, the year-over-year percentage changes here do not reveal the significance in the absolute changes. Thus, the year-over-year percentage changes that were provided did not give the respondents enough information to defend their interests.[27] Reporting aggregate figures would have been helpful. No reason, however, is given for the failure to report aggregate figures, despite the fact that reporting these figures would not have implicated any confidentiality concerns. Continuing an error that it makes throughout, China points to trend lines that are not labeled to indicate scale.[28] The U.S. has already explained why these unlabeled trend lines are flawed.[29]

3. Conclusion

26. 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

[24] China First Written Submission, para. 57.
[25] China First Written Submission, para. 57. *See also* China First Opening Statement, para. 10.
[26] *See, e.g., China – GOES (Panel),* para. 7.164.
[27] U.S. Responses to First Panel Questions, paras. 1-2.
[28] China First Written Submission, paras. 60, 62, 66, 68, 71.
[29] *See, e.g.,* U.S. First Opening Statement, para. 12.

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.

27. 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.

28. China offers no evidence to support its argument. Rather, it only offers a single, conclusory sentence in its final determination to support its contention. Based on the record evidence, the limited information disclosed by MOFCOM was insufficient to allow respondents to defend their interests and to meet China's obligations under Article 6.9.

29. 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.[30] 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.

30. None of the documents on the record support China's contention that it disclosed the margin calculations and underlying data.[31] Thus, by failing to disclose the data and calculations it performed to determine the existence and margin of dumping – including the calculation of the normal value and the export price for the respondents – China has breached Article 6.9 of the AD Agreement.

31. In response, China asserts that MOFCOM complied with Article 6.9 because it disclosed the essential facts.[32] China cites the final determination, which only states that China disclosed

[30] U.S. First Written Submission, paras. 48-53.
[31] U.S. First Opening Statement, para. 40.
[32] China First Written Submission, para. 89.

the essential facts.[33] 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.[34] 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.[35] 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.

32. 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.

1. MOFCOM's Notification Attempts are Irrelevant to the U.S. Claims regarding China's Calculation of the "All Others" Rates Using Facts Available.

33. An investigating authority's recourse to facts available under Article 6.8 of the AD Agreement and Article 12.7 of the SCM Agreement is limited to situations where an interested party (1) refuses access to necessary information within a reasonable period; (2) otherwise fails to provide such information within a reasonable period; or (3) significantly impedes the investigation.[36] The panel report in *Mexico – Anti-Dumping Measures on Rice* explained that exporters not given notice of the information required of them cannot be considered to have failed to provide necessary information.[37] The Appellate Body in *Mexico – Anti-Dumping Measures on Rice* further explained that an exporter must be given the opportunity to provide information required by an investigating authority before the latter resorts to facts available pursuant to Article 6.8 of the AD Agreement (the first sentence of which is almost identical to Article 12.7 of the SCM Agreement).[38]

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[33] Final Determination, pp. 29-30 (Exhibit CHN-07).
[34] China Responses to the Panel's First Set of Written Questions ("China Responses to First Panel Questions"), para. 8. China notes 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.
[35] *See, e.g., U.S. – Wool Shirts (AB)*, p. 14*; China – GOES (Panel)*, para. 7.5.
[36] *U.S. – Anti-Dumping and Countervailing Duties (China) (Panel)*, para. 16.9.
[37] *Mexico – Anti-Dumping Measures on Rice (Panel)*, fn 211.
[38] *Mexico – Anti-Dumping Measures on Rice (AB)*, paras. 258-264.

34. 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.[39]

35. 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.[40]

36. 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."[41] 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."[42] 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. [43]

37. 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.[44]

38. 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

[39] China First Written Submission, paras. 105, 129.
[40] As noted in the U.S. First Written Submission, n. 83, Article 6.1 of the AD Agreement provides context for Article 6.8 by establishing that the investigating authorities must give notice to the interested parties "of the information that the authorities require" before an investigating authority resorts to facts available. Similarly – and as noted at para. 84 of the U.S. First Written Submission – Article 12.1 of the SCM Agreement provides context for Article 12.7 by establishing that the investigating authorities must indicate to the interested parties the information that they require before an investigating authority resorts to facts available.
[41] China Responses to First Panel Questions, para 15.
[42] China First Written Submission, para. 111.
[43] *China – GOES (Panel)*, paras. 7.387, 7.446.
[44] *Mexico – Anti-Dumping Measures on Rice (AB)*, paras. 258-264.

export price."[45] 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.[46] Thus, MOFCOM applied the adverse all others rate to Ford, even though MOFCOM acknowledged that it could not have participated in the antidumping investigation.

a. The Panel's Reasoning in *China – GOES* is Persuasive.

39. 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.[47] The panel reached a similar conclusion with regard to Article 12.7 of the SCM Agreement:

> [E]ven in the absence of an equivalent to Annex II [of the AD Agreement], the Panel considers that a similar conclusion to that reached under Article 6.8 of the Anti-Dumping Agreement is appropriate. In particular, in the absence of being notified of the "necessary information" in the context of a particular investigation, *it is difficult to conclude that unknown exporters refused access to or failed to provide necessary information or otherwise impeded the investigation*.[48] (emphasis added).
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> [t]he Panel concludes that in applying "facts available" to exporters that were not notified of the information required of them, and that did not refuse to provide necessary information or otherwise impede the investigation, China acted inconsistently with Article 12.7 of the SCM Agreement.[49]

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.[50]

40. Given the soundness of the *China – GOES* panel's reasoning, and the similar underlying facts and legal arguments in *China – GOES* and this dispute,[51] the United States considers the panel's reasoning in *China – GOES* should be considered highly persuasive here

[45] Final Determination, pp. 41-42 (Exhibit USA-02).
[46] Final Determination, pp. 41-42 (Exhibit USA-02).
[47] *China – GOES (Panel)*, para. 7.393.
[48] *China – GOES (Panel)*, para. 7.446.
[49] *China – GOES (Panel)*, para. 7.448.
[50] *See China – GOES (Panel)*, para. 7.390; *see also* China First Written Submission, para. 113.

2. In Addition to Not Being Relevant, MOFCOM's Notification Attempts are Insufficient to Justify Its Use of Facts Available to Calculate the "All Others" Rates.

41. 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.[52] Also, China's description of posting its notice on a website as "wide dissemination" is inaccurate.[53] 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.

42. 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.

43. 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. Paragraph 1 of Annex II of the AD Agreement, for example, provides in part:

> The authorities should also ensure that the party is aware that if information is not supplied within a reasonable period of time, the authorities will be free to make determinations on the basis of the facts available, including those contained in the application for the initiation of the investigation by the domestic industry.

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.[54] 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. [55]

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[51] *See, e.g., China – GOES (Panel)*, paras 7.371, 7.376, 7.378, 7.438.
[52] And, perhaps, reviewing MOFCOM's website at least once every 20 days, given that MOFCOM required producers or exporters to register within 20 days from the initiation of the investigation.
[53] China First Written Submission, paras. 105, 129.
[54] U.S. Responses to First Panel Questions, paras 22-25.
[55] *Mexico – Anti-Dumping Measures on Rice (AB)*, para. 263.

44. 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."[56] 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.

3. Conclusion

45. In sum, China applied adverse facts available in calculating the "all others" rates. But 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 refused access to the required information, or otherwise failed to provide access to the information within a reasonable period.[57] China makes no effort to explain how unknown or non-existent exporters could possibly have failed to cooperate under the covered agreements. Instead, China explains away its actions by referencing irrelevant and inadequate notification attempts. China's own argument indicates that the actions discussed above were MOFCOM's only efforts to notify "all other" producers and exporters of autos. As demonstrated above, whether considered on their own or collectively, it is not reasonable to resort to the use of available facts on the basis of these efforts.

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.

46. 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.

47. In response, China claims that "all pertinent facts contributing to MOFCOM's decision to apply facts available are laid out" by MOFCOM.[58] China then rehashes the same arguments it

[56] China First Written Submission, para. 106.
[57] U.S. First Opening Statement, para. 22.
[58] China First Written Submission, para. 115.

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.[59]

48. 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.[60] Reviewing a similar set of facts, the panel in *China – GOES* found that China acted inconsistently with the covered agreements.[61]

49. 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). Paragraph 7 of Annex II to the AD Agreement states, in relevant part:

> If the authorities have to base their findings, including those with respect to normal value, on information from a secondary source, including the information supplied in the application for the initiation of the investigation, they should do so with special circumspection. In such cases, the authorities should, where practicable, check the information from other independent sources at their disposal, such as published price lists, official import statistics and customs returns, and from the information obtained from other interested parties during the investigation.

50. 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.[62] 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.

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[59] China First Written Submission, para. 115, 133.
[60] U.S. Responses to First Panel Questions, paras. 14-15.
[61] *China – GOES (Panel)*, paras. 7.408, 7.464.
[62] China First Written Submission, para. 119 ("The U.S. claim also fails for the simple reason that there are no MOFCOM calculations to disclose with respect to the AD all others rate. As MOFCOM explained in its pre-final determination disclosure to the United States, it applied the AD margin alleged in the petition; there are no adjustments or further calculations on MOFCOM's part that could have been disclosed. The petition, however –

51. 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.

52. 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.

53. 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.

54. Regarding the "all others" dumping margin, China cites to a passage of the final determination,[63] which mirrors the statements contained in MOFCOM's Final AD Disclosure.[64] 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.[65]

55. 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.[66] As above, MOFCOM did not provide any additional explanation in its final determination, and nowhere does China explain how a non-exporting producer refused

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which is outside the scope of the Article 6.9 disclosure obligation – clearly and fully lays out the data underlying the alleged margin of dumping.").

[63] Final Determination, pp. 83-84 (Exhibit CHN-07).

[64] Final Disclosure, p. 24 (Exhibit USA-11).

[65] U.S. Responses to First Panel Questions, para. 19. *See also* U.S. First Written Submission, para. 78.

[66] Final Disclosure, p. 41 (Exhibit USA-11).

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.[67]

56. 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:

> the decision to resort to facts available to determine the existence and the margin of dumping in relation to "all other" exports is one step in the process leading to the imposition of a final measure, within the meaning of 12.2.2 of the Anti-Dumping Agreement. In the Panel's view, the final determination did not set forth" all relevant information on matters of fact" of the "findings…reached on all issues of fact" supporting the conclusion that unknown, indeed non-existent, exporters refused to provide necessary information or otherwise impeded the investigation.[68]

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

57. As demonstrated in the U.S. first written submission,[69] our statements during the first substantive meeting with the Panel,[70] and our responses to the Panel's written questions,[71] 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. For its part, in its first written submission, statements, and responses, China has provided the Panel nothing that explains or excuses the shortcomings of MOFCOM's injury determination.

58. The U.S. opening statement at the first panel meeting responds to many of the arguments China makes in its first written submission. We will not repeat in this submission all of the arguments we make in our opening statement, though we continue to rely on them, as well as the arguments we make in the U.S. first written submission and our oral and written responses to the Panel's questions. Here, we will seek to build upon and clarify the arguments we have advanced thus far, touching on each of our claims in turn.

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[67] U.S. First Written Submission, paras. 98-99. *See also* U.S. Responses to First Panel Questions, paras. 19, 21.
[68] *China – GOES (Panel)*, para. 7.424.
[69] *See* U.S. First Written Submission, paras. 100-175.
[70] *See, e.g.*, U.S. First Opening Statement, paras. 41-102.
[71] *See* U.S. Responses to First Panel Questions, paras. 26-40.

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.

59. As we have explained previously,[72] 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. We will address each of these failings in turn.

1. MOFCOM's Definition of the Domestic Industry Was Distorted Because It Was Limited to Members of the Petitioning Group.

60. 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.[73] 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.

61. We recall that, in *EC – Fasteners (China)*, the Appellate Body, in elaborating the meaning of Articles 3.1 and 4.1 of the AD Agreement and Articles 15.1 and 16.1 of the SCM Agreement, explained 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 . . . ."[74] In that dispute, the investigating authority published a notice inviting domestic producers to make themselves known and volunteer for inclusion in a sample of the domestic industry, and then defined the domestic industry to include only producers that responded to the notice and volunteered for inclusion in a sample.[75] The Appellate Body expressed concern 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."[76]

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[72] *See* U.S. First Written Submission, paras. 105-125; U.S. First Opening Statement, paras. 46-69; U.S. Responses to First Panel Questions, paras. 26-27.

[73] *See, e.g.*, China First Written Submission, paras. 153-161 ("MOFCOM did not Exclude Foreign Joint Ventures in Defining the Domestic Industry") and 138 ("*Every* producer of the domestic like product had the opportunity to submit information and argument on injury, and MOFCOM incorporated *all* data that it received in its definition of the domestic industry." (emphasis in original)); *see also* China Responses to First Panel Questions, para. 23 (explaining that four of the eight companies included in the definition of the domestic industry were JVs).

[74] *EC – Fasteners (China) (AB)*, para. 414 (citations omitted) (emphasis added).

[75] *EC – Fasteners (China) (AB)*, para. 426.

[76] *EC – Fasteners (China) (AB)*, para. 427.

62. Here, 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.

63. China's attempt to distinguish the facts of *EC – Fasteners (China)* fails. China argues that the Appellate Body there "laid out its reasoning in the face of a 'self-selection process'" among domestic producers.[77] However, there was exactly the same kind of self-selection process among domestic producers here, and it was not theoretical. There was self-selection in that 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.*[78]

64. The Appellate Body further stated in *EC – Fasteners (China)* 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."[79] 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. It is far more likely that the data selected by CAAM would be from domestic producers posting the weakest performance, which would distort the injury analysis. MOFCOM's failure even to inquire with CAAM why it provided data only for these particular companies is further evidence of the distortion that MOFCOM's process introduced into its definition of the domestic industry.

65. The Appellate Body has explained that "authorities charged with conducting an inquiry or a study – to use the treaty language, an 'investigation' – must actively seek out pertinent information[80] and may not "remain[] passive in the face of possible shortcomings in the evidence submitted. . . ."[81] Given the centrality of the domestic industry definition 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, it is particularly important that investigating authorities make active efforts to collect the information necessary to define the domestic industry in a comprehensive and objective manner.

[77] China First Written Submission, para. 166.
[78] *See* China Responses to First Panel Questions, para. 23.
[79] *EC – Fasteners (China) (AB)*, para. 413 (emphasis added).
[80] *U.S. – Wheat Gluten (AB)*, para. 53.
[81] *U.S. – Wheat Gluten (AB)*, para. 55.

66. 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.

67. 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.'"[82] However, China is conflating two distinct lines of reasoning. While the Appellate Body disapproved of the application of a minimum benchmark of 25 percent in defining what constituted a major proportion of domestic production under Article 4.1 of the AD Agreement and Article 16.1 of the SCM Agreement,[83] that issue was separate from the question of whether the investigating authority acted in such a way as to give rise to a material risk of distortion in defining the domestic industry.[84] The distinction that China attempts to draw between the situation in *EC – Fasteners (China)* and the situation in the underlying investigations is not relevant.

68. Additionally, China reads the Appellate Body report in *EC – Fasteners (China)* too narrowly. In discussing the requirements of Articles 3.1 and 4.1 of the AD Agreement, the Appellate Body explained 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, *for example*, by excluding a whole category of producers of the like product."[85] China goes to great lengths to show that MOFCOM did not exclude a defined category of producers from the domestic industry, namely JVs. However, as explained above, the U.S. claim does not depend on the Panel finding that MOFCOM excluded all JVs. We simply noted that it appeared likely that MOFCOM did so, based on an analysis of the data on the administrative record, which did not clearly indicate whether JVs were included. In any event, the exclusion of "a whole category of producers" was merely a non-exclusive example that the Appellate Body gave of how a material risk of distortion might be created by an investigating authority. Thus, again, the distinction China attempts to draw is irrelevant.

2. MOFCOM's Definition of the Domestic Industry Does Not Encompass a "Major Proportion" of Domestic Production.

69. As we have explained previously,[86] 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.

[82] China First Written Submission, para. 167.
[83] *EC – Fasteners (China) (AB)*, para. 430.
[84] *EC – Fasteners (China) (AB)*, paras. 413-414.
[85] *EC – Fasteners (China) (AB)*, para. 414 (emphasis added).
[86] *See* U.S. First Written Submission, paras. 118-125; U.S. First Opening Statement, paras. 64-69.

70. The actual percentages of domestic production represented by the companies MOFCOM included in the domestic industry are, at this point, not in dispute. 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."[87]

71. Assuming these numbers to be correct, the dispute between the Parties that we are asking the Panel to resolve is whether, in this case, these percentages meet the definition of "a major proportion of the total domestic production" in Article 4.1 of the AD Agreement and Article 16.1 of the SCM Agreement. The United States does not disagree with China that "a 'major proportion' may be less than 50% of total domestic production" in some cases.[88] However, the proper analysis is not merely quantitative. If that were the case, the Agreements would simply specify some minimum percentage of domestic production that must be included in the domestic industry definition. Rather, the Panel should consider 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, and in light of the absence of any discussion by MOFCOM in the final determination of the nature and composition of the auto industry in China or why it could not seek additional information.

72. The Panel should also consider the percentages in light of the Appellate Body's elaboration of the meaning of "a major proportion" and the obligation to base an injury determination on "positive evidence" in *EC – Fasteners (China)*:

> Article 3.1 requires that an injury determination be based on "positive evidence". Pursuant to Article 3.4, such "positive evidence" includes relevant economic factors and indices collected from the domestic industry, which have a bearing on the state of the industry. Naturally, the "positive evidence" to be used in an injury determination requires wide-ranging information concerning the relevant economic factors in order to ensure the accuracy of an investigation concerning the state of the industry and the injury it has suffered. Thus, "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.[89]

The Appellate Body considered that "a major proportion" should be properly understood as constituting "a relatively high proportion of the total domestic production."[90]

73. In light of these 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

[87] China First Written Submission, para. 169.
[88] China First Written Submission, para. 170.
[89] *EC – Fasteners (China) (AB)*, para. 413 (emphasis added).
[90] *EC – Fasteners (China) (AB)*, paras. 412, 419.

MOFCOM examined represent "a relatively high proportion of the total domestic production"? The answer to all of these questions is no.

74. MOFCOM gave no indication in the final determination that the domestic industry was fragmented or so large that sampling would be necessary, MOFCOM did not identify any practical constraints on its ability to obtain information, and nothing in the final determination suggests that MOFCOM's investigation of automobiles involved any special market situations that would warrant a lower threshold for defining "major proportion." Thus, 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 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.

75. As we have explained previously,[91] 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.[92] We have demonstrated, though, that 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.

76. China responds by insisting that there was price parallelism and by advancing various arguments that respond to arguments the United States is not making, or which are not critical to our claims. China's arguments are unavailing.

1. There Was No Parallel Pricing Trend and MOFCOM's Attempt to Base its Price Depression Finding on Such a Trend is without Foundation.

77. 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."[93] 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."[94] Finally, China suggests that the price declines from interim 2008 to interim

[91] *See* U.S. First Written Submission, paras. 126-151; U.S. First Opening Statement, paras. 70-88.
[92] Final Determination, pp. 130-131 (Exhibit CHN-07).
[93] *See, e.g.*, China Responses to First Panel Questions, para. 34.
[94] China Responses to First Panel Questions, para. 36.

2009 were "comparable."[95] The evidence on the administrative record does not support China's arguments. There was no price parallelism.

78. 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. Taking each data point in turn:

- from 2006 to 2007, prices simply moved in different directions, with the price of subject imports *decreasing* by RMB 27,000 (an 8.47 percent decline) and the price of the domestic like product *increasing* by RMB 30,000 (an 11.08 percent gain);

- from 2007 to 2008, the prices moved in the same direction, both increasing, but the price increase of subject imports, RMB 115,000 (or 39.6 percent), was more than double the price increase of the domestic like product, RMB 54,000 (or 16.82 percent); and

- finally, from interim 2008 to interim 2009, the third and final data point on the administrative record, the prices again moved in the same direction, but again did so at far different rates, with the price of subject imports declining modestly by just RMB 13,000 (or 3.17 percent), while this time the price decline of the domestic like product was far greater, approximately triple that of subject imports, at RMB 35,500 (or 10.13 percent).[96]

79. In sum, nothing in the data on the record before MOFCOM supports the conclusion that prices for subject imports and the domestic like product were moving in parallel. MOFCOM reached this conclusion only by disregarding one of the only three data points at had before it, looking just at the price changes from 2006 to 2008 and interim 2008 to interim 2009, while ignoring what happened in 2007. And even with the change from interim 2008 to interim 2009, the modest movement in price of subject imports undermines an argument that prices moved downwards in parallel. 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."[97]

80. Furthermore, neither MOFCOM in its final determination nor China in its submissions and statements to the Panel even attempts to explain *how* parallel pricing caused the depression of domestic prices. China points out that, in *China – GOES*, the Appellate Body stated that it

[95] China Responses to First Panel Questions, para. 36.
[96] *See* China Responses to First Panel Questions, para.37 (the absolute price changes are derived from the table presented there); Final Determination, p. 129-130 (Exhibit CHN-07) (the percentage changes are presented there).
[97] *EU – Footwear (China)*, paras. 7.483; s*ee also U.S. – Tyres (China) (AB)*, para. 280.

"can conceive of ways in which an observation of parallel price trends might support a price depression or suppression analysis."[98] While this is true, the Appellate Body continued, explaining that:

> For instance, the fact that prices of subject imports and domestic products move in tandem might indicate the nature of competition between the products, and may explain the extent to which factors relating to the pricing behaviour of importers have an effect on domestic prices. The difficulty we have with this issue on appeal, however, is that there is no basis on which to draw any such conclusions in this case. In its Final Determination, MOFCOM referred twice to the price trends of subject imports and domestic products, in both instances noting that the "developing trend" of price for the two products was "basically the same" in that the price initially rose and then dropped. Apart from these two references, however, MOFCOM did not provide any further description of these price trends, or set out any explanation or reasoning regarding the role such trends played in MOFCOM's price effects analysis and findings. We note, moreover, that, although China argues that parallel price trends is "one of the key elements of MOFCOM's discussion", China has not explained before the Panel, or now on appeal, what the significance of this element was to the analysis set out in MOFCOM's Final Determination. In the absence of sufficient reasoning in MOFCOM's Final Determination, or an elucidation of the Final Determination by China, as to what explanatory force parallel price trends had for the depression or suppression of domestic prices, we see no basis to fault the Panel for failing to recognize or discuss the significance of these trends for MOFCOM's analysis.[99]

81. 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."[100] 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.

82. Finally, we note that China acknowledges that the prices of subject imports and the domestic like product diverged in 2007, but argues that the domestic industry's loss of market share in that year shows that "domestic producers found themselves facing debilitating and crippling loss of market share unless they likewise reduced prices in the face of crippling import competition."[101] This *post hoc* rationalization by China is unpersuasive. China ignores the fact that the domestic industry's loss of market share in 2007 was almost entirely due to gains made by third-country imports and Chinese producers not included in MOFCOM's definition of the domestic industry, not the subject imports. While the domestic industry lost about eight

[98] China Responses to First Panel Questions, para. 31 (*citing China – GOES (AB)*, para. 210).
[99] *China – GOES (AB)*, para. 210.
[100] *China – GOES (AB)*, para. 210.
[101] China First Written Submission, para. 199.

percentage points of market share, subject imports gained less than one percentage point.[102] Moreover, it is hard to see what the domestic industry's loss of market share in 2007 (to suppliers other than subject imports) has to do with MOFCOM's reasoning that price parallelism justified the conclusion that subject imports depressed the price of the domestic like product in interim 2009. If anything, this seems like an entirely different explanation altogether for the price depression finding, but the Appellate Body has been clear that a panel should limit its review to those findings that an authority actually made, and not findings that the Member attempting to defend the authority's action may choose to assert after the fact.[103]

2. MOFCOM's Analysis of the Market Share of Subject Imports Does Not Support the Price Depression Finding.

83. 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.[104] China's argument is unpersuasive.

84. 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.[105] This can be seen from the fact that the increases in the volume of subject imports resulted in only a very slight rise in the market share of subject imports, from 9.97 percent in 2006 to 10.74 percent in 2008.[106] It is true that the domestic industry as defined by MOFCOM lost market share in the 2006-2008 period, but 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.[107]

85. The increase in the market share of subject imports in interim 2009 occurred at a time when the domestic industry's market share also increased, by almost the same amount.[108] China attempts to dismiss this fact as "not relevant" or "just one isolated piece of data."[109] However, it is clear that the increase in the volume or market share of subject imports, when taken in its proper context, has no "explanatory force for the occurrence of significant depression . . . of domestic prices" in interim 2009.[110] The domestic industry may have been lowering its prices in

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[102] *See* Final Determination, section VI.A.2, pp. 128-129 (subject import market share) and section VI.C.5, p. 133 (domestic products market share) (Exhibit CHN-07).
[103] *See, e.g., Japan – DRAMs (Korea) (AB)*, para. 159.
[104] China First Written Submission, paras. 178, 179, and 192.
[105] Final Determination, compare section VI.A.1, p. 128 with section VI.C.1, pp. 131-132 (Exhibit CHN-07).
[106] Final Determination, section VI.A.2, pp. 128-129 (Exhibit CHN-07).
[107] Final Determination, section VI.A.2, pp. 128-129 (subject import market share) and section VI.C.5, p. 133 (domestic products market share) (Exhibit CHN-07).
[108] The market share of subject imports rose by 4.69 percentage points from interim 2008 to interim 2009, while the domestic industry's market share rose by 4.51 percentage points over the same period. Final Determination, section VI.A.2, p. 128-129 (subject import market share) and section VI.C.5, p. 133 (domestic products market share) (Exhibit CHN-07).
[109] China First Written Submission, para. 214.
[110] *China – GOES (AB)*, para. 138.

interim 2009 to recapture lost market share, as China suggests,[111] but it was, for the most part, not market share that the domestic industry had lost to subject imports.[112]

86. China suggests that, because no party raised the issue of the domestic industry's gain in market share in interim 2009 during the investigation, the Panel should discount its significance.[113] China's assertion has no basis in the AD or SCM Agreements. While certain provisions in the AD and SCM Agreements contain language limiting an investigating authority's responsibilities to arguments presented to it, Articles 3.1 and 3.2 of the AD Agreement, and Article 15.1 and 15.2 of the SCM Agreement, contain no such limitation. Even if no party had raised an argument 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.

3. MOFCOM's Use of Annual Average Unit Values Was Inconsistent with Its Obligation to Base Its Injury Determination on Positive Evidence and an Objective Examination.

87. As explained above, MOFCOM's price effects analysis was inconsistent with the requirements of Articles 3.1 and 3.2 of the AD Agreement and Articles 15.1 and 15.2 of the SCM Agreement because the purported bases for MOFCOM's price depression determination – *i.e.*, parallel pricing and increasing market share – did not support MOFCOM's conclusion that subject imports depressed the price of the domestic like product. An additional problem with MOFCOM's price effects analysis was its use of full-year or full-period average unit values ("AUVs"). 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.[114]

88. 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.[115] 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.[116]

89. 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"

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[111] China First Written Submission, para. 216.
[112] As discussed below, in the section of this submission addressing "causation," China's comparison of a whole year (2006) with an interim period (interim 2009) – so as to be able to show a 3.5 percent increase in the market share of subject imports – is improper and inconsistent with its obligation to engage in an objective examination of the relevant data.
[113] China First Written Submission, para. 217.
[114] *See* U.S. First Written Submission, paras. 141-144; U.S. First Opening Statement, paras. 82-87.
[115] China First Written Submission, para. 200.
[116] China First Opening Statement, para. 46.

of the effect of subject imports on the prices of domestic like products.[117] Contrary to China's view,[118] the Appellate Body's emphasis on the importance of price comparability was not limited to an examination of price undercutting.[119]

90. 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.[120] 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. For example, the section of MOFCOM's preliminary determination from which China quotes in its first written submission notes that the subject imports and the domestic like product are: (1) "generally the same . . . in terms of size of automobile bodies, wheel base and performance indicators;" (2) that both "are used for passengers and daily transportation;" (3) that they "overlap partially in terms of prices and consumers;"[121] and (4) that "[s]ome consumers own both the product under investigation and the product produced by Chinese producers."[122]

91. This is insufficient in light of the detailed sales data provided by CAAM and placed on the record by a U.S. respondent showing that the Chinese national manufacturers and the U.S. automobile producers concentrated their sales in different grades, with the Chinese national manufacturers selling primarily entry level vehicles and U.S. producers selling primarily premium and luxury vehicles.[123] China's argument now that this sales data was "unreliable" is merely a *post hoc* rationalization that deserves no credit.[124] When MOFCOM noted in its final determination that the data had been submitted, it made no suggestion that it found the data unreliable. On the contrary, MOFCOM said that the data showed that both the domestic like product and the subject imports were sold in all four categories, though MOFCOM did not grapple with the limited extent to which this was actually the case, and asserted that this "further indicates that the products of the domestic industry and the product under investigation compete with each other."[125] Since MOFCOM itself relied on the sales data as support for its conclusion, China cannot now ask the Panel to dismiss the data as unreliable.

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[117] *China – GOES (AB)*, para. 200.
[118] *See* China First Written Submission, para. 213.
[119] *See China – GOES (AB)*, para. 200 ("[I]f subject import and domestic prices were not comparable, this would defeat the explanatory force that subject import prices might have for the depression or suppression of domestic prices." (emphasis added)).
[120] China First Written Submission, paras. 200-206.
[121] Preliminary Determination, p. 29 (CHN-05).
[122] Preliminary Determination, p. 31 (CHN-05).
[123] *See* U.S. Respondent Comments on the Preliminary Determination, Table 6, pp. 50-51 (Exhibit USA-12).
[124] China Responses to First Panel Questions, para. 54. The Appellate Body has been clear that a Panel's review should be of those findings that an authority made, and not findings that the Member attempting to defend the authority's action may choose to assert after the fact. *See, e.g., Japan – DRAMs (Korea) (AB)*, para. 159.
[125] Final Determination, p. 158 (Exhibit CHN-07).

4. MOFCOM's Flawed Domestic Industry Definition Compromised Its Price Effects Analysis.

92. The U.S. first written submission explains that 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.[126] 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.[127]

93. China is mistaken. The U.S. claims under Article 3.2 of the AD Agreement and Article 15.2 of the SCM Agreement are not consequential claims. 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, so it is not necessary for the Panel to determine whether "any violation of Article 4.1 of the AD Agreement and 15.1 [sic] of the SCM Agreement concerning the definition of the domestic industry as a matter of law results in a violation of a Member's price effects analysis under Articles 3.2 of the AD Agreement and 15.2 of the SCM Agreement."[128] 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.

94. 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.

95. We have shown in the U.S. first written submission, our statements during the first panel meeting, and in our responses to the Panel's questions[129] that 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.

96. China responds to the U.S. claims by arguing that the focus should not be on interim 2009,[130] though that is the only time in the period of investigation during which MOFCOM

[126] U.S. First Written Submission, paras. 148-150.
[127] China First Written Submission, paras. 173 and 219.
[128] China First Written Submission, para. 219.
[129] *See* U.S. First Written Submission, paras. 152-175; U.S. First Opening Statement, paras. 89-102; U.S. Responses to First Panel Questions, paras. 29-40.
[130] China First Written Submission, para. 231.

found that injury occurred, and that the United States has "selectively cit[ed] isolated data and ignor[ed] the complete picture,"[131] which is simply untrue. China's arguments are unpersuasive.

97. The United States separately addresses below each individual obligation in Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement with which MOFCOM's causation determination is inconsistent. In addition, we recall that MOFCOM's causation determination was not based on positive evidence and did not involve an objective examination, as required by Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement, which provides a separate basis to find that China breached its WTO obligations.

1. MOFCOM Failed To Demonstrate that Subject Imports Were Causing Injury to the Domestic Industry.

98. 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.

99. In the antidumping and countervailing duty investigations of certain automobiles from the United States, MOFCOM found that, "because of the effects that the import volume of the product under investigation increased and the import prices decreased, the sales price of domestic like product, the increase margin of the sales revenue, pre-tax profits and the rate on return of investment of the domestic industry all fell sharply…"[132] In other words, 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 and will discuss further below, MOFCOM has failed to establish the requisite causal connection between subject imports and injury to the domestic industry.

a. Subject Imports Did Not Cause Domestic Prices to Decline.

100. As explained in the preceding discussion of MOFCOM's price effects analysis, and in earlier U.S. submissions and statements, 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 is without any foundation for the reasons we have given in our discussion of MOFCOM's price effects analysis and, thus cannot serve as a basis for MOFCOM's conclusion that subject imports caused injury to the domestic industry.

101. China mischaracterizes the U.S. position when it contends that the United States incorrectly presumes a direct, *per se* link between the obligations contained in Articles 3.1 and

[131] China First Written Submission, para. 224.
[132] Final Determination, pp. 140-41 (Exhibit CHN-07).

3.2 of the AD Agreement and Articles 15.1 and 15.2 of the SCM Agreement, on the one hand, and the obligations related to causation set out in Articles 3.4 and 3.5 of the AD Agreement and 15.4 and 15.5 of the SCM Agreement, on the other.[133] The United States does not make such a sweeping legal argument.[134] Instead, we argue that, under the circumstances of this case, MOFCOM's deficient price effects analysis compromised its causation analysis because the alleged price depression by subject imports was a key component of MOFCOM's causation analysis. Thus, fatal deficiencies in the price effects analysis clearly compromise the integrity of the causation analysis.

102. In addition, other evidence on the administrative record also calls into question the integrity of MOFCOM's causation analysis. For example, demand for the domestic like product declined only once during the entire period of investigation, during interim 2009, which was also the only time period during which MOFCOM found price depression. It is likely that domestic prices were depressed not by subject imports, but by declining demand. While MOFCOM recognized that demand contracted by almost 22 percent in interim 2009, as compared with interim 2008, it dismissed this as a cause of injury to the domestic industry because, MOFCOM noted, the domestic industry "still kept increasing production and sales."[135] MOFCOM's explanation simply does not address the relationship between demand and price.

b. Declining Domestic Prices Did Not Cause the Injury that the Domestic Industry Experienced.

103. 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."[136] 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.

104. The United States has explained that MOFCOM simply ignored the role that the sharp drop in the domestic industry's productivity played in its financial performance.[137] China responds to this by asserting that productivity was not a meaningful or significant factor to be examined when considering the causal link between subject imports and material injury because labor costs are a relatively insignificant part of the cost of manufacturing a vehicle in China.[138] An examination of the relevant data, however, shows that most of the decline in the domestic

[133] China First Written Submission, paras. 264 and 265. It is unclear why China is making arguments concerning Article 3.4 of the AD Agreement and Article 15.4 of the SCM Agreement, given that the United States has not made claims with respect to those articles.
[134] The United States notes, however, that in view of the overarching nature of Articles 3.1 and 15.1, and the logical progression of the inquiry mapped out in the paragraphs of Article 3 of the AD Agreement and Article 15 of the SCM Agreement, it can be expected that violations of earlier provisions will lead to violations of the paragraphs addressing causation. *See China – GOES (AB)*, paras. 126 and 128.
[135] China First Written Submission, para. 250.
[136] Final Determination, pp. 140-41 (Exhibit CHN-07).
[137] U.S. First Written Submission, paras. 160-163.
[138] China First Written Submission, para. 238.

industry's pre-tax profits from interim 2008 to 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).[139] The domestic industry's sagging productivity cannot be dismissed as insignificant. Rather, it seriously undercuts the integrity of MOFCOM's causation determination.

105. In sum, MOFCOM failed to demonstrate that subject imports caused injury to the domestic industry. For the reasons we have given, MOFCOM's causation determination also was not based on positive evidence and did not involve an objective examination. In the words of a recent panel, MOFCOM's causation determination was not 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."[140] Accordingly, MOFCOM's causation determination was inconsistent with Articles 3.1 and 3.5 of the AD Agreement, and Articles 15.1 and 15.5 of the SCM Agreement.

2. MOFCOM Failed To Base its Causation Determination on an Examination of All Relevant Evidence Before it.

106. 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." As we have shown, MOFCOM failed to examine all relevant evidence before it.

107. Specifically, we have explained that MOFCOM did not address evidence that subject imports took market share from non-subject imports and not from the domestic like product,[141] 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.[142]

108. This evidence tends to undermine MOFCOM's causation determination. 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. Accordingly, this is another basis for finding that MOFCOM's causation determination was inconsistent with the specific obligation in the second sentence of Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement, as well as with the general obligation to base the injury determination on positive evidence and an objective examination, as provided in Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement.

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[139] *See* China First Written Submission, para. 238, n. 256.
[140] *EU – Footwear (China) (Panel)*, paras. 7.483; s*ee also U.S. – Tyres (China) (AB)*, para. 280.
[141] *See* U.S. First Written Submission, paras. 158-159.
[142] *See* U.S. First Written Submission, paras. 160-163.

3. MOFCOM Failed to Examine Known Factors Other than the Subject Imports which at the Same Time Were Injuring the Domestic Industry and Failed to Meet its Obligation Not To Attribute Injuries Caused by those Other Factors to the Subject Imports.

109. 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."

110. We have demonstrated that other known factors likely were the cause of the economic difficulties experience by the domestic industry.[143] 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.

111. China seeks to excuse MOFCOM's disregard of the domestic industry's sagging productivity by attempting to portray productivity as only one of many factors examined by MOFCOM. China contends that the United States is focusing on only one piece of information, whereas MOFCOM "analyzed sixteen different indicia of the financial industry's [sic] health and performance."[144] China's argument is unpersuasive. China is confusing MOFCOM's consideration of economic factors having a bearing on the state of the domestic industry (the sixteen factors) pursuant to Article 3.4 of the AD Agreement and Article 15.4 of the SCM Agreement,[145] which is not at issue here, with MOFCOM's consideration of "any known factors other than the [subject] imports which at the same time are injuring the domestic industry" pursuant to Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement,[146] which *is* at issue.

112. Moreover, even if it were relevant that productivity is only one of sixteen factors that MOFCOM examined, China neglects to mention that most of the sixteen factors showed positive trends in interim 2009.[147] In summing up the data for these sixteen factors in its assessment of material injury to the domestic industry, MOFCOM identified only six factors that showed a deterioration in interim 2009: apparent consumption, price of the domestic product, sales revenue, pre-tax profit, investment return, and investment in new projects.[148] At least three of these factors (pre-tax profit, investment return, and investment in new projects) would have been adversely affected by declining productivity. It is curious that MOFCOM neglected even to mention the sharp drop in the domestic industry's productivity in its assessment of material

[143] *See* U.S. First Written Submission, paras. 172-175.
[144] China First Written Submission, para. 237.
[145] Final Determination, section VI.C, pp. 131-138 (Exhibit CHN-07).
[146] Final Determination, section VII.B, pp. 142-146 (Exhibit CHN-07).
[147] Final Determination, section VI.C, pp. 131-138 (Exhibit CHN-07).
[148] Final Determination, section VI.D, pp. 138-139 (Exhibit CHN-07).

injury, despite the fact that it had documented the decline in productivity in the preceding section of the final determination. This omission suggests that MOFCOM was engaged in a selective and non-objective analysis of the evidence, whereby it ignored evidence which suggested that any injury was attributable to factors other than the subject imports.

113. China asserts that no party raised the issue of the domestic industry's declining productivity during the investigation, and thus the Panel should discount its significance.[149] But, this does not excuse MOFCOM's failure to examine the issue to ensure that its determination was based on positive evidence and involved an objective examination, and that injury caused by other known factors is not attributed to the dumped or subsidized imports. MOFCOM has an obligation to consider "other known factors" in its analysis, and the issue of declining productivity was clearly known to MOFCOM.[150]

114. Another likely cause of declining domestic prices was an increase in the sales tax in China on larger engine vehicles (from 15 to 25 percent for vehicles with engines over three liters but less than four liters, and from 20 to 40 percent for vehicles with engines over four liters), which coincided with a reduction in the sales tax on smaller engine vehicles (from 10 to 5 percent).[151] MOFCOM was obligated to examine the tax change and avoid attributing the injury caused by it to the subject imports. MOFCOM failed to do so. 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."[152] MOFCOM notes the petitioner's argument that Chrysler mistakenly suggested that the domestic industry's production and sales volume declined, which was not a fact MOFCOM found. However, noting that argument does not explain why the tax change did not cause the sharp drop in apparent consumption of the larger vehicles that were subject to the higher tax and the downward pressure on the price of these vehicles.

115. MOFCOM was obligated to undertake an objective examination of the implications of the tax increase on vehicles with larger engines 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.

116. Accordingly, this is yet another basis for finding that MOFCOM acted inconsistently with a specific obligation in Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement, and for finding that MOFCOM's injury determination was not based on positive evidence and did not involve an objective examination, as required by Article 3.1 of the AD Agreement and Article 3.5 of the SCM Agreement.

IV. CONSEQUENTIAL CLAIMS

117. 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

[149] China First Written Submission, para. 239.
[150] Final Determination, section VI.C.13, p. 136-137 (Exhibit CHN-07)
[151] U.S. Respondent Comments on the Preliminary Determination, section V.A, pp. 22-23 (Exhibit USA-12).
[152] Final Determination, p. 163 (CHN-07).

Agreement and Article 10 of the SCM Agreement,[153] 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.

118. Article 1 of the AD Agreement provides that:

> An anti-dumping measure shall be applied only under the circumstances provided for in Article VI of GATT 1994 and pursuant to investigations initiated and conducted in accordance with the provisions of this Agreement. The following provisions govern the application of Article VI of GATT 1994 in so far as action is taken under anti-dumping legislation or regulations. (footnote omitted).

119. Article 10 of the SCM Agreement similarly provides that:

> Members shall take all necessary steps to ensure that the imposition of a countervailing duty on any product of the territory of any Member imported into the territory of another Member is in accordance with the provisions of Article VI of GATT 1994 and the terms of this Agreement. Countervailing duties may only be imposed pursuant to investigations initiated and conducted in accordance with the provisions of this Agreement and the Agreement on Agriculture. (footnotes omitted).

120. 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. If so, the Panel should find that China has also breached Article 10 of the SCM Agreement. Nothing more is necessary, as a factual matter, to establish such breaches.

121. In *U.S. – Anti-Dumping and Countervailing Duties (China)*, the Appellate Body recalled that it had "treated claims under Articles 10 and 32.1 of the *SCM Agreement* as consequential claims in the sense that, where it has not been established that the essential elements of the subsidy definition in Article 1 are present, the right to impose a countervailing duty has not been established and this, as a consequence, means that the countervailing duties imposed are inconsistent with Articles 10 and 32.1 of the *SCM Agreement*."[154] The Appellate Body was of the view that the complaining Member "was not required to advance further arguments to

[153] The United States no longer requests that the Panel find that China acted inconsistently with Article VI of the GATT 1994.

[154] *U.S. – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 358 (*citing U.S. – Softwood Lumber IV (AB)*, para. 143).

establish a consequential violation of Articles 10 and 32.1."[155] The United States considers that the Panel should find the Appellate Body's reasoning persuasive and relevant here.

122. Accordingly, China has acted inconsistently with Article 1 of the AD Agreement and Article 10 of the SCM Agreement.

V. CONCLUSION

123. For the reasons set forth above, 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.

[155] *U.S. – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 358.