CHINA – COUNTERVAILING AND ANTI-DUMPING DUTIES ON GRAIN-ORIENTED FLAT-ROLLED ELECTRICAL STEEL FROM THE UNITED STATES

(AB-2012-4 / DS414)

Appellee Submission
of the United States of America

August 7, 2012

SERVICE LIST

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I. INTRODUCTION AND EXECUTIVE SUMMARY

1. The Panel in this dispute found that the antidumping and countervailing duty measures that the Government of the People's Republic of China ("China") adopted with respect to imports of grain oriented flat-rolled electrical steel (GOES) from the United States are inconsistent with China's obligations under the *General Agreement on Tariffs and Trade 1994* ("GATT 1994"), 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").

2. The Panel sustained most of the United States' claims concerning the subsidy and dumping determinations contained in the measures at issue. Notably, the Panel upheld every U.S. claim concerning the injury determination.[1] It found that MOFCOM's price effects analysis was inconsistent with Articles 3.1 and 3.2 of the AD Agreement and Articles 15.1 and 15.2 of the SCM Agreement. It also found that MOFCOM's price effects analysis failed to comply with the essential facts disclosure and the public notice and explanation requirements set forth in Articles 6.9 and 12.2.2 of the AD Agreement and Articles 12.8 and 22.5 of the SCM Agreement.[2] It further found that MOFCOM's causation analysis violated Articles 3.1 and 3.5 of the AD Agreement and Articles 15.1 and 15.5 of the SCM Agreement, as well as the disclosure and public notice requirements of the AD and SCM Agreements.[3]

3. China has appealed only the Panel's findings and conclusions with respect to Articles 3.2, 6.9, and 12.2.2 of the AD Agreement and Articles 12.8, 15.2, and 22.5 of the SCM Agreement concerning MOFCOM's price effects analysis. As we demonstrate below, China's arguments are unfounded. China seeks to persuade the Appellate Body that "effects" do not need to have causes, a notion that is not supported by common sense, the dictionary or prior panel and Appellate Body reports. China contends that repeated references to the "low prices" of imports in MOFCOM's determination are essentially irrelevant to that determination, and criticizes the Panel for reading MOFCOM's decision exactly as MOFCOM wrote it. China complains about findings the Panel never made and mischaracterizes those that the Panel did. The Panel committed no error, and its findings under appeal should be upheld.

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[1] Panel Report, paras. 7.475 - 7.675.

[2] Panel Report, para. 8.1(f).

[3] Panel Report, para. 8.1(g). Importantly, China does not appeal the Panel's conclusion that "MOFCOM's finding that subject imports caused material injury to the domestic industry is inconsistent with" the non-attribution language of Articles 3.5 and 15.5 of the AD and SCM Agreements. *See* Panel Report, para. 7.638 and 7.593-7.638. The Panel reviewed in detail MOFCOM's findings on other known injurious effects and concluded that MOFCOM had not complied with its obligations under Articles 3.1 and 3.5 of the AD Agreement and Articles 15.1 and 15.5 of the SCM Agreement, or with its disclosure and public notice requirements relating to these MOFCOM findings.

4. In Sections A through D below, the United States summarize its arguments. The United States will then set forth its legal arguments in full in Part II.

A. The Panel Correctly Interpreted the Text of Article 3.2 of the AD Agreement and Article 15.2 of the SCM Agreement

5. The principal legal argument made by China in this appeal involves the proper interpretation of Article 3.2 of the AD Agreement and Article 15.2 of the SCM Agreement. Article 3.2 of the AD Agreement states in relevant part:

> With regard to the *effect of the dumped imports on prices*, the investigating authorities shall consider whether there has been a significant price undercutting by the dumped imports as compared with the price of a like product of the importing Member, or whether the *effect of such imports* is otherwise to depress prices to a significant degree or prevent price increases, which otherwise would have occurred, to a significant degree.[4]

Article 15.2 of the SCM Agreement is worded identically, except that it uses the term "subsidized imports" where Article 3.2 of the AD Agreement uses the term "dumped imports."[5]

6. The Panel properly concluded that the phrase "effect of {dumped or subsidized} imports," as used in Articles 3.2 and 15.2, requires an authority to assess whether any identified price depression or suppression is caused by dumped or subsidized imports. The Panel's interpretation of this phrase is fully consistent with the dictionary definition of the word "effect," which is "[s]omething accomplished, caused or produced, a result, a consequence."[6] The fact that some event is an "effect" means that it has a "cause," and that it is the "result" or "consequence" of some other factor.

7. Moreover, the text of Articles 3.2 and 15.2 make clear that an investigating authority must assess whether dumped or subsidized imports are a cause of significant price depression or price suppression in the market. Specifically, Articles 3.2 and 15.2 state that the authority must consider the "*effect of {the dumped/subsidized} imports* on prices" in the market and whether the "*effect of such imports* is otherwise to depress prices to a significant degree or prevent price

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[4] AD Agreement, Art. 3.2 (emphasis added).

[5] SCM Agreement, Art. 15.2 (emphasis added).

[6] The New Shorter Oxford English Dictionary (English) (1993); *see US – Upland Cotton (AB)*, para. 435. This is the same dictionary definition on which China relies. China Appellant Submission, para. 55.

increases, which otherwise would have occurred, to a significant degree."[7] Given this language, it is clear that the text of the Articles explicitly connect a cause – that is dumped or subsidized – to any identified price suppression or depression, as the Panel correctly concluded.[8]

8. Moreover, while the Panel's interpretation is consistent with the plain language and meaning of the text of Articles 3.2 and 15.2, China's strained interpretation is not. China reads the word "effect" as though it were not followed by the phrase "of such imports." Since the latter language makes clear that the price effects observed must be shown to be a result or consequence of dumped or subsidized imports, China improperly reads the phrase "of such imports" out of the text of Articles 3.2 and 15.2, treating it as though the drafters of these Articles intended the phrase to be surplusage.

9. Furthermore, the Panel's interpretation is also consistent with the context within which this language occurs. When Article 3 of the AD Agreement and Article 15 of the SCM Agreement merely require an authority to examine the existence of a factor *per se*, rather than whether the factor is the result or consequence of the dumped or subsidized imports, the AD and SCM Agreements use specific language to make clear that this is the case.[9]

10. Additionally, Articles 3.5 of the AD Agreement and 15.5 and SCM Agreement do not contain the only "causal effects" obligation of the Agreements, as China asserts. While it is true that Articles 3.5 and 15.5 do impose important obligations on an authority with respect to its causal link analysis in dumping and subsidy investigations (including the obligation that the authority examine the effects of factors other than dumped or subsidized imports in its analysis), other sections of Articles 3 and 15 contain provisions that require an authority to address the causal effects of subject imports on the domestic industry.[10] In other words, the existence of

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[7] AD Agreement, Art. 3.2 (emphasis added); SCM Agreement, Art. 15.2 (emphasis added).

[8] Panel Report, paras. 7.519-7.522.

[9] *See, e.g.*, AD Agreement, Art. 3.2 and SCM Agreement, Art. 15.2 (stating that, with respect to volume of imports, the investigating authority shall consider whether there is a "significant increase in dumped imports," not whether it has an "effect" on the industry).

[10] *See, e.g.*, AD Agreement, Art. 3.1 and SCM Agreement, Art. 15.1 (requiring that authorities perform an "objective examination" based on "positive evidence" of the "effect of the {dumped/subsidized} imports on prices in the domestic market" and the "consequent impact of these imports on domestic producers"); AD Agreement, Art. 3.2 and SCM Agreement, Art. 15.2 (requiring that authorities consider "whether there has been a significant price undercutting by the {dumped/subsidized} imports" of domestic prices and whether the "effect of such imports is otherwise to depress prices to a significant degree or prevent price increases, which otherwise would occurred, to a significant degree"); AD Agreement, Art. 3.4 and SCM Agreement, Art. 15.4 (stating that the examination of the "impact of the {dumped/subsidized} imports on the domestic industry" shall include an examination of all relevant economic factors and indices having a bearing on the state of the industry"); *see also Thailand – H-*

language in Articles 3.5 and 15.5 addressing certain aspects of an authority's causation analysis does not suggest, in any way, that Articles 3.2 and 15.2 do not similarly incorporate aspects of an authority's obligation to assess the effects of dumped or subsidized imports on the industry, as China contends.

11. China's other observations about the text of Articles 3.2 and 15.2 do not undermine the Panel's legal conclusions. While China correctly states that an authority need not make a finding of significant price undercutting as one element of a price effects finding, the United States did not claim, and the Panel did not find, that a specific finding of significant price undercutting by the subject imports is required in every case by Articles 3.2 and 15.2. Instead, the United States explained, and the Panel agreed that, when an "essential predicate" of an authority's price effects analysis is that prices of dumped/subsidized imports were low compared to the prices of domestically produced merchandise, the authority needs to establish that it has objective grounds, based on positive evidence, for concluding that this is the case.[11]

12. Moreover, it is not correct, as China claims, that an authority's use of price comparisons for imported and domestic merchandise is necessarily distinct from its consideration of the price-depressive or price-suppressive effects of dumped or subsidized imports. An examination of the relative price levels of the domestically produced merchandise and the imports subject to investigation is typically an essential component of an authority's assessment of the price-depressive or price-suppressive effects of the dumped or subsidized imports, especially where the authority has made the "low" price of imports a critical component of its analysis, as China did here.

B. The Panel Correctly Reviewed the MOFCOM Determination As Written and Properly Found that MOFCOM's Pricing Findings Were Not Based on Positive Evidence and Did Not Reflect an Objective Examination of the Record

13. Although China urges that the "low" price of imports was not an important part of MOFCOM's pricing findings in the Final Determination, MOFCOM repeatedly linked the price depression and price suppression it found to exist in the market to the "low prices" of the imports under investigation.[12] Consequently, the Panel correctly found that MOFCOM's "low price" findings were an important component of its price effects analysis, and appropriately reviewed the sufficiency of MOFCOM's "low price" findings under Articles 3.1 and 3.2 of the AD Agreement and 15.1 and 15.2 of the SCM Agreement. In other words, the Panel reviewed MOFCOM's Final Determination exactly as it was written, which means that it properly

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Beams (AB), para. 106.

[11] Panel Report, paras. 7.482 and 7.529-7.530.

[12] *See*, *e.g.*, Final Determination, CHN-16, at 58-65.

discharged its duty under Article 11 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") to "make an objective assessment of the facts of the case before it."

14. Indeed, China's strenuous arguments on appeal that MOFCOM did not compare prices of imported and domestically produced merchandise are actually contrary to the arguments made by China before the Panel. For example, China told the Panel that certain information it had submitted to the Panel "support{s} the finding reached by MOFCOM that subject imports from Russia and the United States were charging prices lower than domestic prices, and had a pricing policy to keep their prices lower."[13]

15. Moreover, the Panel expressly considered China's claim that MOFCOM's price effects findings were based on considerations other than the "low prices" of dumped and subsidized imports. The Panel rejected this argument, noting that this claim was not consistent with MOFCOM's repeated reliance in its determination on the "low prices" of the dumped and subsidized imports. The Panel also correctly pointed out that it was not evident that MOFCOM's "low prices" finding was such an unimportant factor in the analysis that the Panel could uphold MOFCOM's analysis on other grounds. In sum, the Panel fully discharged its duty under Article 11 of the DSU by evaluating the final determination as written, rather than by using the approach that China inaccurately ascribes to the Panel.

16. China also has no foundation for its claim that the Panel concluded that China was required to use certain pricing methodologies under Article 3.2 of the AD Agreement and Article 15.2 of the SCM Agreement. The United States did not claim that an authority was required by Articles 3.2 and 15.2 to use specific methodologies to conduct its price effects analysis, and the Panel made no findings to this effect. Because China's complaints do not pertain to any actual findings the Panel made, they do not properly form the basis of an appeal before the Appellate Body.

17. The Panel did find however, that certain pricing findings made by MOFCOM were not supported by "positive evidence" and did not reflect an "objective examination" under Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement in the circumstances of the GOES investigation. As the Panel reasonably found, under Articles 3.1 and 15.1 of the AD and SCM Agreements, the annual average unit values ("AUVs") relied on by MOFCOM were not the sort of "objective" and "positive" evidence that an authority could use to establish whether subject imports were priced lower than domestic prices, given that they were overly broad in several respects.[14] Because China has not challenged the Panel's conclusions that these findings were inconsistent with Articles 3.1 and 15.1 of the AD and SCM Agreements but has instead

[13] China November 25, 2011 Response to Panel, response to question (b).

[14] Panel Report, paras. 7.523-7.536.

challenged non-existent "pricing methodology" findings of the Panel under Articles 3.2 and 15.2, China's claims are not appropriately before the Appellate Body.

18. In addition to being improperly framed in this appeal, China's analytical challenges to the Panel's conclusions are not persuasive. The Panel reasonably assessed the evidentiary deficiencies of MOFCOM's price depression and price suppression findings. As the Panel concluded, the annual AUV data relied on by MOFCOM was not the sort of positive and objective data that an authority could rely on to assess the relative pricing levels of imports and domestic like products, given that it was overly broad in a number of respects. Moreover, the Panel properly considered the arguments that the United States asserted under Articles 3.1 and 15.1, regardless of whether any party submitted a similar argument during the course of the MOFCOM investigation. Even assuming China's arguments that the U.S. arguments relating to the AUV were not raised during the MOFCOM investigation were factually correct, which they are not, the Appellate Body has made clear that a Member is not limited in dispute settlement to those arguments raised by interested parties in the domestic proceeding.

C. The Panel Properly Found that MOFCOM Did Not Disclose Essential Facts Relating to Its Pricing Analysis

19. The Panel also properly found that China acted inconsistently with Article 6.9 of the AD Agreement and Article 12.8 of the SCM Agreement because MOFCOM did not disclose facts essential to its price effects analysis before its final determination. MOFCOM's findings of price depression and price suppression were based on the "low prices" and "pricing strategies" of the imports under investigation, but MOFCOM disclosed no price comparisons between the domestically produced merchandise and the imports under investigation. It also disclosed no relevant information concerning the basis for its purported "pricing strategy" findings.

20. China does not contest the Panel's interpretation of Articles 6.9 and 12.8. Instead, China's principal argument is that, under its interpretation of Articles 3.2 and 15.2, MOFCOM need not have disclosed information on anything other than trends in prices and the cost-price ratio. This interpretation, however, cannot be reconciled with the language of Articles 3.2 and 15.2, which provides that price depression and price suppression must be "*the effect of such {dumped or subsidized} imports*." Since Articles 3.2 and 15.2 provide that an authority must consider whether price suppression or depression are a result of the dumped or subsidized imports, the Panel did not err when it said that MOFCOM therefore was required under Articles 6.9 and 12.8 to disclose the essential facts under consideration with respect to the price "effects" of these imports.

21. In the alternative, China mistakenly claims that, even if the Panel correctly interpreted Articles 3.2 and 15.2 to require considering whether the dumped or subsidized imports were a cause of price suppression and depression in the market, MOFCOM was only required to disclose the essential facts relating to MOFCOM's finding that importers "attempted" to charge low prices during the period. China's argument is misplaced because MOFCOM did not rely

solely on the fact that importers "attempted" to charge low prices during the period. Instead, it found that importers had adopted a specific strategy to set their prices lower than Chinese producers and that, as a result of this strategy, import prices had been "low" throughout the period.

22. Given these findings, which were repeated throughout the determination, the Panel correctly concluded that MOFCOM was obliged, but failed to, disclose the essential facts relating to its low price and pricing strategy findings. Moreover, as the Panel also found, MOFCOM's simple recitation of its conclusory assertion that there had been a low pricing strategy and that import prices had been low throughout the period was insufficient as a summary of the essential facts that form the basis of that assertion.

D. The Panel Properly Found that MOFCOM Did Not Comply with Its Obligation to Disclose Relevant Information Concerning Its Pricing Findings in Its Public Determination

23. Finally, the Panel properly found that China acted inconsistently with Article 12.2.2 of the AD Agreement and Article 22.5 of the SCM Agreement by failing to disclose relevant information on matters of fact underlying MOFCOM's conclusion regarding the existence of "low" import prices. In its final determination, MOFCOM disclosed no meaningful information comparing the prices of domestically produced merchandise and the imports under investigation, nor did it disclose any evidence to support its finding that the "low prices" of imports had caused price suppression and depression in the market.

24. As it argued with respect to its obligations under Articles 6.9 of the AD Agreement and 12.8 of the SCM Agreement, China contends that MOFCOM's Final Determination only needed to contain, with respect to adverse price effects, a reference to the existence of price depression and price suppression. China's argument is again premised on its mistaken view that Article 3.2 of the AD Agreement and Article 15.2 of the SCM Agreement do not require an authority to find "the effect of the . . . imports on prices" – that is, to find a causal relationship between the imports under investigation, on the one hand, and significant price depression or significant price suppression, on the other. Since this is clearly one aspect of the pricing analysis set forth in Articles 3.2 and 15.2, China has no basis for its claim that it satisfied its obligations under Articles 12.2.2 and 22.5.

II. LEGAL ARGUMENT

A. The Panel's Interpretation of Article 3.2 of the AD Agreement and Article 15.2 of the SCM Agreement Was Fully Consistent with the Text of the Agreements

25. As China makes clear in its submission, the principal legal issue in this appeal concerns the proper interpretation of the phrase "the effect of the . . . imports on prices" found in Article 3.2 of the AD Agreement and Article 15.2 of the SCM Agreement.[15] China contends that Articles 3.2 and 15.2 obligate MOFCOM only to establish that price suppression or depression exists in the market, and that the Articles do not require an analysis of "the causes of those effects."[16] According to China, "{n}othing in the text of the provision requires the authority to determine whether the factors identified are *caused* by the dumped imports."[17] China bases its claims on a strained reading of these Articles, and its claims are unfounded as a result. The Panel, by contrast, interpreted the phrase "the effect of {dumped/subsidized} imports" in a manner consistent with the language of Articles 3.2 and 15.2.

26. Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement provide important context for construing Articles 3.2 and 15.2. Under Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement, an investigating authority must base its injury determination in an antidumping or countervailing duty investigation on "positive evidence," and that authority must conduct an "objective examination" of the volume of dumped or subsidized imports, their effect on the prices in the domestic market for the domestic like product, and their consequent impact on the domestic producers of such products. Specifically, Article 3.1 states that:

> A determination of injury for purposes of Article VI of GATT 1994 shall be based on positive evidence and involve an objective examination of both (*a*) the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and (*b*) the consequent impact of these imports on domestic producers of such products.[18]

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[15] As noted above, China does not challenge the Panel's finding that MOFCOM's determination failed to comply with its obligations under Articles 3.1 and 3.5 of the AD Agreement and 15.1 and 15.5 of the SCM Agreement, or its related obligations of disclosure of essential facts and public analysis of all relevant facts related to these issues under Articles 12.2.2 and 22.5 of the AD and SCM Agreements.

[16] China Appellant Submission, para. 60.

[17] China Appellant Submission, para. 68 (emphasis in original); *see also* para 95 ("Articles 3.2 and 15.2 contain no requirement of a causal linkage at all").

[18] AD Agreement, Art. 3.1.

Article 15.1 of the SCM Agreement contains essentially the same language, with the exception that it refers to "subsidized" rather than "dumped" imports.[19]

27. Article 3.2 of the AD Agreement and Article 15.2 of the SCM Agreement elaborate standards for authorities examining the price effects of dumped or subsidized imports. Article 3.2 of the AD Agreement states:

> With regard to the *effect of the dumped imports* on prices, the investigating authorities shall consider whether there has been a significant price undercutting *by the dumped imports* as compared with the price of a like product of the importing Member, or whether the *effect of such imports* is otherwise to depress prices to a significant degree or prevent price increases, which otherwise would have occurred, to a significant degree."

Article 15.2 of the SCM Agreement is worded identically, except that it uses the term "subsidized imports" where Article 3.2 of the AD Agreement uses the term "dumped imports."[20]

28. The Panel reasonably interpreted the scope of this language. As the Panel explained:

> The analysis envisaged by the second sentence of Article 3.2 of the Anti-Dumping Agreement and Article 15.2 of the SCM Agreement concerns 'the effect of the [dumped/subsidized] imports on prices.' Furthermore, the authority must consider whether 'the effect of [dumped/subsidized] imports is … to depress prices to a significant degree.' Accordingly, merely showing the existence of significant price depression does not suffice for the purposes of Article 3.2 of the Anti-Dumping Agreement and Article 15.2 of the SCM Agreement. An authority must also show that such price depression is an effect of the subject imports.[21]

Thus, in a clear and straightforward analysis, the Panel properly gave effect to the plain language of the text of these Articles.

1. The Panel's Interpretation of the Phrase "the Effect of Such Imports" is Fully Consistent with the Text of the AD and SCM Agreements

29. China expends much effort in its submission seeking to undermine the Panel's straightforward analysis. China claims that the Panel improperly construed the phrase "the effect of such imports" in Articles 3.2 and 15.2 to require an assessment of whether price suppression

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[19] SCM Agreement, Art. 15.1.

[20] SCM Agreement, Art. 15.2.

[21] Panel Report, para. 7.520.

and depression were the result of dumped or subsidized imports. In China's view, Articles 3.2 and 15.2 only require that price depression or suppression be found to exist in the market and do not require a link between these effects and the dumped or subsidized imports.[22] China asserts that the text of the AD and SCM Agreements supports its view. Its arguments, however, are divorced from the language of the AD and SCM Agreements.

30. Despite China's claims to the contrary, the Panel interpreted the scope of the phrase "effect of {dumped or subsidized} imports" in a manner that was fully consistent with the plain meaning of the text and the overall context of the AD and SCM Agreements.[23] The Panel correctly found that Articles 3.2 and 15.2 obligate an authority to assess whether price suppression and depression in the market is the "effect of {dumped or subsidized} imports." The use of the word "effect" in this phrase guided the Panel's interpretation. The Panel explained that, by use of the phrase "effect of the . . . imports on prices" – with the word "such" referring to dumped or subsidized imports – Articles 3.2 and 15.2 make clear that an authority must establish a cause and effect relationship between the dumped and subsidized imports, on the one hand, and any significant price depression or price suppression,[24] on the other. As the Panel concluded, the term "the effect of {dumped/subsidized} imports" in Articles 3.2 and 15.2 makes clear that any price depression or price suppression observed must be an "effect of the subject imports."[25]

31. China contests this straightforward analysis. According to China, "Articles 3.2 and 15.2 do not impose *any* obligation to find *any* relationship between subject imports and the observed adverse price effects."[26] In making this argument, China would have the Appellate Body read Articles 3.2 and Article 15.2 as though they did not include the phrase "the effect of such imports." In other words, China reads Articles 3.2 and 15.2 as though they do not contain any language providing that price depression and price suppression must be the "*effect* of dumped or subsidized imports," or that the investigating authority must consider the "*effect* of the dumped or subsidized imports on prices." Such an interpretation contravenes the text of Articles 3.2 and 15.2.

32. China's claims about the meaning of the word "effect" are misguided. The United States agrees that the dictionary indicates that the word "effect" means "[s]omething accomplished,

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[22] China Appellant Submission, paras. 43-109.

[23] Panel Report, paras. 7.519-7.522.

[24] The United States will use the term "price suppression," as did the Panel, to refer to the concept of "price increases which otherwise would have occurred."

[25] Panel Report, paras. 7.520.

[26] China Appellant Submission, para. 116 (emphasis added).

caused or produced, a result, a consequence."[27] We disagree with China, however, that this definition, which *expressly mentions* "something caused," somehow "does not focus on the cause" of the price effects observed in the market.[28] Despite China's claims, the dictionary definition of "effect" clearly means that the "effect" has a "cause," and is the "result" or "consequence" of some other factor.

33. The Panel's reading of Articles 3.2 and 15.2 is consistent with the text and its common meaning. The text of Articles 3.2 and 15.2, for instance, specifically provide that an authority must consider the "*effect of {the dumped/subsidized} imports* on prices" in the market, and that it must consider whether the "*effect of such imports* is otherwise to depress prices to a significant degree or prevent price increases, which would otherwise have occurred, to a significant degree." Given this language, the text of the Articles explicitly connects a cause – that is, dumped or subsidized imports – to price suppressive or depressive "effects" in the market, just as the Panel correctly concluded.[29]

34. Nor does focusing on the term "consequence," as China does with its references to the Spanish and French texts, change this analysis. The dictionary definition of "consequence" is "[a] thing or circumstance which follows an effect or result of *something preceding*."[30] This definition further indicates that China has no basis for its claim that the word "effect" "does not necessarily imply any relationship between an earlier event and the present factual situation."[31] Whether the term examined is "effect" or "consequence," the dictionary definitions do not refer simply to the existence of a present situation or condition in the market, as China asserts. Instead, they both clearly connote that the effect in question is a result of some other factor. And since the AD and SCM Agreements precisely identify that factor – *i.e.*, the dumped or subsidized imports – Articles 3.2 and 15.2 both state that price suppression and depression must be the "effect" of those imports.

35. In other words, the Panel correctly concluded that:

> merely showing the existence of significant price depression does not suffice for the purposes of Article 3.2 of the Anti-Dumping Agreement and Article 15.2 of the SCM Agreement. An authority must also show that the price depression is an effect of the

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[27] New Shorter Oxford English Dictionary (1993).

[28] China Appellant Submission, para. 55.

[29] Panel Report, paras. 7.519-7.522.

[30] New Shorter Oxford English Dictionary (1993) (emphasis added).

[31] China Appellant Submission, para. 59.

subject imports.[32]

This conclusion follows directly from the plain language used in Article 3.2 of the AD Agreement and Article 15.2 of the SCM Agreement. China has no basis for its complaint that "the Panel essentially grafts on the second sentence of Articles 3.2 and 15.2 legal obligations that does not exist in these two provisions."[33] The Panel did not alter the legal text of Articles 3.2 and 15.2; it is China that does so by reading out specific language stating that any price suppression and depression must be the "effect of {dumped/subsidized} imports."

2. The Panel's Interpretation of the Phrase "The Effect of Such Imports" is Fully Supported by its Context

36. The Panel's interpretation of the phrase "the effect of {dumped or subsidized} imports" – in addition to being consistent with the text of Articles 3.2 and 15.5 – is also fully supported by its context. In this regard, the United States notes that, when Article 3 and Article 15 merely instruct an authority to examine the *existence* of a factor or condition, rather than whether the factor or condition is *an effect* of some other event, they use appropriate language to signify this. Article 3.2 of the AD Agreement, for example, provides that "{w}ith regard to the volume of the dumped imports, the investigating authority shall consider whether there has been a significant increase in dumped imports, either in absolute terms or relative to production or consumption in the importing Member."[34] Thus, this portion of Article 3.2 requires an authority to examine what the volumes of dumped imports are, and not the effects or consequences of those volumes.[35]

37. In contrast, the part of Articles 3.2 and 15.2 addressing price effects explicitly requires that price suppression and depression be "the effect of such imports." Under Article 3.2, therefore, an authority has differing obligations with respect to price and volume: the authority must analyze the "effects of the dumped imports" with respect to its price effects analysis, but need only address the existence of a significant increase in subject import volumes.

38. China, however, incorrectly perceives the two as imposing the same basic obligation on an authority in terms of the "effects" of imports, with the volume analysis requiring only an examination of import volume trends, and the price analysis requiring only an examination of

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[32] Panel Report, para. 7.521.

[33] China Appellant Submission, para. 47.

[34] Article 15.2 of the SCM Agreement is worded identically, except that it uses the phrase "subsidized imports" rather than "dumped imports."

[35] China disregards this distinction by repeatedly referring to a non-existent "volume effects" requirement under Articles 3.2 and 15.2. China Appellant Submission, paras. 62, 85, 98.

whether price suppression or depression existed during the period of investigation.[36] China's analysis is not consistent with the language of the Articles and is not supported by the context.[37]

39. The Panel's reading of Articles 3.2 and 15.2 is also consistent with the context of these Articles in the injury provisions of the AD and SCM Agreements. Even a cursory reading of Articles 3 and 15 of the AD and SCM Agreements make clear that Articles 3.5 and 15.5 do not contain the *only* causal effects obligations in the injury provisions of the Agreements, as China claims. While it is true that Articles 3.5 and 15.5 do impose important causation requirements on an authority in dumping and subsidy investigations – such as the obligation to examine the effects of other known factors causing injury – other parts of Articles 3 and 15 also contain language addressing the obligations of an authority to assess the causal "effects" of subject imports on the domestic industry.[38] Thus, the causal link language in the first sentence of Articles 3.5 and 15.5 does not suggest, in any way, that Articles 3.2 and 15.2 were not also intended to embody specific aspects of an authority's causal link analysis in antidumping and countervailing duty investigations.

40. Indeed, a more detailed comparison of Articles 3.5 and 15.5 with Articles 3.2 and 15.2 makes clear that Articles 3.5 and 15.5 were not intended to subsume the specific price effects obligations in Articles 3.2 and 15.2, as China also claims. Although Articles 3.5 and 15.5, on the one hand, and Articles 3.2 and 15.2, on the other, both address aspects of an authority's causal link analysis, they each contain different language concerning the nature of the causal effects to be examined by an authority. Specifically, Articles 3.2 and 15.2 provide that an authority shall

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[36] China seeks to justify its interpretation of Articles 3.2 and 15.2 by reference to and review of the "object and purpose" of the provisions themselves. *See* China Appellant Submission, para. 84. The United States, however, notes that under Article 31 of the Vienna Convention on the Law of Treaties, interpretations are made in light of the object and purpose of the treaty, not of individual provisions of that treaty.

[37] We note that, in the context of the "serious prejudice" provisions of the SCM, the Appellate Body has indicated that the use of the phrase the "effect of the subsidy" indicates that the Panel should assess whether the effects observed (such as price depression or suppression) are the result of the subsidy. *US – Upland Cotton (AB)*, para. 435.

[38] *See, e.g.*, AD Agreement, Art. 3.1 and SCM Agreement, Art. 15.1 (requiring that authorities perform an "objective examination" based on "positive evidence" of the "effect of the {dumped/subsidized} imports on prices in the domestic market" and the "consequent impact of these imports on domestic producers") (emphasis added); AD Agreement, Art. 3.2 and SCM Agreement, Art. 15.2 (requiring that authorities consider "whether there has been a significant price undercutting by the {dumped/subsidized} imports" of domestic prices or whether the "effect of such imports is otherwise to depress prices to a significant degree or prevent price increases, which otherwise would have occurred, to a significant degree"); AD Agreement, Art. 3.4 and SCM Agreement, Art. 15.4 (stating that "[t]he examination of the impact of the {dumped/subsidized} imports on the domestic industry shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry").

consider whether the dumped or subsidized imports have undercut domestic prices and whether any price suppression or depression in the market are "the effect of such imports."

41. In contrast, the causation analysis in Articles 3.5 and 15.5 mandates examination of "all relevant evidence before the authorities," a requirement not stated in Articles 3.2 and 15.2. Moreover, Articles 3.5 and 15.5 specifically provide that "[t]he authorities shall also examine any known factors other than the {dumped/subsidized} 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 dumped imports." Consequently, to satisfy the causal link requirements of Articles 3.5 and 15.5, the authority must show that the material injury is caused by dumped or subsidized imports as opposed to other factors through use of a non-attribution analysis.[39]

42. This non-attribution obligation does not exist in Article 3.2 of the AD Agreement and Article 15.2 of the SCM Agreement.[40] This difference explains the analysis of the panels in *EC – DRAMs* and *Egypt – Steel Rebar*, which are reports relied on heavily by China. In these reports, the panels found that, when evaluating price effects or impact, an authority need not engage in the type of non-attribution analysis set forth in Articles 3.5 and 15.5. In *EC – DRAMs*, for example, the panel stated that "Article 15.2 of the SCM Agreement does not, as such, require an investigating authority to establish a causal link between the subsidized imports and the domestic prices *which would require it to examine all other factors affecting domestic prices at the same time.*"[41] Thus, in *EC – DRAMs*, the panel only found that an authority need not conduct a non-attribution analysis as part of its price undercutting analysis. Similarly, in *Egypt – Steel Rebar*, the panel found that an authority need not conduct a non-attribution analysis under Article 3.4 of

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[39] *See,* e.g., *US – Hot Rolled Steel (AB)*, paras. 221-227.

[40] Consequently, China's hypothetical about a sleeping man awakening in a park amidst a falling leaf, rain, and noisy crowds is inapposite. China admits that "the man's jumping up and running away is an 'effect' of the leaf falling on his face." China Appellant Submission, para. 80. Obviously, then, under the dictionary definition of "effect," the falling leaf is *a* cause of the man awakening. In the U.S. view, this is exactly the type of "effect" relationship envisioned in Articles 3.2 and 15.2. Although it may be true that the falling leaf may not be the *principal*, *sole* or a s*ignificant* cause of the man's awakening, as opposed to the rain or noisy crowds, this does not necessarily negate the existence of some cause and effect relationship between the leaf and the man's awakening. Moreover, there may be other events occurring simultaneously with the man's awakening. For example, a typhoon may be hitting the coast 3000 kilometers away. The typhoon may be coincident with the man's awakening, but, in contrast to the events happening in the park, would arguably not be a cause of this event. Contrary to China's arguments, while Articles 3.2 and 15.2 do require an authority to assess whether the record indicates that price effects are the effect of imports, they do not require an assessment as to whether other known injury factors break the apparent causal link between imports and price effects.

[41] *EC – DRAMs*, para. 7.338 (emphasis added).

the AD Agreement.[42] These reports lend no support to China's claim that an authority need not find *any* causal relationship between the imports under investigation and price effects under Articles 3.2 and 15.2.

43. Consequently, the Panel appropriately distinguished the *EC – DRAMs* report.[43] As the Panel observed, following the portion of that report on which China relied, "the very next sentence in the panel's report (which was omitted by China) states that '[t]he EC examined *the effect of the subsidized imports on domestic prices* and thus, in our view, complied with Article 15.2. Accordingly, we do not accept that the report of the panel in *EC – DRAMs* stands for the proposition that an authority is not required by Article 15.2 of the SCM Agreement to show that the relevant price depression is an effect of the subject imports."[44] Unlike China, the Panel read the entire analysis of the *EC – DRAMs* panel and gave it the correct interpretation.[45]

44. Finally, neither *EC – DRAMs* nor *Egypt – Steel Rebar* attempts to construe the phrase that is at issue in this appeal: the language of Articles 3.2 and 15.2 specifying that price suppression or depression must be "the effect of {dumped/subsidized} imports." Neither report purports to state that price depression or suppression need not be the effect of the dumped or subsidized imports pursuant to Articles 3.2 and 15.2, as China continues to claim. As a result, there is no basis for China's claims that *EC – DRAMs* or *Egypt – Steel Rebar* are dispositive of the issue presented here, or that they are inconsistent with the Panel report in this dispute.[46]

3. The Relationship Between the Three Types of Price Analyses Referenced in Articles 3.2 and 15.2

45. In its submission, China makes several other observations about the text of Articles 3.2 and 15.2 that have little bearing on the Panel's actual findings in the dispute. Unlike its arguments concerning the meaning of the phrase "the effect of such imports," these arguments do not appear directly to address any legal interpretation the Panel actually made. Moreover, these

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[42] *Egypt – Steel Rebar*, para 7.62.

[43] In paragraph 107 of its Appellant Submission, China misquotes the Panel as stating that "the United States is merely suggesting that MOFCOM was required, by Article 15.2 of the SCM Agreement, to consider the effect of other known factors on domestic prices." What the Panel actually (and correctly) said is that "[t]he United States is merely suggesting that MOFCOM was required, by Article 15.2 of the SCM Agreement, *to consider the effect of subject imports on prices*." Panel Report, para. 7.522 (emphasis added).

[44] Panel Report, para. 7.522 (emphasis added).

[45] China Appellant Submission, para. 106.

[46] China Appellant Submission, para. 91.

arguments appear to be purely theoretical in nature or address issues not in dispute. Nevertheless, we address these observations briefly.

46. First, China emphasizes that there are three possible types of price effects articulated in Article 3.2 and 15.2: price undercutting, price depression, and price suppression. China suggests that these three types of effects are entirely independent of each other, and that an authority could choose to examine price depression or price suppression without providing any evaluation of price undercutting.[47] As the United States told the Panel, it does not disagree that an authority can make a finding of significant price effects without finding that there has been "significant" price undercutting during the period of investigation.[48] As the United States also told the Panel, this does not, however, mean that price undercutting is entirely distinct from price depression or price suppression as an analytical matter.

47. Examining the relative price levels of the domestically produced and imported merchandise is typically essential to a complete analysis of price effects. As previously discussed, Articles 3.2 and 15.2 do not obligate an authority only to find merely that price depression or price suppression are occurring. Instead, they direct an authority to examine whether "the effect of such imports is otherwise to depress prices to a significant degree or prevent price increases, which otherwise would have occurred, to a significant degree."[49]

48. Viewed in isolation, the fact that price depression or suppression exists does not itself establish that the dumped or subsidized imports have had an "effect" on prices of the domestically produced product; rather, it is merely an observation of an actual condition in the market. A number of factors in any market may cause price suppression and depression, including a wide variety of factors that have nothing to do with dumped or subsidized imports, such as demand changes, competition between domestic producers, or changes in raw materials costs. The domestic industry can choose to cut prices or restrain price increases in response to these factors, just as it might in response to dumped imports.

49. Consequently, to evaluate whether price suppression or depression are the effect of dumped/subsidized imports, an authority will ordinarily need to examine in detail the manner in which prices of domestic and subject merchandises reacted to each during the period. An authority can assess whether any price depression or suppression in the market is the "effect" of dumped or subsidized imports, as Article 3.2 and 15.2 entail, only by examining the relative price levels of imports and domestic producers over that time.

50. Nevertheless, an authority could find significant price depression or suppression even if it

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[47] China Appellant Submission, paras. 64-67.

[48] U.S. Response to First Set of Panel Questions, para. 54.

[49] AD Agreement, Art. 3.2 and SCM Agreement, Art. 15.2

did not find significant price undercutting. Imports, for example, may garner a price premium over the domestically produced product because of superior quality. In such circumstances, should import prices decline from their previous levels, prices for the domestic product may well follow suit to maintain the price differential attributable to quality differences. Thus, dumped or subsidized imports may cause price depression or suppression even if they are not undercutting domestic prices. The use of the word "otherwise" should consequently be construed in this manner to mean "in a way other than through price undercutting."[50] Even in this context, however, an objective authority should perform a comparison of the pricing levels of imports and domestically produced products, as well as a review of their relative pricing trends, in order to ensure that it has performed an "objective examination" of the "positive evidence" bearing on the issue of subject imports' effect on prices in the market.

51. Second, China argues that the text of Articles 3.2 and 15.2 specifically states only that an authority must "consider" the various possible price effects.[51] Irrespective of whether China's interpretation of the word "consider" is correct, their interpretation would not be dispositive of whether the Panel correctly concluded that MOFCOM's analysis was not based on "positive evidence" and reflected an "objective examination" of these issues, as required by Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement.

52. As we explain in detail below, MOFCOM did much more than "consider" whether price effects existed. It expressly found that, due to their "low prices," the imports under investigation caused price depression and price suppression. Because this finding formed such a significant aspect of MOFCOM's pricing and injury analysis, Articles 3.1 and 15.1 of the AD and SCM Agreements obligated MOFCOM to rely on "positive evidence" to support those findings and to perform an "objective examination" of the record evidence.

53. Given this, the Panel properly evaluated whether the price effects findings made by MOFCOM were consistent with the "objective examination" and "positive evidence" requirements of Articles 3.1 and 15.1 of the AD and SCM Agreements. There was no need for the Panel to address whether MOFCOM could only "consider" price depression and suppression and not make findings on these issues.[52] Because MOFCOM clearly made findings on these issues, it was required to establish that it had positive evidence, examined objectively, to support

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[50] We observe that such a construction is consistent with the use of the phrase "d'une autre manière," meaning "in another way," in the French version of the AD and SCM Agreements.

[51] China Appellant Submission, para. 51.

[52] *Compare Thailand – H-Beams*, paras. 7.179-7.180 (concluding that absence of specific price undercutting finding in determination was not dispositive; in any event, finding was conveyed in other documents that were part of record), *with Korea – Certain Paper*, paras. 7.245-7.251 (determining that the authority satisfied requirement to "consider" price effects by making findings on price undercutting, price suppression, and price depression).

these findings.

54. Third, China emphasizes that the text of Articles 3.2 and 15.2 does not impose any specific methodology for evaluating price effects.[53] This is correct, but China admits that any methodology an authority uses must meet the "positive evidence" and "objective examination" requirements of Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement.[54] As we discuss below in section II.B.2., the Panel did not find that, under Articles 3.2 and 15.2, MOFCOM was required to use any particular methodology for assessing the degree to which price suppression or depression was caused by the dumped or subsidized imports. Instead, the Panel concluded that MOFCOM did not conduct the objective examination of positive evidence required by Article 3.1 and 15.1 for certain of its price effects findings.[55] Accordingly, China has no basis for claiming that the Panel required it to use certain methodologies for assessing the price effects of imports under Articles 3.2 and 15.2 of the AD and SCM Agreements.

B. The Panel Properly Interpreted MOFCOM's Price Effects Analysis

55. China also claims that the Panel improperly applied the obligations of Articles 3.2 and 15.2 when reviewing MOFCOM's price effects findings.[56] According to China, the Panel allegedly misconstrued MOFCOM's findings about the "low prices" of imports and importers' pricing strategy, created findings that MOFCOM never made, and accorded insufficient weight to other factors relied on by MOFCOM in its pricing analysis.[57]

56. The Panel did nothing of the sort. Instead, it reasonably found that MOFCOM's "low price" findings were an important component of its pricing findings, that MOFCOM had not based this finding on "positive evidence" or performed an "objective examination" of these issues, and that it therefore violated the obligations of Articles 3.1 and 3.2 of the AD Agreement and 15.1 and 15.2 of the SCM Agreement.[58] We discuss these issues below.

1. The Panel Did Not Misread MOFCOM's Price Effects Analysis or Create Findings MOFCOM Did Not Make

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[53] China Appellant Submission, para. 61.

[54] China Appellant Submission, para. 62.

[55] Panel Report, paras. 7.524-7.536.

[56] China Appellant Submission, paras. 110-150.

[57] China Appellant Submission, paras. 110-150.

[58] Panel Report, paras. 7.511-7.554.

a. MOFCOM's Findings

57. Despite China's claims to the contrary, the Panel did not misread MOFCOM's findings or create any findings that MOFCOM did not make in its determination. This can be confirmed by an examination of MOFCOM's pricing determination and the few facts disclosed by MOFCOM that relate to its findings, very few of which are actually provided in China's Appellant Submission.

58. For its injury determination, MOFCOM collected information for calendar years 2006, 2007, 2008, and the first quarter of 2009.[59] That information showed that the cumulated imports from Russia and the United States increased throughout this period.[60] Nevertheless, during most of this period, the Chinese GOES industry was not struggling but was instead prospering. The limited information disclosed by MOFCOM showed that the domestic industry's output, sales quantities, sales revenues, employment, wages, prices and pre-tax profit all increased from 2006 to 2007 and from 2007 to 2008, when subject imports were increasing.[61]

59. It was only during the first quarter of 2009 – which happened to be the last three months of a 39 month period of investigation – that the Chinese GOES industry began to experience some difficulties. In particular, the industry's profitability declined.[62] The decline in profits, however, was not volume-related. The Chinese GOES industry showed double digit increases in sales quantities and revenues from the first quarter of 2008 to the first quarter of 2009.[63] Moreover, the market share of the Chinese industry actually increased during this period, increasing by nearly the same amount as the market share of imports from Russia and the United States.[64] Rather than being related to volume declines, the Chinese industry's decline in profits occurred because the increased quantity of sales during the first quarter of 2009 was being sold at lower prices.[65]

60. Accordingly, MOFCOM's finding that the industry was suffering adverse price effects from the subject imports was a critical component of MOFCOM's injury determination.

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[59] *See*, MOFCOM Final Determination, CHN-16, at 57-58.

[60] MOFCOM Final Determination, CHN-16, at 57.

[61] MOFCOM Essential Facts Disclosure, CHN-29, at 9-11.

[62] MOFCOM Essential Facts Disclosure, CHN-29, at 10.

[63] MOFCOM Essential Facts Disclosure, CHN-29, at 10.

[64] MOFCOM Essential Facts Disclosure, CHN-29, at 9-10.

[65] MOFCOM Essential Facts Disclosure, CHN-29, at 10. Consequently, MOFCOM's affirmative determination could not have been, and was not, based solely or even principally on volume considerations.

Moreover, when explaining why imports had had significant price depressing effects during the period, MOFCOM referred repeatedly to the "low prices" of these imports, and explained that the "low prices" of the dumped or subsidized imports were a cause of this price depression:

> During the on-the-spot verification, the petitioner provided contracts and records of price setting to show that a pricing policy aiming at setting the price down to a level lower than the price of the domestic like product was adopted by producers of product concerned. *Because the sale of the product concerned was kept at a low price*, and the import volume of the product concerned increased greatly beginning from 2008, under this impact, domestic producers lowered their price to keep the market share.[66]

61. MOFCOM then essentially repeated this same explanation when it rejected the contrary arguments of one of the respondents, tying the "lower" prices of the imports under investigation to price suppression as well as price depression:

> Upon investigation, the Investigating Authority determined that: the investigation show[s] that during the injury investigation period, the volume of import of GOES increased greatly, and the price developing trend of the product concerned is rising-then-dropping and was basically the same as that of like products. *[R]elevant evidences show that a pricing policy aiming at setting the price to a level lower than that of the domestic like product was adopted when selling the product concerned in China market and that forced petitioner to lower the price of like products*, the price-cost differential declined continually.[67]

62. Further, as the Panel observed, the relevant sub-section in the Final Determination is entitled "{t}he impact of the import *price* of the product concerned on the price of domestic like products."[68] Additionally, MOFCOM linked price depression to the "low price" of the imports under investigation at several other points in its final determination:

> In Q1 2009, as the consequence of a large number of *imports of product concerned at a low price*, the sales price of like product of China's domestic industry declined with deterioration of the profit level. In this case, in order to keep domestic market share and business operation, China's domestic industry made sales of the domestic like product based on a lowered selling price.[69]

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[66] MOFCOM Final Determination, CHN-16, at 58 (emphasis added).

[67] MOFCOM Final Determination, CHN-16, at 59 (emphasis added).

[68] Panel Report, para. 7.540 (quoting MOFCOM Final Determination at 58).

[69] MOFCOM Final Determination, CHN-16, at 62 (emphasis added).

> Under the impact of the large volume *of imports of the product concerned at a low price*, in order to keep the market share, the price of the domestic like product was lowered.[70]
>
> Under the impact *of the imports of the product concerned at a low price*, in order to keep the market share, the price of the domestic like product was lowered.[71]
>
> Upon investigation, the Investigating Authority determined that the large quantity imports *of product concerned at a low price* depressed the price of the domestic like product of China.[72]

63. Moreover, these same "low price" findings were an important component of MOFCOM's assessment that the domestic industry was materially injured by the imports under investigation. MOFCOM tied "low prices" of the merchandise under investigation to the domestic industry's decline in performance during the first quarter of 2009:

> Moreover, as impacted by the product concerned imported in constant great number *and at a low price*, the increase of output and capability did not bring increase of profit and scale effect to the domestic industry of China.[73]
>
> Upon investigation, the Investigating Authority determined that due to the impact of the large quantity *of product concerned at a low price*, the normal production and sales of the domestic industry in China was depressed and the sales price decreased.[74]
>
> Because of the impact of a large number *of imported product concerned at a low price*, financial indices of China's domestic industry deteriorated.[75]
>
> There was a causal link between the material injury suffered by the domestic industry of China and the large quantity *of imports of the product concerned at a low price.*[76]

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[70] MOFCOM Final Determination, CHN-16, at 65 (emphasis added).

[71] MOFCOM Final Determination, CHN-16, at 72 (emphasis added).

[72] MOFCOM Final Determination, CHN-16, at 73 (emphasis added).

[73] MOFCOM Final Determination, CHN-16, at 60 (emphasis added).

[74] MOFCOM Final Determination, CHN-16, at 61 (emphasis added).

[75] MOFCOM Final Determination, CHN-16, at 63 (emphasis added).

[76] MOFCOM Final Determination, CHN-16, at 67 (emphasis added).

> As per the data, the large quantity *of imports of the product concerned at a low price* caused material injury to the domestic industry of China.[77]

64. As can be seen from these excerpts from the determination, MOFCOM made the "low price" of dumped and subsidized imports a critical part of its injury determination. At each point in its analysis, MOFCOM made clear that it was not merely import volumes or the "parallel" pricing trends of domestic products that caused declines in the industry's prices and condition, but that the "low prices" of imports were also a critical factor in its analysis.

65. Despite the evident importance of this finding to its analysis, MOFCOM disclosed strikingly few facts about domestic and import pricing levels in its Injury Disclosure Document or the Final Determination itself. In fact, the only factual disclosure in its Injury Disclosure Document is found in a section titled "Price of the Subject Merchandise." There, MOFCOM stated as follows:

> According to the custom statistics, the price of GOES originated from the United States and Russia during 2006, 2007, 2008 and Q1 2009 was RMB25913.08/ton, RMB26683.58/ton, RMB31371.75/ton, and RMB26672.64/ton respectively.[78]

In other words, the only "pricing" data disclosed by MOFCOM were AUV data for import transactions derived from Customs statistics. Moreover, MOFCOM disclosed only one annual observation for calendar years 2006, 2007, and 2008. Consequently, for an investigation that involved a three-and-one-quarter year period, MOFCOM disclosed only four observations of AUVs for the imports under investigation.

66. MOFCOM disclosed no information at all about the AUV's of the domestically produced product, nor did it state how the AUVs of the domestically produced product compared with the disclosed AUVs of the imports. Furthermore, MOFCOM disclosed no information concerning actual prices charged for any product in any commercial transaction. The only information that the Injury Disclosure Document provided on the prices of domestic merchandise was general pricing trends. The Injury Disclosure Document stated that prices for the domestically produced product were 6.66 percent *higher* in 2007 than in 2006, and that prices *increased* even more rapidly – by 14.53 percent – between 2007 and 2008. The disclosure document reported a 30.25 percent price decline in the first quarter of 2009 compared to the first quarter of 2008.[79] MOFCOM did not, however, disclose how it calculated these percentages, or report the data underlying these calculations. Nor did it provide any other information concerning these calculations. Indeed, it was not until the middle of the Panel proceedings, in its response to the

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[77] MOFCOM Final Determination, CHN-16, at 73 (emphasis added).

[78] MOFCOM Essential Facts Disclosure, CHN-29, at 9.

[79] MOFCOM Essential Facts Disclosure, CHN-29, at 10.

first set of questions posed by the Panel, that China first disclosed that the domestic pricing data reflected AUVs.[80]

b. The Panel's Findings

67. As can be seen from the foregoing, the Panel correctly concluded that an important component of MOFCOM's pricing analysis was its "finding that subject import prices were 'low' relative to domestic prices, and {its determination} that there was a 'pricing policy' of setting subject import prices lower than domestic prices."[81] As the Panel indicated, MOFCOM's determination repeatedly referenced its "low prices" finding when it was describing why it found that the imports under investigation had price suppressive and depressive effects, and caused injury to the industry. Moreover, as the Panel explained, nothing in the determination indicated that MOFCOM believed that these pricing findings were not an important aspect of the determination, as China claims.[82]

68. China objects to the Panel's characterization of this finding as an important aspect of MOFCOM's analysis, claiming that this finding was not "central" to MOFCOM's analysis.[83] The Panel's characterization of MOFCOM's price effects finding is not error at all. As noted previously, in no fewer than *six* instances, MOFCOM directly linked price depression and price suppression to "low prices" and in no fewer than *five* additional instances linked "low prices" to the material injury purportedly sustained by China's domestic GOES industry. China's argument that "the Panel criticizes price comparisons that were never the basis of MOFCOM's consideration"[84] cannot be reconciled with even a casual reading of the MOFCOM Final Determination.

69. Nor is there any basis for China's suggestion that MOFCOM's use of the term "low prices" does not mean that it purported to compare prices of the domestically produced product and the imports under investigation,[85] or that MOFCOM's use of the term "pricing strategies" was not intended to reflect prices actually charged.[86] This is confirmed by the first price depression finding quoted above, which specifically indicates that the result of the importers' "pricing policy"

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[80] China Response to First Set of Panel Questions, para. 117.

[81] Panel Report, para. 7.524.

[82] Panel Report, paras. 7.539-7.542.

[83] *See, e.g.*, China Appellant Submission, paras. 34 and 117.

[84] China Appellant Submission, para. 117.

[85] China Appellant Submission, para. 130.

[86] China Appellant Submission, para. 141.

was to keep import pricing at a lower level than domestic products and that, as a result of this policy, "the product concerned was kept at a low price."[87] Given the linkage of these two findings, it is clear that MOFCOM found that the alleged policy was effective at keeping prices lower than the domestic products, just as the Panel concluded.[88] Indeed, the Panel's analysis was fully consistent with MOFCOM's conclusion that "{t}hrough investigation, {MOFCOM} confirmed, as per cumulative assessment of the case and relevant evidence, the pricing policy of the imports of the products concerned was to set the price to a level lower than that of the domestic like product."[89] As this statement indicates, despite China's claims, MOFCOM did not simply find that importers were "attempting" to set subject import prices lower than domestic prices, it found that they actually did so.[90]

70. China's claim that "'low-priced' imports can exist regardless of the relative prices of subject imports and domestic prices"[91] has little basis. Low-priced imports must be "low priced" in relation to something that is higher-priced. A meaningful discussion of low-priced imports must include a comparison of subject import pricing to domestic pricing. As a result, since China conceded that it made price comparisons to establish the "low prices" of the dumped and subsidized imports, as the Panel found,[92] MOFCOM could only have made such a finding by comparing the pricing levels of the import and domestic pricing.[93] Moreover, China admitted to the Panel that MOFCOM made such comparisons, as we discuss below in more detail. China's claim that an authority can meaningfully conclude that subject import pricing is "low" without referencing domestic pricing under Articles 3.2 and 15.2 is analytically unsound.

71. Moreover, the importance given these findings by MOFCOM is evident from an argument

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[87] MOFCOM Final Determination, CHN-16, at 58.

[88] *See* Panel Report, paras. 7531-7.534.

[89] MOFCOM Determination, p. 70.

[90] The Panel also properly rejected MOFCOM's reliance on certain documents that allegedly supported its "pricing policy" finding because the documents were related to sales made in the first quarter of 2009, which is when MOFCOM found that subject imports were not lower priced than domestic merchandise. Panel Report, paras. 7.532 - 7.534. Despite China's claims to the contrary, the Panel properly concluded that their probative value was undermined by the fact that these documents allegedly showed subject imports being priced lower than domestic merchandise at a point when MOFCOM concluded that the subject imports were priced higher than domestic merchandise generally. *Id.*

[91] China Appellant Submission, para. 135.

[92] Panel Report, para. 7.530 n.505.

[93] Panel Report, paras. 7.529-7.530.

made by respondent Allegheny Ludlum on the record during MOFCOM's investigation that MOFCOM's preliminary findings on "low prices" and "pricing strategies" did not reflect apparent price comparisons or actual record data. In responding to these arguments, MOFCOM *expressly reaffirmed* its "low price" and "pricing strategy" findings and summarily rejected the argument that it had not engaged in pricing comparisons:

> Allegheny Ludlum claimed that although the price of domestic like product decreased in Q1 of 2009, there is no evidence showing that the pricing strategy of imports was to decrease the price to a level lower than that of the domestic like product and consequently result in underselling of the domestic like product.
>
> The petitioner stated in the petitioner's comment on the comment from Allegheny Ludlum on the information disclosure that the Investigating Authority undertook a detailed analysis on the price of the domestic like product and the import price of the product concerned. Due to the impact from sales of the product concerned at a low price, the price of the domestic like product decreased.
>
> Upon investigation, the Investigating Authority determined that the large quantity imports of product concerned at a low price depressed the price of the domestic like product of China.[94]

At no point did MOFCOM suggest, as China now argues, that it did not give significant weight to the "low prices" of imports or that it did not rely on a comparison of import and domestic prices when making this finding.

72. Indeed, China's current claim that MOFCOM did not make a finding that import prices were lower than domestic prices is *directly contrary* to a number of statements made by China to the Panel. For example, before the Panel, China expressly stated that:

> "These documents [submitted at the Panel's request] support the *finding* reached by MOFCOM that *subject imports from Russia and the United States were charging prices lower than domestic prices*, and had a pricing policy to keep their prices lower."[95]

As can be seen, China conceded to the Panel that MOFCOM found that the subject importers were charging lower prices than domestic suppliers. Moreover, China made other similar admissions during the proceeding, stating that:

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[94] MOFCOM Final Determination, CHN-16, at 73.

[95] China November 25, 2011 Response to Panel, response to question (b) (emphasis added).

> It did "not deny that the MOFCOM determination mentioned 'low' or 'lower' price in various places."[96]
>
> "*MOFCOM properly exercised its discretion to make … {t}he general observation that subject import prices were 'low' and were 'lower than' domestic prices throughout the period*."[97]
>
> "China's point is simply that given the use for which the AUV data has been requested – *to confirm the factual statement that subject import prices were lower than domestic prices* – the range of AUVs and range of underselling margins accomplished that objective."[98]

Given China's statements before the Panel, the Panel was completely justified in concluding that MOFCOM found that import prices were lower than domestic prices during the period of investigation.[99] China has no basis for its claims that MOFCOM did not rely on the "low prices" of imports as a central component of its pricing analysis or that MOFCOM did not draw its conclusion about the low prices of imports from a price comparison of domestic and import prices.[100]

73. Given the foregoing, it is China, and not the Panel, that seeks to "reinterpret" the MOFCOM Final Determination. China cannot seriously claim that MOFCOM's repeated references to imports sold at "a low price" as a basis for its price suppression and depression findings were not an important component of MOFCOM's analysis. The Panel construed the determination exactly as it was written and did not, in any manner, fail to assess the content of that determination in a reasoned and objective manner.[101]

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[96] China Second Written Submission, para. 102.

[97] China Second Written Submission, para. 104 (emphasis added).

[98] China Response to Second Set of Panel Questions, para. 160 (emphasis added)

[99] Panel Report, para. 7.530.

[100] Indeed, the lack of internal logic in MOFCOM's determination – combined with MOFCOM's failure to disclose meaningful information on pricing – was one of the basic reasons the United States pursued this dispute. *See*, *e.g.*, U.S. First Written Submission, paras. 210-11.

[101] China also argues that the Panel has no basis for finding that MOFCOM concluded that import prices were "low" based on a comparison of "low" import prices to domestic prices. According to China, the "only specific reference" by MOFCOM comparing domestic and subject import prices was MOFCOM's statement that subject import prices were, in fact, "higher" than domestic prices in the first quarter of 2009. China Appellant Submission, paras. 131, 201. This clearly does not undermine the Panel's conclusion that MOFCOM did, indeed, compare the pricing levels of domestic and import

2. The Panel Did Not Improperly Ignore Alternative Grounds for MOFCOM's Price Depression and Suppression Findings

74. China also claims that the Panel ignored alternative grounds that MOFCOM presented for its price depression and price suppression findings. China first posits that MOFCOM found "parallel pricing trends" to be an independent grounds for its price depression and price suppression findings.[102] There are several problems with this particular claim. First, China never made this argument to the Panel.[103] Given this, China has no basis for asking the Appellate Body to consider whether the Panel should have addressed such an argument.[104]

75. Second, there is no indication in MOFCOM's determination that a "parallel" pricing finding was an independent ground for its price effects analysis. China's claims are belied by the following excerpt from the MOFCOM determination:

> As having been stated above, during the injury investigation period, the developing trend of price of the domestic like products was basically the same as that of the price of product concerned, that is, the price initially rose then dropped. During the on-the-spot verification, the petitioner provided contracts and records of price setting to show that a pricing policy aiming at setting the price down to a level lower than the price of the domestic like product was adopted by producers of product concerned. *Because the sale of the product concerned was kept at a low price*, and the import volume of the product concerned increased greatly beginning from 2008, under this impact, domestic producers lowered their price to keep the market share.[105]

As can be seen, MOFCOM identified the reasons for its price depression finding in the last

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products. MOFCOM's reference to relative pricing in this quarter does not help China's case. In that reference, MOFCOM confirmed that the prices of subject imports were higher than the prices of domestically produced merchandise in the first quarter of 2009, which is when domestic prices were allegedly adversely affected by prices of the subject imports. The fact that subject import pricing was higher than domestic pricing at a point in the period when domestic prices fell considerably undermines the objectivity and reasonableness of MOFCOM's pricing analysis. It certainly does not support it.

[102] China Appellant Submission, paras. 122-24.

[103] *See*, *e.g.*, China Response to Second Set of Panel Questions, paras. 115-17 (positing subject import volumes, but not "parallel pricing trends" as alternate grounds for MOFCOM price depression finding).

[104] *Canada – Aircraft (AB)*, paras. 209-210.

[105] MOFCOM Final Determination, CHN-16, at 58 (emphasis added).

sentence of the excerpt after the word "because." This sentence indicates that MOFCOM found "the sale of the product concerned . . . at a low price" was one of the two identified causes of the price depression, not parallel pricing trends. Given this, China has little grounds for its assertion that MOFCOM's parallel pricing finding was the primary pricing finding supporting its price depression analysis.

76. Third, the pricing information actually disclosed by MOFCOM does not support a finding that "parallel" pricing trends caused price depression. The record showed that AUVs for the subject imports and Chinese products both rose in 2007 and 2008.[106] In other words, the "parallel" pricing trends in 2007 and 2008 did not cause any price depression. Given this, the "parallel" pricing trends in 2007 and 2008 do not support China's belief that parallel pricing trends alone could have caused any price depression seen in 2009. Although China claims that there was a "sharp drop of subject import prices in Q1 2009,"[107] this claim is contradicted by MOFCOM's own disclosure that average unit values for the imports under investigation declined by only 1.25 percent between the first quarters of 2008 and 2009.[108] When this decline is compared to the far greater decline of 30.25 percent in domestic prices during first quarter 2009,[109] it is evident that "parallel" pricing trends did not explain the price depression or suppression seen during the first quarter of 2009.

77. The Panel appropriately recognized this logical inconsistency, stating that:

> MOFCOM also found that subject import prices increased by 2.97% and 17.57% in 2007 and 2008, respectively. In addition, MOFCOM also found that the subject import price was not lower than the domestic price in the first quarter of 2009. In the absence of any further clarification by MOFCOM, we are not persuaded that an objective and impartial investigating authority could properly have found that, following a 17.57% increase in subject import price in 2008, a 1.25% decrease in subject import price in the first quarter of 2009 could have had the effect of depressing domestic prices, particularly as subject imports prices in any event remained higher than domestic prices in that period.[110]

Indeed, China has not challenged this aspect of the Panel's analysis, indicating that China has nothing to say about one of the three significant bases on which the Panel rejected MOFCOM's

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[106] MOFCOM Final Determination, CHN-16, at 58.

[107] China Appellant Submission, para. 150.

[108] MOFCOM Final Determination, CHN-16, at 58.

[109] MOFCOM Final Determination, CHN-16, at 58.

[110] Panel Report, para. 7.535.

price depression analysis. Since this finding goes to the heart of the analytical problems identified by the Panel concerning MOFCOM's pricing analysis, China has no grounds for arguing that the Panel did not have an objective and sound basis for rejecting MOFCOM's findings.

78. In contrast to its newly raised claims about "parallel" pricing trends, China did argue before the Panel that its price depression and price suppression findings could be supported solely on the basis that the volume of imports under investigation increased. The Panel addressed China's claim in its analysis and reasonably rejected it.[111] The Panel concluded that "[w]e do not consider that MOFCOM's final determination supports China's argument that volume effects were the primary basis for MOFCOM's finding that price depression was an effect of subject imports."[112] The Panel correctly noted that, when making this argument, China relied on "extracts from MOFCOM's final determination that appear to lend equal weight to considerations of both subject import volume and price."[113]

79. Moreover, the Panel explained that, throughout these extracts, "MOFCOM refers both to the increased volume of subject imports, and the allegedly low price thereof."[114] Further, as the Panel correctly observed, a sub-section of MOFCOM's Final Determination was entitled "{t}he impact of the import price of the product concerned on the price of domestic like products."[115] Accordingly, the Panel reasonably concluded that "there is nothing in MOFCOM's determination to indicate that MOFCOM relied more heavily on the increase in volume of subject imports than it did on the low price thereof for the purpose of establishing that price depression was an effect of imports."[116]

80. In sum, China has not established that the Panel's findings do not reflect an objective assessment of the facts. In its Final Determination, MOFCOM consistently and repeatedly relied on the "low prices" of the imports under investigation as a central basis for its price depression and price suppression findings. Accordingly, the Panel acted entirely appropriately in refusing to pursue China's argument that MOFCOM's volume findings constitute an sufficient and independent basis for its findings on price depression and price suppression. Although China claims that MOFCOM focused solely or primarily on the volumes of imports in its analysis, this was not at all evident on the face of MOFCOM's determination. Since "[a] panel's examination

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[111] Panel Report, para. 7.538.

[112] Panel Report, para. 7.539.

[113] Panel Report, para. 7.539.

[114] Panel Report, para. 7.540.

[115] MOFCOM Determination at 58; see also Panel Report, para. 7.540.

[116] Panel Report, para. 7.540.

of [an authority's] conclusions must be critical and searching, and be based on the information contained in the record and the explanations given by the authority in its published report,"[117] the Panel acted properly in assessing whether MOFCOM had provided "positive evidence" to support its "low price findings and performed an "objective examination" of that evidence.

81. As the Appellate Body stated in *Japan – DRAMs*:

> In our view, it follows from the requirement that the investigating authority provide a reasoned and adequate explanation for its conclusions, that the underlying rationale behind those conclusions be set out in the investigating authority's determination. It is on the basis of the rationale or explanation provided by the investigating authority that a panel must examine the consistency of the determination with a covered agreement, including whether the investigating authority has adequately explained how the facts support the determination it has made. Just as a panel must focus in its review on the rationale or explanation provided by the investigating authority in its report, so, too, is the respondent Member precluded during the panel proceedings from offering a new rationale or explanation *ex post* to justify the investigating authority's determination.[118]

Accordingly, the Panel acted entirely reasonably by evaluating the final determination as MOFCOM wrote it, as opposed to the manner in which China has attempted to recast it.

3. The Panel Did Not Require MOFCOM to Use Specific Pricing Methodologies

82. China also claims that the Panel improperly imposed specific pricing methodologies on MOFCOM under Article 3.2 and 15.2.[119] Again, the Panel did nothing of the sort. At no point did the Panel state that Articles 3.2 and 15.2 require an authority to perform its price analysis and comparisons using any particular methodology. On the contrary, the Panel agreed with China that MOFCOM did not make a finding of significant price undercutting and that it could therefore not conclude that MOFCOM erred in this respect.[120] Moreover, the United States acknowledged to the Panel that Articles 3.2 and 15.2 do not require an authority to make a finding of significant

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[117] *US – Softwood Lumber (AB) IV*, para. 93; see also *US – Tyres (AB)*, paras. 329-330.

[118] *Japan – DRAMs (AB)*, para. 159. *See also U.S. – Hot Rolled Steel (AB)*, para. 55 (based on Article 17.6(i) of the AD Agreement).

[119] China Appellant Submission, paras. 26-31 and 154-182.

[120] Panel Report, para. 7.530.

price undercutting to find significant price effects.[121] In other words, the Panel was not requested to address whether an authority must find significant price undercutting under Article 3.2 and did not purport to do so.

83. In this respect, the actual claim raised by the United States before the Panel was one that China does not acknowledge or address in its Appellant Submission. Before the Panel, the United States did not claim that an authority was required to use specific price comparison methodologies under Articles 3.2 and 15.2 when analyzing whether price depression or price suppression was "the effect of such imports." Instead, the United States made the argument, which was addressed by the Panel, that MOFCOM's "low-price" and "pricing strategy" findings were not supported by "positive evidence" and did not reflect an "objective examination" of the data, as required by Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement. The Panel's findings were framed accordingly:

> "MOFCOM's reliance on AUVs, without any consideration of the need for adjustments to ensure price comparability, is neither objective, nor based on positive evidence."[122]
>
> "In the absence of any explanation as to why the Exhibit CHN-37 contract should trump MOFCOM's finding that subject imports were not priced lower than domestic products in the first quarter of 2009, we do not consider that an objective and impartial investigating authority could properly have relied on this contract to support a finding that subject imports were priced "lower" than domestic products in that period."[123]
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> "In the absence of any explanation as to why the evidence contained in these Exhibits {CHN-38-40} should trump MOFCOM's finding that subject imports were not priced lower than domestic products in the first quarter of 2009, we do not consider that an objective and impartial investigating authority could properly have relied on these negotiations to support a finding that subject imports were priced "lower" than domestic products in that period."[124]
>
> "In the absence of any further clarification by MOFCOM, we are not persuaded that an objective and impartial investigating authority could properly have found that, following a 17.57% increase in subject import price in 2008, a 1.25%

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[121] Panel Report, para. 7.483.

[122] Panel Report, para. 7.530.

[123] Panel Report, para. 7.533.

[124] Panel Report, para. 7.534.

> decrease in subject import price in the first quarter of 2009 could have had the effect of depressing domestic prices, particularly as subject imports prices in any event remained higher than domestic prices in that period."[125]

Consequently, in its analysis, the Panel did not address whether China was required to adopt any specific price comparison methodologies under Articles 3.2 and 15.2, as China claims. Instead, the Panel addressed directly whether MOFCOM acted in an objective and impartial manner and supported its "low price" and "price strategy" findings with positive evidence, objectively examined, as required by Articles 3.1 and 15.1.

84. In its Appellant Submission, however, China does not challenge the Panel's legal interpretation of Articles 3.1 and 15.1. Indeed, it largely fails to acknowledge that Articles 3.1 and 15.1 were the basis for the Panel findings in question. Instead, China argues that the Panel made findings that it never made, allegedly imposing specific methodological approaches on China under Articles 3.2 and 15.2. As a result, China's arguments about non-existent "pricing methodology" findings by the Panel under Articles 3.2 and 15.2 do not undermine in any manner the Panel's findings under Articles 3.1 and 15.1 about the analytical flaws in MOFCOM's analysis. Given China's failure to frame these issues appropriately, the Appellate Body need not give them much consideration.

85. Furthermore, China's arguments do not actually call into question the validity of the Panel's analysis. In its report, the Panel reasonably concluded that the United States had established that there were significant evidentiary deficiencies in MOFCOM's price depression and price suppression finding. As indicated, the United States explained that MOFCOM's reliance on annual AUVs to make price comparisons failed to satisfy the "objective examination" and "positive evidence" requirements of Articles 3.1 and 15.1 because the use of AUV's for such a purpose was unreliable, given the particular circumstances of the GOES market.[126] These circumstances included a non-homogenous product that was classified in two different HS categories and was sold in different grades with different product characteristics.[127] Moreover, during the course of the Panel proceeding, China provided evidence showing that GOES was subject to intense price fluctuations within the course of a single year.[128] Given these factors, the Panel reasonably concluded that the AUV data relied on by MOFCOM simply did not provide the positive and objective evidence that an authority should rely on to perform its pricing analysis in

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[125] Panel Report, para. 7.535.

[126] U.S. Response to Second Set of Panel Questions, paras. 53-54; U.S. First Written Submission, para. 218.

[127] *See* CHN-2 at 15-16.

[128] China Response to First Set of Panel Questions, para. 121.

the circumstances of the investigation.[129] It did not go further.

86. Moreover, China has not adequately rebutted the three reasons the Panel provided for finding that MOFCOM's use of AUV data was not objective. For example, the Panel concluded that MOFCOM's use of AUV data was not an objective examination of positive data because MOFCOM did not compare the imports under investigation and the domestically produced product at the same level of trade.[130] The sole information that China provided the Panel relating to this issue was a response to a question from the Panel, which China reproduces at paragraph 156 of its Appellant Submission. In that response, China indicated that the AUV data for the domestically produced product reflected transactions between the domestic producer and the end user. In contrast, the subject import AUVs measure transactions between the exporter and the first Chinese purchaser, which is typically an importer that will then resell the product – at a profit – to the end user. The Panel, contrary to China's argument, did not make assumptions. Instead, it simply relied on the information China provided. Even here, China concedes that the AUV data that MOFCOM used was "not a comparison of specific prices in specific distribution channels."[131] Given this, the Panel acted reasonably and objectively in concluding that such flawed data could not serve as an evidentiary basis for a finding of "low prices," given the nature of the product in question.[132]

87. Similarly, as the Panel also reasonably noted, the annual AUV data cited by MOFCOM was not particularly reliable because it reflected a single annual data point encompassing different types of GOES.[133] China does not contest this. It merely states – without explaining why – that

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[129] Panel Report, paras. 7.526-7.530.

[130] Panel Report, para. 7.528.

[131] China Appellant Submission, para. 158. China further contends that the AUVs reflected "the average revenue of the product physically in China." *Id*. China nowhere explains why or how this metric reflects whether particular suppliers are offering product to purchasers at a "low price."

[132] Moreover, contrary to China's assertions, China Appellant Submission, paras. 161-162, *Egypt – Steel Rebar* is inapposite. The panel report in that dispute merely stated that price comparisons under Article 3.2 of the AD Agreement need not be conducted at a particular level of trade. It did not indicate an authority could have positive evidence of price differences when it compared prices at different levels of trade. *See Egypt – Steel Rebar*, para. 7.73. Further, in *Guatemala – Cement II*, para. 8.50 (emphasis added), the panel rejected the validity of the authority's pricing analysis because it failed to consider differences in levels of trade. The Panel stated that there "is no evidence before us to suggest that, at the time of initiation, the Ministry considered any of these elements concerning the effect of the relevant imports on Guatemalan cement prices. Even if the Ministry had considered possible price undercutting, for example, the only prices available to the Ministry were not comparable since they concerned transactions taking place at different levels of trade." *Id*. (emphasis added).

[133] Panel Report, para. 7.528.

MOFCOM did not attempt to collect more precise data, or even to use the breakouts available in the customs data in its record.[134] China again ignores the primary point of the Panel's analysis, which is that if an authority endeavors to make price comparisons, it must have sufficiently precise information to do so meaningfully. In this case, the record showed that the product covered by the investigation was a non-homogenous product that was classified in two different HS categories and was sold in different grades with different product characteristics.[135] Moreover, the record also showed that there were considerable variations in the AUV's for the two HS categories cited by China in its arguments on this issue, indicating that a single comparison of the two categories combined would likely reflect an inaccurate assessment of comparative pricing levels between the subject imports and domestic products.[136] Given these factors, the Panel had every reason for finding that the Panel's use of one overly broad AUV data point for all of the Russian and U.S. imports did not constitute positive evidence of subject import pricing, and that it would not allow MOFCOM to perform a sufficiently objective analysis of subject import pricing.

88. Further, the Panel reasonably concluded that MOFCOM's use of annual pricing data for its price comparisons was not sufficiently precise in terms of the time periods covered. China contends that annual pricing data may be probative for ascertaining price trends for a price depression or price suppression analysis, but does not respond to the reasoning of the Panel, which reasonably found that "the determination of a single price point throughout the entire year does not provide a sufficiently precise basis, in our view, *for comparing prices*."[137] As the record of the Panel proceeding showed, GOES was subject to intense price fluctuations within the course of a single year.[138] In light of this, the Panel properly noted that, *"given the possibility of prices varying over time*, an objective and impartial investigating authority would rather conduct contemporaneous price comparisons, or at least price comparisons during a relatively short period of time."[139] In its brief, China has done nothing to undermine the reasonableness of this conclusion in light of the conditions affecting the Chinese GOES market.

89. In sum, China's complaints about the Panel's rejection of MOFCOM's AUV anlaysis ignore the central point of the Panel's analysis. As the Panel stated:

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[134] *See* China Appellant Submission, para. 168.

[135] *See* CHN-2 at 15-16.

[136] *See* US-41 (showing that, in 2008, the AUV of subject imports in the HS 7225.1100 category was $4.61 while the AUV of subject imports in the HS 7226.1100 category was $1.47).

[137] Panel Report, para. 7.528 (emphasis added).

[138] China Response to First Set of Panel Questions, para. 121.

[139] Panel Report, para. 7.528.

> Thus, even though MOFCOM did not make a finding of significant price undercutting (i.e. price undercutting of a certain magnitude), MOFCOM did rely on a finding that subject import prices undercut domestic prices. In our view, a proper finding of the existence of price undercutting necessarily entails a comparison of prices, and the authority should ensure that the prices it is using for its comparison are properly comparable. As soon as price comparisons are made, price comparability necessarily arises as an issue.[140]

China did not attempt to dispute this point during the Panel proceedings. Instead, it acknowledged to the Panel that "[w]hen analyzing price undercutting, it may be necessary to have more precise information to ensure that the comparison of domestic and import prices is in fact reasonable and objective."[141] The Panel simply made the common-sense observation that there is no functional difference between a price comparison made for purposes of a price undercutting finding and a price comparison made for purposes of a price depression or price suppression finding. China has failed to explain why the "reasonable and objective" standard it articulated to the Panel is not applicable generally to price comparisons an authority makes for purposes of Articles 3.2 and 15.2. Instead, it now argues that authorities have a "degree of discretion" apparently to do whatever they please in their price effects analysis, with the only restriction being that "the authority think carefully about the effects in question."[142] China submits no textual nor other authority for its changed position.

90. Finally, China complains that the Panel's findings were flawed because "[t]he Panel essentially embrace{d} arguments made by the United States after the fact during the panel proceedings, not arguments the respondents had presented to MOFCOM during the underlying investigations."[143] China's argument is wrong, factually and legally. First, China's argument is factually mistaken because the record indicates that respondent Allegheny Ludlum, in its comments on the preliminary determination, specifically raised the issue that "[t]he investigation authority hasn't provided any price comparison between the domestic like product and the imported product concerned."[144] Allegheny Ludlum further raised objections on the basis that "{t}he investigation authority distorted the price analysis by using price trend on a yearly basis."[145] Consequently, during the investigation at least one respondent made several of the same

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[140] Panel Report, para. 7.530 (footnotes omitted).

[141] China Response to First Set of Panel Questions, para. 131.

[142] China Appellant Submission, para. 151.

[143] China Appellant Submission, para. 183.

[144] Allegheny Ludlum Comments, CHN-31, at 3.

[145] Allegheny Ludlum Comments, CHN-31, at 4-6.

objections to the price comparison analysis that the United States made to the Panel. MOFCOM acknowledged aspects of Allegheny Ludlum's objections.[146] But its response was at best cursory and did not address the substance of the objections.[147]

91. Second, China's argument is legally mistaken. Nothing in the AD and SCM Agreements precludes the United States from asserting arguments under Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement that MOFCOM findings were not based on positive evidence or reflect an objective examination. Certain provisions in the AD and SCM Agreements contain language limiting an investigating authority's responsibilities to those of addressing arguments or information presented to it. For example, the non-attribution obligation in Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement is limited to "any known factors" other than dumped or subsidized imports, and thus does not require an authority to consider all conceivable factors. Similarly, Article 12.2.2 of the AD Agreement and Article 22.5 of the SCM Agreement state that a public notice of an affirmative determination providing for the imposition of a definitive duty shall contain reasons of the acceptance or rejection of arguments or claims made by the exporters and importers, limiting this obligation to claims or arguments actually asserted.

92. In contrast, Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement contain no similar limitation relating to an authority's obligation to conduct an objective examination of the matter before it and to have positive evidence to support its findings. Indeed, the Appellate Body has characterized the obligations of Article 3.1 as "absolute." "They provide for no exceptions, and they include no qualifications."[148] Similarly, in *Mexico – Steel Pipes and Tubes*, the panel rejected a Mexican argument that it should reject a claim under Article 3.1 about the use of a particular period of investigation by Mexico because no party complained about the period of investigation during the administrative proceedings. The panel emphasized that, since "the selection of the POI is linked to an investigating authority's obligation under Article 3.1 to conduct an objective assessment of positive evidence, that authority is bound to satisfy its obligations whether or not this issue is raised by an interested party in the course of an investigation.[149] Consequently, the Panel appropriately considered the claims that the United States asserted.

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[146] MOFCOM Final Determination, CHN-16, at 58-59. Significantly, MOFCOM did not acknowledge Allegheny Ludlum's objection to the use of annual AUV data.

[147] MOFCOM Final Determination, CHN-16, at 59.

[148] *EC – Bed Linen (Article 21.5) (AB)*, para. 109.

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

4. The Panel's Analysis Did Not Violate Article 11 of the DSU

93. China also argues that the Panel violated Article 11 of the DSU by misreading MOFCOM's pricing findings, and by failing to consider the totality of the evidence with respect to MOFCOM's pricing analysis.[150] In making these arguments, China asserts that the Panel mistakenly concluded that "references to 'low prices' in the final determination were synonymous with a comparison between subject imports and domestic products, and in fact were references to price undercutting."[151] China further asserts that the Panel's analysis focused on an unimportant aspect of MOFCOM's analysis – its "low prices" finding – and failed to "recognize that MOFCOM's price effects discussion focused on multiple pieces of evidence."[152]

94. First, we note that China's arguments regarding its Article 11 claim merely repeat its arguments in respect of the Panel's interpretation of the substantive requirements under the AD and SCM Agreements regarding price effects. The United States has demonstrated above that the Panel's analysis of the requirements of the AD and SCM Agreements and its application of those requirements to MOFCOM's determination on the issue of price effects was correct.

95. The Appellate Body explained in *EC and Certain Member States – Large Civil Aircraft,* that "a claim under Article 11 of the DSU 'must stand by itself and should not be made merely as a subsidiary argument or claim in support of a claim that a panel failed to apply correctly a provision of the covered agreements'."[153] In that dispute, the Appellate Body declined to address the European Union's claims under Article 11 of the DSU regarding the interpretation and application of various articles of the SCM Agreement that the Appellate Body had already addressed.[154]

96. Second, the Appellate Body has also made clear that an Article 11 claim is a "very serious allegation",[155] and requires a demonstration of "egregious error".[156] To rise to the level of an Article 11 violation, a mistake on the part of the Panel must constitute a deliberate disregard of

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[150] China Appellant Submission, paras. 193 - 209.

[151] China Appellant Submission, para. 200.

[152] China Appellant Submission, para. 204.

[153] *EC and Certain Member States – Large Civil Aircraft (AB)*, para. 761, citing to *Chile – Price Band System (Article 21.5) (AB)*, para. 238 (referring to *US – Steel Safeguards (AB)*, para. 498). See also *China – Publications and Audiovisual Products (AB)*, para. 189.

[154] *EC and Certain Member States – Large Civil Aircraft (AB)*, para. 761.

[155] *US – Zeroing (AB)*, para. 253.

[156] *EC – Hormones (AB)*, para. 133.

evidence or gross negligence amounting to bad faith.[157] Clearly, there is no basis for China's claim that the Panel committed the sort of "egregious error" that would warrant a finding of a violation of Article 11. This Panel undertook a thorough examination of the evidence before it and the arguments of the parties. China's assertions to the contrary are unfounded and should be rejected.

a. The Panel Did Not Fail to Carry Out Its Duty under Article 11 of the DSU by Misreading the Evidence

97. China does not present any new argument to support its claim that the Panel erred because "MOFCOM did not make a finding that subject imports were priced lower than domestic products."[158] Instead, it merely recycles its discussion in Section IV.B. of its submission.[159] As we have previously discussed in detail, the Panel did not mistakenly conclude that MOFCOM had performed a comparison of domestic and subject pricing and that MOFCOM concluded that subject import prices were "low" compared to domestic prices. On the contrary, in its determination, MOFCOM repeatedly found that subject imports were priced "low" during the period, and its analysis made clear that this finding was based on a comparison of domestic and subject import prices.

98. Indeed, China explicitly conceded before the Panel both that MOFCOM did engage in prices comparisons for domestic products and subject imports,[160] and acknowledged that there had been a "*finding* reached by MOFCOM that *subject imports from Russia and the United States were charging prices lower than domestic prices*, and had a pricing policy to keep their prices lower."[161] Given these statements by China, the Panel did not commit error by evaluating MOFCOM's determination on the basis of specific findings included in the determination. On the contrary, it acted consistently with Article 11 by evaluating MOFCOM's determination as written, and by finding MOFCOM's analysis lacking under Articles 3.1 and 3.2 of the AD Agreement and Articles 15.1 and 15.2 of the SCM Agreement.

b. The Panel Did Not Fail to Consider the Totality of the Evidence

99. As above, China does not present any new argument to support its claim that the Panel erred in failing to consider the totality of the evidence in its price effects analysis because it based

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[157] *EC – Hormones (AB)*, paras. 133 and 138.

[158] China Appellant Submission para. 203.

[159] *See* China Appellant Submission, paras. 200-201 *compare to* paras. 130-131.

[160] Panel Report, paras. 7.529 - 7.530.

[161] China November 25, 2011 Response to Panel, response to question (b) (emphasis added).

"its ultimate conclusion on only a single factor, failing to recognize that MOFCOM's price effects discussion focused on multiple pieces of evidence."[162] Indeed, China's argument regarding totality of the evidence is only a summary of its discussion in Section IV.B. of its submission.[163]

100. The Panel did not mistakenly fail to give the proper weight to MOFCOM's "low price" findings or to other aspects of MOFCOM's affirmative price effects findings. China contends that the Panel should have upheld MOFCOM's price suppression and depression findings based on other findings that allegedly supported MOFCOM's analysis, such as its findings on increasing import volumes and parallel price trends for imports and domestic products.[164] In rejecting the one argument on this score that China presented to the Panel – which was China's claim that the increasing volumes of imports alone could support MOFCOM's price suppression and depression analysis – the Panel clearly and reasonably rejected such an approach, correctly pointing out that a "panel must exercise great caution in determining whether or not to engage in analyses not undertaken by the investigating authority itself."[165]

101. The Panel found that there was nothing in MOFCOM's determination to indicate that it had given any greater weight in its pricing analysis to the volumes of imports than their "low pricing" levels, and its "low prices" finding formed a "central" component of MOFCOM's findings.[166] Similarly, there is no language in MOFCOM's determination indicating that it gave greater weight to its findings on "parallel" pricing trends and importers' alleged "pricing policy" aimed at setting their prices lower than domestic prices than it had to its finding of "low" import prices. As a result, the Panel had no basis for concluding that these findings could, by themselves, support MOFCOM's pricing analysis. Given this, the Panel did not commit any error, much the "egregious error" addressed by Article 11, in finding that MOFCOM's "low prices" was a central aspect of its overall pricing analysis and that MOFCOM's determination could not be upheld under 3.1 and 3.2 of the AD Agreement and 15.1 and 15.2 of the SCM Agreement.

102. In sum, China's Article 11 claim is merely a subsidiary argument to its arguments with respect the Panel's interpretation and application of the substantive requirements under the AD and SCM Agreement, and therefore cannot stand on its own. Regardless, the Panel properly evaluated MOFCOM's analysis as written and gave its individual components, including its "low

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[162] China Appellant Submission para. 204.

[163] *See* China Appellant Submission, para. 204 ("in fact, as discussed in detail above. . .") *compare to* paras. 122-123, 141, and 144.

[164] China Appellant Submission, paras. 204 - 205.

[165] Panel Report, para. 7.541 (citing *Japan – DRAMs (AB)*, paras. 131-135).

[166] Panel Report, para. 7.541.

prices" finding, the appropriate weight. In doing so, the Panel conducted a proper assessment as required by Article 11 of the DSU. The Appellate Body should reject China's Article 11 claim in its entirety.

C. The Panel Properly Concluded that MOFCOM Violated Its Obligation to Disclose Essential Facts under Articles 6.9 of the AD Agreement and 12.8 of the SCM Agreement

103. Articles 6.9 of the AD Agreement and 12.8 of the SCM Agreement require investigating authorities, before a final determination is made, to "inform all interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures."[167] Articles 6.9 and 12.8 further provide that "[s]uch disclosure should take place in sufficient time for the parties to defend their interests." The Panel concluded that MOFCOM's failure to disclose the essential facts underlying MOFCOM's finding of "low" subject import prices was inconsistent with these Articles.[168]

104. China does not contest the Panel's legal interpretation of Articles 6.9 and 12.8. Instead, China's main argument is essentially that the Panel's flawed construction of Articles 3.2 and 15.2 led the Panel to make incorrect findings on the Article 6.9 and 12.8 claims. China contends that, because MOFCOM only needed to find that price depression and suppression existed in the market, the only "essential facts" it needed to disclose were the declines in domestic prices (in connection with price depression) and changes in the price-cost ratio of the Chinese domestic industry (in connection with price suppression).[169] This, however, ignores that Articles 3.2 and 15.2 both require that price depression or suppression be the "effect" of the imports under investigation, as discussed in detail above. Moreover, MOFCOM in fact attempted to satisfy this requirement by repeatedly referring to the "low price" of the imports under investigation.[170]

105. As the Panel explained, because MOFCOM's conclusion regarding the "low price" of subject imports formed an essential part of the reasoning used to support the price suppression and price depression findings, MOFCOM was required to disclose not only the conclusion regarding the existence of a "low price," but also the "essential facts" supporting this conclusion, in order to allow interested parties to defend their interests.[171] MOFCOM failed to do so. The only factual disclosure in its Injury Disclosure Document consists of four observations of AUVs for the

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[167] AD Agreement, Article 6.9; *see also* SCM Agreement, Article 12.8.

[168] Panel Report, para. 7.575.

[169] China Appellant Submission, paras. 210-215.

[170] *See*, *e.g.*, Final Determination, CHN-16, at 58, 59, 60, 61, 62, and 63.

[171] Panel Report, para. 7.569.

imports under investigation, based on Chinese Customs statistics.[172] MOFCOM disclosed no information about either the absolute AUVs of the domestically produced product or how the AUVs of the domestically produced product compared with the disclosed AUVs of the imports under investigation.[173]

106. China also makes an alternative argument. It asserts that, even if the Appellate Body were to find that the Panel correctly imposed an obligation to find some causal relationship between subject imports and adverse price effects, MOFCOM still met its obligation to disclose essential facts. According to China, this is because "the essential fact that MOFCOM ultimately relied upon in its Final Determination was the fact that the importers were *attempting* to charge lower prices."[174] China's contention now that so-called "low price strategies" were the essential fact underlying MOFCOM's price effects findings cannot be squared either with language of the MOFCOM determination or China's representations to the Panel. The Panel correctly recognized that MOFCOM's "conclusion regarding the 'low price' of subject imports was repeatedly referenced throughout its determination" and that it "formed an essential part of the reasoning MOFCOM used to support its price suppression and price depression findings."[175]

107. In any event, the Panel properly found that MOFCOM's vague references to "low price strategies" did not constitute an adequate disclosure of essential facts to support MOFCOM's price effects finding. As the Panel explained: "[i]n order to allow the respondents to defend their interests, a summary of the essential facts supporting the finding of a low price strategy was required, rather than merely stating the conclusion that such a strategy existed."[176] The Panel correctly recognized that Articles 6.9 and 12.8 require disclosure of "facts," and not merely conclusory assertions. The Panel also recognized that such facts indeed existed, and that when China belatedly disclosed them, during the Panel proceeding, the United States was able to challenge the relevance of these facts to MOFCOM's price depression finding.[177]

108. China takes issue with the Panel's observation that the margins of underselling over the 2006-2008 period (revealed by China for the first time in its Second Written Submission to the

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[172] MOFCOM Essential Facts Disclosure, CHN-29, at 9.

[173] See discussion in section IV.B.1.a. above.

[174] China Appellant Submission, para. 218. We note that this assertion that low price strategies were the essential fact on which MOFCOM relied is at odds with the assertion elsewhere in China's submission that the declines in domestic prices and changes in the price-cost ratio were the relevant essential facts. China Appellant Submission, para. 212.

[175] Panel Report, para. 7.569.

[176] Panel Report, para. 7.573.

[177] *Id.*

Panel) were essential facts that should have been disclosed. China contends that these were "never facts that 'form the basis of the decision' to impose measures."[178] As noted above, MOFCOM repeatedly referred in its final determination to the "low price" of subject imports. China's attempt to distance itself from this by now claiming that "{t}he facts about prices of subject imports relative to domestic prices were never 'essential' to MOFCOM's discussion of prices effects"[179] is simply at odds with the language of the MOFCOM Final Determination. It is China, and not the Panel, that seeks to rewrite the MOFCOM Final Determination.

109. Nor is there any merit to China's argument that the Panel improperly focused its analysis on the pricing policy of exporters, and that it ignored decreasing import prices and increasing import volume.[180] This is just another attempt by China to rewrite MOFCOM's decision. The Panel did not improperly focus its analysis on pricing policies; rather, it found that the references in MOFCOM's preliminary determination and final injury disclosure to low price strategies of the Russian and U.S. exporters were insufficient as a summary of the essential facts supporting the conclusion of low import prices.[181]

110. For these reasons, the Appellate Body should uphold the Panel's finding that China violated its obligations under Article 6.9 of the AD Agreement and Article 12.8 of the SCM Agreement by failing to disclose essential facts underlying MOFCOM's price effects findings.

D. The Panel Properly Found that MOFCOM's Failure to Include in its Determination Information Material to the Price Effects Analysis Violated Article 12.2.2 of the AD Agreement and Article 22.5 of the SCM Agreement

111. Articles 12.2.2 of the AD Agreement and 22.5 of the SCM Agreement require that an authority's notice of the conclusion of an investigation, in the case of an affirmative determination, contain "all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures." The Panel concluded that China acted inconsistently with these Articles by failing adequately to disclose "all relevant information on matters of fact" underlying MOFCOM's conclusion regarding the existence of "low" import prices.[182]

112. China does not contest the Panel's legal interpretation of Articles 12.2.2 and 22.5. As with

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[178] China Appellant Submission, para. 220.

[179] China Appellant Submission, para. 216.

[180] China Appellant Submission, para. 221.

[181] Panel Report, para. 7.573.

[182] Panel Report, para. 7.592.

the arguments regarding Articles 6.9 and 12.8, discussed above, China's contention here is that the Panel's purportedly incorrect conclusions on Articles 3.2 and 15.2 led it to make consequent errors on procedural claims. China contends that all that MOFCOM's Final Determination needed to contain, with respect to adverse price effects, was a reference to the existence of price depression and price suppression.[183]

113. Again, this ignores that Articles 3.2 and 15.2 require that price depression or suppression be the "effect" of the imports under investigation, and that MOFCOM clearly attempted to satisfy this requirement by repeatedly referring to the "low price" of subject imports. [184]

114. China claims that the Panel focused on the absence of any disclosure "not just about the existence of price undercutting . . . but also the specific magnitude of the price undercutting."[185] China misconstrues the Panel's reasoning. The Panel did not fault MOFCOM for failing to disclose specific margins of underselling *per se*. Rather, the Panel referred to the existence of these margins (which China disclosed in its second written submission) to illustrate that "MOFCOM had before it information on the prices of subject imports and the prices of the domestic product and undertook a comparative analysis of this information."[186] The Panel then noted that "the final determination did not include any indication that a comparative analysis of prices had been performed or provide the factual information arising from the comparison."[187] Indeed, MOFCOM's final determination disclosed no meaningful information comparing the prices of domestically produced merchandise and the imports under investigation, or identifying how the "pricing strategies" of the importers affected the prices that they charged *vis a vis* the domestically produced merchandise.

115. China also attempts to draw attention away from MOFCOM's failure to give public notice by pointing to the disclosure of other elements which were purportedly relevant to MOFCOM's pricing analysis, such as the pricing policy of importers.[188] Leaving aside the question of the adequacy of the disclosure of these other elements, they are no substitute for a disclosure of information regarding the existence of "low" import prices. As explained above, the Panel correctly recognized that MOFCOM's findings regarding the 'low price' of subject imports was an essential part of the MOFCOM's reasoning and, accordingly, should have been disclosed.

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[183] China Appellant Submission, paras. 223-225.

[184] *See*, *e.g.*, Final Determination, CHN-16, at 58, 59, 60, 61, 62, and 63.

[185] China Appellant Submission, paras. 226.

[186] Panel Report, para. 7.591.

[187] Panel Report, para. 7.591.

[188] China Appellant Submission, paras. 229.

116. As with the arguments regarding Articles 6.9 and 12.8, discussed above, China's contentions that the relative prices of subject imports and the domestic product were "never one of the 'matters of fact' that led to the imposition of final measures,"[189] or that they were not considered material by MOFCOM,[190] are simply implausible in light of MOFCOM's repeated references in its Final Determination to the "low" prices of subject imports. As the Panel correctly observed: "given the importance that the conclusion regarding the 'lower' price of subject imports played in MOFCOM's reasoning . . . further information on the matters of fact leading to this conclusion was required under Articles 22.5 of the SCM Agreement and 12.2.2 of the Anti-Dumping Agreement."[191]

117. For these reasons, the Appellate Body should uphold the Panel's finding that China acted inconsistently with Articles 12.2.2 of the AD Agreement and 22.5 of the SCM Agreement and by failing adequately to disclose "all relevant information on matters of fact" underlying MOFCOM's conclusion regarding the existence of "low" import prices.

III. CONCLUSION

118. In sum, China has no basis for challenging the Panel's conclusions on MOFCOM's pricing analysis. China mistakenly challenges the Panel's interpretation of the meaning of Articles 3.2 and 15.2 of the Agreement, claiming that the Panel should not have given meaning to a phrase – the "effects of such imports" – that is a critical component of those Articles. China argues that MOFCOM's repeated references to the "low price" of imports should have been given no weight by the Panel and criticizes the Panel for reading MOFCOM's decision exactly as it was written. China criticizes the Panel for making findings that the Panel did not make, and mischaracterizes those that the Panel did.

119. The Panel's analysis contains no legal error. It correctly interpreted Article 3.2 and 15. 2 of the Agreement as obligating MOFCOM to consider whether the significant price suppression and depression in the market were the effect of dumped and subsidized imports. The Panel also reasonably concluded that MOFCOM findings on the "low" prices of these imports and the alleged "pricing policies" of importers were neither supported by "positive evidence" nor objectively examined by MOFCOM, as required by Articles 3.1 and 15.1 of the AD and SCM Agreements. Furthermore, the Panel also reasonably found that MOFCOM had failed to disclose essential facts relating to these findings to the parties, as well as failing to include the relevant facts related to these findings in its determination.

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[189] China Appellant Submission, paras. 230.

[190] China Appellant Submission, paras. 231.

[191] Panel Report, para. 7.591.

120. The Panel reviewed MOFCOM's analysis as written, properly interpreted the legal requirements of the AD and SCM Agreements and correctly concluded that MOFCOM had not complied fully with its obligations concerning its pricing analysis under the AD and SCM Agreements. Accordingly, China's appeal should be rejected in its entirety.