

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

**FIRST WRITTEN SUBMISSION OF
THE UNITED STATES OF AMERICA**

March 12, 2013

TABLE OF CONTENTS

TABLE OF CONTENTS.....	i
TABLE OF CASES.....	v
TABLE OF EXHIBITS.....	vii
I. INTRODUCTION.....	1
II. PROCEDURAL BACKGROUND.....	3
III. FACTUAL BACKGROUND.....	4
A. The Measures.....	4
B. The Products Subject to Investigation.....	4
C. The Petition, Initiation of the Investigations, and Questionnaires.....	5
D. Preliminary Determination.....	7
E. Comments on the Preliminary Determination.....	8
F. Disclosure Documents.....	8
G. Final Determination and Imposition of Antidumping and Countervailing Duties.....	9
IV. STANDARD OF REVIEW.....	10
V. PROCEDURAL FLAWS IN MOFCOM'S INVESTIGATIONS OF CERTAIN AUTOMOBILES FROM THE UNITED STATES.....	12
A. China Breached Article 6.5.1 of the AD Agreement and Article 12.4.1 of the SCM Agreement by Failing to Require the Provision of Adequate Non-Confidential Summaries.....	12
1. Article 6.5.1 of the AD Agreement and Article 12.4.1 of the SCM Agreement Require the Preparation of Non-Confidential Summaries Absent Exceptional Circumstances.....	12
2. The Non-Confidential Summaries Are Inadequate.....	14
a. Sales to Output Ratio, Return on Investment, Salary, Apparent Consumption.....	14
b. Other Economic Indicators.....	15

B.	China Breached Article 6.9 of the AD Agreement by Failing to Disclose the Calculations and Data Used to Determine the Existence of Dumping and Calculate Dumping Margins.	16
1.	Article 6.9 of the AD Agreement Requires the Investigating Authority to Disclose to Interested Parties the Calculations and Data Used to Determine the Existence of Dumping and to Calculate Dumping Margins.	16
2.	MOFCOM Failed to Disclose the Calculations and Data it Used to Determine the Existence of Dumping and Arrive at the Dumping Margins.	18
VI.	MOFCOM’S FLAWED ALL OTHERS DUMPING DETERMINATION	19
A.	MOFCOM’s Determination of the All Others Rate Is Inconsistent with Articles 6.8, 6.9, 12.2, and 12.2.2 of the AD Agreement.	19
1.	MOFCOM’s Use of Facts Available Is Inconsistent with Article 6.8 and Annex II of the AD Agreement.....	19
2.	China Acted Inconsistently with Article 6.9 of the AD Agreement by Failing to Disclose the Essential Facts under Consideration Regarding its Calculation of the “All Others” Dumping Rate.	21
a.	MOFCOM’s Determinations and Disclosures.....	22
b.	MOFCOM Failed to Disclose the Essential Facts under Consideration Forming the Basis for the All Others Dumping Rate, and the United States Was Deprived of Its Ability to Defend Its Interests as a Result.	22
3.	MOFCOM Failed to Explain Its Determination.	24
VII.	MOFCOM’S FLAWED ALL OTHERS SUBSIDY RATE DETERMINATION	25
A.	MOFCOM’s Determination of the All Others Rate Is Inconsistent with Articles 12.7, 12.8, 22.3, and 22.5 of the SCM Agreement.....	25
1.	MOFCOM’s Use of Facts Available Is Inconsistent with Article 12.7.	25
2.	China Acted Inconsistently with Article 12.8 of the SCM Agreement by Failing to Disclose the Essential Facts under Consideration Regarding its Calculation of the “All Others” Subsidy Rate.	27

a.	MOFCOM’s Determinations and Disclosures.....	27
b.	MOFCOM Failed to Disclose the Essential Facts Under Consideration Forming the Basis for the All Others Subsidy Rate, and the United States Was Deprived of Its Ability to Defend Its Interests as a Result.	27
3.	MOFCOM Failed to Explain Its Determination.	29
VIII.	MOFCOM’S FLAWED INJURY DETERMINATION	29
A.	MOFCOM’s Narrow Definition of the Domestic Industry Is Inconsistent with Articles 3.1 and 4.1 of the AD Agreement and Articles 15.1 and 16.1 of the SCM Agreement.	31
1.	MOFCOM Acted Inconsistently with Articles 3.1 and 4.1 of the AD Agreement and Articles 15.1 and 16.1 of the SCM Agreement Because Its Definition of the Domestic Industry Was Distorted.....	31
2.	MOFCOM Acted Inconsistently with Articles 3.1 and 4.1 of the AD Agreement and Articles 15.1 and 16.1 of the SCM Agreement Because Its Definition of the Domestic Industry Was Limited to a Small Subset of the Industry.	35
B.	MOFCOM’s Price Effects Analysis Is Inconsistent with Articles 3.1 and 3.2 of the AD Agreement and Articles 15.1 and 15.2 of the SCM Agreement.....	38
1.	An Investigating Authority’s Consideration of Price Effects Must Be Based on “Positive Evidence” and Must “Involve an Objective Examination.”.....	38
2.	MOFCOM’s Finding of Parallel Pricing is Contradicted by Record Evidence and, In Any Event, MOFCOM Failed to Explain the Relevance of Parallel Pricing to its Price Effects Analysis.....	40
3.	MOFCOM Failed to Address Evidence that Subject Imports Oversold the Domestic Like Products During the Period in which MOFCOM Identified Price Depression.	42
4.	MOFCOM Failed to Make Needed Adjustments to the Average Unit Values Used in its Price Effects Analysis.....	43
5.	MOFCOM Failed to Consider or Address Evidence that the Market Share of the Domestic Like Products Increased Along	

	with that of Subject Imports During the Period in Which MOFCOM Found Price Depression.	44
6.	MOFCOM’s Flawed Domestic Industry Definition Compromised Its Price Effects Analysis.	45
C.	China’s Causation Analysis Is Inconsistent with Articles 3.1 and 3.5 of the AD Agreement and Articles 15.1 and 15.5 of the SCM Agreement.	45
1.	MOFCOM’s Causation Determination Is Compromised by Its Flawed Domestic Industry Definition and Price Effects Analysis.....	47
2.	MOFCOM Failed to Address Evidence that Subject Imports Took Market Share from Non-Subject Imports and Not From the Domestic Like Products.	47
3.	MOFCOM Failed to Account for the Sharp Decline in the Chinese Industry’s Productivity throughout the Period of Investigation.....	48
4.	MOFCOM Failed to Recognize the Lack of Competition between Subject Imports and the Domestic Like Product.	49
5.	MOFCOM Failed to Take Into Account the Sharp Drop in Demand in Interim 2009.	50
6.	MOFCOM Failed to Address Other Factors That May Have Caused Injury to the Domestic Industry.	51
IX.	CONSEQUENTIAL CLAIMS	52
X.	CONCLUSION.....	53

TABLE OF CASES

Short form	Full Citation
<i>Argentina – Ceramic Tiles</i>	Panel Report, <i>Argentina – Definitive Anti-Dumping Measures on Imports of Ceramic Floor Tiles From Italy</i> , WT/DS189/R, adopted 5 November 2001
<i>China – Broiler Products</i>	<i>China – Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States</i> , WT/DS427
<i>China – GOES (Panel)</i>	Panel Report, <i>China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States</i> , WT/DS414/R, adopted 16 November 2012, as modified by the Appellate Body Report, WT/DS414/AB/R
<i>China – GOES (AB)</i>	Appellate Body Report, <i>China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States</i> , WT/DS414/AB/R, adopted 16 November 2012
<i>EC – Fasteners (China) (AB)</i>	Appellate Body Report, <i>European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China</i> , WT/DS/397/AB/R, adopted 28 July 2011
<i>EC – Salmon (Norway)</i>	Panel Report, <i>European Communities – Anti-Dumping Measure on Farmed Salmon from Norway</i> , WT/DS337/R, adopted 15 January 2008
<i>EU – Footwear (China)</i>	Panel Report, <i>European Union – Anti-Dumping Measures on Certain Footwear from China</i> , WT/DS405/R, adopted 22 February 2012
<i>Mexico – Anti-Dumping Measures on Rice (Panel)</i>	Panel Report, <i>Mexico – Definitive Anti-Dumping Measures on Beef and Rice, Complaint with Respect to Rice</i> , WT/DS295/R, adopted 20 December 2005, as modified by Appellate Body Report, WT/DS295/AB/R
<i>Mexico – Anti-Dumping Measures on Rice (AB)</i>	Appellate Body Report, <i>Mexico – Definitive Anti-Dumping Measures on Beef and Rice, Complaint with Respect to Rice</i> , WT/DS295/AB/R, adopted 20 December 2005
<i>Thailand – H-Beams (AB)</i>	Appellate Body Report, <i>Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H Beams from Poland</i> , WT/DS122/AB/R, adopted 5 April 2001
<i>US – Anti-Dumping and Countervailing Duties (China) (Panel)</i>	Panel Report, <i>United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China</i> , WT/DS379/R, adopted 25 March 2011, as modified by Appellate Body Report, WT/DS379/AB/R
<i>US – Hot-Rolled Steel (AB)</i>	Appellate Body Report, <i>United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan</i> , WT/DS184/AB/R, adopted 23 August 2001

Short form	Full Citation
<i>US – Softwood Lumber VI (Article 21.5 – Canada) (AB)</i>	Appellate Body Report, Recourse to Article 21.5 of the DSU by Canada, <i>United States – Investigation of the International Trade Commission in Softwood Lumber from Canada</i> , WT/DS277/AB/RW, adopted 9 May 2006
<i>US – Tyres (China) (AB)</i>	Appellate Body Report, <i>United States – Measures Affecting Imports of Certain Passenger Vehicle and Light Truck Tyres from China</i> , WT/DS399/AB/R, adopted 5 October 2011

TABLE OF EXHIBITS

Exhibit No.	Description	Short Title
USA-01	Announcement No. 20, 2011, of the Ministry of Commerce of the People’s Republic of China	
USA-02	Appendix to Announcement No. 20, 2011, of the Ministry of Commerce of the People’s Republic of China, “The Final Determination of MOFCOM on the Anti-Dumping and Countervailing Investigations against Certain Imports of Cars Originating from the U.S.”	Final Determination
USA-03	Announcement No. 84, 2011, of the Ministry of Commerce of the People’s Republic of China, December 14, 2011	
USA-04	Anti-dumping and Anti-Subsidy Investigation Application, September 9, 2009	Original Petition
USA-05	Petition for Antidumping and Countervailing Duty Investigation, October 19, 2009	Amended Petition
USA-06	Initiation of Antidumping Investigation into Saloon Cars and Cross-country Cars (of a Cylinder Capacity $\geq 2000\text{cc}$) Originating from the United States, MOFCOM Public Notice [2009] No. 83	AD Initiation Notice
USA-07	Initiation of Countervailing Duty Investigation into Saloon Cars and Cross-country Cars (of a Cylinder Capacity $\geq 2000\text{cc}$) Originating from the United States, MOFCOM Public Notice [2009] No.84	CVD Initiation Notice
USA-08	The Preliminary Determination of the Ministry of Commerce, People’s Republic of China on the Anti-Dumping and Countervailing Investigations against Some Car Imports Originating from the U.S.	Preliminary Determination

Exhibit No.	Description	Short Title
USA-09	Letter on the Disclosure of Basic Facts upon which the Dumping Margin and Ad Valorem Subsidy Rate are based in the Preliminary Determination of the Auto AD and CVD Investigation against the U.S., April 2, 2011	Preliminary Disclosure
USA-10	Disclosure of Basic Facts upon which the Industry Injury Determination is based in the AD and CVD Investigations of Some Cars Originating from the U.S., April 15, 2011	Final Disclosure (Injury)
USA-11	Disclosure of Basic Facts upon which the Dumping Margin and Ad Valorem Subsidy Rate are based in the Final Determination of the Auto AD and CVD Investigation against the U.S., April 18, 2011	Final Disclosure (AD/CVD)
USA-12	U.S. Respondent Comments on the Preliminary Determination	
USA-13	New Shorter Oxford English Dictionary (Clarendon Press 1993)	

I. INTRODUCTION

1. In this dispute, the United States challenges antidumping and countervailing duty measures imposed by the People's Republic of China ("China") on certain automobiles from the United States. This is the third dispute settlement proceeding the United States has commenced against China concerning antidumping and countervailing duty measures targeting U.S. exports, owing to China's repeated failure to abide by the commitments it made when it joined the World Trade Organization (WTO).¹

2. In this submission, the United States will demonstrate that China, through its investigating authority, the Ministry of Commerce of the People's Republic of China ("MOFCOM"), has acted inconsistently with its obligations under the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("AD Agreement") and the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement").

3. Specifically, MOFCOM's antidumping and countervailing duty investigations of certain automobiles from the United States suffered from critical procedural defects. The United States will demonstrate that China acted inconsistently with its WTO obligations in the following respects:

- *First*, MOFCOM acted inconsistently with Article 6.5.1 of the AD Agreement and Article 12.4.1 of the SCM Agreement by failing to require the petitioner (the China Association of Automobile Manufacturers ("CAAM")) to provide adequate non-confidential summaries of allegedly confidential information. By failing to require non-confidential summaries, MOFCOM did not allow the interested parties to obtain a reasonable understanding of the substance of the confidential information. The petitioner gave no indication that the information could not be summarized and did not provide the reasons why summarization was not practicable.
- *Second*, MOFCOM acted inconsistently with Article 6.9 of the AD Agreement by failing to disclose essential facts to U.S. respondents. Specifically, MOFCOM did not allow U.S. respondents to see the data or the calculations underlying their respective dumping margins. As a result, U.S. respondents could not know what treatment MOFCOM gave to their data and thus were denied an opportunity to present relevant arguments in order to defend their interests.

4. Additionally, with respect to MOFCOM's reasoning and conclusions for its dumping and subsidy determinations, the United States will demonstrate that the "all others" dumping and subsidy rates MOFCOM applied are inconsistent with China's WTO obligations in the following respects:

- *First*, MOFCOM acted inconsistently with Articles 6.8, 6.9, 12.2, 12.2.2, and paragraph 1 of Annex II of the AD Agreement by imposing an "all others" rate

¹ See *China – GOES* (DS414) and *China – Broiler Products* (DS427).

based on facts available to producers that MOFCOM did not notify of the information required of them, and that did not refuse to provide necessary information or otherwise impede the dumping investigation. Moreover, MOFCOM failed to inform the United States and other interested parties of the essential facts under consideration that formed the basis for the application of facts available or the margin calculation, and failed to disclose in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by MOFCOM, or all relevant information on matters of fact and law and reasons which led to the imposition of final measures.

- *Second*, MOFCOM acted inconsistently with Articles 12.7, 12.8, 22.3, and 22.5 of the SCM Agreement by imposing an “all others” rate based on facts available to producers that MOFCOM did not notify of the information required of them, and that did not refuse to provide necessary information or otherwise impede the countervailing duty investigation. Moreover, MOFCOM failed to inform the United States and other interested parties of the essential facts under consideration that formed the basis for this calculation, and failed to disclose in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by MOFCOM, or all relevant information on matters of fact and law and reasons which have led to the imposition of final measures.

5. Finally, with respect to MOFCOM’s injury determination, the United States will demonstrate that China acted inconsistently with its WTO obligations in the following respects:

- *First*, MOFCOM acted inconsistently with Articles 3.1 and 4.1 of the AD Agreement and Articles 15.1 and 16.1 of the SCM Agreement by defining the domestic industry to include only those firms that supported the AD and CVD investigations.
- *Second*, MOFCOM acted inconsistently with Articles 3.1 and 3.2 of the AD Agreement and Articles 15.1 and 15.2 of the SCM Agreement because its price effects finding was not based on positive evidence and did not involve an objective examination. Specifically, MOFCOM’s finding of parallel pricing was contradicted by record evidence and, in any event, MOFCOM failed to explain the relevance of parallel pricing. MOFCOM failed to address evidence that subject imports oversold the domestic like product during the period in which MOFCOM identified price depression. MOFCOM failed to make needed adjustments to average unit values that it used in its price effects analysis. MOFCOM failed to consider or address evidence that the market share of domestic products increased along with that of subject imports. Finally, MOFCOM’s price effects analysis was compromised by its flawed domestic industry definition.
- *Third*, MOFCOM acted inconsistently with Articles 3.1 and 3.5 of the AD Agreement and Articles 15.1 and 15.5 of the SCM Agreement because its causation determination was neither objective nor based on positive evidence.

MOFCOM's causation analysis was premised on its flawed domestic industry definition and its flawed price effects analysis. MOFCOM failed to examine evidence indicating that subject imports took market share from non-subject imports and not from domestic like products. MOFCOM failed to examine evidence regarding the Chinese industry's sharp decline in productivity throughout the period of investigation. MOFCOM failed to examine the lack of competition between subject imports and the domestic like product. MOFCOM failed to examine the sharp drop in demand during the period in which it found material injury. And MOFCOM failed to examine other factors that may have caused injury to the domestic industry.

II. PROCEDURAL BACKGROUND

6. On July 5, 2012, the United States requested consultations with China pursuant to Articles 1 and 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU"), Article XXIII:1 of the GATT 1994, Article 30 of the SCM Agreement (to the extent that Article 30 incorporates Article XXIII of the GATT 1994), and Article 17.3 of the AD Agreement with respect to China's measures imposing anti-dumping duties and countervailing duties on certain automobiles from the United States.² Pursuant to this request, the United States and China held consultations on August 23, 2012. Unfortunately, those consultations did not resolve the dispute.

7. On September 17, 2012, the United States requested the establishment of a panel pursuant to Article 6 of the DSU, Article 17.4 of the AD Agreement, and Article 30 of the SCM Agreement.³ The Dispute Settlement Body ("DSB") considered this request at its meeting on September 28, 2012, at which time China objected to the establishment of a panel.

8. The United States renewed its request for the establishment of a panel at the October 23, 2012 meeting of the DSB. At that meeting, a panel was established with the following terms of reference:

[t]o examine, in the light of the relevant provisions of the covered agreements cited by the parties to the dispute, the matter referred to the DSB by the United States in document WT/DS440/2 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.⁴

² WT/DS440/1.

³ WT/DS440/2. The United States wishes to inform the Panel that it does not intend to pursue claims under Article 5.4 of the AD Agreement and Article 11.4 of the SCM Agreement, which were set forth in the U.S. request for the establishment of a panel under the heading "Initiation of the Investigation: Support for the Application."

⁴ WT/DS440/3, para. 2.

III. FACTUAL BACKGROUND

A. The Measures

9. China’s measures imposing antidumping and countervailing duties on certain automobiles from the United States are set forth in MOFCOM’s Notice No. 20 [2011]⁵ and Notice No. 84 [2011],⁶ including any and all annexes.

10. Under these measures, China has imposed antidumping and countervailing duties on imports of certain automobiles from U.S. producers and exporters at the following rates:

	AD Rate⁷	CVD Rate⁸
General Motors	8.9%	12.9%
Chrysler Group	8.8%	6.2%
Mercedes-Benz	2.7%	0%
BMW	2.0%	0%
Honda	4.1%	0%
Ford	21.5% ⁹	0%
“All others”	21.5%	12.9%

B. The Products Subject to Investigation

11. As described by MOFCOM in the final determination, the products subject to the investigations were as follows:

⁵ Announcement No. 20, 2011, of the Ministry of Commerce of the People’s Republic of China (Exhibit USA-01) and Appendix, “The Final Determination of MOFCOM on the Anti-Dumping and Countervailing Investigations against Certain Imports of Cars Originating from the U.S.,” May 5, 2011 (“Final Determination”) (Exhibit USA-02).

⁶ Announcement No. 84, 2011, of the Ministry of Commerce of the People’s Republic of China, December 14, 2011 (imposing antidumping and countervailing duties) (Exhibit USA-03).

⁷ Final Determination, section IV.C, p. 42, 83 (Exhibit USA-02).

⁸ Final Determination, section V.A.3(4), pp. 61-62, 83 (Exhibit USA-02).

⁹ Ford is subject to the “all others” AD rate. *See* Final Determination, section IV.A.6, p. 42 (Exhibit USA-02).

Name: Saloon cars and Cross-country cars (with engine displacement >2500cc).

Details: All saloon cars and cross-country cars with engine displacement above 2500cc comprised of engine, chassis, body and electrical equipment.

Application: The investigated products are widely used for transportation of passengers and their luggage and other accompanied goods.¹⁰

C. The Petition, Initiation of the Investigations, and Questionnaires

12. On September 9, 2009, the China Association of Automobile Manufacturers (“CAAM” or “petitioner”) filed a petition requesting that MOFCOM initiate antidumping and countervailing duty investigations on certain automobiles from the United States.¹¹ On October 19, 2009, the petitioner filed an amended petition with MOFCOM.¹² The petition asserted that the U.S. manufacturers of the allegedly dumped and subsidized products include, but are not limited to, General Motors Corporation (GM), Ford Motor Co., and Chrysler Motors Corporation.¹³ While the narrative portion of the petition totaled over 100 pages in length, much of the relevant information was withheld as confidential, and no public summary of this information was ever provided to the U.S. government or to U.S. respondents.

13. On November 6, 2009, MOFCOM initiated the antidumping and countervailing duty investigations of certain automobiles from the United States.¹⁴ At the time of initiation, the scope of the investigations covered imported saloon cars and cross-country cars of a cylinder capacity of greater than or equal to 2000cc, and was limited to such products exported from the United States.¹⁵ The scope of the investigations was later amended to cover saloon cars and

¹⁰ Announcement No. 20, 2011, of the Ministry of Commerce of the People’s Republic of China (Exhibit USA-01). The announcement indicated that the automobiles investigated were classified under the Import and Export Tariff Schedule of the People’s Republic of China as the following customs tariff numbers: 87032361, 87032362, 87032369, 87032411, 87032412, 87032419, 87032421, 87032422, 87032429, 87033311, 87033312, 87033319, 87033321, 87033322, 87033329, 87033361, 87033362, 87033369, 87039000.

¹¹ Anti-dumping and Anti-Subsidy Investigation Application, September 9, 2009 (“Original Petition”) (Exhibit USA-04).

¹² Petition for Antidumping and Countervailing Duty Investigation, October 19, 2009 (“Amended Petition”) (Exhibit USA-05).

¹³ Amended Petition, pp. 14-15 (Exhibit USA-05).

¹⁴ Initiation of Antidumping Investigation into Saloon Cars and Cross-country Cars (of a Cylinder Capacity \geq 2000cc) Originating from the United States, MOFCOM Public Notice [2009] No. 83 (“AD Initiation Notice”) (Exhibit USA-06); Initiation of Countervailing Duty Investigation into Saloon Cars and Cross-country Cars (of a Cylinder Capacity \geq 2000cc) Originating from the United States, MOFCOM Public Notice [2009] No.84 (“CVD Initiation Notice”) (Exhibit USA-07).

¹⁵ AD Initiation Notice, pp. 1-2 (Exhibit USA-06); CVD Initiation Notice, p. 2 (Exhibit USA-07).

cross-country cars of a cylinder capacity greater than 2500cc.¹⁶ The period of investigation was September 1, 2008, to August 31, 2009, for the investigations of dumping and subsidization, and January 1, 2006 to September 30, 2009 for injury.¹⁷

14. MOFCOM notified the producers identified in the petition of the initiation of the investigations and requested that the U.S. Embassy in China notify any other exporters and producers.¹⁸ MOFCOM required any U.S. exporter that wished to participate in the investigations to register with MOFCOM by November 26, 2009.¹⁹

15. On December 9, 2009 MOFCOM issued AD questionnaires to General Motors, Chrysler, Mercedes-Benz and its affiliated company Daimler, BMW, Honda, Mitsubishi, and Ford.²⁰ Mitsubishi announced its withdrawal from the investigation on December 28, 2009. The remaining respondents submitted their AD questionnaire responses in January 2010.²¹ In March 2011, following more than one year of apparent inactivity, MOFCOM issued supplemental AD questionnaires to the respondents “concerning the problems contained in the initial dumping questionnaire responses.”²²

16. Similarly, on December 9, 2009, MOFCOM issued CVD questionnaires to the United States government, as well as to General Motors, Chrysler, Ford, Mercedes-Benz, BMW, Honda, and Mitsubishi. Mitsubishi announced its withdrawal from the investigation on December 28, 2009, and the remaining respondents submitted their AD questionnaire responses in January 2010.²³ As in the antidumping investigation, in March 2011, following more than one year of apparent inactivity, MOFCOM issued supplemental CVD questionnaires to the respondents “concerning problems contained in the initial [CV] questionnaire responses.”²⁴

¹⁶ Preliminary Determination of the Ministry of Commerce, People’s Republic of China on the Anti-Dumping and Countervailing Investigations against Some Car Imports Originating from the U.S., pp. 14-16 (“Preliminary Determination”) (Exhibit USA-08)

¹⁷ AD Initiation Notice, p. 1 (Exhibit USA-06); CVD Initiation Notice, p. 2 (Exhibit USA-07).

¹⁸ Final Determination, section I.A.1(2), pp. 3-4 (Exhibit USA-02).

¹⁹ AD Initiation Notice, p. 2 (Exhibit USA-06); CVD Initiation Notice, p. 4 (Exhibit USA-07).

²⁰ Final Determination, section I.B.1(1), p. 4 (Exhibit USA-02).

²¹ Final Determination, section I.B.1(2), p. 5 (Exhibit USA-02).

²² Final Determination, section I.B.1(3), p. 5 (Exhibit USA-02).

²³ Final Determination, section I.B.2(2), p. 6 (Exhibit USA-02).

²⁴ Final Determination, section I.B.2(3), p. 6 (Exhibit USA-02).

D. Preliminary Determination

17. On April 2, 2011, nearly 17 months after initiating the investigations, MOFCOM published its preliminary determination in the antidumping and countervailing duty investigations, finding that certain automobiles from the United States were dumped and subsidized during the period of investigation and that subject imports had caused material injury to the domestic industry.²⁵

18. With respect to dumping, MOFCOM assigned five of the six respondents the following preliminary dumping margins: General Motors (9.9 percent), Chrysler (8.8 percent), Mercedes-Benz (2.7 percent), BMW (2.0 percent), and Honda (4.4 percent).²⁶ Notably, MOFCOM applied a higher “All Others” dumping margin of 21.5 percent to respondent Ford, even though Ford filed the same detailed questionnaire responses as the five companies that received individual margins.²⁷

19. With regard to other U.S. companies, MOFCOM indicated that it decided to “us[e] available facts and the best information available, to apply the dumping margin claimed in the petition[.]”²⁸ MOFCOM assigned a dumping margin of 21.5 percent to these companies.²⁹

20. With respect to subsidization, MOFCOM assigned five of the six respondents the following countervailing duty rates: General Motors (12.9 percent), Chrysler (6.2 percent), Mercedes-Benz (0.0 percent), BMW (0.0 percent), and Honda (0.0 percent).³⁰ MOFCOM applied the weighted average subsidy rate of General Motors, 12.9 percent, to all other U.S. companies.³¹

21. As to other U.S. companies, the preliminary determination indicates that MOFCOM decided to “apply the *ad valorem* subsidy rate of General Motors LLC to these companies” by “adopting available facts[.]”³²

²⁵ See Final Determination, section I.D, p. 14 (Exhibit USA-02); see also Preliminary Determination (Exhibit USA-08).

²⁶ Preliminary Determination, section VIII, p. 55 (Exhibit USA-08).

²⁷ See Final Determination, section I.B.1(2), p. 5 (Exhibit USA-02).

²⁸ Preliminary Determination, section IV.A.6, p. 31 (Exhibit USA-08).

²⁹ Preliminary Determination, section VIII, p. 55 (Exhibit USA-08).

³⁰ Preliminary Determination, section VIII, p. 55 (Exhibit USA-08).

³¹ Preliminary Determination, section V.A.3(3), p. 44 (Exhibit USA-08).

³² Preliminary Determination, section V.A.3(3), p. 44 (Exhibit USA-08).

22. With regard to injury, MOFCOM defined the domestic industry as limited to “domestic producers represented by the China Association of Automobile Manufacturers[.]”³³ MOFCOM’s principal injury findings included that: (i) dumped and subsidized imports had depressed prices for the domestic like product;³⁴ (ii) allegedly dumped and subsidized imports had an adverse impact on the domestic industry,³⁵ and (iii) there was a causal link between subject imports and the alleged injury to the domestic industry.³⁶

E. Comments on the Preliminary Determination

23. On April 11, 12, and 14, 2011, the U.S. government and U.S. respondents submitted written comments to MOFCOM on the preliminary determination.³⁷

F. Disclosure Documents

24. MOFCOM disclosed to the U.S. government and U.S. respondents the so-called “Basic Facts” relied upon for the dumping margin calculation and the subsidy rate calculation in the preliminary determination, on April 2, 2011.³⁸

25. On April 15, 2011, the Investigation Bureau of Industry Injury disclosed to the U.S. government and U.S. respondents the “Basic Facts” upon which the injury determination was based.³⁹ On April 18, 2011, MOFCOM disclosed the “Basic Facts” relied upon for the dumping margin calculation and for the subsidy calculation in the final determination.⁴⁰

³³ Preliminary Determination, section III.B, p. 18 (Exhibit USA-08).

³⁴ Preliminary Determination, section VI.B.3, p. 46 (Exhibit USA-08).

³⁵ Preliminary Determination, section VI.D, p. 51 (Exhibit USA-08).

³⁶ Preliminary Determination, section VII.A, p. 52 (Exhibit USA-08).

³⁷ Final Determination, section I.E.3(2), p. 18 (Exhibit USA-02).

³⁸ Letter on the Disclosure of Basic Facts upon which the Dumping Margin and Ad Valorem Subsidy Rate are based in the Preliminary Determination of the Auto AD and CVD Investigation against the U.S., April 2, 2011 (“Preliminary Disclosure”) (Exhibit USA-09).

³⁹ Disclosure of Basic Facts upon which the Industry Injury Determination is based in the AD and CVD Investigations of Some Cars Originating from the U.S., April 15, 2011 (“Final Disclosure (Injury)”) (Exhibit USA-10).

⁴⁰ Disclosure of Basic Facts upon which the Dumping Margin and Ad Valorem Subsidy Rate are based in the Final Determination of the Auto AD and CVD Investigation against the U.S., April 18, 2011 (“Final Disclosure (AD/CVD)”) (Exhibit USA-11).

G. Final Determination and Imposition of Antidumping and Countervailing Duties

26. On May 5, 2011, approximately one month after having issued its preliminary determination in the antidumping and countervailing duty investigations of certain automobiles from the United States, MOFCOM issued its final determination.

27. With respect to dumping, as it did in the preliminary determination, MOFCOM found dumping.⁴¹ MOFCOM assigned five of the six respondents the following final dumping margins: General Motors (8.9 percent), Chrysler (8.8 percent), Mercedes-Benz (2.7 percent), BMW (2.0 percent), and Honda (4.1 percent).⁴² As it did in the preliminary determination, MOFCOM determined an “All Others” dumping margin of 21.5 percent, which it applied to respondent Ford.⁴³

28. With respect to subsidization, MOFCOM found that certain automobiles from the United States were subsidized.⁴⁴ MOFCOM assigned respondents the following countervailing duty rates: General Motors (12.9 percent), Chrysler (6.2 percent), Mercedes-Benz (0.0 percent), BMW (0.0 percent), Honda (0.0 percent), and Ford (0.0 percent).⁴⁵ MOFCOM applied the subsidy rate determined for General Motors, 12.9 percent, to all other U.S. companies.⁴⁶

29. In the final determination, MOFCOM found that the allegedly dumped and subsidized imports had caused material injury to the domestic industry. MOFCOM’s definition of the domestic industry was again limited to the domestic enterprises supporting the investigations, and the key injury findings in the final determination mirrored those in the preliminary determination.⁴⁷

30. Despite finding dumping, subsidization, and injury, MOFCOM determined at the time of the final determination not to collect antidumping or countervailing duties on certain automobiles from the United States.⁴⁸ Subsequently, MOFCOM reversed that decision and, on December 14,

⁴¹ Final Determination, section VIII, p. 83 (Exhibit USA-02).

⁴² Final Determination, section VIII, p. 83 (Exhibit USA-02).

⁴³ Final Determination, section VIII, p. 83 (Exhibit USA-02).

⁴⁴ Final Determination, section VIII, p. 83 (Exhibit USA-02).

⁴⁵ Final Determination, section VIII, p. 83 (Exhibit USA-02).

⁴⁶ Final Determination, section V.A.3.(4), p. 61 and section VIII, p. 83 (Exhibit USA-02).

⁴⁷ See Final Determination, section VIII, p. 83 (Exhibit USA-02).

⁴⁸ Announcement No. 20, 2011, of the Ministry of Commerce of the People’s Republic of China, p. 2 (Exhibit USA-01).

2011, began collecting antidumping and countervailing duties consistent with the findings in the final determination.⁴⁹

IV. STANDARD OF REVIEW

31. The applicable standard of review in this dispute is that stated in Article 11 of the DSU and Article 17.6 of the AD Agreement. Article 11 provides:

The function of panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements. Panels should consult regularly with the parties to the dispute and give them adequate opportunity to develop a mutually satisfactory solution.

32. Article 17.6 of the AD Agreement provides that:

(i) in its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned;

(ii) the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.

33. Per these standards, the Panel must examine whether MOFCOM's conclusions are "reasoned and adequate" in "light of the evidence."⁵⁰ In order to do so, the

panel's examination of those 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.

⁴⁹ Announcement No. 84, 2011, of the Ministry of Commerce of the People's Republic of China, December 14, 2011 (imposing antidumping and countervailing duties) (Exhibit USA-03).

⁵⁰ *US – Softwood Lumber VI (Article 21.5 – Canada) (AB)*, para. 93.

The panel’s scrutiny should test whether the reasoning of the authority is coherent and internally consistent. The panel must undertake an in-depth examination of whether the explanations given disclose how the investigating authority treated the facts and evidence in the record and whether there was positive evidence before it to support the inferences made and conclusions reached by it. The panel must examine whether the explanations provided demonstrate that the investigating authority took proper account of the complexities of the data before it, and that it explained why it rejected or discounted alternative explanations and interpretations of the record evidence.⁵¹

34. Accordingly, the standard of review recognizes that investigating authorities in anti-dumping and countervailing duty investigations may have to consider conflicting arguments and evidence and that they will need to exercise discretion. However, it does not entitle an investigating authority to automatic deference regarding the exercise of that discretion. To the contrary, the investigating authority is responsible for ensuring that its explanations reflect that conflicting evidence was considered:

[I]t is in the nature of anti-dumping and countervailing duty investigations that an investigating authority will gather a variety of information and data from different sources, and that these may suggest different trends and outcomes. The investigating authority will inevitably be called upon to reconcile this divergent information and data. However, the evidentiary path that led to the inferences and overall conclusions of the investigating authority must be clearly discernible in the reasoning and explanations found in its report. When those inferences and conclusions are challenged, it is the task of a panel to assess whether the explanations provided by the authority are “reasoned and adequate” by testing the relationship between the evidence on which the authority relied in drawing specific inferences, and the coherence of its reasoning. In particular, the panel must also examine whether the investigating authority’s reasoning takes sufficient account of conflicting evidence and responds to competing plausible explanations of that evidence. This task may also require a panel to consider whether, in analyzing the record before it, the investigating authority evaluated all of the relevant evidence in an objective and unbiased manner, so as to reach its findings “without favouring the interests of any interested party, or group of interested parties, in the investigation.”⁵²

⁵¹ *US – Softwood Lumber VI (Article 21.5 – Canada) (AB)*, para. 93.

⁵² *US – Softwood Lumber VI (Article 21.5 – Canada) (AB)*, para. 97 (footnote omitted).

V. PROCEDURAL FLAWS IN MOFCOM’S INVESTIGATIONS OF CERTAIN AUTOMOBILES FROM THE UNITED STATES

A. China Breached Article 6.5.1 of the AD Agreement and Article 12.4.1 of the SCM Agreement by Failing to Require the Provision of Adequate Non-Confidential Summaries.

35. In its antidumping and countervailing duty investigations of the product at issue, China accepted confidential information without requiring adequate non-confidential summaries of that information. This lack of transparency significantly prejudiced the ability of U.S. companies and the United States to defend their interests. In this case, China acted inconsistently with its obligations under Article 6.5.1 of the AD Agreement and Article 12.4.1 of the SCM Agreement.

1. Article 6.5.1 of the AD Agreement and Article 12.4.1 of the SCM Agreement Require the Preparation of Non-Confidential Summaries Absent Exceptional Circumstances.

36. An investigating authority that accepts confidential information from an interested party must also require that party to provide a non-confidential summary of such information. Specifically, Article 6.5.1 of the AD Agreement and Article 12.4.1 of the SCM Agreement provide:

The authorities shall require [interested Members or] interested parties providing confidential information to furnish non-confidential summaries thereof. These summaries shall be in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence. In exceptional circumstances, such [Members or] parties may indicate that such information is not susceptible of summary. In such exceptional circumstances, a statement of the reasons why summarization is not possible must be provided.⁵³

37. The text of Article 6.5.1 of the AD Agreement and Article 12.4.1 of the SCM Agreement contains four key elements with respect to the obligation to require non-confidential summaries from interested parties that submit confidential information. First, the Articles *obligate* an investigating authority to ensure that non-confidential summaries of information submitted by interested parties are furnished, as evidenced by the fact that the opening sentence of these provisions is expressed in the mandatory: “authorities *shall require*”⁵⁴

38. Second, the provision applies to information submitted by any interested party in the investigation. The petitioner was an interested party in the investigation and therefore China had an obligation to require the petitioner to provide non-confidential summaries under Articles 6.5.1 and 12.4.1.

⁵³ The only difference in the text of the two provisions is that Article 12.4.1 of the SCM Agreement includes the bracketed text.

⁵⁴ See *China – GOES (Panel)*, para. 7.189.

39. Third, the obligation to provide a non-confidential summary or an explanation of why summarization is not possible falls on the interested Member or interested party submitting the information. The first sentence of Article 6.5.1 of the AD Agreement and 12.4.1 of the SCM Agreement obligates the investigating authority to require the “interested Members or interested parties” to “furnish non-confidential summaries.” Thus, in *China – GOES*, the panel rejected China’s argument that MOFCOM could fulfill its obligation to require the petitioner to provide non-confidential summaries by substituting its own non-confidential summary.⁵⁵ The third and fourth sentences specify that if the interested Member or interested party indicates that the information is not susceptible of summary, “a statement of the reasons why summarization is not possible must be provided.” In this regard, the Appellate Body has highlighted the risk of abuse in investigations if these requirements are not met:

For its part, the investigating authority must scrutinize such statements to determine whether they establish exceptional circumstances, and whether the reasons given appropriately explain why, under the circumstances, no summary that permits a reasonable understanding of the information’s substance is possible. As the Panel found, ‘in the absence of scrutiny of non-confidential summaries or stated reasons why summarization is not possible by the investigating authority, the potential for abuse under Article 6.5.1 would be unchecked unless and until the matter were reviewed by a panel.’⁵⁶

40. In *China – GOES*, the panel concluded that China acted inconsistently with Article 6.5.1 of the AD Agreement and Article 12.4.1 of the SCM Agreement because MOFCOM failed to require adequate non-confidential summaries of confidential information included in the application.⁵⁷ The panel found the general non-confidential summary section of the GOES application inadequate.⁵⁸ The panel also rejected China’s arguments that certain sections of the application as a whole qualified as adequate non-confidential summaries.⁵⁹

41. Fourth, it is useful to recognize what is not in these provisions. Notably absent is any suggestion that these provisions require an interested party to contest the adequacy of a non-confidential summary, or derive a non-confidential summary from the information contained in an application. The panel in *China – GOES* rejected the argument that a respondent must contest the adequacy of non-confidential summaries during the investigation,⁶⁰ and found that the provisions do not require interested parties to “infer, derive and piece together a possible

⁵⁵ *China – GOES (Panel)*, para. 7.190.

⁵⁶ *EC – Fasteners (China) (AB)*, para. 544.

⁵⁷ *China – GOES (Panel)*, paras. 7.224–7.225.

⁵⁸ *China – GOES (Panel)*, para. 7.200.

⁵⁹ *China – GOES (Panel)*, para. 7.224.

⁶⁰ *China – GOES (Panel)*, para. 7.191.

summary of the confidential information.”⁶¹ Requiring interested parties to engage in such guesswork impairs an interested party’s ability to defend its interests, and nullifies the transparency and due process protections contained in these provisions.

2. The Non-Confidential Summaries Are Inadequate.

42. In the investigations at issue, the petitioner did not present to MOFCOM any particular circumstances, let alone exceptional ones, that explained why the information in question was not susceptible to non-confidential summary. The petitioner did not provide any explanation other than a simple assertion that the information was confidential.⁶² Yet MOFCOM failed to require the petitioner to prepare non-confidential summaries of information it submitted. The following examples from the application illustrate the non-confidential information for which MOFCOM did not require summaries.

a. Sales to Output Ratio, Return on Investment, Salary, Apparent Consumption

43. For several categories of information, the petitioner simply redacted the information contained in the application. For instance:

Sales to output ratio - Table 19	Petitioner’s combined sales production ratios are redacted. Percent changes are redacted. ⁶³
Return on investment - Table 27	Petitioner’s change in return on investment is redacted. Percent changes are redacted. ⁶⁴
Salary - Table 29	Petitioner’s combined data not reported. Percent changes are redacted. ⁶⁵

The shortcomings in summarization are glaring. For example, under Table 27 the application provides that:

... the rate plummeted in 2008 from [confidential] in 2006 to [confidential]. Despite the 4 trillion Yuan stimulus package and the reduction of auto purchase

⁶¹ *China – GOES (Panel)*, para. 7.202.

⁶² Amended Petition, p. 111 (Exhibit USA-05) (“[T]he petitioner requests that the following materials . . . should be treated secretly . . . e.g. prohibiting any contact, consultation, file retrieval or query for any materials of this application’s non-disclosure part in any way.”).

⁶³ Amended Petition, Table 19, pp. 94-95 (Exhibit USA-05).

⁶⁴ Amended Petition, Table 27, pp. 99-100 (Exhibit USA-05).

⁶⁵ Amended Petition, Table 29, p. 101 (Exhibit USA-05).

tax, the rate was only [confidential] in the first three quarters in 2009, which is against the market regulations. This shows that the dumping of the subject merchandise severely affected production and operation of the petitioner, and a lot of its investment cannot be recovered.⁶⁶

These sentences do nothing to shed light on the contents of the redacted information. Moreover, the appendix containing statistics on injury was treated as confidential, and no non-confidential summary was provided. As a result, respondents could not view the data or non-confidential summaries of the data.⁶⁷ As in *China – GOES*, the respondents were left in the dark about the substance of the information provided.⁶⁸

44. For apparent consumption, Table 21, apparent consumption volume is redacted.⁶⁹ Percent changes in volume for 2006-2007 and 2007-2008 are reported, but confusingly, the percent changes from the first three quarters of 2008 compared to the first three quarters of 2009 are redacted. Other tables set out percent changes from the first three quarters of 2008 compared to the first three quarters of 2009.⁷⁰ Yet no explanation is given as to why this information has been redacted in Table 21. The application indicates that Appendix 2 includes apparent consumption statistics. This appendix, however, was treated as confidential; interested parties, thus, could not view the information contained in the appendix.

b. Other Economic Indicators

45. For a number of other data categories, the application indicates year-on-year percentage changes for the POI, but it does not provide a non-confidential summary of the actual values associated with the percentage changes. Again, the application contains no explanation for why such information could not be summarized.⁷¹ The petitioner itself reported that it consisted of several different entities.⁷² Even if some of the redacted information related to individual company data, MOFCOM could have required a non-confidential summary consisting of the

⁶⁶ Amended Petition, p. 100 (Exhibit USA-05).

⁶⁷ See Amended Petition, Appendix 9 (Exhibit USA-05).

⁶⁸ *China – GOES (Panel)*, para. 7.213 (“the due process objective of Articles 12.4.1 and 6.5.1 may be undermined, as an interested party may not be aware that the redacted information has in fact been summarized and can be contested.”).

⁶⁹ Amended Petition, p. 96 (Exhibit USA-05).

⁷⁰ Compare to, e.g., Table 17.

⁷¹ Amended Petition, pp. 93-104 (Exhibit USA-05) (Tables reporting product capacity, output, sales volume, inventory, pre-tax profit, number of employees, productivity, and cash flow).

⁷² Amended Petition, p. 9 (Exhibit USA-05).

aggregate data from the various petitioner companies. Yet it failed to require any such summary, thereby preventing respondents from addressing the submitted information.⁷³

46. Due to the petitioner’s extensive reliance on what it characterized as confidential information, the fact that MOFCOM did not require non-confidential summaries of the information that was capable of summary was a significant failure, which seriously compromised the ability of the United States and U.S. companies to respond to the petitioners’ allegations. Because MOFCOM did not require adequate non-confidential summaries, the respondents could not adequately defend their interests.

B. China Breached Article 6.9 of the AD Agreement by Failing to Disclose the Calculations and Data Used to Determine the Existence of Dumping and Calculate Dumping Margins.

47. China breached Article 6.9 of the AD Agreement by failing to disclose to interested parties the “essential facts” forming the basis of MOFCOM’s decision to apply antidumping duties. In particular, China failed to make available the data it used and calculations it performed to determine the existence and margin of dumping, including the calculation of the normal value and export price for the respondents.

1. Article 6.9 of the AD Agreement Requires the Investigating Authority to Disclose to Interested Parties the Calculations and Data Used to Determine the Existence of Dumping and to Calculate Dumping Margins.

48. Article 6.9 of the AD Agreement requires the investigating authority to disclose to interested parties the “essential facts” forming the basis of the investigating authority’s decision to apply anti-dumping duties:

The authorities shall, before a final determination is made, inform all interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures. Such disclosure should take place in sufficient time for the parties to defend their interests.

49. Article 6.9 pertains to the disclosure of “facts.” A “fact” is “[a] thing known for certain to have occurred or to be true; a datum of experience” and “[e]vents or circumstances as distinct from their legal interpretation.”⁷⁴ The use of the adjective “essential” indicates that this obligation does not encompass “any and all” facts, but rather, is concerned only with the

⁷³ Under China’s system, interested parties may only access information that is designated non-confidential.

⁷⁴ New Shorter Oxford English Dictionary (Clarendon Press, 1993) (Exhibit USA-13); *see also EC – Salmon (Norway)* para. 7.805 (“In our view, essential facts to be disclosed under Article 6.9 may qualify under any of these meanings of the word fact.”) (citing these same definitions).

“essential facts.” The ordinary meaning of “essential” is “of or pertaining to a thing’s essence” and “absolutely indispensable or necessary.”⁷⁵

50. Moreover, the obligation to disclose “essential facts” encompasses those essential facts “under consideration which form the basis for the decision whether to apply definitive measures.” The term “consideration” has been defined, *inter alia*, as “the action of taking into account.”⁷⁶ Thus, for purposes of the investigating authority’s dumping determination, the essential facts under Article 6.9 are the “indispensable and necessary” facts considered by the investigating authority in determining whether definitive measures are warranted – *e.g.*, whether dumping has occurred and, if so, the magnitude of such dumping.⁷⁷

51. The calculations relied on by an investigating authority to determine the normal value and export price – as well as the data underlying those calculations – constitute “essential facts” forming the basis of the investigating authority’s imposition of final measures within the meaning of Article 6.9.⁷⁸ These data are “facts” because they are things “known for certain to have occurred.” For example, the existence of a particular sales transaction at a given price during the period of investigation is an actual “event or circumstance” known to have occurred. The investigating authority aggregates, disaggregates or otherwise mathematically manipulates this adjusted data to calculate the normal value and export price. These calculations similarly are “facts” because they also represent things known to have occurred, as distinct from the investigating authority’s reasoning or legal interpretation of those data.

52. The calculations and underlying data are facts that are “absolutely indispensable” to the determination of the existence and magnitude of dumping. The investigating authority must consider the margin calculations, along with their constituent values, in making a decision to apply a duty. Without such information, no affirmative determination could be made and no definitive duties could be imposed. Article 6.9 requires that investigating authorities inform interested parties of essential facts under consideration prior to making a final determination of dumping. As Article 6.9 expressly provides, the aim of the requirement is “to permit parties to defend their interests.” The panel in *EC – Salmon (Norway)* stated:

We consider that the purpose of disclosure under Article 6.9 is to provide the interested parties with the necessary information to enable them to comment on the completeness and correctness of the facts being considered by the investigating authority, provide additional information or correct perceived errors,

⁷⁵ New Shorter Oxford English Dictionary (Clarendon Press 1993) (Exhibit USA-13).

⁷⁶ New Shorter Oxford English Dictionary (Clarendon Press 1993) (Exhibit USA-13).

⁷⁷ The Panel in *EC – Salmon (Norway)* indicated that essential facts included not only those facts supporting a determination, but encompassed “the body of facts essential to any determination that are being considered in the process of analysis and decision-making by the investigating authority.” *EC – Salmon (Norway)*, para. 7.796.

⁷⁸ The data underlying the investigating authority’s calculations consist of various production costs and sales data submitted by the interested parties and adjusted, where appropriate, by the investigating authority.

and comment on or make arguments as to the proper interpretation of those facts.⁷⁹

53. If an investigating authority does not provide the interested parties access to these facts on a timely basis, they cannot defend their interests. If, for example, the investigating authority does not provide an interested party the calculations used to determine the existence and magnitude of dumping, or the data underlying those calculations, the interested party cannot review the investigating authority's calculations to determine whether they contain clerical or mathematical errors, or whether the investigating authority actually did what it purported to do. Unless an interested party is provided with these essential facts, it cannot adequately defend its interests.⁸⁰

2. MOFCOM Failed to Disclose the Calculations and Data it Used to Determine the Existence of Dumping and Arrive at the Dumping Margins.

54. The preliminary and final antidumping determinations provided only MOFCOM's vague descriptions of its methodologies for determining and adjusting the normal value and export price for the respondent companies. They do not contain the actual data used in the dumping margin calculations and the calculations themselves.

55. The calculations and related information MOFCOM should have made available include, but are not limited to: (1) all calculations performed with respect to the derivation of normal value; (2) all calculations performed with respect to the derivation of export price; and (3) all calculations performed with respect to the determination of costs of production. For normal value, export price, and costs of production, MOFCOM should have provided the details of any data adjustments or manipulations performed by MOFCOM on the data provided by each respondent, made available adjustments and revisions made by MOFCOM to the sales data provided by each respondent, and specifically identified any data provided by each respondent that was eliminated or rejected by MOFCOM. These facts were "essential" to MOFCOM's dumping determination because they formed the basis of its decision to apply definitive measures and the determination of the dumping margins.

56. MOFCOM's failure to make available the calculation data prevented the respondents from knowing basic information about how the dumping margins to which they would be subject had been determined. Without the actual calculations performed by the investigating authority, it

⁷⁹ *EC – Salmon (Norway)*, para 7.805.

⁸⁰ The actual data and calculations must be disclosed because even a clerical or mathematical mistake, or a mistake in a conversion of units, could result in a serious distortion of the dumping margin. Any number of inadvertent errors could occur, including, for example: (i) errors in currency or other conversions (such as mistakenly treating the unit of measurement of data in pounds, although the data were reported in kilograms or mistakenly neglect to convert various expenses incurred in different markets to a common currency before deducting or adding those expenses in calculating normal value or export price); (ii) the omission of a sale from the calculations; (iii) not deducting an expense that was intended to be deducted; or (iv) simply misplacing a decimal point. Any such mistakes would not be apparent from the information provided by MOFCOM to the interested parties in this case.

is not possible to check the calculations against the methodological explanations given, to ensure the completeness and accuracy of the investigating authority's calculations.

57. Thus, MOFCOM's failure to make available the data and calculations it used to determine the existence and margin of dumping, including the calculation of the normal value and export price for the respondents, is inconsistent with Article 6.9 of the AD Agreement.

VI. MOFCOM'S FLAWED ALL OTHERS DUMPING DETERMINATION

A. MOFCOM's Determination of the All Others Rate Is Inconsistent with Articles 6.8, 6.9, 12.2, and 12.2.2 of the AD Agreement.

58. In the final determination, MOFCOM applied the all others dumping margin of 21.5 percent to unexamined U.S. producers/exporters. It did so despite the fact that the dumping margin for the respondents ranged from 2 percent to 8.9 percent.⁸¹ MOFCOM's explanation for its all others dumping margin was that, pursuant to Article 21 of its Anti-Dumping Regulation, it relied on "the best information available and facts that were adopted in the PD, and appl[ied] the dumping margin claimed in the petition" for all other U.S. companies.⁸²

1. MOFCOM's Use of Facts Available Is Inconsistent with Article 6.8 and Annex II of the AD Agreement.

59. China acted inconsistently with Article 6.8 of the AD Agreement and paragraph 1 of Annex II because MOFCOM applied (apparently adverse) facts available, despite the fact that it did not notify the relevant producers of the information required of them, and the producers did not refuse to provide necessary information or otherwise impede the dumping investigation.

60. Article 6.8 states as follows:

In cases in which any interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation, preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available. The provisions of Annex II shall be observed in the application of this paragraph.

Article 6.8 thus establishes that an investigating authority may only resort to the facts available where an interested party "refuses access to" or otherwise "does not provide" information that is "necessary" to the investigation, or otherwise "significantly impedes" the investigation. An

⁸¹ MOFCOM applied an all others rate of 21.5 percent to Ford, despite the fact that Ford did not export to China during the period of investigation: "Since Ford did not have any exports during the POI, there was no export price." Final Determination, section IV.A.6, p. 41 (Exhibit USA-02).

⁸² Final Determination, section IV.A.6, p. 41 (Exhibit USA-02).

investigating authority may not assign a margin based on facts available when the authority has not requested the information in the first place.⁸³

61. The Appellate Body in *Mexico – Anti-Dumping Measures on Rice* explained that an exporter must be given the opportunity to provide information required by an investigating authority before the latter resorts to facts available that can be adverse to the exporter’s interests.⁸⁴ An exporter that is unknown to the investigating authority is not notified of the information required, and thus is denied an opportunity to provide it. In that dispute, the Appellate Body found that the Mexican authorities breached Article 6.8 by using facts available contained in the petition to calculate dumping margins for exporters that the authorities did not investigate and did not give notice of the information required by the investigating authority.⁸⁵ Similarly, the panel in *Mexico – Anti-Dumping Measures on Rice* noted that exporters not given notice of the information required of them cannot be considered to have failed to provide necessary information.⁸⁶

62. Article 6.8 must be read together with paragraph 1 of Annex II.⁸⁷ Paragraph 1 of Annex II of the AD Agreement requires investigating authorities to ensure that respondents receive proper notice of the rights of the investigating authorities to use the facts available.⁸⁸

As soon as possible after the initiation of the investigation, the investigating authorities should specify in detail the information required from any interested party, and the manner in which that information should be structured by the interested party in its response. The authorities should also ensure that the party is aware that if information is not supplied within a reasonable time, the authorities will be free to make determinations on the basis of the facts available,

⁸³ Article 6.1 of the AD Agreement provides context for Article 6.8 by establishing that the investigating authorities must indicate to the interested parties the information that they require: “All interested parties in an anti-dumping investigation shall be given notice of the information which the authorities require and ample opportunity to present in writing all evidence which they consider relevant in respect of the investigation in question.” Article 6.1 thus establishes that an investigating authority that has decided to include a particular exporter or producer “in the antidumping investigation” cannot simply announce that it has initiated the investigation and place the burden on the producer or exporter to come forward and “appear.” Rather, the investigating authority must affirmatively reach out and “give notice” of the information that it requires. See *Argentina – Ceramic Tiles*, para. 6.54: “[A]n investigating authority may not fault an interested party for not providing information it was not clearly requested to submit.”

⁸⁴ *Mexico – Anti-Dumping Measures on Rice (AB)*, paras. 258-264.

⁸⁵ *Mexico – Anti-Dumping Measures on Rice (AB)*, paras. 258-264.

⁸⁶ *Mexico – Anti-Dumping Measures on Rice (Panel)*, fn. 211.

⁸⁷ *China – GOES (Panel)*, 7.384.

⁸⁸ *US – Hot-Rolled Steel (AB)*, para. 79 (stating that paragraph 1 of Annex II “is specifically concerned with ensuring that respondents receive proper notice of the rights of the investigating authorities to use facts available . . .”).

including those contained in the application for the initiation of the investigation by the domestic industry.

Article 6.8 and Annex II, paragraph 1 together ensure that an exporter or producer has an opportunity to provide information required by an investigating authority before the latter resorts to the use of facts available.⁸⁹ The panel in *China – GOES* found that China’s failure to notify the “all other” exporters of the necessary information required of them did not satisfy the precondition for resorting to facts available found in paragraph 1 of Annex II of the AD Agreement and, as a result, China acted inconsistently with Article 6.8 of the AD Agreement.⁹⁰

63. In the antidumping investigation of certain automobiles from the United States, MOFCOM sent its antidumping questionnaire to only the producers/exporters that the petitioners identified in the petition. MOFCOM made no attempt to even identify whether any other U.S. exporters/producers might exist. Rather, MOFCOM notified the identified producers and the U.S. Embassy of the initiation of the antidumping investigation and requested that the U.S. Embassy “notify relevant exporters and producers.”⁹¹

64. Indeed, MOFCOM had no evidence that any interested party “refused access to” or otherwise “did not provide” information that was “necessary” to the antidumping investigation, or otherwise “significantly impeded” the antidumping investigation. As was the case in *China – GOES*, other exporters of subject merchandise were non-existent: no other U.S. exporters of automobiles existed at the time of the antidumping investigation of certain automobiles from the United States.

65. Therefore, China’s application of facts available was improper, as it is logically impossible for a non-existent exporter to fail to cooperate.⁹² By applying facts available in these circumstances, China breached Article 6.8 of the AD Agreement and paragraph 1 of Annex II.

2. China Acted Inconsistently with Article 6.9 of the AD Agreement by Failing to Disclose the Essential Facts under Consideration Regarding its Calculation of the “All Others” Dumping Rate.

66. MOFCOM failed to inform the United States and other interested parties “of the essential facts under consideration” which formed the basis for this calculation in time for the

⁸⁹ *Argentina – Ceramic Tiles*, para. 6.55 (providing that the inclusion in Annex II, paragraph 1, of a requirement to specify in detail the information required “strongly implies that investigating authorities are not entitled to resort to best information available in a situation where a party does not provide certain information if the authorities failed to specify in detail the information which was required.”).

⁹⁰ *China – GOES (Panel)*, para. 7.393.

⁹¹ Preliminary Determination, I.B.1, p. 3 (Exhibit USA-08).

⁹² “It is not clear how non-existent exporters could possibly refuse to provide information or impede an investigation.” *China – GOES (Panel)*, para. 7.387 (finding that China breached the AD Agreement by using facts available to determine the all others AD margin).

United States and other interested parties to defend their interests. Therefore, MOFCOM's calculation of the all others dumping rate also was inconsistent with Article 6.9 of the AD Agreement.

a. MOFCOM's Determinations and Disclosures

67. In the preliminary determination, MOFCOM established an all others dumping rate of 21.5 percent. MOFCOM explained its determination in a single sentence: "For other U.S. companies, in accordance with Article 21 of the AD regulations, the Investigating Authority decided, using available facts and the best information available, to apply the dumping margin claimed in the petition to these companies."⁹³ Article 21 of China's Anti-Dumping Regulation pertains to the use of facts available. MOFCOM provided no further explanation of its calculation of the all others dumping rate, and it did not disclose the information forming the basis for the calculation of this rate. Nor did MOFCOM further explain its decision to apply the petition rate or the steps that it took to evaluate or corroborate the margin information provided in the petition.

68. Prior to the final determination, MOFCOM released its final disclosure to the United States and interested parties. In the final disclosure, MOFCOM reported an all others dumping rate of 21.5 percent,⁹⁴ and provided no further information beyond repeating the single sentence contained in its preliminary determination.

69. In the final determination, MOFCOM established a final all others dumping rate of 21.5 percent. It did so despite the fact that the dumping rates for the other respondents ranged from 2 percent to 8.9 percent. Again, MOFCOM's cursory explanation referred to Article 21 of its Anti-Dumping Regulation and indicated that it relied upon "the best information available and facts that were adopted in the PD, and appl[ied] the dumping margin claimed in the petition" for all other U.S. companies.⁹⁵

b. MOFCOM Failed to Disclose the Essential Facts under Consideration Forming the Basis for the All Others Dumping Rate, and the United States Was Deprived of Its Ability to Defend Its Interests as a Result.

70. Article 6.9 of the AD Agreement provides:

The authorities shall, before a final determination is made, inform all interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures. Such disclosure should take place in sufficient time for the parties to defend their interests.

⁹³ Preliminary Determination, section IV.C, p. 31 (Exhibit USA-08).

⁹⁴ Final Disclosure (AD/CVD), section III.6(3), p. 25 (Exhibit USA-02).

⁹⁵ Final Determination, section IV.A.6, p. 41 (Exhibit USA-02).

As noted elsewhere in this submission, the obligation contained in Article 6.9 applies to: (1) essential facts (as opposed to reasoning), that (2) form the basis for the decision to apply definitive measures. The purpose of Article 6.9 is to make clear to interested parties the information on which the investigating authority will rely in deciding whether to apply definitive measures.

71. Here, MOFCOM did not identify the essential facts that formed the basis for its imposition of a 21.5 percent all others dumping rate. As described above, its disclosure consisted of a single sentence. Noticeably absent from its determination are the following types of facts that would be necessary to MOFCOM's decision to apply facts available:

- Facts relating to whether or not the U.S. companies refused access to necessary information or significantly impeded the antidumping investigation. Article 6.8 of the AD Agreement allows investigating authorities to use facts available if an interested party refused access to, or otherwise did not provide, necessary information within a reasonable period of time, or significantly impeded the antidumping investigation. Thus, facts essential to MOFCOM's determination include facts relating to the actions of the companies covered by the "all others" rate that in MOFCOM's view constituted refusing access to necessary information or impeding the antidumping investigation.
- Facts that led MOFCOM to conclude that a 21.5 percent all others dumping rate was an appropriate rate applicable to all other companies. In order to establish a rate of 21.5 percent for all other companies, MOFCOM must have had a factual basis for its determination that the 21.5 percent rate was an appropriate rate for these "all other" companies, especially considering that the dumping rates for the other respondent companies were substantially lower than 21.5 percent.
- Facts underpinning the calculation of the 21.5 percent rate, and the details of the calculation itself. MOFCOM must have utilized specific information, and performed calculations supported by this information, to establish or corroborate a 21.5 percent rate.

72. These facts are essential because they form the basis for MOFCOM's decision to apply a facts available all others dumping rate. Because MOFCOM did not disclose these essential facts, the United States and other interested parties were not able to understand, much less evaluate and, if necessary, rebut, MOFCOM's assessment or calculation of the all others dumping margin. For example, interested parties had no opportunity to assess whether MOFCOM's decision to rely on the facts available was inappropriate, because MOFCOM never disclosed the factual basis for that decision nor its efforts to verify the accuracy of the margin estimates provided in the petition. Without any disclosure of the facts underlying MOFCOM's decision to apply facts available, the interested parties were unaware of the factual basis for MOFCOM's determination and therefore could not adequately defend their interests concerning MOFCOM's calculation of the "all others" dumping rate.⁹⁶

⁹⁶ See *China – GOES (Panel)*, para. 7.408.

73. Likewise, because MOFCOM did not adequately disclose the factual information used to calculate the 21.5 percent all others rate, the United States and interested U.S. companies were not able to argue that this rate was inappropriate. MOFCOM provided no indication of what specific information was used, and, without knowing this, there was no way for the United States and interested U.S. companies to determine whether the information was a reasonable surrogate for an “all others” rate. Given the significant disparity between the “all others” rate and the rates calculated for the known exporters – the “all others” rate was more than twice as high as the margin for any of the investigated companies – a more detailed disclosure of the “essential facts” under consideration leading to the “all others” rate was required to allow the United States to defend its interests and those of potential future exporters.⁹⁷

74. For these reasons, China acted inconsistently with Article 6.9 of the AD Agreement through its failure to disclose the essential facts under consideration which formed the basis for its determination of the all-others dumping margin.

3. MOFCOM Failed to Explain Its Determination.

75. Article 12.2 of the AD Agreement provides:

Public notice shall be given of any preliminary or final determination Each such notice shall set forth, or otherwise make available through a separate report, in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities.

76. Article 12.2.2 of the AD Agreement further provides:

A public notice of conclusion or suspension of an investigation in the case of an affirmative determination providing for the imposition of a definitive duty or the acceptance of a price undertaking shall contain, or make available through a separate report, all relevant information on matters of fact and law and reasons which have led to the imposition of final measures or the acceptance of a price undertaking, due regard being paid to the requirements for protection of confidential information. In particular, the notice or report shall contain the information described in subparagraph 2.1, as well as the reasons for the acceptance or rejection of relevant arguments or claim made by the exporters and importers, and the basis for any decision made under subparagraph 10.2 of Article 6.

77. The factual and legal bases for MOFCOM’s resort to facts available pursuant to Article 21 of its regulations constitute relevant information on matters of fact and law and reasons which have led to the imposition of final measures.⁹⁸ These issues are the centerpiece of MOFCOM’s determination of the margin to apply to unexamined producers/exporters. As mentioned above,

⁹⁷ See *China – GOES (Panel)*, para. 7.409.

⁹⁸ See *China – GOES (Panel)*, para. 7.424.

MOFCOM's preliminary determination and final disclosure each contained a single sentence reporting its decision to apply facts available to all U.S. producers/exporters that it did not examine, a statement that contained no underlying facts, reasoning or explanation for that decision.

78. Consequently, MOFCOM breached Article 12 of the AD Agreement because it failed to provide in sufficient detail the findings and conclusions that lead to application of facts available pursuant to Article 21 of its regulations.

VII. MOFCOM'S FLAWED ALL OTHERS SUBSIDY RATE DETERMINATION

A. MOFCOM's Determination of the All Others Rate Is Inconsistent with Articles 12.7, 12.8, 22.3, and 22.5 of the SCM Agreement.

79. In the final determination, MOFCOM applied the all others subsidy rate of 12.9 percent to unexamined U.S. producers/exporters.⁹⁹ MOFCOM's explanation for its all others subsidy rate was that it relied upon Article 21 of its CVD Regulation, and that it relied on facts available to make its determination for all other U.S. companies.¹⁰⁰

1. MOFCOM's Use of Facts Available Is Inconsistent with Article 12.7.

80. China acted inconsistently with Article 12.7 of the SCM Agreement because MOFCOM applied facts available to producers that MOFCOM did not notify of the information required of them, and that did not refuse to provide necessary information or otherwise impede the countervailing duty investigation.

81. Article 12.1 of the SCM Agreement provides:

Interested Members and all interested parties in a countervailing duty investigation shall be given notice of the information which the authorities require and ample opportunity to present in writing all evidence which they consider relevant in respect of the investigation in question.

82. Article 12.7 of the SCM Agreement provides:

In cases in which any interested Member or interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation, preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available.

83. In *US – Anti-Dumping and Countervailing Duties (China)*, the panel noted that Article 12.7 of the SCM Agreement permits recourse to facts available only when an interested party (i)

⁹⁹ Final Determination, p. 62 (Exhibit USA-02).

¹⁰⁰ Final Determination, p. 61 (Exhibit USA-02).

refuses access to necessary information within a reasonable period; (ii) otherwise fails to provide such information within a reasonable period; or (iii) significantly impedes the investigation.¹⁰¹

84. Given the obligation under Article 12.1 to give an interested party notice of what information is required of them, the use of facts available is further conditioned on the investigating authority specifying to that interested party in sufficient detail the information required, and making the interested party aware that failure to supply such information will result in a determination based on facts available. Article 12.7 of the SCM Agreement, when read in light of Article 12.1, establishes that an investigating authority may only apply a subsidy rate based on the “facts available” for failing to provide information if the authority has first specifically asked the party to provide the information and has been refused.¹⁰²

85. As discussed elsewhere in this submission, in *Mexico – Anti-Dumping Measures on Rice*, the Appellate Body explained that an exporter must be given the opportunity to provide information required by an investigating authority before the latter resorts to facts available that can be adverse to the exporter’s interests.¹⁰³ An exporter that is unknown to the investigating authority is not notified of the information required, and thus is denied an opportunity to provide it. Similarly, the panel in *Mexico – Anti-Dumping Measures on Rice* noted that exporters not given notice of the information required of them cannot be considered to have failed to provide necessary information.¹⁰⁴

86. In the countervailing investigation of certain automobiles from the United States, MOFCOM sent its anti-subsidy questionnaire to only the producers/exporters that the petitioners identified in the petition. MOFCOM made no attempt to even identify whether any other U.S. exporters/producers might exist. Rather MOFCOM notified the identified producers and the U.S. Embassy of the initiation of the countervailing investigation and requested that the U.S. Embassy “notify relevant exporters and producers.”¹⁰⁵

87. Indeed, MOFCOM had no evidence that any interested party “refused access to” or otherwise “did not provide” information that was “necessary” to the investigation, or otherwise “significantly impeded” the investigation. As was the case in the investigation that was the subject of *China – GOES*, exporters of subject merchandise other than the named respondents did not exist at the time of the countervailing duty investigation. Therefore, China’s application of facts available was improper, as it is logically impossible for a non-existent exporter to fail to

¹⁰¹ *US – Anti-Dumping and Countervailing Duties (China) (Panel)*, para. 16.9.

¹⁰² *See China – GOES (Panel)*, para. 7.446.

¹⁰³ *Mexico – Anti-Dumping Measures on Rice (AB)*, paras. 258-264.

¹⁰⁴ *Mexico – Anti-Dumping Measures on Rice (AB)*, fn. 211.

¹⁰⁵ Preliminary Determination, section I.B.1, p. 3 (Exhibit USA-08).

cooperate.¹⁰⁶ By applying facts available in these circumstances, China breached Article 12.7 of the SCM Agreement.

2. China Acted Inconsistently with Article 12.8 of the SCM Agreement by Failing to Disclose the Essential Facts under Consideration Regarding its Calculation of the “All Others” Subsidy Rate.

88. Because MOFCOM failed to inform the United States and other interested parties “of the essential facts under consideration” which formed the basis for this calculation in time for the United States and other interested parties to defend their interests, MOFCOM’s calculation of the all others subsidy rate also was inconsistent with Article 12.8 of the SCM Agreement.

a. MOFCOM’s Determinations and Disclosures

89. In the preliminary determination, MOFCOM established an all others subsidy rate of 12.9 percent. MOFCOM explained its determination in one single sentence: “For all other U.S. companies, in accordance with Article 21 of the CVD regulations, the Investigating Authority decided, by adopting facts available, to apply the *ad valorem* subsidy rate of General Motors LLC to these companies.”¹⁰⁷ Article 21 of China’s CVD Regulation pertains to the use of facts available. However, MOFCOM provided no further explanation of its calculation of the all others subsidy rate.

90. Prior to the final determination, MOFCOM released its final disclosure to the United States and interested parties. In the final disclosure, MOFCOM maintained the all others subsidy rate of 12.9 percent.¹⁰⁸ MOFCOM’s explanation was identical to its preliminary determination.¹⁰⁹ Again, MOFCOM provided no further information. In the final determination, MOFCOM applied the all others subsidy rate of 12.9 percent. MOFCOM’s cursory explanation repeated that of its preliminary determination and final disclosure.¹¹⁰

b. MOFCOM Failed to Disclose the Essential Facts Under Consideration Forming the Basis for the All Others Subsidy Rate, and the United States Was Deprived of Its Ability to Defend Its Interests as a Result.

91. Article 12.8 of the SCM Agreement provides:

¹⁰⁶ “Indeed . . . a conclusion that non-existent exporters refused to provide information or impeded the investigation seems illogical.” *China – GOES (Panel)*, para. 7.446 (finding the China breached Article 12.7 of the SCM Agreement by using facts available to determine the all others subsidy rate).

¹⁰⁷ Preliminary Determination, section V.A.3(3), p. 44 (Exhibit USA-08).

¹⁰⁸ Final Disclosure (AD/CVD), section V.1.2(4), p. 41 (Exhibit USA-11).

¹⁰⁹ Final Disclosure (AD/CVD), section V.1.2(4), p. 41 (Exhibit USA-11).

¹¹⁰ Final Determination, p. 61 (Exhibit USA-02).

The authorities shall, before a final determination is made, inform all interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures. Such disclosure should take place in sufficient time for the parties to defend their interests.

Similar to the obligations contained in Article 6.9 of the AD Agreement, the obligation contained in Article 12.8 of the SCM Agreement applies to: (1) essential facts, as opposed to reasoning, that (2) form the basis for the decision to apply definitive measures. The purpose of Article 12.8 of the SCM Agreement is also similar to Article 6.9 of the AD Agreement: to make clear to interested parties the information on which the investigating authority will rely in deciding whether to apply definitive measures.

92. As in the AD proceeding, MOFCOM did not identify the essential facts that formed the basis for its imposition of a 12.9 percent all others subsidy rate. As described above, its disclosure consisted of a single sentence. Noticeably absent from this disclosure are the facts that serve as the basis for MOFCOM's decision regarding the application of facts available, and in particular the facts that led MOFCOM to conclude that resorting to the use of the facts available was appropriate.

93. These facts are essential because they form the basis for any investigating authority's determination to apply a facts available subsidy rate. Article 12.7 of the SCM Agreement allows investigating authorities to use facts available if an interested Member or interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period of time, or significantly impedes the countervailing duty investigation. Therefore, MOFCOM must have relied on a factual determination that the actions of the companies covered by the all others rate met the requirements of Article 12.7 – either because the companies refused access to or failed to provide information, or because they significantly impeded the proceeding.

94. Because MOFCOM failed to disclose these essential facts, the United States and interested U.S. companies were not able to present arguments addressing the merits of MOFCOM's use of an all others subsidy rate. Without disclosure of the facts underlying MOFCOM's decision to apply facts available, the United States and interested U.S. companies were unaware of the factual basis for MOFCOM's determination and therefore could not adequately defend their interests.¹¹¹

95. A mere statement that the investigating authority is resorting to facts available does not meet the disclosure requirements of Article 12.8 of the SCM Agreement. For these reasons, China acted inconsistently with Article 12.8 of the SCM Agreement through its failure to disclose the essential facts under consideration which formed the basis for its determination of the all-others subsidy rate.

¹¹¹ See *China – GOES (Panel)*, para. 7.464.

3. MOFCOM Failed to Explain Its Determination.

96. Article 22.3 of the SCM Agreement provides:

Public notice shall be given of any preliminary or final determination Each such notice shall set forth, or otherwise make available through a separate report, in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities.

97. Article 22.5 of the SCM Agreement further provides:

A public notice of conclusion or suspension of an investigation in the case of an affirmative determination providing for the imposition of a definitive duty or the acceptance of a price undertaking shall contain, or make available through a separate report, all relevant information on matters of fact and law and reasons which have led to the imposition of final measures or the acceptance of a price undertaking, due regard being paid to the requirements for protection of confidential information. In particular, the notice or report shall contain the information described in subparagraph 2.1, as well as the reasons for the acceptance or rejection of relevant arguments or claim made by the exporters and importers, and the basis for any decision made under subparagraph 10.2 of Article 6.

98. As mentioned above, MOFCOM’s preliminary determination and final disclosure each contained a single sentence regarding its decision to apply facts available to all U.S. producers/exporters that it did not examine. The factual and legal bases for MOFCOM’s resort to facts available pursuant to Article 21 constitute relevant information on matters of fact and law and reasons which have led to the imposition of final measures. These issues are the centerpiece of MOFCOM’s determination of what margin to apply to unexamined producers/exporters.

99. Consequently, Article 22 of the SCM Agreement required that MOFCOM provide in sufficient detail the findings and conclusions that led to application of facts available pursuant to Article 21 of its regulations. The single, perfunctory sentence MOFCOM included in its determination and disclosure document does not satisfy this requirement.

VIII. MOFCOM’S FLAWED INJURY DETERMINATION

100. In its final determination, MOFCOM concluded that the domestic industry in China producing certain automobiles was materially injured by reason of dumped and subsidized imports of such automobiles from the United States (“subject imports”). Due to three critical shortcomings, MOFCOM’s injury determination is inconsistent with a number of provisions of the AD and SCM Agreements.

101. First, MOFCOM narrowly defined the domestic industry for the purpose of its injury investigation, such that the domestic industry that MOFCOM examined included only a fraction

of domestic producers, limited to members of CAAM, the petitioner in the AD and CVD investigations. MOFCOM's limited definition did not include enterprises representing "a major proportion of the total domestic production" of the like product, within the meaning of Article 4.1 of the AD Agreement and Article 16.1 of the SCM Agreement. MOFCOM's domestic industry definition was not based on positive evidence, nor did it involve an objective examination of the evidence before MOFCOM, as required by Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement.

102. Second, in its price effects analysis, MOFCOM found that subject imports depressed prices for the domestic like product during interim 2009 (the only part of the period of investigation in which MOFCOM found adverse price effects). However, among other things, MOFCOM failed to establish how a modest (3.17 percent) decline in the average price of subject imports could have resulted in a much larger (10.13 percent) decline in the average price of the domestic like product, especially given the fact that the imports were selling at a much higher price than the domestic like product during this period. Ultimately, for these and other reasons, MOFCOM's consideration of the effect of U.S. imports on the price of the Chinese domestic like product was not based on positive evidence, nor did it involve an objective examination of the evidence, as required by Articles 3.1 and 3.2 of the AD Agreement and Articles 15.1 and 15.2 of the SCM Agreement.

103. Third, MOFCOM's causation determination (*i.e.*, its ultimate finding that U.S. imports caused material injury to the Chinese industry) likewise was not based on positive evidence, nor did it involve an objective examination of the evidence. MOFCOM also failed to examine all relevant evidence and any known factors other than U.S. imports that were causing injury to the Chinese domestic industry. In particular, aside from the fact that MOFCOM's causal link finding relies heavily on and is tainted by MOFCOM's flawed domestic industry definition and price effects analysis, MOFCOM failed to address key evidence. Specifically, MOFCOM failed to address evidence that subject imports and the domestic like product were sold largely in different categories – for the most part, imports were in the "premium" and "luxury" categories, while the domestic like product consisted of lower-priced "entry" and "mid" models – and thus competition between them was limited. MOFCOM failed to recognize that the increase in the volume of subject imports displaced sales of non-subject imports and not domestic industry sales, which also increased at the expense of non-subject imports. And MOFCOM failed to take into account that the Chinese domestic industry suffered from a sharp drop in productivity and demand during interim 2009. For these and other reasons, MOFCOM's causation determination is inconsistent with Articles 3.1 and 3.5 of the AD Agreement and Articles 15.1 and 15.5 of the SCM Agreement.

104. In light of these flaws, on which we further elaborate in the sections that follow, China's AD and CVD measures on certain automobiles from the United States breach Articles 3.1, 3.2, 3.5, and 4.1 of the AD Agreement and Articles 15.1, 15.2, 15.5, and 16.4 of the SCM Agreement.

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

105. In defining the domestic industry, MOFCOM limited that industry to domestic enterprises that were members of the petitioning coalition, CAAM. All of these enterprises naturally supported the antidumping and countervailing duty investigations, although they accounted for less than half of domestic production. Specifically, MOFCOM defined the domestic industry in the following terms:

The evidence shows that the total production quantity of like products from domestic producers represented by the China Association of Automobile Manufacturers accounts for the major portion of the total production quantity of domestic like products, which meets the requirements for definition as domestic industry in Article 11 of the AD Regulations, Article 11 of the CV Regulations, Articles 13 of the AD Injury Investigation Provisions, and Article 13 of the CV Injury Investigation Provisions. The Investigating Authority determined that the domestic enterprises mentioned above can represent the Chinese domestic industry of Saloon cars and Cross-country cars of cylinder capacity > 2500cc. The basis for this determination is data from China’s domestic industry, and except where expressly stated, all data came from the above mentioned domestic producers.¹¹²

In other words, MOFCOM defined the domestic industry, for the purpose of the injury examination, as the petitioner CAAM’s member companies, notwithstanding the fact that producers representing more than half of China’s domestic production of the domestic like product fell outside this definition, as explained below.

106. Also discussed below, MOFCOM’s definition of the domestic industry is inconsistent with the definition set out in Article 4.1 of the AD Agreement and Article 16.1 of the SCM Agreement, because it does not include enterprises that represent “a major proportion of the total domestic production” of automobiles. As a result, MOFCOM’s injury determination, which was based on its flawed definition of the domestic industry, is inconsistent with Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement because it was not based on “positive evidence,” nor did it “involve an objective examination.”

1. MOFCOM Acted Inconsistently with Articles 3.1 and 4.1 of the AD Agreement and Articles 15.1 and 16.1 of the SCM Agreement Because Its Definition of the Domestic Industry Was Distorted.

107. Article 4.1 of the AD Agreement provides that:

¹¹² Final Determination, section III.B, p. 24 (Exhibit USA-02).

[T]he term “domestic industry” shall be interpreted as referring to the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products, except that

- (i) when producers are related to the exporters or importers or are themselves importers of the allegedly dumped product, the term “domestic industry” may be interpreted as referring to the rest of the producers;
- (ii) in exceptional circumstances the territory of a Member may, for the production in question, be divided into two or more competitive markets and the producers within each market may be regarded as a separate industry if [certain conditions not relevant to this dispute are met.]

108. Article 16.1 of the SCM Agreement provides that:

[T]he term “domestic industry” shall, except as provided in paragraph 2, be interpreted as referring to the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products, except that when producers are related to the exporters or importers or are themselves importers of the allegedly subsidized product or a like product from other countries, the term “domestic industry” may be interpreted as referring to the rest of the producers.

109. The substance of these two provisions is identical. Each establishes that the “domestic industry” is “the domestic producers as a whole of the like products,” *i.e.*, all domestic producers, or a subset of the domestic producers “whose collective output of the products constitutes a major proportion of the total domestic production” of the like products. Each provision also establishes that producers that are related to the exporters or importers or are themselves importers of the allegedly dumped or subsidized product, or a like product from other countries, may be excluded from the definition of the “domestic industry.”¹¹³

110. Article 3.1 of the AD Agreement provides 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.

¹¹³ MOFCOM did not make a finding that any domestic producers were related to importers or exporters or were themselves importers of the subject merchandise and it did not exclude any domestic producers from the industry on that basis. Final Determination, section III.B, p. 24 (Exhibit USA-02).

Article 15.1 of the SCM Agreement is worded identically, except that it uses the term “subsidized imports” where Article 3.1 of the AD Agreement refers to “dumped imports.”

111. In *EC – Fasteners (China)*, the Appellate Body discussed the relationship between the definition of the domestic industry and the obligation that an investigating authority’s injury determination “involve an objective examination.” The Appellate Body explained that:

Article 3.1 requires that a determination of injury “involve an objective examination” of, *inter alia*, the impact of the dumped imports on domestic producers. The Appellate Body has found that an “objective examination” in accordance with Article 3.1 “requires that the domestic industry, and the effects of dumped imports, be investigated in an unbiased manner, without favouring the interests of any interested party, or group of interested parties, in the investigation”. In other words, to ensure the accuracy of an injury determination, an investigating authority must not act so as to give rise to a material risk of distortion in defining the domestic industry, for example, by excluding a whole category of producers of the like product. The risk of introducing distortion will not arise when no producers are excluded and the domestic industry is defined as “the domestic producers as a whole”. Where a domestic industry is defined as those producers whose collective output constitutes a major proportion of the total domestic production, it follows that the higher the proportion, the more producers will be included, and the less likely the injury determination conducted on this basis would be distorted. Therefore, the above interpretation is also consistent with the requirement under Article 3.1 that an injury determination be based on an objective examination of the impact of the dumped imports on domestic producers.¹¹⁴

112. At the outset of the underlying investigations here, MOFCOM issued notices inviting parties to register to participate in the antidumping and countervailing duty injury investigations.¹¹⁵ Only one domestic party, the petitioner CAAM, responded to these notices.¹¹⁶ MOFCOM explains that it then issued its Industry Injury Questionnaire to “known domestic producers.”¹¹⁷ These producers were “known” in the sense that they were the producers who responded to MOFCOM’s notices inviting parties to register to participate in the injury investigation, *i.e.*, CAAM’s members. CAAM was the only party to provide a response to MOFCOM’s domestic producer questionnaire.

113. In its final determination, MOFCOM did not purport to examine “the domestic producers as a whole.” Rather, MOFCOM determined that the petitioners alone, that is, the members of

¹¹⁴ *EC – Fasteners (China) (AB)*, para. 414 (citations omitted) (emphasis added).

¹¹⁵ Final Determination, section I.B.3(2), pp. 9-10 (Exhibit USA-02).

¹¹⁶ Final Determination, section I.B.3(2), p. 10 (Exhibit USA-02).

¹¹⁷ Final Determination, section I.B.3(4), p. 11 (Exhibit USA-02).

CAAM, represented “the major portion” of Chinese auto production, “which meets the requirements for definition as domestic industry.”¹¹⁸

114. MOFCOM’s approach in these investigations is strikingly similar to an investigating authority’s approach that China challenged recently in another dispute. There, the investigating authority published a notice inviting domestic producers to make themselves known and volunteer for inclusion in a sample of the domestic industry, and then defined the domestic industry to include only producers that responded to the notice and volunteered for inclusion in the sample.¹¹⁹ The Appellate Body expressed concern that “by defining the domestic industry on the basis of a willingness to be included in the sample, the [investigating authority’s] approach imposed a self-selection process among the domestic producers that introduced a material risk of distortion.”¹²⁰ The Appellate Body found there that “by limiting the domestic industry definition to those producers willing to be part of the sample, the [investigating authority] excluded producers that provided relevant information. In so doing, the [investigating authority] reduced the data coverage that could have served as a basis for its injury analysis and introduced a material risk of distorting the injury determination.”¹²¹

115. MOFCOM’s determination in the underlying investigations to limit the definition of the “domestic industry” only to the petitioners similarly “reduced the data coverage that could have served as a basis for its injury analysis and introduced a material risk of distorting the injury determination.”¹²² Furthermore, MOFCOM excluded “a whole category of producers of the like product,”¹²³ (*i.e.*, domestic producers that did not express support for the petition) and likely also joint ventures between international and Chinese-owned companies (“JVs”). This gave rise to “a material risk of distortion.”¹²⁴

116. Logically, domestic producers posting the weakest performance would have the most to gain from the imposition of an antidumping or countervailing duty measure, and would therefore have a financial incentive to support the petition and participate in the injury investigation. Conversely, domestic producers that were performing well financially would lack any incentive to respond to MOFCOM’s notice. Indeed, domestic producers posting the strongest performance would have every incentive *not* to make themselves known. Specifically, withholding their performance data from the investigating authority could only increase the probability of an

¹¹⁸ Final Determination, section III.B, p. 24 (Exhibit USA-02).

¹¹⁹ *EC – Fasteners (China) (AB)*, para. 426.

¹²⁰ *EC – Fasteners (China) (AB)*, para. 427.

¹²¹ *EC – Fasteners (China) (AB)*, para. 430.

¹²² *EC – Fasteners (China) (AB)*, para. 430.

¹²³ *EC – Fasteners (China) (AB)*, para. 414.

¹²⁴ *EC – Fasteners (China) (AB)*, para. 414 (citations omitted) (emphasis added).

affirmative injury or threat of injury determination and hence, higher duties on competing products sold by importers.

117. By limiting the definition of the domestic industry to a self-selected group of producers that supported the petition, MOFCOM introduced a material risk of skewing the economic data and, consequently, distorting the analysis of the state of the domestic industry. As such, MOFCOM’s injury determination, which was based on its definition of the domestic industry, did not “involve an objective examination,” as required by Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement.

2. MOFCOM Acted Inconsistently with Articles 3.1 and 4.1 of the AD Agreement and Articles 15.1 and 16.1 of the SCM Agreement Because Its Definition of the Domestic Industry Was Limited to a Small Subset of the Industry.

118. In addition to the skewing of the data inherent in MOFCOM’s limitation of the domestic industry definition to those enterprises that were members of the group supporting the petition, the evidence suggests that the collective output of those enterprises represented a relatively small percentage of total domestic production in China.

119. In *EC – Fasteners*, the Appellate Body elaborated on the meaning of Articles 3.1 and 4.1 of the AD Agreement in the context of China’s claim regarding the definition of the domestic industry. With respect to the obligation that an injury determination be based on “positive evidence,” and the “major proportion” standard, the Appellate Body explained that:

Article 3.1 requires that an injury determination be based on “positive evidence”. Pursuant to Article 3.4, such “positive evidence” includes relevant economic factors and indices collected from the domestic industry, which have a bearing on the state of the industry. Naturally, the “positive evidence” to be used in an injury determination requires wide-ranging information concerning the relevant economic factors in order to ensure the accuracy of an investigation concerning the state of the industry and the injury it has suffered. Thus, “a major proportion of the total domestic production” should be determined so as to ensure that the domestic industry defined on this basis is capable of providing ample data that ensure an accurate injury analysis.¹²⁵

The Appellate Body considered that “a major proportion” should be properly understood as constituting “a relatively high proportion of the total domestic production.”¹²⁶ In that dispute, the Appellate Body rejected an argument that 25 percent of the domestic industry could constitute a “major proportion.”¹²⁷

¹²⁵ *EC – Fasteners (China) (AB)*, para. 413 (emphasis added).

¹²⁶ *EC – Fasteners (China) (AB)*, paras. 412, 419.

¹²⁷ *EC – Fasteners (China) (AB)*, para. 430.

120. In its final determination, MOFCOM did not provide specific information about the proportion of domestic production represented by CAAM’s members. Instead, MOFCOM stated that the basis for its determination that CAAM’s members accounted for the “major portion” of domestic production was “data from Chinese domestic industry, and except where expressly stated, all data came from the above mentioned domestic producers.”¹²⁸ As explained below, evidence on the record before MOFCOM indicates that the “collective output” of CAAM’s members (or those members whose data CAAM included in its questionnaire response) was, at most, on the order of 31 to 40 percent.¹²⁹

121. Specifically, in comments addressing MOFCOM’s preliminary determination, one U.S. respondent pointed out that MOFCOM had apparently limited the domestic industry to China’s national automobile companies, thus excluding JVs that accounted for the majority of China’s production of saloon cars and cross-country vehicles with an engine displacement greater than 2500 cc.¹³⁰ Indeed, data provided by CAAM itself, and placed on the record by a U.S. respondent, showed that in 2008, Chinese national automobile companies sold 45,608 vehicles in the ≥ 2500 cc category, whereas JVs sold 68,482 such vehicles.¹³¹ Based on these data, Chinese national automobile companies accounted for only 39.98 percent of the sales of the domestic like product in 2008. In 2007 and 2006, this percentage was 39.75 percent and 31.12 percent, respectively.¹³² Thus, based on an analysis of CAAM’s own data, MOFCOM’s definition of the domestic industry excluded Chinese producers that accounted for more than 60 percent of production, at a minimum, throughout the period of investigation.

122. In the final determination, MOFCOM responded to the U.S. respondent’s arguments and the CAAM data placed on the record simply by stating that the respondent was mistaken and that MOFCOM had not excluded JVs from the definition of the “domestic industry.”¹³³ The final determination does not include any analysis of or response to the CAAM data that was placed on the record.

¹²⁸ Final Determination, section III.B, p. 24 (Exhibit USA-02). MOFCOM refers here to “Data and Material of Saloon Cars and Cross-country Cars with Cylinder Capacity >2500cc” that was submitted by CAAM on March 21, 2011. These data were not disclosed to U.S. respondent companies or their legal counsel, or to the U.S. government, during the course of the investigation.

¹²⁹ During the investigations, MOFCOM amended the scope of the investigations to exclude cars with a cylinder capacity of between 2000cc and 2500cc. *See* Final Determination, section II.B, p. 21 (Exhibit USA-02).

¹³⁰ U.S. Respondent Comments on the Preliminary Determination, p. 19 (Exhibit USA-12). The comments identified the following international companies as being among the joint venture partners involved in production of the subject merchandise in China: Volkswagen, Audi, Volvo, Renault, Peugeot, Toyota, Nissan, Mazda, Hyundai, and Kia. *Id.*

¹³¹ U.S. Respondent Comments on the Preliminary Determination, Table 2, pp. 44-45 (Exhibit USA-12).

¹³² U.S. Respondent Comments on the Preliminary Determination, Table 2, pp. 44-45 (Exhibit USA-12).

¹³³ Final Determination, section VII.C.3, p. 75 (Exhibit USA-02).

123. However, other data that MOFCOM reported in the final determination cast doubt on MOFCOM's assertion that it included JV producers in the industry. Specifically, MOFCOM found that the market share of the domestic industry ranged from 9.59 to 18.69 percent during the period of investigation.¹³⁴ This is implausible if MOFCOM actually included JVs in its definition of the domestic industry. CAAM's data indicate that Chinese manufacturers, including both domestic Chinese producers and JVs, had a market share of 41.51 to 57.12 percent during the period of investigation.¹³⁵ Excluding JVs, CAAM's data show that domestic Chinese producers had a market share ranging from 13.32 to 21.28 percent during the POI, which is closer to, but higher than, the 9.59 to 18.69 percent market share found by MOFCOM.¹³⁶ In addition, MOFCOM states that the "domestic industry" sold 33,181 vehicles in 2008.¹³⁷ This is considerably less than the 45,608 vehicles that CAAM's data show were sold by Chinese national automobile companies in 2008.¹³⁸ Thus, the CAAM data put on the record by a U.S. respondent actually suggest that the "domestic industry," as defined by MOFCOM, may be a subset even of the non-JV domestic Chinese producers, which would mean that the enterprises included in the definition of the "domestic industry" account for an even lower proportion of domestic production.

124. Under the circumstances of these investigations, where there has been no indication by MOFCOM that the domestic industry is fragmented or is so large that sampling would be necessary, MOFCOM's exclusion from the definition of the domestic industry enterprises accounting for more than 60 percent of domestic production resulted in a definition of the domestic industry that did not include a "major proportion" within the meaning of Article 4.1 of the AD Agreement and Article 16.1 of the SCM Agreement. The Appellate Body has explained that a "major proportion" means a "relatively high proportion of the total domestic production."¹³⁹

125. For the reasons given above, MOFCOM's definition of the domestic industry does not constitute "a major proportion of domestic production," within the meaning of Article 4.1 of the AD Agreement and Article 16.1 of the SCM Agreement. MOFCOM examined enterprises accounting for a relatively low proportion of domestic production – excluding enterprises accounting for over 60 percent of domestic production – and thus failed to ensure that the domestic industry, as MOFCOM defined it, was capable of providing "ample data" that would "ensure an accurate injury analysis."¹⁴⁰ Consequently, MOFCOM's injury determination, which

¹³⁴ See Final Determination, section VI.C.5, p. 65 (Exhibit USA-02).

¹³⁵ U.S. Respondent Comments on the Preliminary Determination, Table 5, p. 49 (Exhibit USA-12)

¹³⁶ U.S. Respondent Comments on the Preliminary Determination, Table 5, p. 49 (Exhibit USA-12)

¹³⁷ Final Determination, section VI.C.4, p. 65 (Exhibit USA-02)

¹³⁸ U.S. Respondent Comments on the Preliminary Determination, Table 2, pp. 44-45 (Exhibit USA-12)

¹³⁹ *EC – Fasteners (China) (AB)*, paras. 412, 419.

¹⁴⁰ *EC – Fasteners (China) (AB)*, para. 413.

was based on its definition of the domestic industry, was neither objective nor based on “positive evidence,” as required by Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement.

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

126. MOFCOM’s consideration of the impact of imports of subject products from the United States on the price of domestic like products – its price effects analysis – consists entirely of the following two paragraphs in the final determination:

As illustrated by the above data, during the POI, the average sales price of domestic like products varied the same as the import price of Subject products. It was in the upward trend from 2006 to 2008 and in the downward trend in the first three quarters of 2009. According to the evidence, the import price of the Subject products in the first three quarters of 2009 decreased by 3.17% compared to the same period of the previous year. As a result, compared to the same period of the previous year, the price of the domestic like products decreased by 10.13%. The price of Subject products has clearly depressed the price of domestic like products.

As mentioned before, during the POI, according to the evidence, the quantity of imported Subject Products continually increased along with the continual expansion in market share of the Subject Products. Especially at the end of the POI, the market share of the Subject Products increased sharply while the price of the Subject Products decreased, which resulted not only in depressing the price of domestic like products but also affected the profitability of the domestic industry.¹⁴¹

On its face, the passage above constitutes simply a finding of price depression at the end of the period of investigation, *i.e.*, interim 2009; MOFCOM did not find price suppression or price undercutting. However, as explained in detail below, MOFCOM’s finding of price depression during interim 2009 is plainly contradicted by the evidence on the administrative record, and its consideration of price effects is not based on “positive evidence” and it did not “involve an objective assessment.” Consequently, MOFCOM acted inconsistently with Articles 3.1 and 3.2 of the AD Agreement, and Articles 15.1 and 15.2 of the SCM Agreement.

1. An Investigating Authority’s Consideration of Price Effects Must Be Based on “Positive Evidence” and Must “Involve an Objective Examination.”

127. The Appellate Body has stated that Articles 3.1 and 3.2 of the AD Agreement, when read together, require “that the basis of any evaluation as to the volume of dumped imports or the

¹⁴¹ Final Determination, section VI.B.3, p. 63 (Exhibit USA-02).

price effects of such imports has to be positive evidence.”¹⁴² Furthermore, the Appellate Body has stated that “an authority’s consideration of the volume of subject imports and their price effects pursuant to Articles 3.2 and 15.2 is . . . subject to the overarching principles, under Articles 3.1 and 15.1, that it be based on positive evidence and involve an objective examination.”¹⁴³

128. As explained above, Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement require that injury determinations be based on “positive evidence” and “involve an objective examination of both (a) the volume of the [dumped or subsidized] imports and the effect of the [dumped or subsidized] imports on prices in the domestic market for like products and (b) the consequent impact of these imports on the domestic producers of such products.”

129. Article 3.2 of the AD Agreement provides that:

With regard to the volume of the dumped imports, the investigating authorities 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. 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. No one or several of these factors can necessarily give decisive guidance. (emphasis added)

The language of Article 15.2 of the SCM Agreement is nearly identical to the language of Article 3.2 of the AD Agreement, simply substituting “subsidized imports” for “dumped imports.”

130. The Appellate Body has stated that “the term ‘positive evidence’ in Article 3.1 relates ‘to the quality of the evidence that authorities may rely upon in making a determination’ and that ‘[t]he word “positive” means . . . that the evidence must be of an affirmative, objective and verifiable character, and that it must be credible.’”¹⁴⁴ Ultimately, in reviewing an investigating authority’s price effects analysis, the question that a panel must address is “whether [the investigating authority] based its determinations regarding the volume of dumped [or subsidized] imports and the effect of the dumped [or subsidized] imports on prices in the domestic market on information that has the quality of positive evidence.”¹⁴⁵ In doing so, a panel must undertake “a careful and in depth scrutiny” of the investigating authority’s determinations, in order to evaluate

¹⁴² *Mexico – Anti-Dumping Measures on Rice (AB)*, para. 202.

¹⁴³ *China – GOES (AB)*, para. 130; *see also id.*, para. 201 (“[A] price effects finding is subject to the requirement that a determination of injury be based on ‘positive evidence’ and involve an ‘objective examination’.”).

¹⁴⁴ *Mexico – Anti-Dumping Measures on Rice (AB)*, para. 202 (citing *US – Hot-Rolled Steel (AB)*, para. 192).

¹⁴⁵ *Mexico – Anti-Dumping Measures on Rice (AB)*, para. 202.

whether the explanations given by the investigating authority “are such reasonable conclusions as could be reached by an unbiased and objective investigating authority in light of the facts and arguments before it and the explanations given.”¹⁴⁶

131. The Appellate Body has also explained that the obligation to “consider” in Articles 3.2 and 15.2 entails an obligation on the part of the investigating authority to take something into account in reaching its decision, though that provision does not require an investigating authority to make a definitive determination in respect of price effects.¹⁴⁷ However, the fact that no definitive determination is required “does not diminish the rigour that is required of the inquiry under Articles 3.2 and 15.2,”¹⁴⁸ and it “does not diminish the scope of *what* the investigating authority is required to consider.”¹⁴⁹ Moreover, “the investigating authority’s *consideration* under Articles 3.2 and 15.2 must be reflected in relevant documentation, such as the authorities’ final determination, so as to allow an interested party to verify whether the authority indeed *considered* such factors.”¹⁵⁰

132. MOFCOM’s cursory discussion of price effects in its final determination simply fails, in a number of respects, to meet the requirements of Articles 3.1 and 3.2 of the AD Agreement and Articles 15.1 and 15.2 of the SCM Agreement, as elaborated by the Appellate Body and previous panels. As discussed below, the price effects analysis undertaken by MOFCOM in the underlying investigations is similar to and suffers from many of the same failings as MOFCOM’s price effects analysis in the *China – GOES* investigations.

2. MOFCOM’s Finding of Parallel Pricing is Contradicted by Record Evidence and, In Any Event, MOFCOM Failed to Explain the Relevance of Parallel Pricing to its Price Effects Analysis.

133. First, as noted above, ultimately, MOFCOM found only price depression – rather than price suppression or price undercutting – and that finding was limited to the interim 2009 period, which was at the end of the period of investigation. In support of its price depression finding, MOFCOM asserted that “the average sales price of domestic like products varied the same as the import price of Subject products.” As shown below, MOFCOM’s assertion that parallel pricing existed between the domestic like products and subject imports is plainly contradicted by the evidence on the administrative record.

134. The following tables present the average unit pricing data on which MOFCOM relied for its price effects analysis:

¹⁴⁶ *EU – Footwear (China) (Panel)*, paras. 7.483; see also *US – Tyres (China) (AB)*, para. 280.

¹⁴⁷ *China – GOES (AB)*, para. 130.

¹⁴⁸ *China – GOES (AB)*, para. 130.

¹⁴⁹ *China – GOES (AB)*, para. 131 (emphasis in original).

¹⁵⁰ *China – GOES (AB)*, para. 131(emphasis in original).

Average Unit Prices of Subject Imports and Domestic Products Presented in MOFCOM’s Final Determination¹⁵¹					
	2006	2007	2008	Interim 2008*	Interim 2009
Subject Imports (¥)	315,467	288,749	403,089	424,850	411,382
Domestic Products (¥)	280,596	311,698	364,122	351,102	315,535
* MOFCOM did not present data for interim 2008 in the final determination. The data reflected here are derived from the data for interim 2009 and the percentage change from interim 2008 to interim 2009, which were presented in the final determination.					

Percentage Change in Average Unit Prices of Subject Imports and Domestic Products Presented in MOFCOM’s Final Determination¹⁵²			
	2006 – 2007	2007 – 2008	Interim 2008 – Interim 2009
Subject Imports	-8.47%	+39.6%	-3.17%
Domestic Products	+11.08%	+16.82%	-10.13%

135. As can be seen, in the 2006-2007 period, there was sharp divergence in the pricing of the domestic like products and subject imports. Over that time, the average price of the domestic product rose 11.08 percent (from ¥ 280,596 to ¥ 311,698), while the average price of subject imports fell 8.47 percent (from ¥ 315,467 to ¥ 288,749).¹⁵³ Accordingly, MOFCOM’s conclusion that the prices of the domestic like products and subject imports were moving in tandem is, as a factual matter, belied by the data on the administrative record.

136. Additionally, merely identifying parallel pricing would do nothing to explain how the effect of subject imports was to significantly depress prices for the domestic like products. Here, as in *China – GOES*, MOFCOM did not provide sufficient reasoning, and in fact said nothing in the final determination to explain how parallel pricing caused the depression of domestic prices.¹⁵⁴

137. Furthermore, MOFCOM failed to address data that contradicted its observation of supposed price parallelism. As noted above, from 2006 to 2007, the price of subject imports

¹⁵¹ Final Determination, section VI.B.1 and 2, p. 63 (Exhibit USA-02).

¹⁵² Final Determination, section VI.B.1 and 2, p. 63 (Exhibit USA-02)

¹⁵³ Final Determination, sections VI.B.1 and VI.B.2, p. 63 (Exhibit USA-02)

¹⁵⁴ See *China – GOES (AB)*, para. 210. We note that MOFCOM used a similarly broad-brush characterization of price trends in that case, finding that the “developing trend” of prices for the two products was “basically the same” in that the price initially rose and then dropped. *Id.*

decreased by 8.47 percent – more than twice the rate of decrease from interim 2008 to interim 2009 – the period during which MOFCOM found significant price depression. However, during the same 2006-2007 period, not only did the price of domestic products not decline in tandem with the drop in the price of subject imports, the price of domestic products increased significantly, by 11.08 percent. Indeed, in 2007, the price of domestic like products actually *exceeded* the price of subject imports. This strongly suggests that variations in the price of the domestic like products were not attributable to variations in the price of subject imports. Notably, MOFCOM said nothing about the 2006-2007 divergence in pricing data in the final determination.

138. As the Appellate Body has explained, “an investigating authority is required to examine domestic prices in conjunction with subject imports in order to understand whether subject imports have explanatory force for the occurrence of significant depression or suppression of domestic prices.”¹⁵⁵ “An examination of price depression, by definition, calls for more than a simple observation of a price *decline*, and also encompasses an analysis of *what* is pushing down the prices.”¹⁵⁶ MOFCOM was required to examine and explain why the price decline of the domestic like products that was observed in interim 2009 was the effect of the pricing of subject imports. MOFCOM failed to do so.

3. MOFCOM Failed to Address Evidence that Subject Imports Oversold the Domestic Like Products During the Period in which MOFCOM Identified Price Depression.

139. Second, as shown in the tables above, subject imports were selling at a much higher price than the domestic like product in interim 2009. The average unit price of subject imports declined 3.17 percent in interim 2009, from ¥424,850 in interim 2008 to ¥411,382, and the average unit price of the domestic like product declined 10.13 percent over the same period, from ¥351,102 to ¥315,535. MOFCOM concludes from this that “[t]he price of the Subject products has clearly cut down that of the domestic like products.”¹⁵⁷ Yet MOFCOM offers no explanation for why it would “clearly” be the case that a modest decline in the price of subject imports in interim 2009 would lead to a decrease in the domestic price three times as large (on a percentage basis) as the decrease in the subject imports price, especially when subject imports were *overselling* the domestic like products by a large amount.

140. Indeed, the U.S. Government and respondents argued during MOFCOM’s investigation that subject imports could not have had adverse price effects on the domestic like products because they were selling at much higher prices than the domestic like product in interim

¹⁵⁵ *China – GOES (AB)*, para. 138; *see also id.*, para. 144.

¹⁵⁶ *China – GOES (AB)*, para. 141.

¹⁵⁷ Final Determination, section VI.B.3, p. 63 (Exhibit USA-02).

2009.¹⁵⁸ MOFCOM’s response to this underscores the cursory nature of its analysis. MOFCOM stated simply that:

Price depression and price suppression does not require the import price of Subject Products be lower than the domestic like product price. The evidence shows that the decrease of import price of Subject Products depressed the domestic like product price.¹⁵⁹

However, MOFCOM did not explain what “evidence” it was referring to in this passage, or how it reached the conclusion that such evidence showed that the price depression observed during interim 2009 was the effect of subject imports. Absent further explanation, the fact that subject imports were overselling the domestic like products calls into question MOFCOM’s conclusion that the price depression observed was the effect of subject imports.¹⁶⁰

4. MOFCOM Failed to Make Needed Adjustments to the Average Unit Values Used in its Price Effects Analysis.

141. Third, the only “pricing” information MOFCOM referenced anywhere in its injury determination consists of average unit values (“AUVs”) for the imports under investigation and for the domestic like product. Indeed, MOFCOM used a single, annual AUV for each year of the period of investigation and a single AUV for interim 2009.¹⁶¹ While in certain circumstances, AUV data may serve as a reliable proxy for pricing information, for that to be the case, each group of products being compared should be relatively similar. Otherwise, differences in AUVs may reflect changes or variations in product mix, not differences in pricing. In the underlying investigations here, the record evidence unequivocally indicates that “certain automobiles” is not a homogenous product and that the subject automobiles imported from the United States primarily fell into a different grade from those primarily sold by the Chinese domestic producers.

142. Specifically, in comments on the preliminary injury determination, one U.S. respondent presented detailed sales data showing that Chinese, U.S., and third country producers sell automobiles in China in four categories: “entry,” “mid,” “premium,” and “luxury.”¹⁶² Furthermore, as explained in greater detail in section VIII.C.4. below, during all parts of the period of investigation, the Chinese domestic industry sold primarily “entry” level vehicles, and a very small number of “premium” or “luxury” vehicles, while U.S. producers primarily sold

¹⁵⁸ Final Determination, section VII.C.4, p. 76 (Exhibit USA-02).

¹⁵⁹ Final Determination, section VII.C.4, p. 77 (Exhibit USA-02).

¹⁶⁰ See *China – GOES (AB)*, para. 138; see also *id.*, para. 144.

¹⁶¹ Final Determination, section VI.B, pp. 62-63 (Exhibit USA-02).

¹⁶² See U.S. Respondent Comments on the Preliminary Determination, Table 6, pp. 50-51 (Exhibit USA-12).

“premium” and “luxury” vehicles, and a very small number of “mid” level vehicles; no sales of “entry” level vehicles by U.S. producers are reported.¹⁶³

143. When the products being compared in a price effects analysis are sold in different grades, such as in this case, it may be necessary to make adjustments to pricing data, especially when using AUVs. In *China – GOES*, the Appellate Body explained that, “although there is no explicit requirement in Articles 3.2 and 15.2, we do not see how a failure to ensure price comparability could be consistent with the requirement under Articles 3.1 and 15.1 that a determination of injury be based on ‘positive evidence’ and involve an ‘objective examination’ of, *inter alia*, the effect of subject imports on the prices of domestic like products. Indeed, if subject import and domestic prices were not comparable, this would defeat the explanatory force that subject import prices might have for the depression or suppression of domestic prices.”¹⁶⁴

144. In light of the varying grades of the automobiles MOFCOM was comparing in its price effects analysis, MOFCOM should have made necessary adjustments to ensure price comparability, or, at the very least, explained why such adjustments were not necessary in this case. MOFCOM’s failure to do so undercuts its conclusion that the price depression observed was the effect of subject imports.

5. MOFCOM Failed to Consider or Address Evidence that the Market Share of the Domestic Like Products Increased Along with that of Subject Imports During the Period in Which MOFCOM Found Price Depression.

145. Fourth, MOFCOM observed that, “[e]specially at the end of the POI, the market share of the Subject Products increased sharply and the price of the Subject Products decreased,” and MOFCOM concluded that this resulted in “not only in depressing the price of domestic like products but also affected the profitability of the domestic industry.”¹⁶⁵ Again, MOFCOM fails to explain this conclusion, which is contradicted by other evidence on the record.

146. Specifically, we note that MOFCOM’s final determination reports that the market share of the domestic like products *also increased* from interim 2008 to interim 2009, nearly as “sharply” as that of subject imports, a 4.51 percent increase in market share for domestic products as compared to a 4.69 percent increase for subject imports.¹⁶⁶ Hence, subject imports were not taking market share from the domestic like products. Rather, both subject imports and the domestic like products took market share from non-subject imports during this period.

¹⁶³ See U.S. Respondent Comments on the Preliminary Determination, Table 6, pp. 50-51 (Exhibit USA-12).

¹⁶⁴ *China – GOES (AB)*, para. 200.

¹⁶⁵ Final Determination, section VI.B.2, p. 63 (Exhibit USA-02).

¹⁶⁶ Final Determination, section VI.A.2, p. 62 (subject import market share) and section VI.C.5, p. 65 (domestic products market share) (Exhibit USA-02).

147. MOFCOM failed to address how this evidence, which undercuts its conclusion that the price decline of domestic like products observed was the effect of subject imports.

6. MOFCOM’s Flawed Domestic Industry Definition Compromised Its Price Effects Analysis.

148. Finally, we note that MOFCOM’s price effects analysis, necessarily, is founded upon and constrained by its narrow definition of the domestic industry, which, as discussed above, is itself inconsistent with Articles 3.1 and 4.1 of the AD Agreement and Articles 15.1 and 16.1 of the SCM Agreement. The flaws in MOFCOM’s domestic industry definition also compromised MOFCOM’s price effects analysis.

149. As the Appellate Body has explained, “the various paragraphs under Articles 3 and 15 provide an investigating authority with the relevant framework and disciplines for conducting an injury and causation analysis. These provisions contemplate a logical progression in an authority’s examination leading to the ultimate injury and causation determination.”¹⁶⁷ The Appellate Body considered that the provisions of Articles 3 and 15 are intended to “develop an investigating authority’s overall examination under Articles 3 and 15 *towards* a definitive determination on the injury caused by subject imports to the domestic industry.”¹⁶⁸ The outcomes of all of the inquiries under the various provisions under Articles 3 and 15 build upon one another and “form the basis for the overall causation analysis contemplated in Articles 3.5 and 15.5.”¹⁶⁹

150. Accordingly, the flaws in MOFCOM’s definition of the domestic industry resonate throughout the subsequent analyses. Those flaws compromise MOFCOM’s consideration of price effects, because pricing data from such a limited part of the domestic industry cannot provide an understanding of the explanatory force of subject imports on the price of the domestic like products.

151. For all of the reasons given above, MOFCOM’s consideration of price effects is inconsistent with Articles 3.1 and 3.2 of the AD Agreement and Articles 15.1 and 15.2 of the SCM Agreement.

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

152. As with Articles 3.1 and 3.2 of the AD Agreement and Articles 15.1 and 15.2 of the SCM Agreement, discussed above, it is appropriate to read Articles 3.1 and 3.5 of the AD Agreement together, and to read Articles 15.1 and 15.5 of the SCM Agreement together. The Appellate Body has observed that “Article 3.1 is an overarching provision that sets forth a Member’s

¹⁶⁷ *China – GOES (AB)*, para. 143.

¹⁶⁸ *China – GOES (AB)*, para. 144.

¹⁶⁹ *China – GOES (AB)*, para. 149.

fundamental, substantive obligation’ with respect to the injury determination, and that this general obligation ‘informs the more detailed obligations’ in the remainder of Article 3.”¹⁷⁰ It is no different for Article 15.1 of the SCM Agreement. Accordingly, an investigating authority is obligated to meet the detailed requirements of Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement, and any determinations or findings it makes in that connection must be based on “positive evidence” and “involve an objective examination,” as required by Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement.

153. Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement establish obligations related to an investigating authority’s assessment of whether dumped or subsidized imports are causing injury to the domestic industry. Article 3.5 of the AD Agreement provides that:

It must be demonstrated that the dumped imports are, through the effects of dumping, as set forth in paragraphs 2 and 4, causing injury within the meaning of this Agreement. The demonstration of a causal relationship between the dumped imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities. The authorities shall also examine any known factors other than the dumped 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. Factors which may be relevant in this respect include, *inter alia*, the volume and prices of imports not sold at dumping prices, contraction in demand or changes in the patterns of consumption, trade restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry.

The language of Article 15.5 of the SCM Agreement is nearly identical to the language of Article 3.5 of the AD Agreement, simply substituting “subsidies” for “dumping” and “subsidized imports” for “dumped imports.”

154. As explained in detail below, MOFCOM’s causation analysis includes and relies upon a number of findings that are contradicted by the evidence on the administrative record before MOFCOM, contrary to the requirements of Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement that the determination be based on “positive evidence,” and “involve an objective examination.” Additionally, MOFCOM failed to meet its obligations under Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement to base its determination on an examination of all relevant evidence before it and to examine any known factors other than dumped and subsidized imports that were injuring the domestic industry.

¹⁷⁰ Mexico – Anti-Dumping Measures on Rice (AB), para. 202 (citing Thailand – H-Beams (AB), para. 106).

1. MOFCOM’s Causation Determination Is Compromised by Its Flawed Domestic Industry Definition and Price Effects Analysis.

155. As an initial matter, we note that, inescapably, MOFCOM’s causation analysis is founded upon its faulty, narrow domestic industry definition, which delineated the scope of the enterprises that MOFCOM examined in connection with its assessment of whether subject imports were causing injury to Chinese automakers. As explained above, MOFCOM’s domestic industry definition is inconsistent with Article 3.1 and 4.1 of the AD Agreement and Article 15.1 and 16.1 of the SCM Agreement.

156. Additionally, MOFCOM relied heavily on its flawed price effects analysis for its causation determination. MOFCOM explained, in discussing causation, that “[t]he import price of the Subject Products depressed the price of domestic like products, resulting in the price of domestic like products decreasing by 10.13%.”¹⁷¹ As explained above, this conclusion was not based on “positive evidence,” and MOFCOM’s consideration of price effects did not “involve an objective examination,” so MOFCOM’s consideration of price effects is inconsistent with Articles 3.1 and 3.2 of the AD Agreement and Articles 15.1 and 15.2 of the SCM Agreement.

157. The flaws in MOFCOM’s domestic industry definition and its price effects analysis taint the causation analysis. In *China – GOES*, the Appellate Body explained that “the inquiry set forth in Articles 3.2 and 15.2, and the examination required under Articles 3.4 and 15.4, are necessary in order to answer the ultimate question in Articles 3.5 and 15.5 as to whether subject imports are causing injury to the domestic industry. The outcomes of these inquiries form the basis for the overall causation analysis contemplated in Articles 3.5 and 15.5.”¹⁷² It follows that, if the bases upon which MOFCOM’s determination analysis is founded are flawed, then the causation analysis is also flawed.

2. MOFCOM Failed to Address Evidence that Subject Imports Took Market Share from Non-Subject Imports and Not From the Domestic Like Products.

158. In addition to pointing to the price decline of subject imports during interim 2009, MOFCOM also discussed the volume and market share of subject imports during the period of investigation. Specifically, MOFCOM explained that:

During the first three quarters of 2009, contrary to the big decrease of 32.63% in other countries import volume, the import volume of the Subject Products rose sharply by 20.12%, along with an increase of 4.69% in the domestic market share
.....¹⁷³

¹⁷¹ Final Determination, section VII.A, p. 69 (Exhibit USA-02).

¹⁷² *China – GOES (AB)*, para. 149.

¹⁷³ Final Determination, section VII.A, p. 69 (Exhibit USA-02).

159. MOFCOM failed to take into account, however, that during the same period – the first three quarters of 2009 – the market share of Chinese domestic products also increased nearly as “sharply,” by 4.51 percent.¹⁷⁴ To the extent that the market share of U.S. subject imports increased, it did so at the expense of the market share of third country imports. U.S. imports did not take market share from the domestic like products. The evidence that subject imports did not take market share from the domestic like products undercuts MOFCOM’s conclusion that subject imports were a cause for material injury to the domestic industry,

3. MOFCOM Failed to Account for the Sharp Decline in the Chinese Industry’s Productivity throughout the Period of Investigation.

160. In support of its causation determination, MOFCOM described the difficulties faced by the domestic industry:

[T]he price, sales, pre-tax profits, and return rate investment for domestic like products decreased sharply with the increase of import volume and the decrease in the import price of Subject Products. The profitability of the domestic industry suffered from this strong impact, resulting in some investment plans and new projects of domestic producers being shelved, postponed, or cancelled. The domestic industry suffered material injury.¹⁷⁵

161. As noted above, MOFCOM determined that the cause of this material injury was subject imports. In doing so, however, MOFCOM ignored another likely culprit, namely, a staggering decline in the domestic industry’s productivity throughout the period of investigation, which was especially evident in interim 2009. As MOFCOM itself recognized in another section of its final determination, the industry’s productivity fell from 3.92 units/person in 2006, to 3.68 units/person in 2007, to 2.92 units/person in 2008. Over the interim periods, productivity fell from 2.56 units/person in interim 2008 to 1.71 units/person, or by 33.24 percent.¹⁷⁶ This sharp drop in productivity in interim 2009 occurred at the same time as the domestic industry expanded its labor force by 68.71 percent.¹⁷⁷

162. Not only did MOFCOM fail to explore the role that this sharp drop in productivity played in the industry’s financial performance, it also mischaracterized this development when it stated, in connection with its causation analysis, that:

During the first three quarters of 2009, the domestic industry, by continuously improving production management and by increasing product competitiveness,

¹⁷⁴ See Final Determination, section VI.A.2, p. 62; section VII.B.1, p. 69; section VI.C.5, p. 64 (Exhibit USA-02).

¹⁷⁵ Final Determination, section VII.A, pp. 69-70 (Exhibit USA-02).

¹⁷⁶ Final Determination section VI.C.13, p. 67 (Exhibit USA-02). MOFCOM did not present data for interim 2008 in the final determination. The data reflected here are derived from the data for interim 2009 and the percentage change from interim 2008 to interim 2009, which were presented in the final determination.

¹⁷⁷ Final Determination, section VI.C.11, p. 66 (Exhibit USA-02).

overcame the decrease in apparent consumption of the domestic market and maintained an increase in output, sales, and market share.¹⁷⁸

A 33.24 percent decline in productivity, in such a short period, can hardly be characterized as “continuously improving production management.”

163. The “productivity of the domestic industry” is expressly identified in Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement as a factor that “may be relevant” to the causation analysis. MOFCOM’s failure to address this factor in its analysis is plainly inconsistent with these provisions.

4. MOFCOM Failed to Recognize the Lack of Competition between Subject Imports and the Domestic Like Product.

164. In its “Analysis of Other Factors” in the discussion of causation in the final determination, MOFCOM states that “[t]he quality and the client base between the domestic like products and that of the subject products is also roughly the same.”¹⁷⁹ This statement is contradicted by evidence on the record, and reflects MOFCOM’s failure to examine relevant evidence before it.

165. During the investigation, a U.S. respondent presented detailed sales data showing that Chinese, U.S., and third country producers sell automobiles in four categories: “entry,” “mid,” “premium,” and “luxury.”¹⁸⁰ Those data show that, in all parts of the period of investigation, the Chinese domestic industry sold primarily “entry” level vehicles, and a very small number of “premium” or “luxury” vehicles. U.S. producers, however, primarily sold “premium” and “luxury” vehicles, and a very small number of “mid” level vehicles; no sales of “entry” level vehicles by U.S. producers are reported. It is evident from these data that, as the U.S. respondent argued, “the overlap of competition between subject imports and the domestic like product is miniscule, if it exists at all.”¹⁸¹

166. This is consistent with and confirmed by data showing that “subject imports *oversold* the domestic like product during most of the period of investigation, and *oversold to a far greater degree toward the end of the period of investigation.*”¹⁸² In interim 2009, the average unit price

¹⁷⁸ Final Determination, section VII.A, p. 69 (emphasis added) (Exhibit USA-02). MOFCOM made a similarly inaccurate statement in its analysis of other factors that might have caused injury to the domestic industry, where it said: “[t]he evidence shows domestic industry is very competitive in terms of production processes, technical equipment, production quality, and production and operation management.” Final Determination, section VII.B.3, p. 71 (Exhibit USA-02).

¹⁷⁹ See Final Determination, section VII.B.3, p. 71 (Exhibit USA-02).

¹⁸⁰ See U.S. Respondent Comments on the Preliminary Determination, Table 6, pp. 50-51 (Exhibit USA-12).

¹⁸¹ U.S. Respondent Comments on the Preliminary Determination, section VI.B, p. 27 (Exhibit USA-12).

¹⁸² U.S. Respondent Comments on the Preliminary Determination, section VI.B, p. 27 (Exhibit USA-12); *see also id.*, section V.B, p. 23.

of the subject imports (¥411,382) was 30.4 percent higher than the average unit price of the domestic like product.

167. MOFCOM’s brief response to the arguments of the U.S. respondent that these product differences seriously limited competition between U.S. and Chinese autos was:

[T]able 6 of Chrysler Group LLC’s evidence 1 shows that the Chinese domestic industry (include both “Chinese domestic producers” and “foreign producers in China”) and the subject merchandise both produce products in four grade, i.e. “elementary”, “medium grade”, “high-grade” and “luxury”, which further explained that the domestic industry’s products are competing with the subject merchandise.¹⁸³

This cursory statement does not in any way address the evidence and argument that was put before MOFCOM showing that competition between the subject imports and the domestic like product was extremely limited.

168. The record evidence of limited competition between subject imports and the domestic like products is a further indication that subject imports were not a cause of the economic difficulties experienced by the domestic industry.

5. MOFCOM Failed to Take Into Account the Sharp Drop in Demand in Interim 2009.

169. In its “Analysis of Other Factors,” MOFCOM also discussed demand for the product under consideration during the period of investigation. This was appropriate, as Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement expressly identify “contraction in demand or changes in the patterns of consumption” as a factor that “may be relevant” to the causation analysis.

170. As with other aspects of its injury analysis, however, MOFCOM’s findings with respect to the impact of demand on its causation determination are not consistent with the evidence on the administrative record. MOFCOM states that:

During the POI, the domestic market demand for Saloon cars and Cross-country cars (of cylinder capacity > 2500cc) had an overall increasing trend. Compared to the previous year, the apparent consumption in 2007 and 2008 increased by 44.54% and by 13.39% respectively. Compared to the same period of the previous year, the apparent consumption in the first three quarters of 2009 decreased 21.65%, although apparent consumption in the first three quarters of 2009 was still close to the apparent consumption for the entire year of 2006. The changes in apparent consumption did not cause any injury to the domestic industry. Thus, the Investigating Authority found the material injury suffered by

¹⁸³ Final Determination, section VII.C.9, p. 78 (Exhibit USA-02).

the domestic industry was not caused by changes in market demand, the consumption model, or other substitute products.¹⁸⁴

171. MOFCOM's conclusion simply does not follow from the data it presented. As discussed above, the only part of the period of investigation in which MOFCOM found injury to have occurred was interim 2009. This coincided with the only instance of demand *contraction* during the period of investigation. Yet, without explanation, MOFCOM dismisses the demand contraction as not having caused any injury to the domestic industry. Given that a contraction in demand would typically be expected to have an adverse effect on pricing in the market, MOFCOM's summary dismissal of this factor as having no injurious impact on the industry was deeply flawed. MOFCOM's conclusion is not based on positive evidence, does not reflect an objective examination, and demonstrates that MOFCOM failed to ensure that injuries caused by other factors were not attributed to the dumped or subsidized imports.

6. MOFCOM Failed to Address Other Factors That May Have Caused Injury to the Domestic Industry.

172. Finally, we note that MOFCOM not only failed to meet the requirements of Articles 3.1 and 3.5 of the AD Agreement and Articles 15.1 and 15.5 of the SCM Agreement with respect to other factors that it did discuss in its final determination (discussed above), MOFCOM further acted inconsistently with those provisions by failing entirely to address a number of other factors that likely accounted for the challenges experienced by the Chinese domestic industry at the end of the period of investigation.

173. First, MOFCOM ignored a decision by China to increase the sales tax on larger engine vehicles, and reduce the sales tax on smaller engine vehicles, and failed to consider the effect this may have had on the domestic industry. A U.S. respondent raised this issue in its comments on the preliminary determination:

On January 20, 2009, China cut the vehicle tax on cars with engines up to 1.6 litres from 10 percent to 5 percent as part of a deliberate effort to encourage the production and sales of more fuel efficient smaller engine passenger cars. The previous September, China had sought to discourage the production and sale of less fuel efficient larger engine cars by raising the tax on sales of such cars from 15 percent to 25 percent for vehicles with engines over three litres, but less than four litres, and from 20 percent to 40 percent for vehicles with engines over four litres. To the extent MOFCOM finds a decline in the production and sales of the domestic like product between 2008 and 2009, it has an affirmative obligation to explain why the drop was caused by subject imports rather than the change in China's tax policies.¹⁸⁵

¹⁸⁴ Final Determination, section VI.B.2, pp. 70-71 (Exhibit USA-02).

¹⁸⁵ U.S. Respondent Comments on the Preliminary Determination, section V.A, pp. 22-23 (Exhibit USA-12).

In the final determination, MOFCOM simply noted this argument and recounted certain other facts. MOFCOM provided no substantive analysis or explanation for why the tax measures were not a cause of injury to the domestic injury.¹⁸⁶

174. Second, MOFCOM failed to address the effect of increases in average wages and employment over the POI, coupled with decreases in productivity, on the domestic industry's pre-tax profits. MOFCOM stated that, from interim 2008 to interim 2009, pre-tax profits decreased by 32.39 percent¹⁸⁷ and attributed this to the decrease in the price of U.S. imports over the same period. MOFCOM did not address evidence on the record showing that, over the same period, the average wages of the domestic industry increased by 17.38 percent,¹⁸⁸ employment in the domestic industry ballooned, increasing by 68.71 percent,¹⁸⁹ and productivity plummeted, decreasing by 33.24 percent.¹⁹⁰ These other known factors, which MOFCOM itself presented elsewhere in the final determination, were likely the cause of the decline in the domestic industry's pre-tax profits. However, MOFCOM failed to examine them in connection with its causation determination.

175. For all of the reasons given above, MOFCOM's causation analysis was not based on positive evidence and did not reflect an objective examination, as required by Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement. Further, MOFCOM failed to meet the requirements of Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement to properly demonstrate causation by examining all relevant evidence before it; by failing to examine certain known factors other than the dumped or subsidized imports which at the same time were injuring the domestic industry; and by failing to ensure that the injuries caused by these other factors were not attributed to the dumped or subsidized imports.

IX. CONSEQUENTIAL CLAIMS

176. In view of the claims set forth above, the United States considers that China has also acted inconsistently with Article VI of the GATT 1994, Article 1 of the AD Agreement, and Article 10 of the SCM Agreement, which only permit antidumping or countervailing duty measures to be applied under the circumstances provided for in Article VI of the GATT 1994 and conducted in accordance with the AD Agreement and the SCM Agreement.

177. Accordingly, the United States requests that the Panel find that China has acted inconsistently with these provisions as well.

¹⁸⁶ Final Determination, section VII.C.7, pp. 79-80 (Exhibit USA-02).

¹⁸⁷ Final Determination, section VI.C.8, p. 66 (Exhibit USA-02).

¹⁸⁸ Final Determination, section VI.C.12, p. 67 (Exhibit USA-02).

¹⁸⁹ Final Determination, section VI.C.11, p. 66 (Exhibit USA-02).

¹⁹⁰ Final Determination, section VI.C.13, p. 67 (Exhibit USA-02).

X. CONCLUSION

178. For the reasons set forth in this submission, the United States respectfully requests that the Panel find that China's measures, as set out above, are inconsistent with China's obligations under the GATT 1994, SCM Agreement, and AD Agreement. The United States further requests, pursuant to Article 19.1 of the DSU, that the Panel recommend that China bring its measures into conformity with the GATT 1994, SCM Agreement, and AD Agreement.