CHINA-COUNTERVAILING AND ANTI-DUMPING DUTIES ON GRAIN ORIENTED FLAT-ROLLED ELECTRICAL STEEL FROM THE UNITED STATES – RECOURSE TO ARTICLE 21.5 OF THE DSU BY THE UNITED STATES

(DS414)

FIRST WRITTEN SUBMISSION OF THE UNITED STATES OF AMERICA

June 3, 2014

TABLE OF CONTENTS

TABLE OF DISPUTES

Short Title	**Full Citation**
Argentina – Poultry Anti-Dumping Duties	Panel Report, *Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil*, WT/DS241/R, adopted 19 May 2003
Canada – Aircraft (Article 21.5 – Brazil)(AB)	Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft – Recourse by Brazil to Article 21.5 of the DSU*, WT/DS70/AB/RW, adopted 4 August 2000
China – Autos	Panel Report, *China – Anti-Dumping and Countervailing Duties on Certain Automobiles from the United States*, WT/DS440/R, circulated 23 May 2014
China – GOES (AB)	Appellate Body Report, *China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States*, WT/DS414/AB/R, adopted 16 November 2012
China – GOES (Panel)	Panel Report, *China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States*, WT/DS414/R and Add.1, adopted 16 November 2012, upheld by Appellate Body Report WT/DS414/AB/R
China – GOES (Article 21.3(c))	Award of the Arbitrator, *China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States – Arbitration Under Article 21.3(c) of the DSU*, WT/DS414/12, 3 May 2013
EC – Countervailing Measures on DRAM Chips	Panel Report, *European Communities – Countervailing Measures on Dynamic Random Access Memory Chips from Korea*, WT/DS299/R, adopted 3 August 2005
EC – Tube or Pipe Fittings (AB)	Appellate Body Report, *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/AB/R, adopted 18 August 2003
EU – Footwear (China)	Panel Report, *European Union – Anti-Dumping Measures on Certain Footwear from China*, WT/DS405/R, adopted 22 February 2012

Mexico – Anti-Dumping Measures on Rice (AB)	Appellate Body Report, *Mexico – Definitive Anti-Dumping Measures on Beef and Rice, Complaint with Respect to Rice*, WT/DS295/AB/R, adopted 20 December 2005
Mexico – Corn Syrup (Article 21.5 – US)(AB)	Appellate Body Report, *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States – Recourse to Article 21.5 of the DSU by the United States*, WT/DS132/AB/RW, adopted 21 November 2001
Thailand – H-Beams (Panel)	Panel Report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, WT/DS122/R, adopted 5 April 2001, as modified by Appellate Body Report WT/DS122/AB/R
US – Countervailing Duty Investigation on DRAMS (AB)	Appellate Body Report, *United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea*, WT/DS296/AB/R, adopted 20 July 2005
US – Hot-Rolled Steel (AB)	Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, adopted 23 August 2001
US – Softwood Lumber VI (Article 21.5 – Canada) (AB)	Appellate Body Report, *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada*, WT/DS277/AB/RW, adopted 9 May 2006
US – Upland Cotton (Article 21.5 – Brazil) (AB)	Appellate Body Report, *United States – Subsidies on Upland Cotton– Recourse to Article 21.5 of the DSU by Brazil*, WT/DS267/AB/RW, adopted 20 June 2008

TABLE OF EXHIBITS

Exhibit No.	Description	Short Title
US-01	MOFCOM, Determination on the Re-investigation of Antidumping and Countervailing Duties on Grain Oriented Flat-Rolled Electrical Steel Imports from the United States, Public Notice [2013] No. 51, including its annexes	Re-determination
US-02	MOFCOM, Public Notice [2013] No. 40	
US-03	MOFCOM, Notice of information disclosure before the industry injury verdict of the anti-dumping on imported grain-oriented silicon Electrical steel with the country of origin in the United States and Russia and the anti-subsidy on the imported grain-oriented silicon Electrical steel with the country of origin in the United States, Public Notice [2013] No. 327	Re-determination Disclosure
US-04	MOFCOM, Final Determination in Anti-Dumping and Anti-Subsidy Investigations on GOES Imports from the US and Russia, No. 21, Apr. 10, 2010 (Orig. Exhibit CHN-16)	Original Final Determination
US-05	MOFCOM, Notice regarding Industrial Injury Investigation Information Disclosure concerning the Antidumping investigation against Imported GOES Originated from the United States and Russia and the Anti-subsidy investigation against Imported GOES Originated from the United States, Mar. 7, 2010 (Orig. Exhibit US-27)	Original Injury Disclosure
US-06	Orig. Exhibit CHN-37 (Contains WTO-Confidential Information)	
US-07	Orig. Exhibit CHN-38 (Contains WTO-Confidential Information)	
US-08	Orig. Exhibit CHN-39 (Contains WTO-Confidential Information)	
US-09	Orig. Exhibit CHN-40 (Contains WTO-Confidential Information)	

US-10	Petition for Antidumping and Countervailing Duty Investigation, June 21, 2013	Revised Application
US-11	*Scheduling a Successful Start-Up*, Iron Age, July 1992	
US-12	GOES: Imports into China (Orig. Exhibit US-41)	
US-13	New Shorter Oxford English Dictionary (Clarendon Press 1993)	

I. INTRODUCTION

1. On November 16, 2012, the Dispute Settlement Body ("DSB") adopted its recommendations and rulings in the dispute *China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-rolled Electrical Steel from the United States* ("*China – GOES*") (DS414), and found that China imposed antidumping and countervailing duties on U.S. exports of grain oriented flat-rolled electrical steel ("GOES") in a manner that breached China's obligations under the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("AD Agreement"), and the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement"). As a result, the DSB recommended that China bring its measures into conformity with its obligations under these agreements.

2. Instead of complying with the DSB's recommendations and rulings, China did the opposite: on July 31, 2013, China's Ministry of Commerce ("MOFCOM") issued a *Determination on the Re-investigation of Antidumping and Countervailing Duties on Grain Oriented Flat-Rolled Electrical Steel Imports from the United States* ("Re-determination")[1] that suffers from many of the same flaws as the original investigation, and as a result, continues to impose antidumping and countervailing duties on imports of GOES in a WTO-inconsistent manner.

3. These breaches include China's Ministry of Commerce ("MOFCOM") findings that the imports subject to investigation (the "subject imports") had adverse effects on prices of the domestic like product; that the domestic industry was materially injured in 2008; and that there was a causal relationship between the subject imports and any material injury to the domestic industry in any part of the period of investigation. The breaches also include MOFCOM's failures to disclose certain facts, and to explain its Re-determination.

4. MOFCOM's price effects findings again fail to show that price suppression and depression were the effect of subject imports; its price effects findings are not supported by positive evidence, and do not entail an objective examination of the evidence.

5. Thy Re-determination contains numerous errors on price effects. First, MOFCOM's price effects analysis suffers from a fundamental flaw. Having disavowed making any price comparisons between the subject imports and the domestic like product in its Re-determination, MOFCOM has no probative evidence indicating that the prices of subject imports adversely affected the prices of the domestic like product. MOFCOM attempts to show instead that the volume of subject imports affected domestic prices are unavailing.

6. Second, MOFCOM continues to assert a theory of parallel pricing, for which it has no evidence. And MOFCOM similarly has failed to explain how the pricing policies of subject foreign producers depressed domestic prices, given that the actual pricing dynamics show that this cannot have been the case.

7. Third, MOFCOM's theory that the domestic industry's loss of market share in 2008 caused the domestic industry to slash its prices by over 30 percent in the first quarter of 2009 is

[1] MOFCOM's Public Notice [2013] No. 51, including its annexes (Exhibit US-01).

not supported by any evidence at all – MOFCOM simply asserts a linkage between the two developments, without identifying the evidence that supports such a linkage.

8. Thus, MOFCOM's price effects findings are not supported by positive evidence, and do not entail an objective examination of the evidence. These findings are therefore inconsistent with Articles 3.1 and 3.2 of the AD Agreement, and Articles 15.1 and 15.2 of the SCM Agreement.

9. MOFCOM's finding that the domestic industry was materially injured in 2008 is also not supported by positive evidence, and does not entail an objective examination of the condition of the domestic industry. In the case of some factors, MOFCOM relied on a deceleration in 2008 from unusually strong performance levels in 2007. MOFCOM also simply ignored certain other factors that underscored the absence of material injury. MOFCOM's findings in this regard are thus inconsistent with Articles 3.1 and 3.4 of the AD Agreement, and Articles 15.1 and 15.4 of the SCM Agreement.

10. MOFCOM's examination of the causal relationship between subject imports and the injury to the domestic industry is also deficient, in several ways. The shortcomings in MOFCOM's price effects analysis undermine MOFCOM's conclusion that there was a causal link between subject imports and injury to the domestic industry. In addition, MOFCOM's assertion that subject imports prevented the domestic industry from realizing economies of scale is nothing more than an assertion, devoid of any factual analysis. MOFCOM also failed to address injury caused by the domestic industry's overexpansion and overproduction. Finally, MOFCOM failed to show that it did not attribute to subject imports injury caused by imports from countries other than Russia and the United States ("nonsubject imports").

11. Regarding this last point, it is noteworthy that MOFCOM's new disclosures show that nonsubject imports were a much more significant factor in the Chinese market than subject imports throughout the period of investigation. MOFCOM, however, failed to address nonsubject imports' contribution to any injury suffered by China's domestic injury. Notwithstanding MOFCOM's flawed reasoning, MOFCOM failed to show that any injury to the domestic industry was caused by subject imports. MOFCOM's causation findings are inconsistent with Articles 3.1 and 3.5 of the AD Agreement, and Articles 15.1 and 15.5 of the SCM Agreement.

12. MOFCOM's Re-determination also suffers from procedural defects. MOFCOM relies on certain essential facts that should have been, but were not, disclosed. MOFCOM also fails to adequately explain various aspects of its price effects and causation determinations. These failures are inconsistent with Articles 6.9, 12.2, and 12.2.2 of the AD Agreement, and Articles 12.8, 22.3, and 22.5 of the SCM Agreement.

13. Thus, from a WTO compliance standpoint, the situation is the same as it was in the original proceedings: China still imposes antidumping and countervailing duties on imports of GOES from the United States through measures that are inconsistent with the covered agreements. U.S. companies, therefore, continue to lose sales and market share in China because of these WTO-inconsistent duties.

14. In light of the evidence and arguments presented below, the United States respectfully requests that the Panel find that China's Re-determination fails to comply with the DSB's recommendations and rulings in *China – GOES*, and is inconsistent with China's WTO obligations.

II. BACKGROUND OF THIS DISPUTE

A. Panel and Appellate Body Findings Confirm that China Acted Inconsistently with Numerous WTO Obligations

15. On April 10, 2010, MOFCOM issued its Final Determination, finding that imports of GOES from Russia and the United States were being dumped and that imports from the United States benefitted from countervailable subsidies. MOFCOM cumulated imports from Russia and the United States in its assessment of injury and causation. MOFCOM found that cumulated subject imports had significant price depressing and significant price suppressing effects. The United States challenged several aspects of MOFCOM's findings.

16. The original panel found that China acted inconsistently with Articles 15.1 and 15.2 of the SCM Agreement, and Articles 3.1 and 3.2 of the AD Agreement, in connection with MOFCOM's findings regarding the price effects of subject imports.[2] The original panel also found that China acted inconsistently with Articles 12.8 and 22.5 of the SCM Agreement due to deficiencies in the related essential facts disclosure;[3] and Articles 6.9 and 12.2.2 of the AD Agreement, because of shortcomings in MOFCOM's public notice and explanation.[4]

17. The original panel also found that the causation analysis in MOFCOM's original determination was deficient in that MOFCOM's original determination did not provide positive evidence to support a conclusion that any injury to the domestic industry was caused by the subject imports[5] and did not sufficiently examine the domestic industry's inventory overhang as an alternative cause of injury.[6] Therefore, according to the original panel, China acted inconsistently with Articles 15.1 and 15.5 of the SCM Agreement, and Articles 3.1 and 3.5 of the AD Agreement. The original panel also found that China acted inconsistently with Articles 12.8 and 22.5 of the SCM Agreement, and Articles 6.9 and 12.2.2 of the AD Agreement, because of deficiencies in the related essential facts disclosure and public notice and explanation related to MOFCOM's causation analysis.[7]

18. China appealed the original panel's findings regarding the price effects of subject imports and the related essential facts disclosure and public notice and explanation. It did not appeal the

[2] *China – GOES (Panel)*, paras. 7.511-7.554.

[3] *China – GOES (Panel)*, paras. 7.567-7.575.

[4] *China – GOES (Panel)*, paras. 7.587-7.592.

[5] *China – GOES (Panel)*, paras. 7.619-7.621.

[6] *China – GOES (Panel)*, paras. 7.630-7.637.

[7] *China – GOES (Panel)*, paras. 7.648-7.660, 7.669-7.675.

original panel's findings that MOFCOM's original determination did not provide positive evidence to support a conclusion that any injury was caused by the subject imports.

19. The Appellate Body rejected all of China's injury arguments on appeal. The Appellate Body found several deficiencies in the price effects analysis in the original MOFCOM determination. The Appellate Body found that the AD Agreement and the SCM Agreement require an authority to find a linkage between the imports subject to investigation and any price depression or price suppression.[8] The Appellate Body further found that MOFCOM had not identified positive evidence in the record, or conducted an objective examination, linking the subject imports to any price depression or price suppression.[9] It found that MOFCOM had not provided positive evidence to support its findings that price depression or price suppression was due to the "low prices" of the subject imports.[10]

20. Moreover, the Appellate Body found that MOFCOM did not satisfy its obligations to disclose essential facts with respect to its findings that the subject imports were sold at "low" prices.[11] The Appellate Body found deficiencies in the explanations that MOFCOM provided in its final determination.[12] Thus, the Appellate Body upheld the original panel's findings that China's measures were inconsistent with Article 6.9 of the AD Agreement and Article 12.8 of the SCM Agreement, and with Article 12.2.2 of the AD Agreement and Article 22.5 of the SCM Agreement.[13]

B. China's Compliance Measures Continue to Impose Duties on GOES

21. The reasonable period of time ("RPT") for China to comply was established as being 8.5 months, expiring on July 31, 2013.[14] On June 14, 2013, China announced that it would re-examine the measures at issue in light of the DSB recommendations and rulings, and that its re-examination would be based on a review of the existing evidence and information in the primary antidumping and countervailing duty investigations.[15]

22. On July 4, 2013, MOFCOM issued its *Notice of information disclosure before the industry injury verdict of the anti-dumping on imported grain-oriented silicon Electrical steel with the country of origin in the United States and Russia and the anti-subsidy on the imported grain-oriented silicon Electrical steel with the country of origin in the United States* ("Re-

[8] *China – GOES (AB)*, para. 169.

[9] *China – GOES (AB)*, paras. 222-228.

[10] *China – GOES (AB)*, paras. 186-196.

[11] *China – GOES (AB)*, para. 251.

[12] *China – GOES (AB)*, paras. 261-267.

[13] *China – GOES (AB)*, para. 268.

[14] *China – GOES (Article 21.3(c))* (WT/DS414/12).

[15] MOFCOM Public Notice [2013] No. 40 (Exhibit US-02).

determination Disclosure"), and gave interested parties an opportunity to submit comments.[16] The United States, along with AK Steel Corporation and Allegheny Ludlum Corporation (U.S. producers and exporters of GOES to China), submitted comments on the Re-determination Disclosure. On July 31, 2013, MOFCOM issued its Re-determination, which continues the imposition of AD/CVD duties on imports of GOES from the United States.

23. On August 19, 2013, China and the United States informed the DSB that they had agreed to certain procedures to govern any disagreement under Article 21.5 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") arising from MOFCOM's Re-determination.[17] Following consultations with China, on January 24, 2014, the United States requested that the DSB establish a panel to review MOFCOM's Re-determination.[18] The Panel was established on February 26, 2014, with the following terms of reference:

> To 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/DS414/16 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.[19]

III. REVIEW UNDER ARTICLE 21.5 OF THE DSU

24. Article 21.5 provides in relevant part that:

> Where there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings such dispute shall be decided through recourse to these dispute settlement proceedings, including whenever possible resort to the original panel.

25. Under Article 21.5 of the DSU, measures that negate or undermine compliance with the DSB's recommendations and rulings and any measures taken to comply that are inconsistent with a covered agreement may come within the scope of an Article 21.5 proceeding. The Appellate Body has explained that Article 21.5 applies to "measures which have been, or which should be, adopted by a Member to bring about compliance with the recommendations and rulings of the DSB."[20]

26. Thus, in reviewing the existence or consistency with a covered agreement of a measure taken to comply with the recommendations and rulings of the DSB, the Appellate Body has found that "this task cannot be done in abstraction from the measure that was the subject of the

[16] Re-determination Disclosure (Exhibit US-03).

[17] WT/DS414/14.

[18] WT/DS414/16.

[19] WT/DS414/17.

[20] *Canada – Aircraft (Article 21.5) (AB)*, para. 36.

original proceedings."[21] Regarding a re-determination of duties, to assess compliance with DSB recommendations and rulings, "the original determination and original panel proceedings, as well as the re-determination…form part of a continuum of events."[22]

27. An Article 21.5 panel is to engage in an objective assessment to determine the existence or consistency of a measure taken to comply. If on a specific issue the underlying evidence and the explanations given by the investigating authority have not changed from the original determination, then an Article 21.5 panel should reach the same conclusions as the original panel: "Doubts could arise about the objective nature of an Article 21.5 panel's assessment if, on a specific issue, that panel were to deviate from the reasoning in the original panel report in the absence of any change in the underlying evidence in the record and explanations given by the investigating authority in a re-determination."[23]

28. Moreover, in this dispute, one question is whether MOFCOM's conclusions are "reasoned and adequate" in "light of the evidence."[24] The Appellate Body has explained that in order to do so, a

> 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.
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> 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.[25]

29. Accordingly, investigating authorities in antidumping and countervailing duty investigations may have to consider conflicting arguments and evidence and will need to exercise discretion. However, the investigating authority is responsible for ensuring that its explanations reflect that conflicting evidence was considered:

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[21] *US – Softwood Lumber VI (Article 21.5 – Canada) (AB),* para. 102.

[22] *Mexico – Corn Syrup (Article 21.5 – US) (AB),* para. 121.

[23] *US – Upland Cotton (Article 21.5 – Brazil) (AB),* para. 285 (citing *US – Softwood Lumber VI (Article 21.5 – Canada) (AB),* para. 103.

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

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

> [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."[26]

IV. MOFCOM'S INJURY RE-DETERMINATION FAILS TO COMPLY WITH THE DSB'S RECOMMENDATIONS AND RULINGS AND IS INCONSISENT WITH CHINA'S WTO OBLIGATIONS

A. MOFCOM's Revised Price Effects Analysis Is Inconsistent with China's Obligations Under Articles 3.1 and 3.2 of the AD Agreement and Articles 15.1 and 15.2 of the SCM Agreement

30. In its Re-determination, MOFCOM again found that subject imports both suppressed and depressed the prices of the domestic product. It found that domestic prices were suppressed in 2008 and the first quarter of 2009, and that domestic prices were depressed in the first quarter of 2009.[27]

31. In its analysis, MOFCOM concluded that the subject imports had adverse effects on the domestic industry's prices in three ways: (i) the volume of subject imports suppressed domestic prices in 2008 and the first quarter of 2009, as evidenced by a cost-price squeeze experienced by the domestic industry in those periods; (ii) the 5.56 percent increase in subject imports' market share in 2008 drove the domestic industry to cut prices by 30.25 percent in the first quarter of 2009, resulting in price depression; and (iii) the pricing policies of subject foreign producers in the first quarter of 2009, as indicated by certain verification documents, drove domestic producers to cut their prices in the first quarter of 2009, also resulting in price depression.

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

[27] Re-determination at 26 (Exhibit US-01).

32. MOFCOM has failed to meaningfully address and remedy the numerous deficiencies that the DSB found in the original determination. Its findings regarding the price effects of subject imports are inconsistent with Articles 3.1 and 3.2 of the AD Agreement and Articles 15.1 and 15.2 of the SCM Agreement, as discussed below.

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

33. Article 3.1 of the AD Agreement states that:

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

34. 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."

35. Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement impose two important requirements on authorities that make injury determinations. The first is that the determination be based on "positive evidence." The Appellate Body has referenced with approval a description of "positive evidence" as "evidence that is relevant and pertinent with respect to the issue being decided, and that has the characteristics of being inherently reliable and trustworthy."[28]

36. The second requirement is that the injury determination involves an "objective examination" of the volume of the dumped or subsidized imports, their price effects, and their impact on the domestic industry. The Appellate Body has stated that, to be "objective," an injury analysis must be "based on data which provides an accurate and unbiased picture of what it is that one is examining" and be conducted "without favouring the interests of any interested party, or group of interested parties, in the investigation."[29] Furthermore, the requirement that the examination be "objective" mandates that "the 'examination' process must conform to the basic principles of good faith and fundamental fairness."[30]

37. Article 3.2 of the AD Agreement and Article 15.2 of the SCM Agreement describe further the nature of the examination that authorities must conduct to determine the price effects of dumped or subsidized imports. Article 3.2 of the AD Agreement states that "[w]ith regard to the effect of the dumped imports on prices, the investigating authorities shall consider whether

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[28] *Mexico – Anti-Dumping Measures on Rice* (AB), paras. 163-64. *See also EC – Tube or Pipe Fittings (AB)*, para. 7.226.

[29] *Mexico – Anti-Dumping Measures on Rice* (AB), para. 180.

[30] *US – Hot-Rolled Steel (AB)*, para. 193

there has been significant price undercutting by the dumped imports as compared with the price of a like product of an importing Member, or whether the effect of such imports is to depress prices to a significant degree or prevent price increases, which otherwise would have occurred, to a significant degree." Article 15.2 of the SCM Agreement is worded identically, except that it uses the term "subsidized imports" where Article 3.2 of the AD Agreement uses the term "dumped imports."

38. In interpreting Articles 3.2 and 15.2, the Appellate Body has explained that it is not enough for an authority to simply observe what is happening to domestic prices. Instead "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."[31]

39. According to the Appellate Body, the "objective assessment" to be made by a panel reviewing an investigating authority's determination should be informed by an examination of whether the authority provided a reasoned and adequate explanation as to: (i) how the evidence on the record supported its factual findings; and (ii) how those factual findings supported the overall determination. This explanation should be discernible from the published determination itself, and should also address alternative explanations that could reasonably be drawn from the evidence, as well as the reasons why the agency chose to discount such alternatives in coming to its conclusions.[32]

2. MOFCOM's Finding That the Volume of Subject Imports Suppressed Domestic Prices in 2008 and the First Quarter of 2009 Does Not Rest on an Objective Examination Based on Positive Evidence

a. MOFCOM's Original Determination, the Panel's Findings, and the Appellate Body's Analysis

40. In its original determination, MOFCOM relied on a number of findings as to "low" or "lower" prices of subject imports to justify its finding of significant price depression in the first quarter of 2009. MOFCOM also found that there was significant price suppression in 2008 and the first quarter of 2009, based on the fact that the domestic industry's costs rose more than its prices.[33]

41. Before the original panel, it became clear that MOFCOM's "low" or "lower" price findings in the original determination had no evidentiary basis.[34] The original panel requested that China provide the evidence underlying these findings, but China failed to respond fully to

[31] *China – GOES (AB)*, para. 138.

[32] *US – Countervailing Duty Investigation on DRAMS (AB)*, para. 186.

[33] Original Final Determination at 59 (Exhibit US-04) (Orig. Exhibit CHN-16).

[34] *China – GOES (Panel)*, para. 7.527.

the panel's request, citing the need to protect business confidential information. China did, however, provide the Panel with ranged average unit value ("AUV") data for subject imports and sales of the domestic product.[35]

42. With regard to MOFCOM's finding of significant price depression, the original panel rejected China's arguments that MOFCOM had not made any finding of price undercutting, and that price comparability should not be considered as an issue. It found that, even though MOFCOM did not make a finding of significant price undercutting, MOFCOM did rely on a finding that subject import prices undercut domestic prices.[36] The original panel also expressed misgivings regarding the AUV data that MOFCOM used to make this finding. The original panel explained that MOFCOM had failed to consider the need for adjustments to the AUV data to ensure price comparability. The original panel explained that "[a]s soon as price comparisons are made, price comparability necessarily arises as an issue." The original panel concluded that MOFCOM's reliance on the AUVs was neither objective, nor based on positive evidence.[37]

43. With regard to MOFCOM's finding of significant price suppression in 2008 and the first quarter of 2009, the original panel found that the same flaws that undermined MOFCOM's price depression analysis also undermined its price suppression analysis.[38] It also found that the commencement of Baosteel's operations in May 2008 should have caused MOFCOM to examine whether the 2008 change in the industry's price-cost ratio was merely a function of the inclusion of the additional start-up costs incurred by Baosteel, rather than an adverse effect of subject imports on price. More specifically, the original panel found that MOFCOM should have considered whether the underlying cost structure of the domestic industry in 2007 was comparable to that in 2008 and the first quarter of 2009.[39] The original panel also noted that, instead of fully considering the start-up costs of domestic industry and its ability to raise prices to cover these costs, "MOFCOM simply assumed that (i) prices should have been able to rise with costs, and (ii) the only reason prices were not able to rise with costs was because of the effect of subject imports."[40]

44. The Appellate Body found that "the Panel was correct to conclude that … MOFCOM's finding as to the 'low price' of subject imports referred to the existence of price undercutting between 2006 and 2008, and that MOFCOM relied on this factor to support its finding of significant price depression and suppression."[41] The Appellate Body also agreed with the panel's reasoning on the use of AUV data. The Appellate Body explained that "if subject import

[35] *China – GOES (Panel)*, para. 7.527.

[36] *China – GOES (Panel)*, para. 7.530.

[37] *China – GOES (Panel)*, para. 7.530.

[38] *China – GOES (Panel)*, para. 7.547.

[39] *China – GOES (Panel)*, para. 7.548.

[40] *China – GOES (Panel)*, para. 7.550.

[41] *China – GOES (AB)*, para. 196.

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."[42] The Appellate Body agreed with the panel that the same flaws that undermined MOFCOM's price depression finding also undermined its price suppression finding.[43]

45. With regard to China's argument that MOFCOM's significant price depression analysis could be upheld solely based on the volume effects of subject imports, the Appellate Body also noted panel findings that "there was 'nothing in MOFCOM's determination to suggest that MOFCOM itself found that the volume effects of subject imports alone were sufficient to conclude that price depression was an effect of subject imports.'"[44] To the contrary, the original panel "considered that MOFCOM's analysis of subject import prices was 'so central' to its analysis that the flaws the panel had found with the analysis 'must invalidate MOFCOM's overall conclusion that price depression was an effect of subject imports.'"[45] The Appellate Body affirmed the original panel's finding that MOFCOM's significant price depression analysis could not be upheld solely based on the volume effects of subject imports.[46]

b. MOFCOM's Volume-Based Price Suppression Analysis Is Flawed

46. MOFCOM's theory that subject import volumes alone affected the prices of the domestic like product did not arise until presented by China in the underlying panel proceedings, and only after it became clear that MOFCOM's price effects analysis could not withstand scrutiny. In its Re-determination, MOFCOM seems to take the position that a price effects analysis can be conducted without taking into account the relationship between the prices of subject imports and the prices of the domestic like product. An objective authority would not, however, attribute negative price effects to subject imports without conducting an analysis of the relationship between the prices of subject imports and the prices of the domestic like product.

47. In considering the effect of the subject imports on prices under Article 3.2 of the AD Agreement and Article 15.2 of the SCM Agreement, the investigating authority shall consider evidence as to that effect, such as evidence of the prices of imported products compared to the prices of domestic products. An investigating authority cannot determine that subject imports had a particular price effect while ignoring the evidence as to the actual prices of imports compared to domestic products. Yet MOFCOM ignored the price comparison evidence altogether in its Re-determination.

48. In its Re-determination, MOFCOM has found that the increase in the volume and market share of subject imports in 2008 suppressed the prices of the domestic product in 2008 and the

[42] *China – GOES (AB)*, para. 200.

[43] *China – GOES (AB)*, para. 227.

[44] *China – GOES (AB)*, para. 215.

[45] *China – GOES (AB)*, para. 215.

[46] *China – GOES (AB)*, para. 221.

first quarter of 2009. Specifically, MOFCOM found that there was price suppression in 2008 (when the domestic industry's prices rose by 14.53 percent) because the domestic industry's "price-cost differential" declined by 7 percent in that year.[47] It also found that there was price suppression in the first quarter of 2009 (when domestic prices fell by 30.25 percent) because the domestic industry's "price-cost differential" declined by 75 percent in that period.[48]

49. Leaving aside the fundamental problem of MOFCOM's complete failure to conduct an analysis of the relationship between prices of subject imports and the domestic like product, MOFCOM's analysis also suffers from other serious flaws. As discussed below, MOFCOM's attempt to show that the decline in the price-cost differential in 2008 was not attributable to Baosteel's startup costs is unpersuasive. MOFCOM's attempt to show that the domestic industry did not exercise price restraint for its own benefit is also unpersuasive.

50. Instead of considering whether the underlying cost structure of the domestic industry in 2007 was comparable to that in 2008 – as the original panel said it should have done – MOFCOM chose another approach to try to establish that the change in the industry's price-cost differential was not merely a function of the inclusion of the additional start-up costs incurred by Baosteel in 2008. According to MOFCOM:

> [I]n 2008, the price-cost differential of like products from the domestic industry and Wuhan Iron and Steel both decreased, and their gross profit margins decreased by 13.01 percentage points and 10.04 percentage points respectively. This shows that even disregarding the influence of Baosteel's new capacity in 2008 on the similar products in the domestic industry, the price-cost differential and gross profit margin of Wuhan Iron and Steel still decreased.[49]

51. MOFCOM's analysis is seriously flawed. The analysis does not disclose the amount by which the price-cost differential for Wuhan decreased in 2008; all that MOFCOM says is that Wuhan's price-cost differential declined. Thus, there is no way of knowing whether this decrease was in any way significant. If the increase in the price-cost differential for Wuhan was relatively small, it is indeed possible that Baosteel's startup costs were responsible for the bulk of the decline in the industry's price-cost differential in 2008.

52. MOFCOM overlooks another critical point. In certain circumstances, producers may forego price increases for their own benefit, and not as a response to import competition. If a producer can sell greater quantities exercising some price restraint – such as by not fully passing through cost increases to purchasers – its overall revenues and profits may increase despite the fact that the ratio of cost to sales revenues on a per unit basis will also be rising.

[47] Re-determination at 26 (Exhibit US-01).

[48] Re-determination at 26 (Exhibit US-01).

[49] Re-determination at 25 (Exhibit US-01).

53. The experience of China's GOES industry during 2008 illustrates this dynamic. During 2008, sales quantities of the Chinese GOES industry increased by 5.04 percent.[50] The domestic industry's prices increased by 14.53 percent,[51] and its sales revenues increased by 20.31 percent.[52] As a result, the industry's pre-tax profit increased by 1.24 percent.[53] Thus, the information disclosed by MOFCOM indicates that, notwithstanding the increase in the ratio of cost to price, the Chinese industry's financial condition improved in 2008 because it was able to garner additional sales. In light of these circumstances, to satisfy the requirements of the covered agreements, MOFCOM needed to provide some reasoned and adequate explanation of why the change in the cost-to-price ratio was significant. It did not do so.

c. MOFCOM Fails to Show that Any Price Suppression Was Linked to Subject Imports

54. Moreover, MOFCOM's price suppression analysis suffers from a more fundamental flaw because it fails to show that any price suppression was the effect of subject imports. MOFCOM simply assumed that any price suppression was linked to subject imports.

55. For example, MOFCOM states that the prices of subject imports and the domestic like product followed consistent trends (a finding for which there is no evidence, as discussed below).[54] Then it recites the market share gains by subject imports in 2008 and the first quarter of 2009. After that, MOFCOM simply states: "[t]he Investigating Authority finds that the import of subject merchandise impacted the price of the domestic like product."[55] In effect, MOFCOM is saying: "the volume and market share of subject imports increased; the domestic industry experienced price suppression; thus the imports caused this price suppression." MOFCOM's analysis contains a crucial gap. This analysis is based on an unsupported assumption; it fails to show that subject imports have any "explanatory force" for the asserted price effects.[56]

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[50] Original Injury Disclosure, section VI.3 (Exhibit US-05) (Orig. Exhibit US-27).

[51] Re-determination at 24 (Exhibit US-01).

[52] Original Injury Disclosure, section VI.5 (Exhibit US-05) (Orig. Exhibit US-27).

[53] Original Injury Disclosure, section VI.6 (Exhibit US-05) (Orig. Exhibit US-27).

[54] Re-determination at 24 (Exhibit US-01).

[55] Re-determination at 24 (Exhibit US-01).

[56] Another example of this kind of conclusory analysis appears on page 27 of the Re-determination (Exhibit US-01) where MOFCOM states:

> based on the evidence obtained during the investigation, the Investigation Authority determined that the import volume of subject merchandise substantially increased in 2008, overtaking the market share of domestic like products, forcing the price of the domestic like product to be unable to absorb the rising product costs, and causing a drop in the price-cost differential.

Again, MOFCOM simply assumes that the increase in import volume and market share caused a drop in the price-cost differential.

56. Confronted with the observation that there was no obvious relationship between changes in prices and market share, MOFCOM asserts that it "conducted a detailed analysis of the change in market share and the influencing factors."[57] However, this "detailed analysis" does not appear in the Re-determination and therefore does not consist of anything more than the assumption described above.

57. Notably, MOFCOM has now disavowed making any price comparisons between the subject imports and the domestic like product. MOFCOM admits that it "neither conducted a comparison of the price level of the subject merchandise and the domestic like product nor did it issue any finding on 'low price' or price cutting."[58] In other words, MOFCOM actually has no statistical data or evidence showing that the prices of subject imports were adversely affecting the prices of the domestic like product.[59]

d. MOFCOM's Theory that Subject Imports Caused Price Suppression Has No Basis

58. In the absence of any evidence showing that the prices of subject imports were adversely affecting the prices of the domestic like product, MOFCOM has simply proffered a theory that the increase in the subject imports' volume and market share in 2008 caused the prices of the domestic like product to be suppressed. According to MOFCOM:

> In 2008, due to rising costs, the import price of the subject merchandise and the price of the domestic like products increased by 17.57% and 14.53%, respectively. However, due to the substantial growth of the import volume of the subject merchandise in 2008, the growth rate increased by 60.64% as compared with 2007, the [subject merchandise's] market share in the Chinese domestic market increased by 5.56 percentage points, while the market share of domestic like products fell by 5.65 percentage points. To avoid the further loss of market share, and in light of rising unit costs, even though the price of domestic like products increased by 14.53%, it was still not possible to absorb the costs and the price-cost differential fell by 7% as compared with 2007.[60]

There are several problems with MOFCOM's analysis.

59. First, MOFCOM states that the domestic industry lost 5.65 percentage points of market share – something that did not fully occur until the end of 2008 – and that "to avoid the *further*

[57] Re-determination at 43 (Exhibit US-01).

[58] Re-determination at 47 (Exhibit US-01).

[59] In light of this disavowal of any price comparisons, MOFCOM's finding that "the price of the subject merchandise is related to that of the domestic like product" (Re-determination at 26 (Exhibit US-01)) lacks any evidentiary basis.

[60] Re-determination at 25-26 (Exhibit US-01).

loss of market share," the domestic industry refrained, *during 2008,* from raising prices enough to cover rising costs. As such, MOFCOM's theory suffers from a temporal problem.

60. MOFCOM also fails to put the 5.56 percent gain in subject import market share in its proper perspective. As discussed below, the domestic industry's market share was actually higher in 2008 than it had been at the beginning of the period of investigation, in 2006. The domestic industry gained more market share in 2007 (7.97 percentage points) than it lost in 2008 (5.65 percentage points). When viewed in its proper perspective, the increase in subject imports in 2008 would not have had the effect on prices claimed by MOFCOM.

61. Also, for subject imports to affect domestic prices, price must be an important factor in customers' purchasing decisions. If customers are making purchasing decisions for reasons other than price – for example, because of quality, product range, or availability – then there would be no reason for domestic producers to exercise pricing restraint to regain market share. MOFCOM ignored compelling evidence in the record of an absence of price competition between subject imports and the domestic like product.

62. The data for the first quarter of 2009 demonstrates an absence of price competition between subject imports and the domestic like product. Although the domestic industry's prices dropped by 30.25 percent, and the prices of subject imports declined by only 1.25 percent, this sharp divergence in prices did not translate into significant shifts in market share.[61] The domestic industry gained 1.04 percentage points of market share, and subject imports gained 1.17 percentage points[62] – both at the expense of nonsubject imports. If price were an important factor in purchasing decisions, the drastic decline in the domestic industry's prices should have caused a much more significant shift in sales and market share in favor of the domestic industry.

63. The Appellate Body recognized that price movements in the first quarter of 2009 indicated that subject imports and the domestic product were not competing on the basis of price. It explained:

> whether the contributing factors are argued to be parallel pricing trends, a policy aimed at undercutting domestic prices, and/or a 1.25% decrease in the price of subject imports, it is nevertheless anomalous that in the only period for which domestic prices actually went down -- that is, the first quarter of 2009 -- there was substantial divergence between the extent of the price decrease for subject imports versus that for domestic products. Indeed, one would normally expect that under the conditions of price competition indicated by these factors, there would be a closer correlation in the movements in subject import and domestic prices. Moreover, although China underscores the importance of the increase in subject import volume to MOFCOM's finding of significant price depression and suppression, we would expect that such a factor would also have had the same or

[61] Re-determination at 48 (Exhibit US-01).

[62] Re-determination at 23, 31 (Exhibit US-01).

> similar effects on the price trends of subject imports and domestic products. The fact that there was a substantial divergence in pricing levels over that period could suggest that the two products were not in competition with each other, or that there were other factors at work.[63]

64. At no point in its analysis, however, has MOFCOM attempted to address this fundamental flaw. Instead, MOFCOM relies on three arguments in an attempt to show that subject imports were affecting the prices of the domestic like product. First, it contends that there was parallel pricing between subject imports and the domestic product. Second, it argues that certain documents obtained during its verification of domestic producers show that respondents had adopted a pricing strategy to set price lower than those of the domestic product. Finally, it claims that a partial overlap in customers proves that price was important in purchasing decisions. Each of these arguments is unpersuasive, as discussed below.

e. MOFCOM's Reliance on Parallel Pricing is Unsubstantiated

65. With regard to parallel pricing, MOFCOM asserts that the trends in the prices of the subject imports and the domestic product are "consistent"[64] or "fundamentally consistent."[65] MOFCOM elaborates on this by stating: "with regard to the change in the average price trend, from 2006 to 2008, the trend of change between the subject merchandise and the domestic like product was consistent and the rate of change was similar, indicating that competition existed between the subject merchandise and the domestic like product."[66]

66. In its report, however, the Appellate Body explained that, although it could "conceive of ways in which an observation of parallel price trends might support a price depression or suppression analysis . . . there is no basis on which to draw any such conclusion in this case."[67] MOFCOM's reliance on parallel pricing is just as unsupported in the Re-determination as it was in the original determination.

67. Moreover, MOFCOM does not explain what pricing data it relied on in reaching its conclusion of parallel pricing. In the absence of any indication in the Re-determination to the contrary, one would assume that MOFCOM has again relied on the same AUV data that the Panel and the Appellate Body found to be unreliable. As the Appellate Body noted, "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."[68] In

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[63] *China – GOES (AB)*, para. 226 (footnote omitted).

[64] Re-determination at 24 (Exhibit US-01).

[65] Re-determination at 39 (Exhibit US-01).

[66] Re-determination at 49 (Exhibit US-01).

[67] *China – GOES (AB)*, para. 210.

[68] *China – GOES (AB)*, para. 200. *See also China – GOES (Panel)*, para. 7.530.

short, MOFCOM's reliance on parallel pricing to show that subject imports affected domestic prices is not supported by positive evidence.

f. Any Evidence of a Supposed Pricing Policy is Not Probative

68. With regard to evidence of a pricing policy by respondents, MOFCOM points to documents that it obtained during verification (a contract between a Russian trading company and a Chinese customer, and three sets of price negotiation documents between a Chinese producer and its customers), and states that these documents show that "prices have significant influence on the purchase decisions of downstream users."[69] An examination of these documents, however, shows that they prove nothing of the sort.[70]

69. First, all of these verification documents pertain to the first quarter of 2009 and not to earlier parts of the period of investigation.[71] Thus, they shed little, if any, light on competitive conditions prior to the first quarter of 2009. Moreover, the contract between the Russian trading company and the Chinese customer (Exhibit US-06) merely provides that [[ ]].[72] The contract does not show that subject imports and the domestic product were highly substitutable or that price was an important factor in purchasing decisions.

70. Nor do the price negotiation documents (Exhibits US-07 through US-09) show what MOFCOM claims they do. As discussed below, all that these documents show is that [[ ]]. As the original panel recognized, MOFCOM's finding that there was no price undercutting in the first quarter of 2009 undermines the probative value of these exhibits.[73]

g. A Partial Overlap of Customers Does Not Provide Any Support for MOFCOM's Conclusion that Subject Imports are Competitive with Domestic Like Product

71. MOFCOM also cites to a partial overlap in customers to support its assertion that price was an important factor in purchasing decisions. By comparing the top ten customers of domestic producers and importers of the subject merchandise, MOFCOM purported to establish

[69] Re-determination, p. 24 (Exhibit US-01).

[70] China did not disclose these verification documents during the underlying re-investigation; therefore, it is difficult for the United States to understand exactly what verification documents MOFCOM is referring to. Because MOFCOM did not collect additional evidence in the re-investigation proceeding, the United States assumes that, in the re-investigation, MOFCOM reviewed certain documents submitted during the original Panel proceeding. These documents were submitted by China during the original panel proceeding as original Exhibits CHN-37 through CHN-40 (Exhibits US-06 to US-09).

[71] *China – GOES (Panel)*, paras. 7.533 and 7.534.

[72] Thus, [[ ]].

[73] *China – GOES (Panel)*, para. 7.534.

that there was an overlap of "around 50 percent."[74] MOFCOM contends that this partial overlap in customers "proves" that subject imports are directly competitive with the domestic like product and that price is an important factor in purchasing decisions.[75]

72. This partial overlap in customers, however, does not prove what MOFCOM says it does. The fact that some customers – be they distributors of electrical equipment or electrical utilities – buy both from subject sources and from domestic producers does not establish that there is direct competition for sales to these purchasers by domestic and subject suppliers, that the domestic and subject suppliers were selling the same products, or that price is an important factor in purchasing decisions. These customers could just as well be buying different types of GOES for different applications from the different sources.

73. MOFCOM should have conducted a thorough inquiry into the relative importance of price and non-price factors in purchasing decisions, rather than simply attributing the price suppression to the subject imports. But the Re-determination demonstrates that MOFCOM failed to do this, thereby underscoring the lack of objectivity of its examination. Because MOFCOM failed to show that subject imports "have explanatory force" for the suppression of domestic prices, MOFCOM's 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.

3. MOFCOM's Finding that Price Depression in the First Quarter of 2009 Was an Effect of Subject Imports Does Not Rest on an Objective Examination Based on Positive Evidence

74. The prices of the domestic like product fell by 30.25 percent in the first quarter of 2009,[76] while the prices of subject imports declined by only 1.25 percent.[77] Subject imports did not undersell the domestic product in this period.[78]

Import Price of Subject Merchandise and the Price of Domestic Like Product			
	2007	**2008**	**Interim 2009**
Subject Imports	+2.9%	+17.57%	-1.25%
Domestic Like Products	+6.66%	+14.53%	-30.25%

[74] Re-determination at 51 (Exhibit US-01).

[75] Re-determination at 51 (Exhibit US-01).

[76] Re-determination at 24 (Exhibit US-01).

[77] Re-determination at 24 (Exhibit US-01).

[78] Original Final Determination, sec. VII(1)(5) (Exhibit US-04) (Orig. Exhibit CHN-16); *see also China – GOES (Panel)*, para. 7.489.

75. Based on these facts, the large decline in domestic prices in the first quarter of 2009 cannot be attributed to the prices of subject imports. As the original panel explained:

> In the absence of any further clarification by MOFCOM, we are not persuaded that an objective and impartial investigating authority could properly have found that, following a 17.57% increase in subject import price in 2008, a 1.25% decrease in subject import price in the first quarter of 2009 could have had the effect of depressing domestic prices, particularly as subject imports prices in any event remained higher than domestic prices in that period.[79]

76. In an attempt to link subject imports to this sharp decline in domestic prices, MOFCOM now asserts that the domestic industry was driven to lower its prices by 30.25 percent in the first quarter of 2009, in response to the loss of 5.65 percentage points of market share to subject imports in 2008. According to MOFCOM:

> In 2007 and 2008, the rate change in the price of the subject merchandise was close to that of domestic like products. However, in 2008, large quantities of the subject merchandise were imported and it overtook the domestic like products' market share, and the domestic like products lost market share of 5.65 percentage points, which was taken by the subject merchandise. In order to avoid any further decrease of market share, in the first quarter of 2009 when the import price of the subject merchandise fell by 1.25%, the domestic industry sharply lowered the price of domestic like products further. The Investigating Authority finds that the import of the subject merchandise impacted the price of domestic like product.[80]

77. The problem with MOFCOM's theory is that there is no evidence that the 30.25 percent drop in the domestic industry's prices in the first quarter of 2009 was in any way related to the gain in the subject imports' market share in 2008. A more plausible explanation for the price drop is that domestic industry was clearing its excess inventories created after it misjudged demand and overproduced in 2008 (the year in which Baosteel, China's second producer of GOES, brought its production online) and in the first quarter of 2009 (when Wuhan expanded its production capacity by 51.65 percent compared with the first quarter of 2008).[81] Indeed, it would have been economically irrational for the domestic industry to slash prices by over 30 percent to regain a 5.65 percent loss of market share in 2008.[82]

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[79] *China – GOES (Panel)*, para. 7.535.

[80] Re-determination at 24 (Exhibit US-01).

[81] Revised Application at Table 27 (Exhibit US-10).

[82] In this connection, it should be noted that that over the 2006-2008 period (a period of steadily growing domestic demand) the domestic industry did not lose market share. From 2006 to 2008, the market share of the cumulated imports under investigation increased by 2.1 percent, and the domestic industry's market share increased by 1.9 percent. Derived from Injury Disclosure in Original Panel Proceeding, secs. V(2), VI(8) (Exhibit US-05) (Orig. Exhibit US-27).

78. The United States further notes that subject imports declined from the 3rd quarter of 2008 to the 4th quarter of 2008, and from the 4th quarter of 2008 to the first quarter of 2009,[83] making it even less plausible that the domestic industry's price cut in the first quarter of 2009 was related to subject imports.

79. Instead of pointing to any evidence or providing a substantive analysis of the purported link between the loss of market share in 2008 and the domestic price drop in interim 2009, MOFCOM merely asserted that "[t]he evidence that the Investigation Authority obtained fully support this determination,"[84] and that its finding was based on a "comprehensive rather than isolated analysis of the situation in 2008 and the first quarter in 2009."[85] MOFCOM never explains what this "evidence" is, or the nature of the "comprehensive analysis" that it supposedly conducted.

80. In a further attempt to make the facts fit its theories of price effects, MOFCOM mischaracterizes the pricing of subject imports in the first quarter of 2009. MOFCOM, for example, states that "[i]n the first quarter of 2009, in light of continuously rising costs, the subject merchandise attempted to undercut the price of the domestic like products, and the import price of subject merchandise fell instead of rose."[86] Without other supporting evidence, MOFCOM's characterization of a 1.25 percent decline in the price of subject imports in the first quarter of 2009 as an "attempt to undercut" domestic prices is not objective given that domestic prices dropped by 30.25 percent and the domestic product was actually underselling subject imports during this period.

81. As the original panel and the Appellate Body explained, merely showing the existence of a significant depression in prices does not satisfy the requirements of the covered agreements. An authority must also show that such price depression is an effect of the subject imports.[87] MOFCOM has not done so here. MOFCOM's finding that the depression of domestic prices in the first quarter of 2009 was attributable to the domestic industry's loss of market share to subject imports in 2008 is inconsistent with Articles 3.1 and 3.2 of the AD Agreement and Articles 15.1 and 15.2 of the SCM Agreement.

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[83] Subject imports declined from 49,160,739 kg in the third quarter of 2008, to 37,623,753 kg in the fourth quarter of 2008, and declined further to 19,400,000 kg in the first quarter of 2009. Exhibit US-11 (Orig. Exhibit US-41) for 2008 quarterly data and Re-determination Disclosure at 9 (for first quarter 2009 data) (Exhibit US-03).

[84] Re-determination at 49 (Exhibit US-01).

[85] Re-determination at 49 (Exhibit US-01).

[86] Re-determination at 27 (Exhibit US-01).

[87] *China – GOES (Panel)*, para. 7.520, *China – GOES (AB)*, para. 144.

4. MOFCOM's Finding That the Pricing Policies of Subject Foreign Producers Caused Price Depression in Interim 2009 Does Not Rest on an Objective Examination Based on Positive Evidence

82. In its original determination, MOFCOM relied on four documents that it obtained from domestic producers during verifications of those companies to conclude that respondents had a "pricing policy" of setting subject import prices lower than domestic prices. MOFCOM relied on this "pricing policy" to explain its finding that subject imports depressed domestic prices in the first quarter of 2009.[88]

83. The original panel examined the four documents and concluded that, because MOFCOM had found that subject imports were in fact not priced lower than domestic products in the first quarter of 2009, an objective and impartial investigating authority could not properly have relied on these documents to support a finding that a pricing policy existed aimed at setting subject imports prices "lower" than domestic products in that period.[89]

84. The Appellate Body disagreed with the original panel's reasoning that respondents' pricing policies could not explain price depression in interim 2009 if subject imports did not actually undersell the domestic product. The Appellate Body explained that "[e]ven in the absence of price undercutting, however, a policy that aims to undercut a competitor's prices may still be relevant to an examination of its price depressive or suppressive effects."[90]

85. However, even though the Appellate Body did not endorse the original panel's rejection of the notion that a pricing policy could have adverse price effects in the absence of underselling, it recognized that the facts of this case do not support such a theory. The Appellate Body explained:

> The fact that there was a substantial divergence in pricing levels over that period could suggest that the two products were not in competition with each other, or that there were other factors at work. Therefore, even though we consider that a policy of price undercutting can explain depressive or suppressive effects on domestic prices even in the absence of actual price undercutting, we do not see that, in the light of the pricing dynamic in the first quarter of 2009, there was a basis to conclude so in this case. That pricing dynamic also calls into question whether the

[88] Original Final Determination, at p. 58 (Exhibit US-04) (Orig. Exhibit CHN-16). As discussed above, all four documents related to the first quarter of 2009. One was a contract between a Russian trading company and a Chinese buyer of subject imports. The other three documents pertained to price negotiations between a Chinese supplier and its customers. *China – GOES (Panel)*, paras. 7.532-7.534.

[89] *China – GOES (Panel)*, paras. 7.533 and 7.534.

[90] *China – GOES (AB)*, para. 206.

> prices of subject imports adequately explain the depression or suppression of domestic prices.[91]

86. In its Re-determination MOFCOM continues to base its finding of price depression in the first quarter of 2009 on the same pricing policy theory, and apparently on the same supporting documents, as it did in the original determination. According to MOFCOM:

> During the verification period, domestic producers submitted to the Investigating Authority a contract concerning the foreign producers' sales of subject merchandise in the Chinese market, in which relevant provisions of the contract demonstrate that in the first quarter in 2009 Russian producers adopted a pricing strategy that set lower prices than those of the domestic like products. The domestic producers also submitted documents on price negotiations with downstream users, which demonstrated that the prices of subject merchandise imported from the United States in the first quarter of 2009 were lower than that of the domestic like products, forcing the domestic industry to lower its prices.[92]

87. MOFCOM's reliance on an alleged policy of price undercutting by subject imports to explain its finding of price depression in the first quarter of 2009 is as misplaced as it was in MOFCOM's original determination. As the Appellate Body noted in its analysis of this issue, in light of the pricing dynamic in that period – where the price of subject imports declined by 1.25 percent, while the price of domestic products plunged by 30.25 percent, and subject imports oversold the domestic product – there was no basis to conclude that a policy of price undercutting could explain depressive or suppressive effects on domestic prices.[93]

88. In addition to the fundamental implausibility of MOFCOM's reasoning, there are also other defects in its analysis, which cast further doubt on whether MOFCOM conducted an objective examination based on positive evidence. The contract between the Russian trading company and the Chinese customer (Exhibit US-06) merely provides (at section 3.5) that [[Moreover, the contract shows that [[ ]].

89. The price negotiation documents (US-07 through US-09) also fail to support MOFCOM's claims. MOFCOM contends that these documents "demonstrate that the prices of subject merchandise imported from the United States in the first quarter of 2009 were lower than those of like products by domestic industry, forcing them to lower their prices." In each of these documents, a purchaser claims that the Chinese producer's [[ ]]. These are nothing more than [[

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[91] *China – GOES (AB)*, para. 226.

[92] Re-determination at 24 (Exhibit US-01).

[93] *China – GOES (AB)*, para. 226. *See also China – Autos*, para. 7.272 (Stating that "it is difficult to understand how a conclusion of price depression was reached in a situation where prices of imports were, for the most part, significantly higher than those of the domestic like product whose prices were purportedly being depressed during the POI.").

]]. China submitted no written evidence of offers for imported merchandise, much less actual sales transactions, at the [[ ]] prices.

5. Conclusion

90. In sum, MOFCOM's findings that the volume of subject imports suppressed domestic prices in 2008 and the first quarter of 2009 is not based on positive evidence, and does not reflect an objective examination of the evidence. Furthermore, MOFCOM's theories that a 5.56 percent increase in subject imports' market share in 2008 drove the domestic industry to cut prices by 30.25 percent in the first quarter of 2009, or that the domestic industry was driven to do so by "pricing policies" of subject foreign producers, lack any foundation in the record. As a result, MOFCOM has not shown, through these findings, that "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." Accordingly, MOFCOM's 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.

B. MOFCOM's Analysis of the Impact of Subject Imports on the Domestic Industry is Inconsistent with China's Obligations Under Articles 3.1 and 3.4 of the AD Agreement, and Articles 15.1 and 15.4 of the SCM Agreement

91. MOFCOM's finding that the subject imports had an adverse impact on the domestic industry was not based on an objective examination of "all relevant economic factors and indices having a bearing on the state of the industry," in breach of Articles 3.1 and 3.4 of the AD Agreement and Articles 15.1 and 15.4 of the SCM Agreement.

92. Article 3.4 of the AD Agreement and Article 15.4 of the SCM Agreement address an investigating authority's obligations in ascertaining the impact of dumped and subsidized imports on the domestic industry. Article 3.4 of the AD Agreement states that:

> The examination of the impact of the dumped imports on the domestic industry concerned shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry, including actual and potential decline in sales, profits, output, market share, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; the magnitude of the margin of dumping; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments. This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance.

Article 15.4 of the SCM Agreement is worded identically, except that (i) it does not refer to "the magnitude of the margin of dumping,' and (ii) it states that authorities should consider "in the case of agriculture, whether there has been an increased burden on government support programs."

93. The "examination" contemplated by Articles 3.4 and 15.4 must be based on a "thorough evaluation of the state of the industry" and it must "contain a persuasive explanation as to how

the evaluation of relevant factors led to the determination of injury."[94] MOFCOM failed to conduct such an examination with respect to its finding that the domestic industry was materially injured in 2008.

94. Additionally, an authority's factual findings under Article 3.4 of the AD Agreement and Article 15.4 of the SCM Agreement must comply with the "objective examination" and "positive evidence" requirements articulated in Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement, respectively.[95] The nature of these requirements is discussed above. MOFCOM's findings are not based on an objective examination and are not supported by positive evidence.

95. In the Re-determination, MOFCOM identifies the 15-month period encompassing 2008 and the first quarter of 2009 as the period during which subject imports allegedly caused injury to the domestic industry.[96] It also states that because 2008 accounted for 80 percent of this period, "the situation in 2008 is more persuasive for identifying injury and the causal link."[97]

96. Given these facts, MOFCOM's examination of the factors enumerated in Articles 3.4 and 15.4 for 2008 is highly distorted and selective. It is distorted because factors that are identified as being indicative of material injury are not viewed in their proper context. It is selective because it ignores the fact that many of these factors showed that the domestic industry was performing well in 2008.

97. Specifically, MOFCOM identifies developments with respect to several factors as being indicative of material injury in 2008, including production, sales, market share, capacity utilization, inventories, pre-tax profit growth rate, return on investment, and net cash flow.[98] MOFCOM's examination of these factors is in almost all respects erroneous.

98. *Production and Sales.* In the Re-determination MOFCOM states that "[t]he production and sales of the domestic industry have been seriously impacted."[99] MOFCOM neglects to mention that in 2008 production grew by 23.91 percent, after increasing by 36.76 percent in

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[94] *Thailand – H-Beams (Panel)*, para. 7.236.

[95] *See EC – Countervailing Measures on DRAM Chips*, para. 7.272. *See also Argentina – Poultry Anti-Dumping Duties*, para. 7.325 ("We consider that '[t]he examination of the impact of dumped imports' referred to in Article 3.4 is precisely the same 'objective examination of … the consequent impact of the[] imports' referred to in Article 3.1(b). Thus, to the extent that a Member failed to conduct a proper 'examination of the impact of dumped imports' for the purpose of Article 3.4, that Member also failed to conduct an 'objective examination of … the consequent impact of the[] imports' within the meaning of Article 3.1(b). Accordingly, since we have found that Argentina violated Article 3.4 of the AD Agreement, we also find that Argentina violated Article 3.1(b) thereof.").

[96] Re-determination at 53 (Exhibit US-01).

[97] Re-determination at 55 (Exhibit US-01).

[98] Re-determination at 33 and 34 (Exhibit US-01).

[99] Re-determination at 34 (Exhibit US-01).

2007;[100] and that sales grew by 5.04 percent in 2008, after increasing by 45.49 percent in 2007.[101] These growth rates in production and sales are not indicative of material injury.

99. *Market Share.* MOFCOM makes much of the fact that the domestic industry's market share declined by 5.65 percent in 2008.[102] MOFCOM neglects to consider this decline in the broader context of the entire period of investigation. Had it done so, it would have observed that the domestic industry's market share in 2008 was higher than it had been in 2006,[103] and that the decline followed a 7.97 percent increase in the industry's market share in 2007. Both of these facts show that the decline of 5.65 percent in 2008 was not particularly significant in the context of the entire period of investigation.

100. *Capacity Utilization.* MOFCOM states that the domestic industry's capacity utilization "dropped substantially" by 19.61 percent in 2008.[104] MOFCOM fails to mention that this drop in the capacity utilization rate was from a very high – perhaps even unsustainable – level for Wuhan, and that it reflects Baosteel's startup mode in 2008. As the ranged data in the Revised Application show,[105] Wuhan operated at 95-105 percent capacity utilization in 2007, before dropping slightly, to 90-100 percent capacity utilization in 2008.[106] The Revised Application shows that Baosteel's 2008 capacity utilization rate was 35-45 percent, [107] but this rate reflects the fact that Baosteel was in startup mode in 2008, as evidenced by the fact that its capacity utilization rose to 80-90 percent in the first quarter of 2009.[108]

101. *Profitability.* MOFCOM states that "[i]n 2008, … the pre-tax profit rate fell 9.24 percentage points compared to 2007."[109] MOFCOM ignores the fact that the domestic industry's profits before tax *increased* by 1.24 percent in 2008, *after rising 52.09 percent in*

[100] Re-determination at 28 (Exhibit US-01).

[101] Re-determination at 30 (Exhibit US-01).

[102] *E.g.*, Re-determination at 31 (Exhibit US-01).

[103] Re-determination at 31 (Exhibit US-01).

[104] Re-determination at 29 (Exhibit US-01).

[105] Revised Application at 76, Table 35 (Exhibit US-10).

[106] Because the data that has been disclosed is ranged, it is impossible to ascertain whether the change from 95-105 percent in 2007 to 90-100 percent in 2008 actually involved any decline at all for Wuhan.

[107] Revised Application at 77, Table 36 (Exhibit US-10).

[108] Indeed, there is evidence in the Revised Application that suggest that the calculation of Baosteel's capacity utilization rate may be flawed because it may not have taken into account the fact that this firm only began producing GOES in May of 2008. Note 1 to Table 36 states: "capacity utilization rate = annual output/actual average production capacity * 100%." (Exhibit US-10). To the extent that the Petitioner divided Baosteel's output for the 7-8 months that it was in production by its full production capacity, this would understate the firm's true capacity utilization.

[109] Re-determination at 31 (Exhibit US-01).

2007.[110] A deceleration in the growth rate in profits, after such a strong increase in 2007, is unsurprising. A deceleration from such strong profit growth is not indicative of material injury, given appropriate consideration of the context.

102. *Rate of Return on Investment.* MOFCOM notes that the rate of return on investment fell by 8.83 percent in 2008.[111] MOFCOM failed to consider that Baosteel's startup in 2008 affected this indicator. The record shows that it took time for Baosteel to ramp up production. As noted above, Boatel's capacity utilization was 35-45 percent in 2008, and then rose to 80-90 percent in the first quarter of 2009. The industry's rate of return on investment would have been depressed in 2008 by Baosteel running at less than full capacity while in its startup phase, because the returns from partial production are measured against the full amount of its investment.

103. *Net cash flow*. MOFCOM notes that net cash flow declined in 2008.[112] MOFCOM neglects to mention that the 6.12 percent decline in net cash flow in 2008 came after *a 95 percent increase* in 2007.[113] A modest decline in net cash flow in 2008, after a 95 percent increase in the previous year, is not indicative of material injury.

104. In addition to performing a distorted and non-objective examination of the factors listed above, MOFCOM completely ignored the following factors which underscored the absence of material injury in 2008: sales income increased 20.31 percent in 2008, after rising 55.18 percent in 2007;[114] employment increased 73.03 percent in 2008, after rising 17.09 percent in 2007;[115] and wages increased 49.13 percent in 2008, after rising 27.0 percent in 2007.[116] Again, these factors do not depict an industry suffering material injury.

105. In sum, MOFCOM's "examination of the impact of the dumped imports on the domestic industry concerned" and "evaluation of all relevant economic factors and indices having a bearing on the state of the industry" was not based on an "objective examination" of "positive evidence." MOFCOM's findings, therefore, are inconsistent with Articles 3.1 and 3.4 of the AD Agreement and 15.1 and 15.4 of the SCM Agreement.

[110] Original Injury Disclosure at 8 (Exhibit US-05) (Orig. Exhibit US-27).

[111] Re-determination at 31 (Exhibit US-01).

[112] Re-determination at 32 (Exhibit US-01).

[113] Original Injury Disclosure at 9 (Exhibit US-05) (Orig. Exhibit US-27).

[114] Re-determination at 30 (Exhibit US-01).

[115] Re-determination at 32 (Exhibit US-01).

[116] Re-determination at 32 (Exhibit US-01).

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

106. For the reasons highlighted below, MOFCOM's causation analysis was not based on an objective examination of positive evidence, as required by Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement, or an examination of all relevant evidence, as required by Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement.

1. An Investigating Authority's Causation Analysis Must Be Based on "Positive Evidence" and Must "Involve an Objective Examination."

107. Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement describe an authority's obligation to ascertain that dumped or subsidized imports are causing injury. Article 3.5 of the AD Agreement states:

> 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.

Article 15.5 of the SCM Agreement has virtually identical language, with references to "subsidized imports" rather than "dumped imports" and "subsidies" instead of "dumping."

108. Additionally, an authority's factual findings under Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement must comply with the "positive evidence" and "objective examination" requirements articulated in Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement respectively.[117] As we demonstrate below, five aspects of MOFCOM's causation analysis fail to conform to these requirements.

2. MOFCOM's Causation Analysis Fails Because of its Reliance on its Defective Price Effects Findings

109. The original panel found that the shortcomings in MOFCOM's price effects analysis also undermined MOFCOM's conclusion on the causal link between subject imports and the material

[117] *See EC – Countervailing Measures on DRAM Chips*, para. 7.272.

injury suffered by the domestic industry.[118] As previously discussed, MOFCOM continues to rely heavily in the Re-determination on its findings that the imports under investigation had significant price effects in finding a causal link between the imports under investigation and any injury sustained by the Chinese GOES industry. As explained above, each price effects finding is inconsistent with Articles 3.1 and 3.2 of the AD Agreement and Articles 15.1 and 15.2 of the SCM Agreement because it is contrary to the disclosed evidence, lacks a discernible factual basis, or fails to reflect an objective examination of the record.

110. Because MOFCOM has not established that the imports under investigation had any significant price effects on the domestically produced product, a necessary element of its causal link analysis fails. Accordingly, due to its failure to demonstrate significant price effects, China has failed to demonstrate that dumped or subsidized imports are causing injury, as required by Articles 3.1 and 3.5 of the AD Agreement and Articles 15.1 and 15.5 of the SCM Agreement.

3. MOFCOM's Assertion That the Domestic Industry Was Prevented by Subject Imports from Realizing the Benefits of Economies of Scale Does Not Rest on an Objective Examination Based on Positive Evidence

111. At several points in the Re-determination, MOFCOM states that China's domestic GOES industry increased its production capacity, but that it was injured by subject imports because they prevented it from realizing attendant economies of scale. For example, MOFCOM finds that, because the industry was impacted by the large volume of subject merchandise, "the increase in output and capacity did not bring about the corresponding economies of scale and profits for the Chinese domestic industry."[119]

112. These are nothing more than conclusory assertions, unsupported by any factual analysis. Among the questions that MOFCOM leaves unaddressed are: which of the two domestic producers was prevented from realizing economies of scale? Why should the producer have reasonably expected to realize economies of scale? What should these economies of scale have been, and when should they have been realized?

113. The record establishes that Baosteel commenced GOES production in May 2008[120] and that Wuhan's largest capacity expansion – of 51.65 percent – occurred in the first quarter of 2009.[121] Steel production facilities frequently incur high start-up costs when they begin production.[122] It was unreasonable for MOFCOM to expect that Baosteel should be realizing economies of scale in the months immediately after it started production (*i.e.*, in the June 2008-

[118] *China – GOES (Panel*, para. 7.620.

[119] Re-determination at 29, 42, and 43 (Exhibit US-01).

[120] Re-determination at 8 (Exhibit US-01).

[121] Revised Application at Table 27 (Exhibit US-10).

[122] *See* "Scheduling a Successful Start-Up," (Exhibit US-11) (Orig. Exhibit US-40) at 2 (noting that new steel production facilities can be characterized by various start-up problems which can seriously impact earnings).

March 2009 period), or that Wuhan should have been realizing economies of scale immediately when it brought so much new capacity online in the first quarter of 2009.

114. To the extent that MOFCOM was referring to Wuhan and the period before the first quarter of 2009, that producer saw spectacular gains in its financial performance in 2007 (pre-tax profit rose 52.09 percent, sales income rose 55.18 percent, and net cash flow rose 95 percent[123]), and several of these financial indicators continued to improve in 2008. It can hardly be said that Wuhan was prevented by subject imports from realizing economies of scale.

115. To the extent that MOFCOM was saying that the domestic industry as a whole should have benefitted from economies of scale, in the sense that one producer should benefit from the other's increase in capacity and output, this would not make any sense at all. As the Petitioner noted, Wuhan and Baosteel are two separate enterprises that are in direct competition with each other.[124] There is no reason why one firm should realize economies of scale after the other adds capacity and increases its output.

116. In sum, MOFCOM's findings that the domestic industry was injured because it was prevented by subject imports from realizing the benefits of economies of scale does not rest on an objective examination based on positive evidence, and MOFCOM fails to demonstrate a causal relationship between subject imports and any such injury to the domestic industry. MOFCOM's findings are inconsistent with Articles 3.1 and 3.5 of the AD Agreement and 15.1 and 15.5 of the SCM Agreement.

4. MOFCOM's Non-Attribution Analysis With Respect to Injury Caused by the Domestic Industry's Overexpansion and Overproduction Continues to be Seriously Flawed

117. In its original determination, MOFCOM found that there was no injury caused by the domestic industry's increases in capacity and production in 2008 and the first quarter of 2009.[125]

118. In order to evaluate the U.S. claim that China had failed to conduct a non-attribution analysis with respect to injury caused by the domestic industry's overexpansion and overproduction, as required by Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement, the original panel asked China to provide confidential data supporting MOFCOM's finding. This request included data on demand, domestic capacity, capacity utilization, domestic production and inventories. China failed to provide most of the requested data. The original panel proceeded to evaluate the issue based on the limited information available to it.[126]

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[123] Re-determination at 30 and 31 (Exhibit US-01).

[124] *E.g.*, Revised Application, at section 1.2, "Notes to exceptional circumstances where non-confidential summary cannot be supplied") (Exhibit US-10).

[125] *China – GOES (Panel)*, para. 7.628.

[126] *China – GOES (Panel)*, para. 7.629.

119. The original panel rejected China's argument that the increase in GOES inventories in China in 2008 and the first quarter of 2009 was caused by an increase in subject imports.[127] It found that inventory overhangs would have occurred notwithstanding the increase in subject imports.[128] Indeed, the original panel found that the increase in subject imports in the first quarter of 2009 could only account for a minor portion of the increase in inventories in that time.[129]

120. The original panel found that MOFCOM breached Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement by failing to conduct a non-attribution analysis to ensure that it was not attributing to subject imports injury caused by the Chinese GOES industry's overexpansion and overproduction. [130] China did not appeal the original panel's findings with regard to causation to the Appellate Body, nor has it fixed the deficiencies that the original panel found.

121. In its Re-determination, MOFCOM did not include the domestic industry's growth in capacity and production in its discussion of "other factors" in the "Causal Link" section of the Re-determination,[131] but it did address this in response to comments by respondents regarding the Re-determination Disclosure.[132] As discussed below, MOFCOM's analysis of this factor in the Re-determination is marred by numerous errors and unsupported, conclusory statements, and continues to fall short of what is required by Articles 3.1 and 3.5 of the AD Agreement, and Articles 15.1 and 15.5 of the SCM Agreement.[133]

122. The domestic industry's expansion of capacity and production outstripped the growth in demand for GOES in the Chinese market by wide margins. From 2006 to 2008, demand grew by 45 percent, capacity grew by 108 percent, and production grew by 69 percent.[134] From the first

[127] The domestic industry's end-of-period inventories grew by staggering amounts in 2008 and the first quarter of 2009. Inventories grew by 839.02 percent in 2008 and by 978.81 percent in the first quarter of 2009. Re-determination at 30 (Exhibit US-01).

[128] *China – GOES (Panel)*, para. 7.632.

[129] *China – GOES (Panel)*, para. 7.633.

[130] *China – GOES (Panel)*, para. 7.637.

[131] Re-determination at 35-37 (Exhibit US-01).

[132] Re-determination at 43-46 and 51-53 (Exhibit US-01).

[133] MOFCOM's assertion that the U.S. government failed to provide any evidence to support its argument that an increase in capacity and production in excess of demand led to soaring inventories is disingenuous (Re-determination at 43 (Exhibit US-01)), given China's refusal to divulge to the Panel and the parties the information necessary to fully evaluate this issue.

[134] Calculated from data in Re-determination at 28 (Exhibit US-01).

quarter of 2008 to the first quarter of 2009, demand grew by only 12.5, while the domestic industry's capacity grew by 80.13 percent and its production grew by 55.23 percent.[135]

123. The Revised Application provides data indicating that it was Baosteel that created any intense new price competition in the Chinese market as it rapidly ramped up its huge new GOES capacity, particularly at the end of 2008 and first quarter of 2009. Wuhan also increased its production capacity by 51.65 percent from the first quarter of 2008 to the first quarter of 2009.[136] That increase in capacity came on top of capacity increases of 35.33 percent from 2006 to 2007, and 26.37 percent from 2007 to 2008.[137] The two Chinese producers were forced to aggressively compete with each other to find customers for their new capacity. The fact that Baosteel was able to sell all or almost all of its output in the first quarter of 2009[138] shows that it competed aggressively with Wuhan to utilize all of its new capacity.

124. In an effort to avoid acknowledging the obvious role of Chinese overexpansion and overproduction in the buildup of an inventory overhang, MOFCOM attributes the large increase in the domestic industry's inventories in 2008 and interim 2009 only to unspecified "sales obstacles."[139] MOFCOM does not say what these "sales obstacles" were or how they allegedly prevented the domestic industry from making more sales. (As discussed above, there is no evidence that subject imports undersold the domestic product in this period.)

125. MOFCOM goes on to state that "the changes of productive capacity [do not] directly correspond to those of inventory."[140] This also does not adequately address the issue. It is obvious that increases in production capacity do not need to "directly correspond" to increases in inventories for the former significantly to affect the latter.

126. MOFCOM then asserts that while "the import of the subject merchandise was dramatically rising in 2008, the sales volume of the domestic like products was dramatically falling, thus extremely restraining the normal sales of the domestic industry and leading to a dramatic increase in inventory."[141] This is another example of MOFCOM's lack of objectivity and distortion of the evidence. While it is true that subject imports increased in 2008 and gained 5.56 percentage points of market share, this needs to be seen in its proper context. Subject imports lost 3.35 percentage points in market share in 2007, while the domestic industry gained 7.97 percentage points. When seen in this context, the increase in subject imports in 2008 is hardly as "dramatic" as MOFCOM seeks to portray it. The domestic industry's market share in

[135] Re-determination at 28 (Exhibit US-01).

[136] Revised Application at Table 27 (Exhibit US-10).

[137] Revised Application at Table 27 (Exhibit US-10).

[138] Table 30 of the Revised Application shows that Baosteel's sales-output ratio was in the range of [[ ]] percent in the first quarter of 2009 (Exhibit US-10).

[139] Re-determination at 43 (Exhibit US-01).

[140] Re-determination at 43 (Exhibit US-01).

[141] Re-determination at 44 (Exhibit US-01).

2008 was higher than it had been in 2006. The domestic industry's sales volume actually grew by 5.04 percent in 2008 (after increasing by 45.49 percent in 2007).[142] Given all of this, the statement that the industry's sales were "extremely restrained" is inconsistent with the record evidence.

127. After making statements in which it attributes the inventory overhang entirely to subject imports, MOFCOM seems to reverse itself and apportions responsibility for the overhang to the three sources of GOES in the market. It states that the inventory overhang in 2008 and the first quarter of 2009 was attributable to these sources in the following proportions: (i) 45-55 percent to overproduction by the domestic industry, (ii) 41-51 percent to subject imports, and (iii) 2 percent to nonsubject imports. Based on these data, MOFCOM concludes that "the increase in the production of domestic like product and imports from other sources did not break the above described causal [link]."[143]

128. MOFCOM's division of responsibility for the inventory buildup lacks any evidentiary support. As a result, MOFCOM's conclusion is not based on positive evidence, nor does it reflect an objective examination of the evidence.

129. To the extent MOFCOM explains the methodology underlying its apportionment of responsibility for the inventory overhang, it appears to do so as follows:

> The Investigating Authority finds that in a normal developing market, if other intervening factors are excluded, market competitors can reasonably forecast based on its market share when market demand is increasing, its expected increase in sales volume and arrange its production and sales accordingly. Using the domestic market share of GOES in 2007 as a reasonable basis for the market competitor's forecast, the Investigating Authority calculated from 2008 to the first quarter of 2009 the possible expected sales volume of the domestic industry and the sales volume of the subject merchandise and products from imported other sources.[144]

In other words, MOFCOM posits that the domestic industry could reasonably have expected to sell amounts in 2008 and the first quarter of 2009 that were proportionate to its market share in 2007. MOFCOM apparently treated only the amount of actual production that exceeded this amount as overproduction by the domestic industry.

130. There are several serious flaws in MOFCOM's reasoning. The year that MOFCOM used as a baseline, 2007, was the part of the period of investigation when the domestic industry had its highest market share, with a gain of 7.97 percent. Using 2007 as a baseline leads to an understatement of the degree to which the domestic industry's overproduction contributed to inventory overhangs. MOFCOM should have used 2006 as the baseline. This would have been

[142] Re-determination at 30 (Exhibit US-01).

[143] Re-determination at 45 (Exhibit US-01).

[144] Re-determination at 44 (Exhibit US-01).

consistent with using the first year of the period of investigation as the baseline for trend analysis generally.

131. Moreover, even if it was reasonable for MOFCOM to use 2007 as the baseline for 2008 production, it is unclear why the domestic industry should have reasonably expected to sell an amount equivalent to its market share in 2007 *in the first quarter of 2009*. The domestic industry's market share fluctuated during the period of investigation. It rose by 7.97 percent in 2007 and fell by 5.65 percent in 2008.[145] Based on its methodology, MOFCOM should have calculated the domestic industry's overproduction in the first quarter of 2009 based on its market share in 2008. The domestic industry continued to rapidly expand its production in the first quarter of 2009. Its production rose by a staggering 55.23 percent in that quarter, as compared with the first quarter of 2008, despite the fact that domestic demand increased by only 12.46 percent in that period. If MOFCOM had performed its apportionment analysis separately for the first quarter of 2009, using market shares in 2008 as a basis, it would have become clear that the domestic industry's share of the responsibility for the inventory overhang in that quarter – the period in which the domestic industry experienced its greatest difficulties – was much higher than the 45-55 percent that it calculated for the 15 month period encompassing 2008 and the first quarter of 2009.

132. The domestic industry's high degree of responsibility for the inventory overhang in the first quarter of 2009 is significant, because that was the only part of the period of investigation when the domestic industry's prices declined and it was the only part of the period of investigation when the domestic industry was not profitable.[146] Nonetheless, MOFCOM states "the situation in 2008 has more evidentiary value [than the first quarter of 2009] for determining injury and causal link" because 2008 accounted for 80 percent of the 15 month period for which it found the domestic industry to have been injured.[147] MOFCOM's approach is erroneous in failing to examine the relevant evidence and base its analysis on the particularities of that evidence.

133. Elsewhere in the Re-determination, MOFCOM states that, after examining confidential information provided by the domestic industry, it concluded that domestic capacity and output increased as demand in the domestic market rose, but that they did not surpass market demand during the period of investigation.[148] This observation misses the point. While it may be true (without seeing the data, there is no way of knowing) that the domestic industry's capacity and output did not exceed *total* market demand, this does not prove that the domestic industry's overcapacity and overproduction was somehow not a significant source of additional supply that caused the inventory overhang that developed in 2008 and the first quarter of 2009. The domestic industry historically did not serve the majority of the domestic market in China. The

[145] Re-determination at 31 (Exhibit US-01).

[146] Notably, Table 24 of the Revised Application shows that subject imports accounted for their lowest share of the Chinese market during the period of investigation in the first quarter of 2009. (Exhibit US-10).

[147] Re-determination at 55 (Exhibit US-01).

[148] Re-determination at 52 (Exhibit US-01).

petition underlying these investigations notes that "[f]or a long time . . . output of GOES grew slowly in China, and import[s] accounted for [50] percent of total consumption."[149] Thus, the domestic industry should not have had any reasonable expectation that it could suddenly begin to supply the entire market, and market demand would absorb all of its capacity and production. The indexed data provided by China shows that the rate of growth in the domestic industry capacity and production outstripped the growth in demand,[150] suggesting that the growth in the domestic industry's capacity and production did indeed lead to the inventory overhang.

134. As the foregoing discussion shows, MOFCOM's analysis of this issue is riddled with misstatements of fact and one-sided, non-objective analysis. Moreover, MOFCOM continues to breach Articles 3.1 and 3.5 of the AD Agreement, and Articles 15.1 and 15.5 of the SCM Agreement by failing to conduct a non-attribution analysis to ensure that it was not attributing to subject imports injury caused by the Chinese GOES industry's over-expansion and over-production.

5. MOFCOM's Non-Attribution Analysis With Respect to Injury Caused by Nonsubject Imports Is Inadequate

135. The original panel found that China breached Article 6.9 of the AD Agreement and Article 12.8 of the SCM Agreement because MOFCOM failed to disclose meaningful information about nonsubject imports. The original panel observed that MOFCOM considered information about at least the volume of nonsubject imports in concluding that nonsubject imports were not a cause of injury to the domestic industry, but failed to disclose to the parties prior to making its determination the public information about nonsubject import volumes that served as the basis for its decision.[151] The original panel also found that MOFCOM failed to disclose in its final determination sufficient information concerning the facts underlying its decision that nonsubject imports were not a cause of injury. The original panel found that this failure to provide information on the matters of fact and law leading to the imposition of final measures breached Article 12.2.2 of the AD Agreement and Article 22.5 of the SCM Agreement.[152]

136. MOFCOM's Re-determination Disclosure make new disclosures concerning the volumes of nonsubject imports and the Re-determination relies on these data in finding that nonsubject imports did not affect the causal link between subject imports and material injury to the domestic

[149] Revised Application, at 11 (Exhibit US-10). The domestic industry's capacity expansion resulted from an "import substitution" growth plan, and domestic capacity was intended to double to be equal to 90 percent of domestic consumption. China's November 25, 2011 submission to the Panel, at 3.

[150] As noted above, from 2006 to 2008, demand grew by 45 percent, capacity grew by 108 percent, and production grew by 60 percent. Responses by the People's Republic of China to Panel Questions Posed on 18 November 2011 (Nov. 25, 2011) at 3 and 4.

[151] *China – GOES (Panel)*, paras. 7.648-7.660.

[152] *China – GOES (Panel)*, paras. 7.669-7.675.

industry.[153] As before, MOFCOM's non-attribution analysis with respect to nonsubject imports is unpersuasive and is not based on an objective examination of the newly-disclosed evidence.

137. For the Panel's convenience, we have consolidated the information concerning the volumes (in tons) and prices (in Yuan) of subject and nonsubject imports that appears in the Re-determination Disclosure and Re-determination.[154]

Year	Subject Imports Volume	Subject Imports Price	Nonsubject Imports Volume	Nonsubject Imports Price
2006	83,837	25,913	169,846	25,468
2007	84,600	26,683	183,349	28,701
2008	135,900	31,371	213,517	30,999
Q1 2009	19,400	26,673	54,206	32,359

138. MOFCOM's new disclosures show that nonsubject imports were a much more significant factor in the Chinese market than subject imports, in all parts of the period of investigation. Nonsubject imports entered China in significantly greater quantities than cumulated subject imports. They continued to grow by significant amounts throughout the period of investigation. In the period in which MOFCOM found that subject imports caused the domestic industry to suffer material injury, 2008 and the first quarter of 2009, nonsubject import quantity exceeded subject import quantity by 57 percent and 179 percent, respectively. Moreover, nonsubject imports had lower average unit values than subject imports in 2008,[155] the period that MOFCOM found to be "more persuasive for identifying the injury and causal link" than the first quarter of 2009.[156]

139. In light of their rising and substantial volumes and competitive prices (insofar as prices can be ascertained from AUVs), it is clear that MOFCOM did not adequately evaluate whether nonsubject imports were a cause of injury to the domestic industry in 2008 and the first quarter of 2009 and that it should have conducted an analysis to ensure that it was not attributing to the subject imports injury caused by the nonsubject imports. MOFCOM dismisses the role of nonsubject imports by stating that, "since 2008," nonsubject imports accounted for a decreasing percentage of the quantity of all imports, and that most of the domestic industry's loss of market

[153] Re-determination Disclosure at 17-18 and Re-determination at 36-37 (Exhibit US-01).

[154] The data for subject imports can be found on pages 23 and 24 of the Re-determination (Exhibit US-01), and the data for nonsubject imports appears on pages 36 and 37 of the Re-determination (Exhibit US-01).

[155] Exhibit US-12 (Orig. Exhibit US-41). MOFCOM states that the prices of nonsubject imports were "similar" to those of subject imports in 2008. Re-determination at 34 (US-01). In fact, the AUV of nonsubject imports was slightly lower (at $4.46) than that of subject imports (at $4.52) in 2008. Exhibit US-11 (Orig. Exhibit US-41).

[156] Re-determination at 55 (Exhibit US-01).

share in 2008 was to subject imports. MOFCOM also contends that the prices of nonsubject imports were "similar" to those of subject imports in 2008, and higher than subject imports in the first quarter of 2009.[157]

140. There are two significant problems with MOFCOM's analysis. First, MOFCOM's statement about the relative importance of subject and nonsubject imports since 2008 is demonstrably incorrect. The percentage of total import volume accounted for by subject imports actually declined since 2008, from 38.9 percent in 2008 to 26.36 percent in the first quarter of 2009.[158] In other words, nonsubject imports increased as subject imports fell.

141. Second, and more fundamentally, MOFCOM's analysis fails to address the inquiry that MOFCOM should have conducted, which is to ask how the increasing quantity of subject imports in 2008 could have had injurious effects on the domestic industry while the increasing and much greater quantity of nonsubject imports sold in 2008 at lower AUVs could have had no injurious effects. The inquiry should also have encompassed whether the large quantity of competitively-priced nonsubject imports breaks any causal link between the subject imports and any injury sustained by the domestic industry.

142. Because MOFCOM's Re-determination is devoid of any such analysis of the effect of nonsubject imports, China failed to comply with Articles 3.1 and 3.5 of the AD Agreement, and Articles 15.1 and 15.5 of the SCM Agreement.

E. MOFCOM's Failure to Disclose Essential Facts Violates Article 6.9 of the AD Agreement and Article 12.8 of the SCM Agreement

143. China breached Articles 6.9 of the AD Agreement and 12.8 of the SCM Agreement by failing to disclose to interested parties the "essential facts" forming the basis of MOFCOM's injury Re-determination. 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 determination, stating as follows:

> 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.

[157] Re-determination at 37 (Exhibit US-01). MOFCOM also makes the point that the market share of nonsubject imports declined in 2009 because the values of these imports rose. *Id*. However, this cannot be reconciled with other information indicating that in 2008, the market share of nonsubject imports did not increase as rapidly as the market share of subject imports, even though the nonsubject imports were sold at lower average unit values. The record does not indicate any relationship between average unit value differentials and changes in market share.

[158] As can be seen from the table above, total imports were 349,417 tons in 2008 and 73,606 tons in the first quarter of 2009, and subject imports were 135,900 tons and 19,400 tons in these periods.

Article 12.8 of the SCM Agreement is worded almost identically; it requires that the authorities inform "all interested Members" in addition to all interested parties.

144. Articles 6.9 of the AD Agreement and 12.8 of the SCM Agreement pertain 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."[159] The use of the adjective "essential" indicates that this obligation does not encompass "any and all" facts, but rather, is concerned only with the "essential facts." The ordinary meaning of "essential" is "of or pertaining to a thing's essence" and "absolutely indispensible or necessary."[160] 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."[161]

145. The original panel found that China had breached Articles 6.9 of the AD Agreement and 12.8 of the SCM Agreement because MOFCOM failed to disclose to the parties any meaningful information about the facts underlying the "low" price findings and about nonsubject imports.[162] The Appellate Body agreed with the panel, finding that MOFCOM should have disclosed the facts underlying the conclusion that there had been price undercutting.[163] The Appellate Body noted that:

> What constitutes an "essential fact" must therefore be understood in the light of the content of the findings needed to satisfy the substantive obligations with respect to the application of definitive measures under the *Anti-Dumping Agreement* and the *SCM Agreement*, as well as the factual circumstances of each case. These findings each rest on an analysis of various elements that an authority is required to examine, which, in the context of an injury analysis, are set out in, *inter alia*, Articles 3.1, 3.2, 3.4, and 3.5 of the *Anti-Dumping Agreement* and Articles 15.1, 15.2, 15.4, and 15.5 of the *SCM Agreement*.[164]

146. MOFCOM again failed to disclose a number of essential facts under consideration which formed the basis for its Re-determination. Specifically, MOFCOM did not disclose:

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[159] New Shorter Oxford English Dictionary (Clarendon Press, 1993) (Exhibit US-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).

[160] New Shorter Oxford English Dictionary (Clarendon Press 1993). (Exhibit US-13).

[161] New Shorter Oxford English Dictionary (Clarendon Press 1993). (Exhibit US-13).

[162] *China – GOES (Panel)*, paras. 7.567-7.575 and 7.648-7.660.

[163] *China – GOES (AB)*, para. 247. China did not appeal the Panel's finding regarding nondisclosure of information concerning nonsubject imports.

[164] *China – GOES (AB)*, para. 241.

(a) any information underlying MOFCOM's assertion that the trends of the prices of the subject imports and the domestic like product were the same;[165]

(b) any information underlying its assertion that the domestic industry was prevented by subject imports from realizing economies of scale;[166]

(c) any information regarding the "sales obstacles" that allegedly prevented the domestic industry from making more sales in 2008 and the first quarter of 2009;[167]

(d) any information regarding the evidence that MOFCOM allegedly considered, and the analysis that it allegedly conducted, in concluding that the domestic industry's loss of market share in 2008 led it to slash prices by over 30 percent in the first quarter of 2009;[168]

(e) any information regarding MOFCOM's assertion that the price-cost differential for Wuhan decreased in 2008;[169]

(f) any information underlying MOFCOM's finding that the capacity and output of the domestic GOES industry did not exceed market demand;[170] and

(g) any information supporting its division of responsibility for the inventory overhang.[171]

147. These facts are "absolutely indispensable" to MOFCOM's determination of material injury. Without such information, no affirmative determination could be made and no definitive duties could be imposed. The covered agreements require that investigating authorities inform interested parties of essential facts under consideration prior to making a final determination. The aim of the requirement is "to permit parties to defend their interests."

148. The facts listed above are "essential facts" in that they are "facts that are significant in the process of reaching a decision as to whether or not to apply definitive measures."[172] They formed part of the basis for MOFCOM's determination of material injury and decision to apply the definitive measures at issue in this dispute. MOFCOM was required to disclose the essential

[165] Re-determination at 24, 39 and 49 (Exhibit US-01).

[166] Re-determination at 29, 42 and 43 (Exhibit US-01).

[167] Re-determination at 43 (Exhibit US-01).

[168] Re-determination at 26 and 49 (Exhibit US-01).

[169] Re-determination at 25 (Exhibit US-01).

[170] Re-determination at 52 (Exhibit US-01).

[171] Re-determination at 45 (Exhibit US-01).

[172] *China – GOES (AB)*, para. 240.

facts that supported its price effects examination and causation analysis, so that interested parties could defend their interests. MOFCOM's failure to disclose these facts in its Re-determination renders this measure inconsistent with Articles 6.9 of the AD Agreement and 12.8 of the SCM Agreement.

F. MOFCOM's Findings are Inconsistent with Articles 12.2 and 12.2.2 of the AD Agreement, and Articles 22.3 and 22.5 of the SCM Agreement

149. 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.

Article 22.3 of the SCM Agreement has identical language. In *EC – Tube or Pipe Fittings*, the Panel found "a 'material' issue" within the meaning of Article 12.2 "to be an issue that has arisen in the course of the investigation that must necessarily be resolved in order for the investigating authorities to be able to reach their determination."[173]

150. 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.

The Article also provides that the notice or report shall contain the information described in Article 12.2.1, which includes "considerations relevant to the injury determination as set out in Article 3." Article 22.5 of the SCM Agreement has virtually identical language with respect to Article 22.4 of the SCM Agreement.

151. The original panel found that China breached Article 12.2.2 of the AD Agreement and Article 22.5 of the SCM Agreement because MOFCOM did not adequately explain the basis for its "low price" findings for its decision that nonsubject imports were not a cause of injury.[174]

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[173] *EC – Tube or Pipe Fittings*, paras. 7.423-7.424; *see also EU – Footwear*, para. 7.844.

[174] *China – GOES (Panel)*, paras. 7.587-7.592 and 7.669-7.675. The original panel did not make findings with respect to Article 12.2 of the AD Agreement and Article 22.3 of the SCM Agreement.

152. The Appellate Body agreed with the panel, finding that MOFCOM had failed to disclose all relevant information on the matters of fact relating to its conclusion that there had been price undercutting.[175] Specifically, it found that MOFCOM's disclosure that "average domestic prices dropped" and that the "price-cost differential dropped" was insufficient to convey all the relevant information on the matters of fact relating to MOFCOM's finding that subject imports were at a "low price."[176] The United States notes that China did not appeal the panel's finding regarding nondisclosure of information concerning nonsubject imports.

153. MOFCOM's Re-determination suffers from the same flaws. It does not explain the matters of fact and law and reasons which led to the imposition of antidumping and countervailing duties. In particular, MOFCOM's Re-determination does not explain:

(a) MOFCOM's assertion that the trends of the prices of the subject imports and the domestic like product were the same;[177]

(b) its assertion that the domestic industry was prevented by subject imports from realizing economies of scale;[178]

(c) its assertion regarding the "sales obstacles" that allegedly prevented the domestic industry from making more sales in 2008 and the first quarter of 2009;[179]

(d) the evidence that MOFCOM allegedly considered, and the analysis that it allegedly conducted, in concluding that the domestic industry's loss of market share in 2008 led it to slash prices by over 30 percent in the first quarter of 2009;[180] and

(e) MOFCOM's finding that the capacity and output of the domestic GOES industry did not exceed market demand.[181]

154. These issues were "material" within the meaning of Articles 12.2 of the AD Agreement and 22.3 of the SCM Agreement because they had to be resolved before MOFCOM could render an affirmative material injury determination. This information also constituted "relevant information on the matters of fact and law and reasons which have led to the imposition of final measures," within the meaning of Article 12.2.2 of the AD Agreement and Article 22.5 of the SCM Agreement. This information was an integral part of MOFCOM's pricing analysis, which

[175] *China – GOES (AB)*, paras. 261-267.

[176] *China – GOES (AB)*, para. 264.

[177] Re-determination at 24, 39 and 49 (Exhibit US-01).

[178] Re-determination at 29, 42 and 43 (Exhibit US-01).

[179] Re-determination at 43 (Exhibit US-01).

[180] Re-determination at 26 and 49 (Exhibit US-01).

[181] Re-determination at 52 (Exhibit US-01).

was central to its finding of a causal link between subject imports and material injury. As such, MOFCOM's failure to disclose the information in its final determinations therefore breached Article 12.2.2 of the AD Agreement and Article 22.5 of the SCM Agreement.

V. CONCLUSION

155. For the reasons set forth in this submission, the United States respectfully requests the Panel to find that China's measures fail to comply with the recommendations and rulings of the DSB; and are inconsistent with China's obligations under the SCM Agreement and Antidumping Agreement.