WORLD TRADE ORGANIZATION

WT/DS414/R
15 June 2012

(12-3102)

Original: English

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

Report of the Panel

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Australia – Salmon	Appellate Body Report, *Australia – Measures Affecting Importation of Salmon*, WT/DS18/AB/R, adopted 6 November 1998, DSR 1998:VIII, 3327
Brazil – Retreaded Tyres	Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R, adopted 17 December 2007, DSR 2007:IV, 1527
Canada - Aircraft	Panel Report, *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/R, adopted 20 August 1999, upheld by Appellate Body Report WT/DS70/AB/R, DSR 1999:IV, 1443
Canada – Wheat Exports and Grain Imports	Appellate Body Report, *Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain*, WT/DS276/AB/R, adopted 27 September 2004, DSR 2004:VI, 2739
EC – Bed Linen	Panel Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/R, adopted 12 March 2001, as modified by Appellate Body Report WT/DS141/AB/R, DSR 2001:VI, 2077
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, DSR 2005:XVIII, 8671
EC – Fasteners (China)	Appellate Body Report, *European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*, WT/DS397/AB/R, adopted 28 July 2011
EC – Fasteners (China)	Panel Report, *European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*, WT/DS397/R and Corr.1, adopted 28 July 2011, as modified by Appellate Body Report WT/DS397/AB/R
EC – Hormones	Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, 135
EC – Salmon (Norway)	Panel Report, *European Communities – Anti-Dumping Measure on Farmed Salmon from Norway*, WT/DS337/R, adopted 15 January 2008, and Corr.1, DSR 2008:I, 3
EC – Tube or Pipe Fittings	Panel Report, *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/R, adopted 18 August 2003, as modified by Appellate Body Report WT/DS219/AB/R, DSR 2003:VII, 2701
Guatemala – Cement I	Panel Report, *Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico*, WT/DS60/R, adopted 25 November 1998, as reversed by Appellate Body Report WT/DS60/AB/R, DSR 1998:IX, 3797
Guatemala – Cement II	Panel Report, *Guatemala – Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico*, WT/DS156/R, adopted 17 November 2000, DSR 2000:XI, 5295
India - Autos	Panel Report, *India – Measures Affecting the Automotive Sector*, WT/DS146/R, WT/DS175/R and Corr.1, adopted 5 April 2002, DSR 2002:V, 1827
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Korea – Certain Paper	Panel Report, *Korea – Anti-Dumping Duties on Imports of Certain Paper from Indonesia*, WT/DS312/R, adopted 28 November 2005, DSR 2005:XXII, 10637

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Mexico – Anti-Dumping Measures on Rice	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, DSR 2005:XXII, 10853
Mexico – Anti-Dumping Measures on Rice	Panel Report, *Mexico – Definitive Anti-Dumping Measures on Beef and Rice, Complaint with Respect to Rice*, WT/DS295/R, adopted 20 December 2005, as modified by Appellate Body Report WT/DS295/AB/R, DSR 2005:XXIII, 11007
Mexico – Olive Oil	Panel Report, *Mexico – Definitive Countervailing Measures on Olive Oil from the European Communities*, WT/DS341/R, adopted 21 October 2008, DSR 2008:IX, 3179
Mexico – Steel Pipes and Tubes	Panel Report, *Mexico – Anti-Dumping Duties on Steel Pipes and Tubes from Guatemala*, WT/DS331/R, adopted 24 July 2007, DSR 2007:IV, 1207
US – Anti-Dumping and Countervailing Duties (China)	Appellate Body Report, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R, adopted 25 March 2011
US – Anti-Dumping and Countervailing Duties (China)	Panel Report, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/R, adopted 25 March 2011, as modified by Appellate Body Report WT/DS379/AB/R
US – Countervailing Duty Investigation on DRAMS	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, DSR 2005:XVI, 8131
US – Countervailing Duty Investigation on DRAMS	Panel Report, *United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea*, WT/DS296/R, adopted 20 July 2005, as modified by Appellate Body Report WT/DS296/AB/R, DSR 2005:XVII, 8243
US – Export Restraints	Panel Report, *United States – Measures Treating Exports Restraints as Subsidies*, WT/DS194/R and Corr.2, adopted 23 August 2001, DSR 2001:XI, 5767
US – Hot-Rolled Steel	Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, adopted 23 August 2001, DSR 2001:X, 4697
US – Offset Act (Byrd Amendment)	Panel Report, *United States – Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217/R, WT/DS234/R, adopted 27 January 2003, as modified by Appellate Body Report WT/DS217/AB/R, WT/DS234/AB/R, DSR 2003:II, 489
US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)	Panel Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina – Recourse to Article 21.5 of the DSU by Argentina*, WT/DS268/RW, adopted 11 May 2007, as modified by Appellate Body Report WT/DS268/AB/RW, DSR 2007:IX-X, 3609
US – Softwood Lumber II	GATT Panel Report, *Panel on United States – Measures Affecting Imports of Softwood Lumber from Canada*, SCM/162, adopted 27 October 1993, BISD 40S/358
US – Softwood Lumber IV	Appellate Body Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WT/DS257/AB/R, adopted 17 February 2004, DSR 2004:II, 571
US – Softwood Lumber IV	Panel Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WT/DS257/R and Corr.1, adopted 17 February 2004, as modified by Appellate Body Report WT/DS257/AB/R, DSR 2004:II, 641
US – Softwood Lumber V	Panel Report, *United States – Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/R, adopted 31 August 2004, as modified by Appellate Body Report WT/DS264/AB/R, DSR 2004:V, 1937

Short Title	Full Case Title and Citation
US – Softwood Lumber VI (Article 21.5 – Canada)	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, and Corr.1, DSR 2006:XI, 4865
US – Tyres (China)	Appellate Body Report, *United States – Measures Affecting Imports of Certain Passenger Vehicle and Light Truck Tyres from China*, WT/DS399/AB/R, adopted 5 October 2011
US – Wool Shirts and Blouses	Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, adopted 23 May 1997, and Corr.1, DSR 1997:I, 323

TABLE OF ABBREVIATIONS USED IN THIS REPORT

Abbreviation	Full Reference
Additional Application	New Subsidy Allegations Application (20 July 2009) (Exhibits CHN-5 and US-16)
AK Steel	AK Steel Corporation
Anti-Dumping Agreement	Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994
Application	Petition for the Anti-Dumping and Anti-Subsidy Investigation (29 April 2009) (Exhibits CHN-2 and US-2)
ATI	ATI Allegheny Ludlum Corporation
AUV	Average unit value
Baosteel	Baosteel Group Corporation
DSU	Understanding on Rules and Procedures Governing Settlement of Disputes
Final Determination	MOFCOM, Final Determination [2010] No. 21 (10 April 2010) (Exhibits CHN-16 and US-28)
Final Disclosure	MOFCOM, Memorandum Regarding the Factual Disclosure on the Dumping Margin and Ad Valorem Subsidy Rate for Grain Oriented Flat-Rolled Electrical Steel Antidumping and Countervailing Cases (15 March 2010) (Exhibit US-26)
Final Injury Disclosure	MOFCOM, Essential Facts under Consideration which Form the Basis of the Determination on Industry Injury, 5 March 2010 (Exhibits CHN-29 and US-27)
GATT 1994	General Agreement on Tariffs and Trade 1994
GOES	Grain oriented flat-rolled electrical steel
MOFCOM	Ministry of Commerce of the People's Republic of China
POI	Period of investigation
Preliminary Determination	MOFCOM, Preliminary Determination [2009] No. 99 (10 December 2009) (Exhibits CHN-17 and US-5)
SCM Agreement	Agreement on Subsidies and Countervailing Measures
USD	US dollars
VRA	Voluntary restraint agreement
WISCO	Wuhan Iron and Steel Corporation
WTO Agreement	Marrakesh Agreement Establishing the World Trade Organization

I. INTRODUCTION

1.1 On 15 September 2010, the United States requested consultations with China under Articles 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (the DSU), Article XXII:1 of the General Agreement on Tariffs and Trade of 1994 (the GATT 1994), Article 30 of the Agreement on Subsidies and Countervailing Measures (the SCM Agreement) (to the extent that Article 30 incorporates Article XXIII of the GATT 1994), and Article 17.3 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the Anti-Dumping Agreement) with respect to China's measures imposing countervailing duties and anti-dumping duties on grain oriented flat-rolled electrical steel (GOES) from the United States, as set forth in the Ministry of Commerce of the People's Republic of China (MOFCOM) Notice No. 21 [2010], including its annexes.[1] The consultations were held on 1 November 2010. The consultations failed to resolve the dispute.

1.2 On 11 February 2011, the United States requested, pursuant to Article 6 of the DSU, Article 17.4 of the Anti-Dumping Agreement, and Article 30 of the SCM Agreement, that the Dispute Settlement Body (the DSB) establish a Panel to examine this matter.[2]

1.3 At its meeting on 25 March 2011, the DSB established a panel pursuant to the request of the United States in document WT/DS414/2, in accordance with Article 6 of the DSU.

1.4 The Panel's terms of reference are the following:

> 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/DS414/2 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.

1.5 Following the agreement of the parties, the Panel was composed on 10 May 2011 as follows:

Chairman: Mr John Adank

Members: Mr Anthony Abad
Mr Jan Heukelman

1.6 Argentina; the European Union; Honduras; India; Japan; Korea; Saudi Arabia and Viet Nam reserved their rights to participate in the Panel proceedings as third parties.

1.7 The Panel met with the parties on 15-16 September and 6-7 December 2011. It met with the third parties on 16 September 2011. The Panel issued its interim report to the parties on 24 February 2012. The Panel issued its final report to the parties on 1 May 2012.

II. FACTUAL ASPECTS

2.1 The United States challenges various aspects of the measures imposing countervailing duties and anti-dumping duties on GOES from the United States. The measures are set forth in MOFCOM's Notice No. 21 [2010], including its annexes.[3] The United States claims that the measures are

[1] WT/DS414/1.
[2] WT/DS414/2.
[3] Final Determination [2010] No. 21 (10 April 2010) ("Final Determination"), Exhibit CHN-16 and Exhibit US-28.

inconsistent with China's commitments and obligations under the GATT 1994, the Anti-Dumping Agreement and the SCM Agreement.

2.2 An application for initiation of an anti-dumping and countervailing duty investigation was filed on 29 April 2009 by two Chinese steel producers, namely Wuhan Iron and Steel (Group) Corporation (WISCO) and Baosteel Group Corporation (Baosteel). The applicants alleged that 27 federal and state laws provided countervailable subsidies to the United States producers of GOES. The application also estimated a dumping margin for GOES imports from the United States of 25%. Finally, the application alleged that the imports of GOES from the United States and Russia caused and threatened injury to the Chinese domestic industry. On 1 June 2009, MOFCOM initiated anti-dumping, countervailing duty and injury investigations. In the countervailing duty initiation notice, MOFCOM initiated on 22 of the 27 federal and state laws that the applicants had alleged provided countervailable subsidies. On 20 July 2009, the applicants filed new subsidy allegations regarding a further 10 federal and state laws. On 19 August 2009, MOFCOM initiated an investigation covering six of these programmes.

2.3 On 10 December 2009, MOFCOM published its preliminary determination. MOFCOM calculated *ad valorem* subsidy rates of 11.7% for AK Steel Corporation (AK Steel) and 12% for ATI Allegheny Ludlum Corporation (ATI). The "all others" subsidy rate reported in the preliminary determination was 12%. MOFCOM calculated preliminary dumping margins of 10.7% for AK Steel, 19.9% for ATI and 25% for "all others".

2.4 Prior to issuing its final determination, MOFCOM released a final disclosure document, in which it revealed that the "all others" subsidy and dumping rates had increased to 44.6% and 64.8% respectively.

2.5 On 10 April 2010, MOFCOM issued its final determination for the anti-dumping and countervailing duty investigations. MOFCOM calculated *ad valorem* subsidy rates of 11.7% for AK Steel, 12% for ATI and 44.6% for "all others". MOFCOM applied a dumping margin of 7.8% to AK Steel, 19.9% to ATI and 64.8% to "all others". MOFCOM found that China's domestic GOES industry sustained material injury and that there was a causal link between the injury and the dumped imports of GOES from Russia and the dumped and subsidized imports of GOES from the United States.

III. PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

A. THE UNITED STATES

3.1 In its written submissions, the United States requested the Panel to find:

(a) China acted inconsistently with Articles 11.2 and 11.3 of the SCM Agreement when it initiated a countervailing duty investigation with respect to 11 of the programmes included in the application;

(b) China acted inconsistently with Articles 12.4.1 of the SCM Agreement and 6.5.1 of the Anti-Dumping Agreement because it failed to require adequate non-confidential summaries of confidential information included in the application;

(c) China acted inconsistently with Article 12.7 of the SCM Agreement because its use of facts available for known exporters was improper;

(d) China acted inconsistently with Article 12.2.2 of the Anti-Dumping Agreement because it failed to make available to the respondent companies the calculations used to determine these companies' final dumping margins;

(e) China acted inconsistently with Article 22.3 of the SCM Agreement because it failed adequately to explain the findings and conclusions supporting its determination that the competitive bidding process under the United States Government procurement statutes at issue did not result in prices that reflected market conditions;

(f) China acted inconsistently with Articles 6.8 and 6.9 of the Anti-Dumping Agreement because it applied anti-dumping duties based on facts available to "unknown" United States exporters and did not disclose the essential facts that led to that result;

(g) China acted inconsistently with Articles 12.2 and 12.2.2 of the Antidumping Agreement because MOFCOM failed to provide in sufficient detail the findings and conclusions leading to application of facts available to "unknown" United States producers/exporters. MOFCOM also failed to provide "all relevant information" on the facts underlying its determination that recourse to facts available was warranted in the calculation of the "all others" antidumping rate;

(h) China acted inconsistently with Article VI:2 of the GATT 1994 because the "all others" anti-dumping duty levied by China was greater in amount than the appropriate margin of dumping;

(i) China acted inconsistently with Articles 12.7, 12.8, 22.3 and 22.5 of the SCM Agreement because it applied countervailing duties based on facts available to "unknown" United States exporters and provided no detail in its final determination or final disclosure documents regarding the findings that led to the application of facts available;

(j) China acted inconsistently with Articles 3.1, 3.2, 6.9 and 12.2.2 of the Anti-Dumping Agreement and Articles 15.1, 15.2, 12.8 and 22.5 of the SCM Agreement because its price effects analysis was not based on positive evidence and it did not engage in an objective examination of the evidence. Further, China did not disclose the essential facts supporting its price effects analysis and did not offer an adequate explanation for its price effects findings;

(k) China acted inconsistently with Articles 3.1, 3.5, 6.9 and 12.2.2 of the Anti-Dumping Agreement and Articles 12.8, 15.1, 15.5 and 22.5 of the SCM Agreement because its causation analysis was not supported by positive evidence or based on an objective examination of the evidence. Further, China failed to disclose the essential facts supporting its analysis and did not provide an adequate explanation for its causation findings; and

(l) Consequently, China also acted inconsistently with Article 1 of the Anti-Dumping Agreement and Article 10 of the SCM Agreement.

3.2 Pursuant to Article 19.1 of the DSU, the United States requests the Panel to recommend that China bring its measures into conformity with the Anti-Dumping Agreement, the SCM Agreement and the GATT 1994.

B. CHINA

3.3 China requests the Panel to reject the United States' claims in their entirety, finding instead that, with respect to each of them, China acted consistently with all of its obligations under the WTO Agreements.

IV. ARGUMENTS OF THE PARTIES

4.1 The arguments of the parties are set out in their written submissions, oral statements to the Panel and their answers to questions. Executive summaries of the parties' written submissions, and their oral statements or executive summaries thereof, are attached as addenda to this Report in Annexes A, C, E and F (see List of Annexes, pages iv-vi).

V. ARGUMENTS OF THE THIRD PARTIES

5.1 India and Viet Nam did not submit third party written submissions, while Viet Nam did not submit a third party oral statement. The arguments of Argentina; the European Union; Japan and Korea are set out in their written submissions, oral statements and answers to questions. The arguments of Honduras and Saudi Arabia are set out in their written submissions and oral statements. The arguments of India are set out in its oral statement. The third parties' written submissions and oral statements, or executive summaries thereof, are attached as addenda to this Report in Annexes B and D (see List of Annexes, pages iv-vi).

VI. INTERIM REVIEW

A. INTRODUCTION

6.1 On 24 February 2012, the Panel submitted its Interim Report to the parties. On 16 March 2012, both parties submitted written requests for review of precise aspects of the Interim Report. On 30 March, the United States submitted comments on China's requests for review. Neither party requested that the Panel hold an interim review meeting.

6.2 The Panel explains below its response to issues of a substantive nature raised by the parties in their comments on the Interim Report. The Panel has also corrected a number of typographical errors identified by the parties.

6.3 Due to changes as a result of our review, the numbering of the footnotes in the Final Report has changed from the Interim Report. The text below refers to the footnote numbers in the Interim Report, with the footnote number in the Final Report in parentheses for ease of reference.

B. PARTIES' REQUESTS FOR CHANGES TO THE INTERIM REPORT

1. Paragraph 7.28

6.4 China submits that the Panel's description of its argument regarding whether the United States made a *prima case* under Article 11 is incomplete. China requests that the Panel supplement the description to reflect the argument that the United States failed to engage in a serious evaluation of the evidence that accompanied the application at issue.

6.5 The United States does not agree that the Interim Report incorrectly characterizes China's argument. However, if the Panel agrees to amend the description of China's argument, the United States requests that the Panel note the sections of the United States' first and second written submissions where it addressed the contents of the application and each allegation.

6.6 The Panel has expanded upon its description of China's argument in paragraph 7.28, so that it is in the level of detail requested by China. The Panel has also accepted the United States' request, by referencing the sections of its submissions that the United States relies upon as addressing the contents of the application (see footnote 19).

2. Paragraph 7.91

6.7 The United States requests some minor changes to the wording in the penultimate sentence of paragraph 7.91, in order to add greater clarity to the sentence.

6.8 China does not comment on this request.

6.9 The Panel has decided to accommodate the United States' request and has made the adjustments sought.

3. Paragraphs 7.105, 7.108 and 7.111

6.10 The United States submits that the Panel should change references to the "Economic Stimulus Package" to the "Economic Stimulus Plan" in its own descriptions of the alleged subsidy and when describing the arguments made by the United States, as this is the correct terminology.

6.11 China does not comment on this request.

6.12 The Panel notes that Exhibits CHN-8 and US-29 refer to the programme at issue as the "Economic Stimulus Plan" rather than the "Economic Stimulus Package". Therefore, the Panel has accommodated the United States' request.

4. Paragraph 7.206

6.13 The United States suggests a minor change to the wording of the final sentence of paragraph 7.206.

6.14 China does not comment on this request.

6.15 In the Panel's view, the United States' suggested change does not alter the meaning of the sentence, but perhaps makes the Panel's statement in the sentence more definitive. The Panel has decided to accommodate the United States' request in order to add greater clarity and force to the sentence at issue.

5. Paragraph 7.365

6.16 China submits that the first sentence of paragraph 7.365 should be struck from the Report. The sentence in question states: "[a]rguably, if the United States' claim were one of substance, regarding for example the benefit determination under Articles 1.1(b) or 14(d) of the SCM Agreement, we may find certain problems with the reasoning used by MOFCOM".

6.17 The United States does not comment upon China's request.

6.18 The Panel has removed the sentence from the Report, on the basis that it is not strictly necessary to its reasoning. The Panel has also added a new footnote to paragraph 7.365 (footnote 357) to emphasise that the United States' claim was not one of substance and Article 22.3 of the SCM Agreement does not discipline the substantive adequacy of an investigating authority's reasoning.

6. Paragraphs 7.527, 7.629, 7.635 and footnote 601 (footnote 604 in the Final Report)

6.19 China argues that the Panel's use of the terms "regrettably", "failed to", "failure" and "impaired", as used variously in paragraphs 7.527, 7.629, 7.635 and footnote 601 (footnote 604 in the Final Report), is inappropriate. According to China, these terms convey value judgments that are not appropriate in a panel's description of what happened during the course of panel proceedings. Further, China argues that the term "impaired" may inadvertently reflect some judgment by the Panel of intent by China to frustrate the Panel's analysis. According to China, where there is no breach of the relevant general and/or special panel working procedures, it is inappropriate for a panel to use language that suggests a motive or intent outside the confines of these rules and obligations.

6.20 The United States disagrees with China's objections and argues that other panels have used the term "regret" to refer to the conduct of a party during a proceeding.[4] Further, the term "impaired" was used by the Panel as part of a factual statement about the impact on the Panel's work.

6.21 The Panel has reflected on the terminology used in the paragraphs at issue and, where it considers appropriate, has made some of the changes requested by China.

7. Paragraph 7.530

6.22 China considers the Panel's statement in the fifth sentence of paragraph 7.530, namely that "such prices should be adjusted to ensure that they are properly comparable", suggests that the Panel is articulating a mandatory methodology the authority must follow. China believes it would be more appropriate to state that the authority should either adjust the prices to ensure comparability, or otherwise explain why specific adjustments are not necessary in a particular situation. China suggests that there may be cases in which adjustments would be immaterial. For example, China posits a scenario in which there are two grades of a product, one priced at $10/unit and one priced at $12/unit. China suggests that, if there were a finding of price undercutting of $5/unit, any adjustment would be immaterial, since the $2/unit difference between the two products could never change the overall existence of undercutting.

6.23 The United States disagrees that the Panel's statement is articulating a mandatory methodology that authorities must follow. The United States understands the point in the final clause of the sentence to be that when making a finding of price undercutting, the prices being compared need to be comparable. The United States asserts that China's proposed revision of the second clause would appear to provide an authority with the ability to use non-comparable prices. The United States also asserts that China's hypothetical is confusing since it appears to be referring to two different domestic prices, while the Panel is discussing the comparison between imported and domestic prices. Should the Panel decide to rephrase the last clause of the sentence, the United States suggests that the clause could be rephrased as: "and the authority should ensure that the prices it is using for its comparison are properly comparable."

6.24 The Panel has decided to adjust the fifth sentence of the paragraph to clarify that, for the purpose of price comparisons, prices should always be comparable.

8. Footnote 525 (footnote 528 in the Final Report), paragraph 7.549

6.25 China suggests deleting the last sentence of footnote 525 (footnote 528 in the Final Report) at paragraph 7.549. According to China, there is no basis before the Panel to express any opinion on

[4] The United States refers in this regard to the Panel Report, *Canada – Aircraft*, para. 9.178, and Panel Report, *India – Autos*, para. 6.54.

whether new capacity has higher costs than expanding existing capacity. China contends that the Panel might properly note this as an issue the authority should address, but the Panel should not use any language that prejudges what the authority might find on this issue.

6.26 The United States contends that the last sentence of footnote 525 (footnote 528 in the Final Report) accurately describes the record before the Panel and should not be deleted. The Panel correctly observed that the United States explained that improvements in existing facilities were unlikely to engender the same degree of start-up costs as opening an entirely new facility. The United States contends that if this statement were not true, China (unlike the United States) had access to the information from the confidential MOFCOM record with which to rebut it. China did not do so.

6.27 The Panel has decided not to accommodate China's request. The United States' argument that creating new capacity is likely to incur greater costs than merely improving existing capacity is relevant to the Panel's findings. In making its findings, the Panel is entitled to rely on relevant United States arguments that were not contested by China.

9. Footnote 602 (footnote 605 in the Final Report), paragraph 7.630

6.28 China disagrees with the first sentence of paragraph 7.630, and the last two sentences of footnote 602 (footnote 605 in the Final Report). China submits that the first sentence of paragraph 7.630 and the entire footnote 602 (footnote 605 in the Final Report) are unnecessary to the Panel's analysis and should be deleted. China asserts that the relevant issue is completely addressed by paragraph 7.632. China submits that, although it may not have been able to provide the precise number for the capacity utilization in 2008 because of confidentiality concerns, China did provide a confidential range that provided upper and lower limits that more narrowly prescribed the actual number. China contends that when a party provides a range and states the actual number is within that range, it is no longer reasonable for the other party to make assumptions that generate a number outside the range.

6.29 The United States disagrees with China's request that the Panel delete the first sentence of paragraph 7.630 and footnote 602 (footnote 605 in the Final Report). According to the United States, the first sentence of paragraph 7.630 is a factually accurate description of the United States' argument and China has no basis to object to the inclusion of a United States argument in the Report. The United States further asserts that the statement and accompanying footnote are directly related to the remainder of paragraph 7.630 so they are not "unnecessary" and should be retained. Finally, with respect to China's use of a range of numbers, the United States considers that the Panel properly noted in the final sentence of footnote 602 (footnote 605 in the Final Report) that China's mere assertion of error, without providing the actual underlying data, is insufficient to reject the basic point being made by the United States.

6.30 The Panel has decided not to accommodate China's request. The first sentence of paragraph 7.630 describes an argument made by the United States that is highly relevant to the Panel's subsequent analysis. Furthermore, footnote 602 (footnote 605 in the Final Report) clarifies the reasons the Panel was not able to reject the United States' argument on the basis of China's simple assertion of error.

10. Paragraph 7.637

6.31 China believes the statement "it is clear" in the second sentence of paragraph 7.637 is inappropriate. Given the Panel's earlier discussion of the limitations on its analysis, China contends that it is hard to see how the conclusion could be "clear". In this situation, China believes the phrase "it appears" more appropriately describes the situation.

6.32 The United States asserts that the fact that the information available to the Panel was limited does not mean that there can be no clear conclusions drawn from it. Moreover, the Panel's statement is qualified by stating the increase was "at least" partially responsible for the accumulation of inventory. According to the United States, therefore, the Panel's use of the phrase "it is clear" is entirely appropriate.

6.33 The Panel has reconsidered the wording it used in the second sentence of paragraph 7.637 and has decided to adjust it to accommodate China's request.

VII. FINDINGS

A. GENERAL PRINCIPLES REGARDING TREATY INTERPRETATION, THE APPLICABLE STANDARD OF REVIEW AND BURDEN OF PROOF

1. Treaty Interpretation

7.1 Article 3.2 of the DSU provides that the dispute settlement system serves to clarify the existing provisions of the covered agreements "in accordance with customary rules of interpretation of public international law". It is generally accepted that the principles codified in Articles 31 and 32 of the Vienna Convention on the Law of Treaties are such customary rules.[5]

2. Standard of Review

7.2 Panels generally are bound by the standard of review set forth in Article 11 of the DSU, which provides, in relevant part, that:

> [A] panel should make an *objective assessment of the matter* before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements.[6] (emphasis added)

7.3 According to the Appellate Body, the "objective assessment" to be made by a panel reviewing an investigating authority's determination is to be informed by an examination of whether the agency 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.[7]

7.4 The Appellate Body has also commented that a panel reviewing an investigating authority's determination may not conduct a *de novo* review of the evidence or substitute its judgment for that of the investigating authority. A panel must limit its examination to the evidence that was before the agency during the course of the investigation and must take into account all such evidence submitted by the parties to the dispute.[8] At the same time, a panel must not simply defer to the conclusions of the investigating authority. A panel's examination of those conclusions must be "in-depth" and "critical and searching".[9]

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[5] Done at Vienna, 23 May 1969, 1155 United Nations Treaty Series 331 (1980); 8 International Legal Materials 679 (1969).

[6] Further to Article 11 of the DSU, Article 17.6 of the Anti-Dumping Agreement sets forth a specific standard of review applicable to anti-dumping disputes.

[7] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 186.

[8] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 187.

[9] Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 - Canada)*, para. 93.

3. Burden of Proof

7.5 The general principles applicable to the allocation of the burden of proof in WTO dispute settlement require that a party claiming a violation of a provision of a WTO Agreement must assert and prove its claim.[10] Therefore, as the complaining party, the United States bears the burden of demonstrating that certain aspects of the anti-dumping and countervailing duty measures at issue are inconsistent with the Anti-Dumping Agreement, the SCM Agreement and the GATT 1994. The Appellate Body has stated that a complaining party will satisfy its burden when it establishes a *prima facie* case, namely a case which, in the absence of effective refutation by the defending party, requires a panel, as a matter of law, to rule in favour of the complaining party.[11] Finally, it is generally for each party asserting a fact to provide proof thereof.[12]

B. WHETHER CHINA ACTED INCONSISTENTLY WITH ARTICLES 11.2 AND 11.3 OF THE SCM AGREEMENT IN INITIATING AN INVESTIGATION WITH RESPECT TO CERTAIN PROGRAMMES

1. Provisions at issue

7.6 The United States' claim relates to Articles 11.2 and 11.3 of the SCM Agreement. These provide, relevantly:

> 11.2 An application under paragraph 1 shall include sufficient evidence of the existence of (a) a subsidy and, if possible, its amount, (b) injury within the meaning of Article VI of GATT 1994 as interpreted by this Agreement, and (c) a causal link between the subsidized imports and the alleged injury. Simple assertion, unsubstantiated by relevant evidence, cannot be considered sufficient to meet the requirements of this paragraph. The application shall contain such information as is reasonably available to the applicant on the following:
>
> ...
>
> (iii) evidence with regard to the existence, amount and nature of the subsidy in question.
>
> 11.3 The authorities shall review the accuracy and adequacy of the evidence provided in the application to determine whether the evidence is sufficient to justify the initiation of an investigation.

2. Factual Background

7.7 On 27 April 2009, two Chinese steel producers, WISCO and Baosteel, filed an application with MOFCOM, requesting relief under China's anti-dumping and countervailing duty laws on behalf of China's domestic GOES industry. The applicants alleged that United States producers of GOES, in particular, AK Steel and ATI, had engaged in injurious dumping and had benefited from various countervailable subsidies.

7.8 In relation to the subsidies, the applicants alleged that 27 federal and state laws, including several federal procurement statutes, provided countervailable subsidies to the United States companies. On 1 June 2009, MOFCOM initiated a countervailing duty investigation in relation to 22 of the 27 programmes included in the application.

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[10] Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14.
[11] Appellate Body Report, *EC – Hormones*, para. 104.
[12] Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14.

7.9 On 20 July 2009, the applicants filed new subsidy allegations regarding 10 federal and state laws. MOFCOM initiated a countervailing duty investigation in relation to six of the programmes included in the additional application.

7.10 In its claim under Articles 11.2 and 11.3 of the SCM Agreement, the United States challenges the initiation of an investigation in relation to six of the programmes included in the original application and five of the programmes included in the additional application. Therefore, the United States' challenge regarding the initiation of the investigation relates to 11 programmes, namely the Medicare Prescription Drug, Improvement and Modernization Act of 2003; the Economic Recovery Tax Act of 1981, the Tax Reform Act of 1986; the Steel Import Stabilization Act of 1984; the State of Indiana Steel Industry Advisory Service; grace periods for meeting the Clean Air Act emissions standards; the "supply of electricity to the steel industry at a low price"; the "supply of natural gas to the steel industry at a low price"; a "subsidy to coal for the steel industry"; the 2003 Economic Stimulus Plan of Pennsylvania; and Pennsylvania's Alternative Energy Funding Program.

3. Arguments of the United States

7.11 According to the United States, the initiation by MOFCOM of the countervailing duty investigation in relation to 11 United States federal and state programmes was inconsistent with Articles 11.2 and 11.3 of the SCM Agreement.

(a) Article 11.2 of the SCM Agreement

7.12 The United States notes that Article 11.2 requires that "an application…shall include sufficient evidence of the existence of…a subsidy". Read in the context of Article 1 of the SCM Agreement, Article 11.2 requires that an application to initiate a countervailing duty investigation include sufficient evidence of the existence of a financial contribution, a benefit (requirements for the existence of a subsidy) and specificity (since Part III of the SCM Agreement applies only if a subsidy is specific).[13] According to the United States, Article 11.2(iii), which refers to evidence "with regard to the existence, amount and nature of the subsidy in question", supports its position.[14]

7.13 With respect to what evidence is "sufficient" in a petition, the United States refers to the second sentence of Article 11.2, which provides that "simple assertion, unsubstantiated by relevant evidence, cannot be considered sufficient".[15] To meet the standard for "sufficient evidence", an application must contain a degree of actual evidence.[16] The panel in *US - Offset Act (Byrd Amendment)* noted that Article 11.2 ensures that "investigations are not initiated on the basis of frivolous or unfounded suits".[17] The United States also argues that while it is not necessary for an applicant definitively to establish the existence of each element of a specific subsidy at the time of lodging a petition, there must be at least some evidence of financial contribution, benefit and specificity. The United States rejects China's attempt to rely on "the broader context provided by the application" in place of evidence for one or more of the necessary elements.[18]

7.14 In relation to the GOES investigation, the United States argues that for 11 of the programmes investigated by MOFCOM, the initial and additional applications included no evidence of basic

[13] United States' first written submission, para. 74 and United States' response to Panel question 37.
[14] United States' first written submission, para. 74.
[15] United States' first written submission, para. 74.
[16] United States' second written submission, para 4, citing Panel Reports, *Mexico – Steel Pipes and Tubes*, para. 7.24 and *Guatemala – Cement II*, para. 8.53 (both discussing Article 5.2 of the Anti-Dumping Agreement).
[17] United States' first written submission, para. 74, quoting Panel Report, *US – Offset Act (Byrd Amendment)*, para. 7.61
[18] United States' response to Panel question 1, para. 6.

subsidy elements and were based on simple assertion. Further, the applications did not state that relevant information was not "reasonably available".[19] The United States alleges deficiencies in the application in relation to the following programmes:

(i) Medicare Prescription Drug, Improvement and Modernization Act

7.15 The United States argues that the application included no evidence indicating that the alleged subsidy was specific. According to the United States, the statement in the AK Steel Annual Report indicating that AK Steel sponsors the relevant type of healthcare plan to qualify for the subsidy does not indicate that the company was the only such company to do so, or that it was one of a limited group of such companies. Further, there was no evidence to indicate that "sponsors of retiree healthcare benefit plans that included a qualified prescription drug benefit" was a *de jure* or *de facto* specific group.

(ii) Economic Recovery Tax Act of 1981

7.16 The United States notes that the Economic Recovery Tax Act of 1981 was in effect for only two years and ceased to operate 27 years prior to the period of investigation. The United States argues that the application contained no evidence indicating that a benefit existed during the period of investigation. According to the United States, China's speculation, after the fact, that it is possible the subsidy could have been allocated over time, and that the allocation period, which was never alleged in the first place, could have exceeded 20 years, is inadequate to support a decision to initiate.[20]

(iii) Tax Reform Act of 1986

7.17 The United States complains that the applicant failed to provide any evidence indicating that a benefit could exist during the period of investigation in relation to subsidies allegedly provided 24 years prior to this period.[21]

(iv) Steel Import Stabilization Act of 1984

7.18 According to the United States, the application was deficient due to lack of evidence of the existence of a financial contribution. The application alleged that the voluntary restraint agreements (VRAs) established under the Steel Import Stabilization Act constituted a price support mechanism within the meaning of Article 1.1(a)(2) of the SCM Agreement.[22] However, the sole evidence relied upon by the petitioner was that the VRAs "effectively provided" steel producers with a price support mechanism. According to the United States, this is not evidence that the VRAs constituted "price support" within the meaning of the SCM Agreement.[23]

(v) State of Indiana Steel Advisory Service

7.19 The United States argues that the application included no evidence that the State of Indiana Advisory Service constitutes a financial contribution. The applicant merely stated that the Advisory Service constitutes the provision of a good or service and that the programme was "indicative" of a

[19] United States' first written submission, paras. 76-77. The United States responds to China's argument that it did not engage in a serious evaluation of the evidence that accompanied the application and therefore did not make a *prima facie* case under Article 11, by noting that it addressed the contents of the application and each allegation at para. 78 of its first written submission, paras. 4-36 of its second written submission and in Exhibits US-2, US-16, US-29, US-30 and US-31.

[20] United States' opening statement at the first meeting of the Panel, para. 8.

[21] United States' second written submission, para. 13.

[22] United States' second written submission, para. 14.

[23] United States' second written submission, para. 15.

financial contribution and could "quite plausibly" have constituted a financial contribution.[24] The United States contends that no evidence was provided indicating that a study would be performed under the programme and, even if it were, whether it would be available to the steel industry. Finally, the United States argues that the application did not indicate what the benefit under the programme would be.[25]

(vi) Grace periods for compliance with the Clean Air Act

7.20 According to the United States, the application appears to allege that steel companies were given a three year postponement for compliance with certain environmental standards in the Clean Air Act and that this "special environmental immunity is virtually an income support to the steel industry". However, the United States argues that the application included insufficient evidence of actual income or price support within the meaning of Article 1.1(a)(2) of the SCM Agreement.[26] With respect to benefit, the United States notes that the "special environmental immunity" ended on 31 December 1985. The applicant did not provide evidence indicating how a benefit could exist in relation to a grace period that expired more than 20 years prior to the start of the period of investigation.[27]

(vii) 2003 Economic Stimulus Plan of Pennsylvania

7.21 According to the United States, the petition did not include sufficient evidence of specificity in relation to the 2003 Economic Stimulus Plan of Pennsylvania. Noting that there are steel production facilities in Pennsylvania does not constitute evidence that steel is a "favoured" industry. Although a focal point of the programme was to provide "[r]esources that allow our traditional industries, especially manufacturing, to access new technology", the United States argues that this was only one of seven focal points. In fact, the Plan "sought to serve a wide variety of economic sectors, industries and firms".[28]

(viii) Pennsylvania's Alternative Energy Funding Programme

7.22 The United States argues that the application was deficient in providing evidence of specificity. The application asserted that "looking at the full range, the applicants could easily discover the fact that…most…grantees were from energy or steel industries" and that the steel industry "was absolutely one of the most important receivers". The United States argues that it is unclear how these statements provide sufficient evidence of specificity.[29] The United States also argues that the application did not provide evidence of the existence of a benefit. MOFCOM ignored evidence provided by the United States demonstrating that, for the most part, the programme was not operational during the period of investigation. For the part of the programme that was operational, the United States provided evidence that the respondent companies did not receive a benefit.

(ix) Natural Gas

7.23 The United States argues that the petition included no evidence of a financial contribution, benefit or specificity in relation to the allegation that GOES producers received a countervailable

[24] United States' second written submission, paras. 16-17.
[25] United States' second written submission, paras. 16-17.
[26] United States' second written submission, para. 18.
[27] United States' second written submission, para. 20. In response to Panel question 39, the United States confirms that it is not challenging MOFCOM's initiation of an investigation with respect to the 1990 amendments to the Clean Air Act.
[28] United States' second written submission, paras. 28-30; United States' response to Panel question 5, paras. 13-15 and United States' opening statement at the first meeting of the Panel, para. 7.
[29] United States' second written submission, para. 32.

subsidy through the pricing of natural gas. The evidence provided by the applicants demonstrated that the natural gas market was deregulated in 1985, at which time users negotiated directly with producers to set prices.[30] China does not point to any evidence in the application to indicate that the United States Government sets prices, let alone sets prices in a discriminatory manner. Further, price differentiation is not, in and of itself, evidence of specificity. Finally, to the extent the applicants argued that subsidies were provided to natural gas producers, China cannot point to any evidence in the application to indicate pass-through of such subsidies.[31]

(x) Electricity

7.24 According to the United States, the petitioners' allegation that GOES producers received a subsidy through the pricing of electricity was not supported by evidence of a financial contribution, benefit or specificity. The evidence in the petition was consistent with the fact that, while the United States Government regulates the provision of electricity, it does not set retail electricity prices. Further, the evidence did not support the applicant's assertion that the United States Government sets preferential prices for certain industries and regions. Price differentiation is not, in and of itself, evidence of specificity and China cannot point to any evidence indicating that the United States Government sets prices in a discriminatory fashion.[32] In addition, the United States notes that, to the extent the applicants argued that subsidies were provided to electricity producers, no evidence was cited indicating pass-through of such subsidies to the steel industry.[33]

(xi) Coal

7.25 The United States notes that there was no evidence in the application that any subsidization to the coal industry passes-through to the steel industry. This was merely asserted by the applicants. Further, China cannot point to any evidence that the United States Government sets the price for coal or in any way sells coal to the steel industry on preferential terms.

(b) Article 11.3 of the SCM Agreement

7.26 The United States claims that China acted inconsistently with its obligations under Article 11.3 because MOFCOM failed to examine the accuracy and adequacy of the evidence provided to substantiate the existence of a subsidy. Regarding the correct interpretation of Article 11.3, the United States cites the panel's interpretation of the analogous provision under the Anti-Dumping Agreement in *US – Softwood Lumber V*, in particular that a panel should determine "whether an unbiased and objective investigating authority would have found that the application contained sufficient information to justify initiation of the investigation".[34]

7.27 According to the United States, for many of the programmes included in the petition, evidence of the basic subsidy elements was missing. The United States argues that no reasonable investigating authority would have initiated an investigation of the 11 programmes at issue.[35] Prior to the initiation, the United States highlighted to MOFCOM the problems with the application. Notwithstanding the information provided to it by the United States, MOFCOM initiated the countervailing duty investigation with respect to all of the programmes at issue.[36]

[30] United States' second written submission, para. 23.
[31] United States' second written submission, paras. 24-25.
[32] United States' second written submission, para. 21.
[33] United States' second written submission, para. 21.
[34] United States' first written submission, para. 79.
[35] United States' first written submission, para. 80.
[36] United States' first written submission, para. 80 and second written submission, para. 36.

4. Arguments of China

7.28 China disputes the United States' claim that MOFCOM acted inconsistently with Articles 11.2 and 11.3 of the SCM Agreement. In fact, China contends that the United States has not made a *prima facie* case with respect to its Article 11 claims. In particular, China argues in its first and second written submissions that the United States failed to engage in a serious evaluation of the evidence that accompanied the application at issue. Rather, the United States simply asserted that "the petition did not contain any evidence" of one or more elements of an actionable subsidy, without referring to the information accompanying the application.[37] China also argues that the allegation that the application failed adequately to allege one or more elements of a subsidy with respect to each of the 11 programmes at issue is in fact incorrect.

(a) Article 11.2 of the SCM Agreement

7.29 According to China, Article 11.2 of the SCM Agreement contains a low application threshold that requires far less substantiation and analysis than claimed by the United States.[38] The objective of Article 11.2 is to limit the evidentiary burden on the applicant. Although China agrees with the United States that Article 11.2 requires evidence of a financial contribution, benefit and specificity, this is qualified by the chapeau to Article 11.2, which requires only the information "reasonably available to the applicant".[39] China argues that, given the lack of any direct reference to "specificity" in Article 11.2, and the difficulty applicants face in obtaining evidence of specificity, particularly *de facto* specificity, a different and less stringent evidentiary standard exists for this element.[40]

7.30 China contends that the jurisprudence relating to the analogous provision under the Anti-Dumping Agreement, namely Article 5.2, provides important context for the interpretation of Article 11.2 of the SCM Agreement.[41] According to China, the panels that have examined Article 5.2 of the Anti-Dumping Agreement have held that applicants need only submit enough evidence to justify an investigation and do not need to analyse the evidence or explain the ultimate conclusion. China notes "the quantity and quality of the information provided by the applicant need not be such as would be required in order to make a preliminary or final determination" and the inclusion of raw information is sufficient to overcome the proscription on simple assertion.[42]

7.31 Although China's primary position is that the United States has not made a *prima facie* case under Article 11.2 of the SCM Agreement, China also seeks to demonstrate that the application for initiation included sufficient evidence for each of the 11 programmes at issue:

(i) Medicare Prescription Drug, Improvement and Modernization Act

7.32 In response to the United States' claim that the application did "not include any evidence of specificity", China argues that AK Steel's Annual Report, which was annexed to the application, stated that the Medicare Act "provides a federal subsidy to sponsors of retiree healthcare benefit plans" and that AK Steel is such a sponsor. According to China, this demonstrates contingent access to the subsidy and could indicate the existence of *de jure* or *de facto* specificity.[43]

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[37] China's first written submission, paras. 25 and 28 and China's second written submission, paras. 12-13.
[38] China's first written submission, para. 14.
[39] China's first written submission, paras. 16-17.
[40] China's response to Panel question 37.
[41] China's first written submission, para. 19.
[42] China's first written submission, para. 22.
[43] China's first written submission, paras. 34-36.

(ii) Economic Recovery Tax Act 1981

7.33 China disputes the significance of the United States' argument that the application did not include any evidence showing that the programme provided a benefit during the period of investigation. According to China, implicit in the evidence of a large benefit to the steel industry is a claim that a benefit was received during the period of investigation. There is no requirement to fix a benefit allocation period at the time of filing an application. China concludes that the lack of analysis linking evidence of the subsidy in 1981 and 1982 to benefits during the POI does not invalidate the allegation.[44]

(iii) Tax Reform Act 1986

7.34 In response to the United States' allegation that the application did not contain evidence of a benefit during the period of investigation, China relies upon the explanation provided for in the Economic Recovery Tax Act. Further, China contends that the applicant had no evidence before it indicating that the programme had been repealed, leaving open the possibility that it was still in effect during the period of investigation.[45]

(iv) Steel Import Stabilization Act 1984

7.35 China disputes the United States' argument that the application included no evidence that the VRAs concluded under the Act constituted a financial contribution. According to China, the application included information that actions under the Act led to "pecuniary benefits" to the United States steel industry. China concludes that whether this could definitively be found to be a financial contribution was not for the application conclusively to determine.[46] In response to a Panel question, China argues that the VRAs caused a transfer of wealth from steel purchasers to the United States steel industry, due to higher domestic steel prices. This could be construed generally as a form of price or income support. Alternatively, China argues that it could be evidence of a financial contribution under Article 1.1(a)(1)(iv) of the SCM Agreement because the effect of the measure is to cause a transfer of funds from private parties to the steel industry.[47]

(v) State of Indiana Steel Industry Advisory Service

7.36 China argues that the evidence in the application demonstrated that the programme provided support to the steel industry, including a mandate to examine laws and problems affecting the industry, and that this was "indicative of a financial contribution" in the form of the provision of goods or services.[48] In response to the United States' argument that a study was never actually conducted under the programme, China argues that the applicants were dealing with imperfect information.[49]

(vi) Grace Periods for Compliance with the Clean Air Act

7.37 China argues that the application articulated a theory regarding the existence of a financial contribution, namely the provision of income or price support to the industry through delaying an obligation to invest in clear air technology. Regarding the United States' argument that the application did not include evidence of benefit, China argues that the applicant provided specific estimates of the cost savings associated with the grace periods. Although the grace periods ended

[44] China's first written submission, paras. 37-39.
[45] China's first written submission, para. 40
[46] China's first written submission, paras. 41-42.
[47] China's response to Panel question 38.
[48] China's first written submission, paras. 43-44.
[49] China's opening statement at the first meeting of the Panel, para. 15.

more than 20 years ago, China relies on its previous argument that it is not necessary to allocate a benefit across time in the context of an application for initiation.[50]

(vii) 2003 Economic Stimulus Plan of Pennsylvania

7.38 China argues that there was "circumstantial evidence of specificity" included in the application, which is sufficient for the purposes of Article 11.2 of the SCM Agreement. In particular, China argues that the evidence demonstrating the prominence of the GOES industry within Pennsylvania was evidence of specificity. Further, the programme included a focus on "resources that allow…traditional industries, especially manufacturing, to access new technology". China argues that a programme emphasizing traditional manufacturing industries suggests the prospect of *de facto* specificity.[51] Finally, China rejects the United States' argument that if more than one sector of an economy is targeted for support, a finding of sufficient evidence of specificity is not possible for the purposes of initiation.[52]

(viii) Pennsylvania's Alternative Energy Funding Plan

7.39 China argues that the application included evidence that certain defined projects were eligible for loans under the programme. Further, "based on actual utilization, these categories could in fact define a very small range of industries that benefited, providing the basis for a *de facto* specificity finding". On the question of benefit, China contends that evidence that individual respondents actually received a benefit under the programme is not required. Rather, presenting evidence of the "implication of a program focused on clean energy in relation to an industry known to be high polluting" is plausible evidence of the existence of a benefit.[53]

(ix) Natural Gas and (x) Electricity

7.40 China argues that, contrary to the United States' allegation, the application did provide evidence of a financial contribution, benefit and specificity associated with the supply of electricity and natural gas to the steel industry. In particular, the application included evidence that the United States Government regulates the electricity and natural gas industries and that the average price paid by the steel industry for electricity and natural gas is lower than the total average price paid in the United States and the price paid by other sectors.[54]

(xi) Coal

7.41 China argues that the application included evidence of subsidies to the coal industry, which "is evidence of benefit through an indirect financial contribution" and evidence of the steel industry's substantial use of coal, "which goes to the issue of *de facto* specificity".[55] Further, China argues that the Coal Subsidy Act is "directly related to the steel industry's use of coal" and therefore provides evidence of a direct financial contribution to the industry.[56]

[50] China's first written submission, paras. 45-46.
[51] China's first written submission, paras. 53-55.
[52] China's response to Panel question 40.
[53] China's first written submission, paras. 56-58.
[54] China's first written submission, paras. 47-50 and China's response to Panel question 1, para. 11.
[55] China's first written submission, paras. 51-52.
[56] China's response to Panel question 1, para. 14.

(b) Article 11.3 of the SCM Agreement

7.42 According to China, Articles 11.2 and 11.3 of the SCM Agreement impose distinct obligations.[57] Article 11.3 obligates an investigating authority to satisfy itself that the information in an application is sufficient evidence of the existence of a financial contribution, benefit and specificity for the purposes of initiating an investigation.[58] China agrees with the United States that in examining whether an initiation is justified, the standard of review to be applied by a panel is "whether an unbiased and objective investigating authority would have found that the application contained sufficient information to justify initiation of the investigation".[59] China argues that Article 11.3 does not require a full investigation; rather the investigating authority's obligation is only to substantiate a need for a more in-depth analysis.[60] As a result, the quantity and quality of the information provided by an applicant need not be such as would be required in order to make a preliminary or final determination.[61]

7.43 China questions whether the United States has made a *prima facie* case under Article 11.3. In particular, the United States' Article 11.3 claim is dependent upon its flawed Article 11.2 claim.[62] In any event, China argues that MOFCOM's initiation of the investigation with respect to the 11 programmes at issue before the Panel was consistent with Article 11.3 of the SCM Agreement. China acknowledges that the United States raised certain objections regarding the evidence underlying some of the programmes at issue. However, MOFCOM concluded that these were issues to be resolved during the course of the investigation, rather than issues fatal to initiation of an investigation.[63]

5. Arguments of third parties

(i) Honduras

7.44 According to Honduras, the evidence required under Article 11.2 cannot consist of mere conjecture, speculation or abstract inferences.[64] In relation to those programmes at issue that expired prior to the period of investigation, Honduras argues that the lack of guidelines in the SCM Agreement regarding the allocation of subsidies over time does not lead to an exception to the requirement to provide sufficient evidence of the existence of a subsidy under Article 11.2.[65] In relation to the State of Indiana Steel Advisory Service, Honduras argues that the mere creation of an entity whose apparent function is to conduct studies or analyses should not be considered sufficient evidence of the *existence* of a financial contribution.[66]

(ii) India

7.45 India notes that whether the application included the requirements found in Article 11.2 of the SCM Agreement is a question of fact, which India urges the Panel to "evaluate…cautiously and keeping in view an objective interpretation of the requirements enunciated under Article 11.2".[67]

[57] China's response to Panel question 1, para. 15.
[58] China's first written submission, para. 59.
[59] China's first written submission, para. 65.
[60] China's first written submission, para. 66.
[61] China's second written submission, para. 17.
[62] China's first written submission, para. 67.
[63] China's first written submission, para. 68.
[64] Honduras's third party statement, para. 6.
[65] Honduras's third party statement, paras. 7-8.
[66] Honduras's third party statement, para. 9.
[67] India's third party statement, paras. 2.2 and 2.10.

(iii) Korea

7.46 Korea submits that the initiation of a countervailing duty investigation is supposed to be a meaningful step, in which the investigating authority carefully examines the information in the petition to determine whether an investigation is justified.[68] Article 11.3 of the SCM Agreement requires the investigating authority to examine all the relevant information and materials in the application and to confirm its veracity before making a decision to initiate an investigation. According to Korea, an investigating authority cannot "passively accept the allegations in the petition…and initiate an investigation hoping to confirm the veracity down the road".[69]

(iv) Saudi Arabia

7.47 According to Saudi Arabia, Articles 11.2 and 11.3 of the SCM Agreement establish "strict disciplines" to govern the initiation of investigations. The jurisprudence on initiation establishes that authorities have an obligation to ensure that the evidence in an application gives a "reasonable indication" of the existence of subsidization.[70] Further, Saudi Arabia notes that the "reasonable availability" of the evidence to the applicant under Article 11.2 is not determinative of the "sufficiency" of the evidence under Article 11.3.[71]

6. Evaluation by the Panel

7.48 The United States claims that China acted inconsistently with Articles 11.2 and 11.3 of the SCM Agreement. According to the United States, with respect to 11 programmes, the initial and additional applications did not meet the requirements of Article 11.2. Further, under Article 11.3, an objective investigating authority would not have found sufficient evidence to initiate the investigations. The Panel notes that the United States' claim is the first under Articles 11.2 and 11.3 of the SCM Agreement in the context of WTO dispute settlement, although the initiation of a countervailing duty investigation was considered in the context of the Tokyo Round Subsidies Code.[72]

(a) The relationship between Articles 11.2 and 11.3 of the SCM Agreement

7.49 Article 11 of the SCM Agreement sets out certain procedural rules relating to the initiation of countervailing duty investigations. In particular, Article 11.2 of the SCM Agreement sets forth the evidence that must be included in an application for initiation submitted to an investigating authority by or on behalf of a domestic industry. Article 11.3 of the SCM Agreement requires an investigating authority to review the accuracy and adequacy of the evidence in order to determine whether it is "sufficient" to justify initiation of an investigation.

7.50 The Panel notes that the WTO covered agreements are international agreements between the WTO Members. Consequently, the obligations embodied in them are binding only upon Members and not upon private actors. In the Panel's view, the obligation upon Members in relation to the sufficiency of evidence in an application finds expression in Article 11.3 of the SCM Agreement, which provides that an investigating authority must assess the accuracy and adequacy of the evidence in an application to determine whether it is sufficient to justify initiation. The obligation in Article 11.3 must be read together with Article 11.2 of the SCM Agreement, which sets forth the requirements for "sufficient evidence". If an investigating authority were to initiate an investigation without "sufficient evidence" before it, this would be inconsistent with Article 11.3. Given this

[68] Korea's third party submission, paras. 13 and 16.
[69] Korea's third party statement, para. 6.
[70] Saudi Arabia's third party statement, para. 4.
[71] Saudi Arabia's third party submission, paras. 3, 10 and 12.
[72] GATT Panel Report, *US – Softwood Lumber II*.

interpretation, the Panel considers it appropriate to make findings under Article 11.3 with respect to the 11 programmes at issue. The Panel will reach its conclusions by reference to the requirements for "sufficient evidence" set forth in Article 11.2, but does not consider it necessary to reach separate conclusions under this provision.

(b) Article 11.3 of the SCM Agreement

7.51 Regarding the standard of review that the Panel should apply under Article 11.3 of the SCM Agreement, both parties agree with the interpretation of the analogous provision under the Anti-Dumping Agreement adopted by the panel in *US – Softwood Lumber V*. In particular, the parties submit that a panel should determine "whether an unbiased and objective investigating authority would have found that the application contained sufficient information to justify initiation of the investigation".[73] The Panel agrees with the parties that its role is not to conduct a *de novo* review of the accuracy and adequacy of the evidence to arrive at its own conclusion regarding whether the evidence in the application was sufficient to justify initiation. Rather, the Panel must consider the reasonableness of MOFCOM's conclusions, by reference to the test articulated by the panel in *US – Softwood Lumber V*.

7.52 Under Article 11.3 of the SCM Agreement an investigating authority has an obligation to determine whether there is "sufficient evidence" to justify initiation of an investigation. Part of this analysis must involve an assessment of the accuracy and adequacy of the evidence furnished. In the Panel's view, when evidence not in the application but relevant to the decision to initiate is submitted to an investigating authority, for example by an exporting Member, an unbiased and objective investigating authority would weigh this evidence in its assessment. Indeed, this is what the language in Article 11.3 implies, in providing that an investigating authority has a duty to determine the accuracy and adequacy of the evidence in the application.[74]

(c) The "sufficient evidence" requirement under Articles 11.2 and 11.3 of the SCM Agreement

7.53 A major issue in contention between the parties is the meaning of "sufficient evidence" under Articles 11.2 and 11.3 of the SCM Agreement. China argues that the standard for "sufficient evidence" is much lower than that advocated by the United States.

7.54 The term "evidence" is defined, relevantly, as "the available facts, circumstances, etc. supporting or otherwise a belief, proposition, etc., or indicating whether or not a thing is true or valid" and "information given personally or drawn from a document etc. and tending to prove a fact or proposition". The term "sufficient" is defined, relevantly, as "adequate".[75] The Panel notes that the phrase "sufficient evidence" in Articles 11.2 and 11.3 of the SCM Agreement is used in the context of determining whether the initiation of a countervailing duty investigation is justified. In making this determination, the investigating authority is balancing two competing interests, namely the interest of the domestic industry "in securing the initiation of an investigation" and the interest of respondents in ensuring that "investigations are not initiated on the basis of frivolous or unfounded suits".[76] It is clear that at the stage of initiating an investigation, an investigating authority is not required to reach definitive conclusions regarding the existence of a subsidy, injury or a causal link between the two. Rather, as the panel noted in *Guatemala – Cement II*, an "investigation is a process where certainty on

[73] Panel Report, *US – Softwood Lumber V*, para. 7.78.

[74] Article 13.1 of the SCM Agreement also suggests that an investigating authority is required to weigh the evidence submitted prior to initiation by an exporting Member, as a part of the process of "clarifying the situation" as to the matters in Article 11.2 of the SCM Agreement.

[75] *The Concise Oxford English Dictionary*, D. Thompson (ed.) (Clarendon Press, 1995), pp. 467 and 1392.

[76] Panel Reports, *US – Offset Act (Byrd Amendment)*, para. 7.61 and *Guatemala – Cement I*, para. 7.52.

the existence of all the elements necessary in order to adopt a measure is reached gradually as the investigation moves forward".[77] Indeed, both parties appear to agree with the reasoning of the panel in *US – Softwood Lumber V*, in examining the analogous provisions under the Anti-Dumping Agreement, that "the quantity and the quality of the evidence required to meet the threshold of sufficiency of the evidence is of a different standard for purposes of initiation of an investigation compared to that required for a preliminary or final determination".[78]

7.55 Therefore, while the amount and quality of the evidence required at the time of initiation is less than that required to reach a final determination, at the same time the requirement of "sufficient evidence" is also a means by which investigating authorities filter those applications that are frivolous or unfounded. Although definitive proof of the existence and nature of a subsidy, injury and a causal link is not necessary for the purposes of Article 11.3, adequate evidence, tending to prove or indicating the existence of these elements, is required. Indeed, in considering the quality of the evidence that should be provided in an application before an investigation is justified, we note that Article 11.2 requires "sufficient evidence of the *existence* of a subsidy", meaning that the evidence should provide an indication that a subsidy actually exists. It is also clear from the terms of Article 11.2 that "simple assertion, unsubstantiated by relevant evidence" is not sufficient to justify the initiation of an investigation.

7.56 According to China, the standard for "sufficient evidence" must be interpreted in the light of the requirement in Article 11.2 that the application contain such information as is "reasonably available" to the applicant. In the Panel's view, the fact that an applicant must provide such information as is "reasonably available" to it confirms that the quantity and quality of the evidence required at the stage of initiating an investigation is not of the same standard as that required for a preliminary or final determination. However, an investigation cannot be justified where, for example, there is no evidence of the existence of a subsidy before an investigating authority, even if such evidence is not "reasonably available" to the applicant. Indeed, to justify initiation under Article 11.3, an investigating authority must have "sufficient evidence" (whether from the applicant, exporting Member or arising out its own enquiries) and not mere assertion before it.[79]

7.57 In the light of these considerations, the Panel considers that the standard advocated by China is at times overly permissive, as indicated in the Panel's consideration of the 11 programmes at issue.

(d) The required evidence

7.58 Although the parties disagree about the appropriate standard for "sufficient evidence" under Articles 11.2 and 11.3 of the SCM Agreement, they concur about the categories of evidence referred to under Article 11.2. In particular, the parties note that evidence of the "existence of a subsidy" requires evidence of the existence of a financial contribution and a benefit. The parties also agree that the reference in Article 11.2(iii) to evidence of the "nature" of a subsidy refers to whether or not the subsidy is specific under Article 2 of the SCM Agreement. However, in response to a Panel question, China argues that the lack of any direct reference to "specificity" under Article 11.2 suggests a different and lower evidentiary standard in relation to it. According to China, this distinction

[77] Panel Report, *Guatemala – Cement II*, para. 8.35.

[78] Panel Report, *US – Softwood Lumber V*, para. 7.84.

[79] In relation to whether evidence must be analysed by an applicant, we note that with respect to each of the 11 programmes at issue in this case, the matter in contention between the parties is whether "sufficient evidence" was included in the application, rather than whether included evidence was analysed or not. In any event, we agree with the United States' statement that mere allegations cannot constitute sufficient evidence and that an applicant need not engage "in an in-depth analysis of the available information" (United States' response to Panel question 3, para. 11). However, we note that an investigating authority must review the accuracy and adequacy of the evidence in accordance with Article 11.3 of the SCM Agreement.

recognises the difficulty applicants may face in obtaining evidence of specificity, particularly *de facto* specificity.[80]

7.59 The Panel notes that Article 1.1 of the SCM Agreement provides that a subsidy exists when (a) there is a financial contribution or any form of income or price support; and (b) a benefit is thereby conferred. Therefore, the Panel agrees with the parties that evidence of the existence of a subsidy requires evidence of these two elements.

7.60 In relation to whether evidence of specificity is required in an application, the Panel concurs with the parties that the reference to evidence of the "nature of the subsidy" includes evidence regarding whether the subsidy is specific. Article 11 is found within Part V of the SCM Agreement. Further, Article 1.2 provides that a subsidy will be subject to Part V only if it is specific within the meaning of Article 2. Therefore, in our view, it is reasonable to conclude that evidence of the "nature of the subsidy" includes evidence regarding whether the subsidy is specific. The alternative would be that the initiation of an investigation would be justified under Article 11.3, even though it may be clear at the time of initiation that the alleged subsidy is not subject to the disciplines of Part V of the SCM Agreement because it is broadly available in a given jurisdiction. This would not be effective in filtering those applications that are "frivolous or unfounded".

7.61 The Panel acknowledges that the term "nature" is used in a number of sections of the SCM Agreement, and that it may not necessarily refer to "specificity" in each instance. For example, the reference to "nature" in Article 4.5 of the SCM Agreement appears to refer to whether or not a subsidy is prohibited. However, in the Panel's view, and as both parties agree, a consideration of the context in which a term is used can result in different meanings across different provisions.[81] As outlined in the previous paragraph, the context in which Articles 11.2 and 11.3 are found supports the parties' view that the "nature" of a subsidy under Article 11.2 (iii) includes evidence of whether or not an alleged subsidy is specific.

7.62 Having concluded that the evidence referred to in Article 11.2 of the SCM Agreement includes evidence of specificity, the Panel finds no basis for China's argument that a lower evidentiary standard applies in relation to it. There is nothing within the terms of Articles 11.2 or 11.3 to suggest that differing evidentiary standards apply depending upon the purpose for which the evidence is furnished. Rather, the same standard of "sufficient evidence" applies regardless of whether the evidence relates to the existence of a financial contribution, benefit or specificity.

(e) The 11 programmes at issue

(i) Medicare Prescription Drug, Improvement and Modernization Act

7.63 The issue in contention between the parties is whether the application included any evidence of specificity in relation to the Medicare Prescription Drug, Improvement and Modernization Act. While the United States claims that the application "did not…include any evidence of specificity"[82], China argues that evidence that "could represent the existence of either a *de jure* or *de facto* specific measure" was submitted with the application.[83]

7.64 The purported evidence of specificity relied upon by China is a statement from the AK Steel Annual Report, annexed to the application, that the subsidy is available to "sponsors of retiree

[80] China's response to Panel question 37, para. 1.

[81] For support for this proposition, see Appellate Body Report, *Japan – DRAMs (Korea)*, para. 272. For the views of the parties on this matter, see the United States' and China's responses to Panel question 37.

[82] United States' first written submission, para. 78.

[83] China's first written submission, para. 35.

healthcare benefit plans that include a qualified prescription drug benefit" and that AK Steel is a sponsor of such a plan. The Panel notes that the application also includes a statement that "the subsidy…is specific".[84]

7.65 In the Panel's view, the fact that the subsidy programme is available to sponsors of particular healthcare plans does not provide an indication of *de jure* specificity. To the contrary, the evidence indicates that eligibility for the subsidy is governed by "objective criteria or conditions" in the sense of Article 2.1(b) of the SCM Agreement, which provides that, subject to Article 2.1(c), "specificity shall not exist" under such circumstances. Further, the evidence that AK Steel sponsors the relevant type of healthcare plan merely indicates that AK Steel is a user of the programme. In our view, this is not sufficient for an unbiased and objective investigating authority to conclude there was any evidence to indicate that the programme was *de facto* specific. For this purpose, at least some evidence that, for example, AK Steel was the only user or one of a limited number of users of the programme would be required.

7.66 Further, the Panel is not convinced by China's argument that the purported evidence of specificity was sufficient in the light of the pervasive government support to the United States steel industry, which was discernible from the application. Article 11.2(iii) requires evidence of the "nature", namely the specificity, "of the subsidy in question". In our view, this requires evidence of the nature of each alleged subsidy programme. General information about government policy, with no direct connection to the programme at issue, is not "sufficient evidence" of specificity.

7.67 China suggests that direct evidence of *de facto* specificity is typically not reasonably available to applicants.[85] However, the fact that an applicant must provide such information as is reasonably available to it does not suggest that an investigating authority is justified in initiating an investigation under Article 11.3 of the SCM Agreement even though there is no evidence of specificity before it.

7.68 The Panel finds that an unbiased and objective investigating authority could not have concluded that there was sufficient evidence of specificity to initiate the investigation in relation to this programme. Therefore, the Panel finds that China acted inconsistently with Article 11.3 of the SCM Agreement.

(ii) Economic Recovery Tax Act 1981

7.69 According to the evidence annexed to the application, the Economic Recovery Tax Act 1981 allowed unprofitable corporations with certain unusable federal income tax credits and deductions effectively to sell them to profitable corporations that could use them to reduce their tax liabilities.[86] The Act operated for a period of two years, expiring in 1983.[87]

7.70 The applicants alleged that the United States steel industry received a subsidy under the Act to the value of USD 750 million.[88] The issue in contention between the parties is whether the application included sufficient evidence of the existence of a benefit during the period of investigation, where the application proposed and was based upon a period of investigation from 2006

[84] Petition for an Anti-Dumping and an Anti-Subsidy Investigation (29 April 2009) ("the Application"), Exhibit CHN-2, pp. 63-64 and Exhibit US-2, p. 36. AK Steel Annual Report for 2008 (Annex 15-4 to the Application) ("AK Steel Annual Report 2008"), Exhibit CHN-3, p. 63. We note that the United States' interpretation of the statement on specificity is that "the subsidy…has the characteristic of special orientation".

[85] See, for example, China's first written submission, para. 36 and China's response to Panel question 37, para. 10.

[86] Paying the Price for Big Steel (Annex 15-2 to the Application), Exhibit CHN-4, p. 133.

[87] Paying the Price for Big Steel (Annex 15-2 to the Application), Exhibit CHN-4, p. 133 and United States' first written submission, para. 78.

[88] Application, Exhibit CHN-2, p. 74.

through the first quarter of 2009 (i.e. the same as the period of investigation ultimately adopted by MOFCOM).[89] The purported evidence relied upon by China is a "large benefit" to the steel industry when the subsidies were disbursed over a two year period concluding in 1983.

7.71 In the view of the Panel, in order to impose a countervailing duty, it is necessary that the product against which it is imposed be presently subsidized. We find support for this in Article 19.1 of the SCM Agreement, which provides that a countervailing duty may be imposed where the "subsidized imports" are causing injury. Further, footnote 36 of the SCM Agreement states that a countervailing duty is "levied for the purpose of offsetting any subsidy bestowed directly or indirectly upon the manufacture, production or export of any merchandise". If the product were not currently subsidized, there would be no subsidy to offset and therefore, no basis for the imposition of countervailing duties. The panel in *Japan – DRAMs (Korea)* agreed that "present subsidization" is required before countervailing duties may be imposed. In the case of non-recurring or expired subsidies, "present subsidization" requires the benefit of the subsidy to be allocated to the period of investigation and indeed, to the period of imposition of countervailing duties.[90]

7.72 Given that Articles 11.2 and 11.3 of the SCM Agreement set out the evidence required before an investigating authority is justified in initiating a countervailing duty investigation, in order to filter those applications that are frivolous or unfounded, we consider that the reference in Article 11.2 to evidence of the existence of a subsidy refers to evidence of the existence of a present subsidy, including the existence of a benefit during the expected period of investigation. The alternative would be that an investigation would be justified under Article 11.3, even though it may be clear that there was no present subsidization and therefore that countervailing duties would ultimately not be authorized.

7.73 In the Panel's view, an unbiased and objective investigating authority would not have found that the application included "sufficient evidence" to indicate the existence of a benefit during the period of investigation proposed by the applicants. Although the programme ceased to operate more than 20 years prior to the period of investigation, the application does not mention the allocation of the benefit of the subsidy or allege that it would be appropriate to allocate the subsidy over time, much less provide any concrete evidence to this effect. While we do not disagree with China's argument that it may not be appropriate to finalize the allocation period for the benefit of a subsidy at the time of initiation of an investigation, this does not lead to the conclusion that no evidence or even argument regarding "present subsidization" was required in the application. Although China argues that "implicit" in the evidence of a large benefit to the steel industry is a claim that the benefit was allocated to the period of investigation, in our view, in the light of the long period between the expiration of the programme and the period of investigation, an unbiased and objective investigating authority would not conclude that such a claim was indeed implicit in the evidence regarding the amount of the subsidy.

7.74 In conclusion, given the absence in the application of even a reference to or an argument about allocation of the benefit of the subsidy to the proposed period of investigation, much less the inclusion of any evidence in this regard, the Panel finds that China acted inconsistently with Article 11.3 of the SCM Agreement. In our view, an unbiased and objective investigating authority would not have concluded that initiation was justified.

[89] See, for example, Application, Exhibit CHN-2, pp. 9, 97 and 100.
[90] Panel Report, *Japan – DRAMs (Korea)*, paras. 7.349-7.361.

(iii) Tax Reform Act 1986

7.75 The Tax Reform Act 1986 granted the steel industry a special transition rule to mitigate the impact of the repeal of a federal investment tax credit.[91] The application claimed that this resulted in a benefit of USD 574 million to the United States steel industry over the period 1986-1990. The issue in contention between the parties is the same as that in relation to the Economic Recovery Tax Act, namely whether the application included sufficient evidence of the existence of a benefit during the period of investigation. The United States argues that the alleged subsidies referred to in the application were provided over 15 years prior to the beginning of the period of investigation.[92]

7.76 Similarly to its argument in relation to the Economic Recovery Tax Act, China argues that "given the outstanding issue of a potential allocation period and petitioners' claim that a benefit was received", there was sufficient evidence of benefit in the application. Perhaps in an attempt to highlight that the applicants were operating with imperfect information about the subsidy programme and that they presented the information reasonably available to them, China also argues that there was no indication in the evidence collected and presented by the applicants that the programme had been repealed, leaving open the possibility that the programme was still in operation during the period of investigation.[93]

7.77 In relation to the latter point, the Panel does not find this line of argument convincing. The evidence in the annex to the application, and cited by the applicants, states that the cost of the subsidy to the government was incurred over the period 1986-1990.[94] Further, the evidence cited in the application indicates that the Tax Reform Act provided "an exceptional *transitional* period" for the steel industry to mitigate the repeal of a certain tax credit. In these circumstances, it is difficult to conclude that the programme may still have been in operation at the time of filing the application, particularly in the light of the fact that the document from which the information was drawn was written in 1999 and does not state that any benefit was received after 1990.[95]

7.78 For the same reasons as expressed in relation to the Economic Recovery Tax Act, the Panel concludes that China acted inconsistently with Article 11.3 of the SCM Agreement. In particular, the evidence in the application indicates that the benefit of the subsidy was received during the period 1986-1990, over 15 years prior to the expected period of investigation. In these circumstances, we consider that an unbiased and objective investigating authority would not view information about the amount of the benefit to be sufficient evidence of the existence of a benefit during the period of investigation.

(iv) Steel Import Stabilization Act 1984

7.79 The annex to the application indicates that under the Steel Import Stabilization Act, VRAs restricting imports of steel into the United States were established. Total imports of steel were capped at 18.5% of market share, with this later increasing to 20.26%.

7.80 The issue in contention between the parties appears to be whether the application included sufficient evidence of the existence of a financial contribution under Article 1.1(a)(i) of the SCM Agreement, or of "any form of…price support" within the meaning of Article 1.1(a)(2).

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[91] Subsidies to the U.S. Steel Industry (Annex 15-1 to the Application), Exhibit US-31, p. 2 and Paying the Price for Big Steel (Annex 15-2 to the Application), Exhibit CHN-4, pp. 133 and 136-137.

[92] United States' first written submission, para. 78.

[93] China's first written submission, para. 40.

[94] Application, Exhibit CHN-2, pp. 75-76; Subsidies to the U.S. Steel Industry, (Annex 15-1 to the Application), Exhibit US-31, p. 2.

[95] Subsidies to the U.S. Steel Industry (Annex 15-1 to the Application), Exhibit US-31 and United States' first written submission, para. 78.

7.81 At the outset we note that it is not entirely clear whether the applicants were alleging that the VRAs constituted a financial contribution or a form of price support or both. The application uses the sub-heading "financial contribution", but the sub-section states that that the voluntary restraint agreements constituted a "government compulsory pricing support mechanism". The sub-section also includes a reference to a document prepared by the American Institute for International Steel, which provides that the Steel Import Stabilization Act "protected the domestic market share of U.S. steel producers…effectively providing them with a government-enforced price support mechanism".[96] However, the application also states that the VRAs constituted a subsidy within the meaning of Article 3 of the Chinese Regulations on Countervailing Measures.[97] Article 3 effectively replicates Article 1.1(a) of the SCM Agreement, including a reference to financial contribution and "any form of income or price support". In its first written submission, China contends that the application included sufficient evidence of the existence of a financial contribution. In response to Panel questioning, China argues the applicants alleged that the VRAs were a subsidy within the meaning of Article 3 of the Regulations on Countervailing Measures and, according to China, the evidence supported the existence of a financial contribution within the meaning of Article 1.1(a)(1)(iv) of the SCM Agreement, although the application did not include the latter assertion. China notes that, in suggesting the VRAs provided a price support mechanism, the applicants did not specifically reference GATT Article XVI. Nevertheless, the VRAs "might be construed generally as a price or income support".[98]

7.82 In the Panel's view, the commentary in the application indicates that the applicants were focused on the VRAs as a form of price support within the meaning of Article 1.1(a)(2) of the SCM Agreement. The application twice refers to the VRAs as a "government compulsory pricing support mechanism" and includes a similar reference in the annex to the application.[99] Although there is a reference to Article 3 of the Regulations on Countervailing Measures, this Article refers to "any form of income or price support", so does not necessarily indicate that the applicants were alleging the existence of a financial contribution, as suggested by China. In any event, despite the absence in the application of a specific assertion regarding the existence of a financial contribution, the Panel will assess whether the application included sufficient evidence of either a financial contribution or price support. This is consistent with the terms of Article 11.2 of the SCM Agreement, which focuses on the evidence, rather than the assertions, included in an application.

7.83 Regarding whether the application included sufficient evidence that the VRAs constituted a form of price support, we note that Article 1.1(a)(2) of the SCM Agreement provides that a subsidy shall be deemed to exist if "there is any form of income or price support in the sense of Article XVI of GATT 1994", where Article XVI deals with subsidies that increase exports or decrease imports. In order to assess whether the application included sufficient evidence of "price support", it is necessary to consider the meaning of this term under Article 1.1(a)(2). There is no definition or other form of guidance in the SCM Agreement regarding the meaning of "price support". Although the Appellate Body has commented that the concept of "income or price support" under Article 1.1(a)(2) broadens the range of measures capable of providing subsidies beyond those that constitute financial contributions, it has not otherwise been required to consider the meaning of Article 1.1(a)(2), and nor has any WTO dispute settlement panel.[100]

7.84 On the one hand, the phrase "any…price support" under Article 1.1(a)(2) of the SCM Agreement is broad and, on its face, could be read to include any government measure that has the

[96] Subsidies to the U.S. Steel Industry (Annex 15-1 to the Application), Exhibit US-31, p. 2.
[97] Application, Exhibit CHN-2, p. 80.
[98] China's response to Panel question 38, para. 2.
[99] Application, Exhibit CHN-2, p. 80 and Subsidies to the U.S. Steel Industry (Annex 15-1 to the Application), US-31, p. 2.
[100] Appellate Body Report, *US – Softwood Lumber IV*, para. 52.

effect of raising prices within a market. According to *Blacks Oxford Dictionary of Economics*, price support includes "government policies to keep the producer prices…above some minimum level".[101] This does not necessarily contradict a broad reading of Article 1.1(a)(2), although it does suggest that the government sets or targets a given price, and consequently does not capture every government measure that has an incidental and random effect on price.[102]

7.85 However, despite the potential for a broad interpretation of the term "price support", reading it in the context of Article 1.1(a) of the SCM Agreement suggests that a more narrow interpretation is appropriate. Under Article 1.1(a)(1)(i)-(iv), the existence of each of the four types of financial contribution is determined by reference to the action of the government concerned, rather than by reference to the effects of the measure on a market. This is consistent with the panel's interpretation of "financial contribution" in *US – Export Restraints*, which the Appellate Body concurred with in *US – Countervailing Duty Investigation on DRAMS.*[103] In *US – Export Restraints*, the panel noted that the concept of "financial contribution" was included in the definition of subsidy in order to avoid an effects-based approach to the concept of a subsidy. According to the panel:

> [B]y introducing the notion of financial contribution, the drafters foreclosed the possibility of the treatment of *any* government action that resulted in a benefit as a subsidy. Indeed, this is arguably the principal significance of the concept of financial contribution, which can be characterised as one of the 'gateways' to the SCM Agreement, along with the concepts of benefit and specificity. To hold that the concept of financial contribution is about the effects, rather than the nature, of a government action would be effectively to write it out of the Agreement, leaving the concepts of benefit and specificity as the sole determinants of the scope of the Agreement.

Reading the term "price support" in this context, it is our view that it does not include all government intervention that may have an effect on prices, such as tariffs and quantitative restrictions. In particular, it is not clear that Article 1.1(a)(2) was intended to capture all manner of government measures that do not otherwise constitute a financial contribution, but may have an indirect effect on a market, including on prices. The concept of "price support" also acts as a gateway to the SCM Agreement, and it is our view that its focus is on the nature of government action, rather than upon the effects of such action. Consequently, the concept of " price support" has a more narrow meaning than suggested by the applicants, and includes direct government intervention in the market with the design to fix the price of a good at a particular level, for example, through purchase of surplus production when price is set above equilibrium.

7.86 Although neither the Appellate Body nor any WTO dispute settlement panels have been required to resolve the meaning of the term "price support" under Article 1.1(a)(2) of the SCM Agreement, we find some support for our approach in the reasoning of a GATT panel, which speculated on the circumstances under which "a system which fixes domestic prices to producers at above the world price level might be considered a subsidy in the meaning of Article XVI". The panel agreed that "a system under which a government, by direct or indirect methods, maintains such a price by purchases and resale at a loss is a subsidy". However, the Panel speculated that "where a

[101] *Oxford Dictionary of Economics,* 3rd ed., J. Black (ed.) (Oxford University Press, 2009), p. 355.

[102] Indeed, the *Macmillan Dictionary of Economics,* 4th ed., D.W. Pearce (ed.), (Macmillian Press Ltd., 1992) defines a "price support scheme" as " a method of artificially raising the price of a good in the market. This will give rise to a situation in which supply exceeds demand and would therefore normally result in the government agency responsible for the support having to purchase the excess supplies itself". A similar definition is provided in the *Dictionary of Economics,* G. Banncok, R.E. Baxter and E. Davis (eds.) (the Economist Books, 1999). This supports a much more narrow concept of price support than suggested in the application.

[103] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS,* para. 114.

government fixes by law a minimum price to producers which is maintained by quantitative restrictions…there would be no loss to government" and consequently, no subsidy.[104] We note that the conclusion regarding the latter example is less relevant in the context of the SCM Agreement, under which the benefit of a subsidy is defined by reference to market benchmarks, rather than by the cost to government. However, both examples used by the GATT panel at least illustrate that it envisaged "price support" to involve the government setting and maintaining a fixed price, rather than a random change in price merely being a side-effect of any form of government measure.

7.87 Further, although the SCM Agreement does not include a definition of the term "price support", we note that a concept of "market price support" is included in the Agreement on Agriculture. Annex 3 of that Agreement provides that "market price support" is calculated as the difference between an external reference price and the "applied administered price".[105] This indicates, at least for the type of price support contemplated in Annex 3 of the Agreement on Agriculture, that a direct form of government control over domestic prices is required, in the form of a fixed, administered price, rather than a movement in prices being an indirect effect of another form of government intervention.

7.88 In the light of these considerations, in the Panel's view, "any form of…price support" is not broad enough to encompass VRAs, which may have an incidental side-effect, of random magnitude, on prices. Therefore, we conclude that an unbiased and objective investigating authority would not have concluded that an investigation was justified under Article 11.3 on the basis of the existence of a subsidy in the form of price support.

7.89 In relation to whether the application included sufficient evidence of the existence of a financial contribution under Article 1.1(a)(1), in its first written submission, China argues that the evidence indicating that the VRAs resulted in "pecuniary benefits" to the United States steel industry constitutes evidence of a financial contribution. In response to a Panel question, China clarifies that its argument relates to Article 1.1(a)(1)(iv) of the SCM Agreement. In particular, according to China, the evidence that the VRAs led to a transfer of wealth from steel purchasers to the United States steel industry "might be seen as evidence of a financial contribution under Article 1.1(a)(1)(iv) of the SCM Agreement given the effect of the measure on private parties, causing them to provide a transfer of funds in the form of higher prices".[106]

7.90 The Panel does not agree with the interpretation of Article 1.1(a)(1)(iv) of the SCM Agreement that is advocated by China. In particular, the Panel does not consider that when a government policy, such as a border measure, has the indirect effect of increasing prices in a market, the government has entrusted or directed private consumers to provide direct transfers of funds to the industry selling the good in the affected market.

7.91 In *US – Countervailing Duty Investigation on DRAMS*, the Appellate Body found that under Article 1.1(a)(1)(iv) the term "entrusts" connotes "the action of giving responsibility to someone for a task or an object" and the term "directs" involves the exercise of authority by a government over a private body.[107] In our view, when the action of a private party is a mere side-effect resulting from a government measure, this does not come within the meaning of entrustment or direction under Article 1.1(a)(1)(iv). The fact that the VRAs resulted in private bodies paying increased prices for

[104] GATT Panel on Subsidies and State Trading, Report on Subsidies, L/1160, 23 March 1960. See L. Rubini, *The Definition of Subsidy and State Aid: WTO and EC Law in Comparative Perspective*, (Oxford University Press, 2009), pp. 123-125 for discussion of this GATT panel.

[105] This is multiplied by the quantity of production eligible to receive the applied administered price, to calculate the "aggregate measures of support".

[106] China's response to Panel question 38, para. 2.

[107] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, paras. 110-111.

steel to the United States steel producers was in no way the result of United States Government action giving responsibility to purchasers to transfer funds to the steel industry or because the Government exercised its authority over the purchasers to ensure that a transfer of funds would occur. Therefore, the increased revenue that the steel industry received after the VRAs came into existence cannot be characterised as evidence of a financial contribution.

7.92 This conclusion accords with our reasoning in analysing of the meaning of the term "price support".[108] In that context, we noted that a financial contribution is defined by reference to the nature of the government action, rather than by its effects. Indeed, in *US – Countervailing Duty Investigation on DRAMS*, the Appellate Body agreed with the panel's analysis on this point in *US – Export Restraints.* The Appellate Body stated:

> Entrustment and direction do not cover 'the situation in which the government intervenes in the market in some way, which may or may not have a particular result simply based on the given factual circumstances and the exercise of free choice by the actors in that market'. Thus, government 'entrustment' or 'direction' cannot be inadvertent or a mere by-product of governmental regulation…[N]ot all government measures capable of conferring benefits would necessarily fall within Article 1.1(a); otherwise paragraph (i) through (iv) of Article 1.1(a) would not be necessary because all government measures conferring benefits, *per se*, would be subsidies.

7.93 In the light of the preceding reasons, the Panel concludes that China acted inconsistently with Article 11.3 of the SCM Agreement. In the Panel's view, an unbiased and objective investigating authority would not have concluded that the application included sufficient evidence of the existence of price support or a financial contribution.[109] The fact that a side-effect of the VRAs was that the United States steel industry received increased revenue does not provide evidence of the existence of a financial contribution under Article 1.1(a)(1)(iv). Further, China's reference to the evidence of "pecuniary benefits" received by the steel industry is not evidence of government action within the meaning of Article 1.1(a)(1)(i)-(iv). Therefore, we find that an unbiased and objective investigating authority would not have concluded that sufficient evidence existed to justify an investigation under Article 11.3.

(v) State of Indiana Steel Industry Advisory Service

7.94 According to the information annexed to the application, in 1987 the State of Indiana formed a "Steel Advisory Commission to examine state and federal laws affecting the steel industry and to consider industry problems such as foreign competition and economic decline".[110]

7.95 The issues in contention between the parties are whether the application included sufficient evidence of the existence of a financial contribution and a benefit. The purported evidence of a financial contribution relied upon by China is the existence of "a program established to perform a function in support of the steel industry", including a mandate to "examine state and federal laws affecting the steel industry and to consider industry problems".[111] In relation to evidence of a benefit,

[108] See para. 7.85 of this Report.

[109] Indeed, we note that Article 11(1)(b) of the Safeguards Agreement prohibits the use of voluntary export restraints. This further reinforces our conclusion that voluntary export restraints were not intended to be disciplined by the SCM Agreement.

[110] Subsidies to the U.S. Steel Industry (Annex 15-1 to the Application), Exhibit US-31, p. 3.

[111] China's first written submission, para. 44 and Subsidies to the U.S. Steel Industry (Annex 15-1 to the Application), Exhibit US-31, p. 3.

China argues that the fact the government assumed an obligation that might normally be undertaken by the industry itself is evidence of the conferral of a benefit.[112]

7.96 In relation to whether the application included sufficient evidence of the existence of a financial contribution, the Panel notes that it is entirely possible that a programme under which a government studies the laws and problems affecting an industry could give rise to a financial contribution in the form of a provision of a good or service. However, the Panel is not satisfied that an unbiased and objective investigating authority could have concluded that the application included "sufficient evidence" to indicate that this was the case in relation to the Steel Industry Advisory Service. The application includes an assertion that the "government undertook a project which should had been founded by companies with large expense, and therefore provided a large financial contribution".[113] Yet the application does not include evidence to indicate that studies under the programme were to be provided or made available to the steel industry, rather than being for internal government use, for the purpose of formulating government policy, for example. Given that "simple assertion unsubstantiated by relevant evidence" is not sufficient under Article 11.2, in the Panel's view, further evidence was required from the applicants tending to indicate that the government was providing a good or service under the programme. The fact that, according to China, the programme "quite plausibly" constituted the provision of a good or service is not sufficient. Rather, some evidence, although not definitive proof, to indicate that the programme conferred a financial contribution was required.

7.97 The United States argues that a further problem in relation to whether the application included evidence of a financial contribution was that there was no evidence indicating that a study had actually been performed under the programme. In response, China contends that the applicants were dealing with imperfect information and did not know with certainty whether the programme had ever produced a study. Even if such information were not "reasonably available" to the applicants, without evidence of the existence of a financial contribution before it, an unbiased and objective investigating authority could not have found initiation to be justified under Article 11.3 of the SCM Agreement. In the Panel's view, as indicated in the preceding paragraph, and also in the light of the fact that there was no evidence in the application of a study having been conducted under the programme, the evidence regarding the existence of a financial contribution was not such that an unbiased and objective investigating authority could have found an investigation justified. In any event, given that the programme has been in existence since 1987, it would be reasonable to expect the applicants to be able to point to some evidence of its use.

7.98 In the light of the Panel's finding that China acted inconsistently with Article 11.3 with respect to the evidence of a financial contribution, the Panel does not consider it necessary to proceed to consider the United States' arguments regarding the sufficiency of the evidence of the existence of a benefit.

(vi) Grace Periods for Compliance with the Clean Air Act

7.99 The application explains that in 1981, legislation granting the steel industry a three-year extension on the deadline for complying with the Clean Air Act came into force. The legislation extended the deadline from 31 December 1982 until 31 December 1985 and the applicants alleged that this reduced the steel industry's costs by USD 3.7 billion.[114] The application also refers to a

[112] China's response to Panel question 40, para. 4.
[113] Application, Exhibit CHN-2, p. 81.
[114] Application, Exhibit CHN-2, p. 84. See also, Paying the Price for Big Steel (Annex 15-to the Application), Exhibit CHN-4, p. 147.

30 year exception for complying with certain standards in the Clean Air Act Amendment of 1990, which was granted to the steel industry in 1989.[115]

7.100 The United States' challenge is limited to the decision to initiate an investigation into the allegation that the three-year extension for compliance with certain environmental standards in the Clean Air Act constituted a subsidy. The United States does not challenge China's investigation into the 30 year exception granted to the steel industry in relation to compliance with the Clean Air Amendment Act of 1990.[116]

7.101 The issue in contention between the parties is whether the application included sufficient evidence of the existence of a financial contribution or "any form of income or price support" within the meaning of Article 1.1(a)(2) of the SCM Agreement, and whether it included sufficient evidence of the existence of a benefit during the period of investigation.[117]

7.102 The Panel commences its analysis by consideration of the latter point, namely whether the application included sufficient evidence of the existence of a benefit during the expected period of investigation. We note that the grace period for complying with the Clean Air Act ended on 31 December 1985.[118] The United States argues that the applicants did not indicate how a benefit could exist during the period of investigation in circumstances where the grace period ended more than 20 years prior to the expected period of investigation. This aspect of the United States' claim raises the same issues as arose in relation to the alleged taxation subsidies.

7.103 As indicated in our analysis of the taxation programmes, in circumstances where a long period of time has elapsed between the expiry of the alleged subsidy and the period of investigation, a lack of any evidence, or indeed any argument or assertion, regarding whether allocation of the benefit to the period of investigation would be appropriate, leads us to the conclusion that an unbiased and objective investigating authority would not have concluded that there was sufficient evidence of the existence of a benefit during the period of investigation to justify initiation.[119]

7.104 Consequently, the Panel concludes that China acted inconsistently with Article 11.3 of the SCM Agreement. In the light of this conclusion, the Panel does not consider it necessary to proceed to consider the second issue in contention between the parties, namely whether, in relation to the grace periods for compliance, the application included sufficient evidence of the existence of "any form of income or price support" within the meaning of Article 1.1(a)(2) of the SCM Agreement.

(vii) 2003 Economic Stimulus Plan of Pennsylvania

7.105 The evidence annexed to the additional application indicates that Pennsylvania introduced an Economic Stimulus Plan aimed at "creating jobs, bolstering business growth, and revitalizing…communities".[120]

7.106 The issue in contention between the parties is whether the additional application included sufficient evidence of *de facto* specificity. The purported evidence relied upon by China includes documentation demonstrating that AK Steel and ATI are located and prominent in Pennsylvania.

[115] Application, Exhibit CHN-2, p. 84.
[116] United States' response to Panel question 39, para. 7.
[117] United States' first written submission, para. 78; China's first written submission, paras. 45-46 and United States' second written submission, paras. 18-20.
[118] Paying the Price for Big Steel (Annex 15-2 to the Application), Exhibit CHN-4, p. 147.
[119] See paras. 7.71-7.74 and 7.78 of this Report.
[120] 2003 Economic Stimulus Plan (Annex 5-32 to the Additional Application) (20 June 2009), Exhibit CHN-8.

Further, China contends the evidence in the additional application demonstrates that the programme is focused on "traditional industries, especially manufacturing".[121]

7.107 The Panel does not consider the information regarding the presence and prominence of GOES manufacturers in Pennsylvania to be evidence of *de facto* specificity. This information demonstrates that AK Steel and ATI may be eligible to be users of the programme, but does not provide any evidence that the steel industry is one of a limited number of users or that it receives a disproportionately large amount of the subsidy, for example. The additional application also states that "the purpose of the Stimulus Packages is to create jobs, bolster businesses and revitalize communities. To achieve this, the Packages must particularly provide its contributions and preference to those influential enterprises and industries in creating jobs and bolstering economies, such as steel industry. Indeed, it's not difficult to discover the *de facto* specificity clearly existed".[122] In our view, the notion that the steel industry must be one of a limited number of enterprises to receive the subsidy, on the basis that the purpose of the Economic Stimulus Plan is to create jobs, bolster business growth and revitalize communities, is mere assertion and is not supported by relevant evidence.

7.108 The second element of China's argument regarding the sufficiency of the evidence of specificity is that the economic development plan included a focus on "resources that allow our traditional industries, especially manufacturing, to access new technology to enhance their productivity". The parties' arguments regarding whether this provides evidence of specificity seem to reflect different conceptual approaches to the issue. The United States argues that because the Economic Stimulus Plan as a whole included six other focal points, apart from traditional manufacturing industries, the information regarding traditional industries is not evidence of specificity. However, China submits that individual subsidies within a single piece of legislation or measure should be analysed separately. China argues that otherwise there would be "a huge loophole in the specificity requirement where authorities would simply lump different kinds of support for different sectors of the economy into a single piece of legislation or measure in order to claim that, in the aggregate, the measure is too diverse or generally available to justify a finding of specificity".[123]

7.109 In order to assess whether the information regarding the focus on traditional industries constitutes sufficient evidence of specificity, it is necessary for the Panel to determine the appropriate conceptual approach to analysing this issue. If the legislation through which a subsidy is enacted necessarily defines the breadth of the specificity analysis, loopholes in the SCM Agreement may arise. In addition to allowing governments to group specific subsidy programmes together in a single piece of legislation to avoid a finding of specificity, a broadly available subsidy programme could be found to be specific if extended to each industry through separate pieces of legislation. Consequently, in the specificity analysis, a subsidy programme should be considered as a whole. The programme should define the breadth of the specificity analysis, rather than the legislation through which it is enacted.

7.110 In the circumstances of this case, we note that the evidence in the annex to the additional application provides that the economic development package includes:[124]

- Over $2.8 billion dollars in loans, grants, and guarantees;

[121] 2003 Economic Stimulus Plan (Annex 5-32 to the Additional Application) (20 June 2009), Exhibit CHN-8.

[122] New Subsidy Allegations Application (20 July 2009) ("Additional Application"), Exhibit CHN-5, p. 27.

[123] China's response to Panel question 41, para. 6.

[124] 2003 Economic Stimulus Plan (Annex 5-32 to the Additional Application) (20 June 2009), Exhibit CHN-8.

- Programs to leverage funds generating at least USD 5 billion in private investment in economic and community development projects;
- Investments in rural, urban, and suburban sites;
- New capital resources for small cities and communities;
- Tools to make Pennsylvania a leader in real estate and business development;
- Incentives and services to attract high-growth firms;
- Resources that allow our traditional industries, especially manufacturing, to access new technology to enhance their productivity

7.111 In response to a Panel question, China appears to argue that the final "focal point" listed above is an individual subsidy and that its specificity should be analysed by reference to the universe of industries and enterprises to which it applies.[125] However, an examination of the additional application indicates that the applicants treated the Economic Stimulus Plan as a single subsidy programme. Although it was open to the applicants to present their arguments on the basis of a number of individual subsidy programmes all enacted under the Economic Stimulus Plan, there is no indication in the additional application that the applicants did this or viewed the provision of access to new technologies as a separate subsidy programme. Rather, the allegations regarding financial contribution and benefit refer to the programme as a whole, with particular examples provided by reference to certain aspects of the programme, including the loans and grants, the research and development tax credits and the joint venture investment guarantees.[126] The access to new technologies is not referred to by the applicants until the section on specificity. Certainly, the applicants did not provide any arguments regarding the existence of a financial contribution and benefit in relation to the access to new technologies. As a result, we cannot find any basis for treating this as a separate subsidy programme. Consequently, we consider it appropriate to analyse the question of specificity by reference to the Economic Stimulus Plan as a single subsidy programme.

7.112 We note that the Economic Stimulus Plan included a diverse range of "focal points", such as economic and community development projects; rural urban and suburban sites; resources for small cities and communities; real estate and business development; and high-growth firms. The information in the additional application indicates that a number of enterprises or industries may have been eligible to receive the alleged subsidies under the programme, including, for instance, the real estate industry, venture capital partnerships, businesses making research and development investments and high-growth enterprises.[127] Further, in relation to some of aspects of the programme, such as the provision of loans, grants and guarantees, it is not clear from the evidence in the additional application whether or not these were broadly available. In our view, the evidence suggests that the programme had a much wider application than suggested by China. Consequently, the Panel is not convinced that an unbiased and objective investigating authority would have found that the information regarding a focus on "traditional industries, especially manufacturing" was sufficient evidence of specificity to justify initiation under Article 11.3 of the SCM Agreement.

7.113 Finally, we note that China repeats the argument made in relation to the Medicare Prescription Drug Improvement, and Modernization Act, namely that the purported evidence of specificity was sufficient in the light of the pervasive government support to the United States steel industry, which was discernible from the application. For the reasons expressed in relation to the Medicare Act, we again do not consider this argument convincing.[128]

[125] China's response to Panel question 41, paras. 5-6.
[126] Additional Application, Exhibit CHN-5, p. 27.
[127] Additional Application, Exhibit CHN-5, p. 26; Research and Development Tax Credit (Annex 5 to the Additional Application), Exhibit CHN-6, p. 189 (of the pdf version of the Exhibit) and New Pennsylvania Venture Guarantee Programme, Exhibit CHN-6, p. 191 (of the pdf version of the Exhibit).
[128] See 7.66 of this Report.

7.114 Therefore, we conclude that the additional application did not include sufficient evidence of specificity for an unbiased and objective investigating authority to conclude that initiation was justified under Article 11.3 of the SCM Agreement. Although China argues that information regarding *de facto* specificity is typically not reasonably available to applicants, in the Panel's view, an investigating authority must nevertheless have "sufficient evidence" of specificity before it before an investigation is justified under Article 11.3.

(viii) Pennsylvania's Alternative Energy Funding Plan

7.115 The evidence in the annex to the additional application indicates that the State of Pennsylvania invested USD 650 million towards "expanding the alternative fuel, clean energy and efficiency sectors". Approximately half of the funding is managed by the Department of Community and Economic Development and this part of the programme focuses on "investing in infrastructure, economic development projects, alternative energy companies and early-stage activities". The remainder of the programme is administered through the Commonwealth Financing Authority, which focuses on business assistance through providing loans and grants to companies for certain categories of projects.[129]

7.116 The issue in contention between the parties is whether the additional application included sufficient evidence of the existence of a benefit during the expected period of investigation and sufficient evidence of specificity. The purported evidence of benefit relied upon by China is the "implication of a programme focused on clean energy in relation to an industry known to be high polluting". According to China, evidence that individual respondents actually received a benefit under the programme is not required. The purported evidence of specificity relied upon by China is the documentation which it claims indicates that the loan programme was directed at a narrow group of beneficiaries.[130]

7.117 At the outset, we note that the alleged subsidy to the steel industry, as detailed in the additional application, relates to that part of the Alternative Energy Funding Plan administered through the Commonwealth Financing Authority. This is evident because the information in the additional application regarding the existence of a financial contribution refers to the "provision of loans and grants to the local enterprises for their clean and alternative energy projects". Further, the section of the additional application relating to benefit discusses the "provision of loans and grants to qualified enterprises".[131] The allegations in the additional application regarding the existence of a financial contribution, benefit and specificity do not refer to the projects to be managed by the Department of Community and Economic Development, namely investment in "infrastructure, economic development projects, alternative energy companies and early-stage activities".[132]

7.118 In relation to whether the additional application included sufficient evidence of the existence of a benefit, China argues that for the purposes of an application, it is not necessary to demonstrate that the steel industry actually received a benefit under the programme. However, in our view, on the of basis the totality of the evidence before the investigating authority, an unbiased and objective investigating authority could not have considered an investigation justified under Article 11.3. This is because the United States submitted evidence to MOFCOM demonstrating that the only aspect of the programme administered by the Commonwealth Financing Authority under which loans and grants were distributed during the period of investigation was the Solar Energy project. The evidence provided by the United States to MOFCOM included a document, prepared by the Commonwealth Financing Authority, listing eight companies that had had projects approved for loans and grants as of

[129] Annex 5 to the Additional Application, (Annex 5-38, Alternative Energy Funding), Exhibit CHN-6.
[130] China's first written submission, paras. 56-58.
[131] Additional Application, Exhibit CHN-5, p. 29.
[132] Annex 5 to the Additional Application, (Annex 5-38, Alternative Energy Funding), Exhibit CHN-6.

14 July 2009.[133] None of the companies listed were producers of GOES, or indeed part of the steel industry. As discussed previously in our reasons, when evidence not in the application but relevant to the decision to initiate is submitted to an investigating authority, an unbiased and objective investigating authority should weigh this evidence in its consideration of whether initiation is justified.[134] Indeed, this is what the language in Article 11.3 implies, namely that an investigating authority has a duty to determine the accuracy and adequacy of the evidence in the application. Weighing the evidence submitted to MOFCOM by the United States, namely a document prepared by a government body indicating that no financial contribution or benefit was received by the respondent companies during the period of investigation, against the additional application which did not include any evidence or even an assertion to the contrary, a reasonable investigating authority could not have concluded that an investigation into the programme was justified. This is because it was clear at the time of initiating that there would be no basis to impose countervailing duties against the products exported by AK Steel and ATI. In reaching this conclusion, we note that the additional application is concerned with a benefit to be received directly by the steel industry, rather than a benefit "passed-through" from other companies.

7.119 Therefore, the Panel concludes that China acted inconsistently with Article 11.3 of the SCM Agreement on the basis that an unbiased and objective investigating authority could not have concluded that there was sufficient evidence of the existence of a benefit to the steel industry during the expected period of investigation to justify initiation. In the light of this conclusion, the Panel does not consider it necessary to proceed to examine whether the additional application included sufficient evidence of specificity.

(ix) Natural Gas

7.120 The issue in dispute between the parties is whether the additional application included "sufficient evidence" of the existence of a financial contribution, benefit and specificity under Articles 11.2 and 11.3 of the SCM Agreement. The additional application includes allegations of two different types of subsidies. In particular, the additional application contends first, that the United States Government regulates the price of natural gas and provides it to the steel industry at below market prices and second, that subsidies provided to the natural gas industry "pass-through" to the steel industry.[135]

7.121 The annex to the additional application includes a significant amount of evidence related to the natural gas industry. In its first written submission, China highlights a number of aspects of this evidence that it relies upon as "sufficient" for the purposes of Articles 11.2 and 11.3 of the SCM Agreement. In particular, China notes the evidence of a long history of government regulation of the natural gas sector; evidence of price differentiation between the prices paid by the steel industry and the average price paid in the economy; and evidence of subsidies to the natural gas industry.[136]

7.122 In relation to the first type of subsidy alleged in the additional application, namely the government provision of goods or services at below market prices, the additional application

[133] United States' Comment Regarding the Initiation Based on the New Allegations, (17 Aug. 2009) Exhibit US-29, p. 6 and second attachment to the Comment, "Pennsylvania - State of Innovation: Commonwealth Financing Authority" (see link to "Commonwealth Financing Authority Approved Projects - Energy Programs", i.e. the last page of the second attachment to the Comment). We note that there appears to be an error on p. 6 of the Comment (Exhibit US-29). In particular, the United States refers to the "Geothermal and Wind Energy" project as the only project operational during the period of investigation. However, an examination of the list prepared by the Commonwealth Financing Authority indicates that it was the Solar Energy project under which loans and grants had been distributed as of 14 July 2009.

[134] See para. 7.52 of this Report.

[135] Additional Application, Exhibit CHN-5, pp. 12-13.

[136] China's first written submission, para. 49.

discusses historical regulation by the United States Government of natural gas prices. The additional application also states that despite the "loosening of regulation…over the natural gas industry…industrial enterprises still had no other choice but to buy natural gas from the network companies at regulated prices".[137] However, an examination of the evidence regarding the United States natural gas industry in the annex to the additional application does not support the applicant's position that the government currently regulates natural gas prices. In particular, the evidence suggests a history of government regulation of natural gas prices, with a gradual decrease in the degree of regulation, to the current situation of market determined prices. The evidence provides that in 1985, the Federal Energy Regulatory Commission published Decree 436, which opened up the function of the delivery of natural gas "to allow the user to negotiate directly with the producer to set the price".[138] Further, in 1989 the Natural Gas Wellhead Decontrol Act was passed, which abolished all regulation over the wellhead price of gas. The Act required abolition of the price regulation by 1993, from which time the market determined the natural gas price.[139] Finally, in 1992, the Federal Energy Regulatory Commission published Decree 636, which abolished "take-or-pay" contracts and reorganized network companies to allow users to choose any producer of natural gas.[140]

7.123 Although China argues that the additional application includes evidence of "continued vestiges of government price regulation through lower-reach development companies", we do not agree with this reading of the evidence.[141] The evidence regarding the history of government regulation of the natural gas industry, found in the annex to the additional application, indicates that, when the government began loosening its regulation over the industry "the lower-reaches distribution companies (LDC) and industrial corporations still had no other choices but to purchase gas from network companies at the regulated price".[142] However, the annex states that Decree 436, published in 1985, required network companies to "open the function of delivering natural gas to all natural gas users including low-reaches selling companies…and to allow the user to negotiate directly with the producer to set the price".[143] As indicated in the preceding paragraph, the government continued with further deregulation after Decree 436. Therefore, China's reference to government price regulation through lower-reach development companies is a reference to historical regulation and does not provide support for the allegation that the government currently provides natural gas to the steel industry at below market prices.

7.124 As well as the evidence in the additional application indicating that the United States Government does not regulate natural gas prices, this was drawn to MOFCOM's attention in the United States' comments on the new subsidy allegations. In its comments, the United States noted that "the natural gas market was deregulated in the 1980s. The market described by petitioners no longer exists (if, indeed, it ever existed). GOES producers purchase natural gas on the open market".[144]

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[137] Additional Application Exhibit CHN-5, p. 13.

[138] Annex 5 to the Additional Application, (Annex 5-16, Overview and Comments on the U.S. Government Regulation of the Natural Gas Market), pp. 4-5, Exhibit CHN-6.

[139] Annex 5 Additional Application, (Annex 5-16, Overview and Comments on the U.S. Government Regulation of the Natural Gas Market), p. 5, Exhibit CHN-6.

[140] Annex 5 to Additional Application, (Annex 5-16, Overview and Comments on the U.S. Government Regulation of the Natural Gas Market), p. 5, Exhibit CHN-6.

[141] China's first written submission, para. 49.

[142] Annex 5 to Additional Application, (Annex 5-16, Overview and Comments on the U.S. Government Regulation of the Natural Gas Market), p. 4, Exhibit CHN-6.

[143] Annex 5 to the Additional Application, (Annex 5-16, Overview and Comments on the U.S. Government Regulation of the Natural Gas Market), p. 4, Exhibit CHN-6.

[144] United States' Comment Regarding the Initiation Based on the New Allegations (17 August 2009), Exhibit US-29, p. 3.

7.125 Therefore, in the light of the evidence provided by the applicants themselves, which was supplemented by comments from the United States to MOFCOM prior to initiation, the Panel concludes that China acted inconsistently with Article 11.3 of the SCM Agreement. In the Panel's view, an unbiased and objective investigating authority could not have concluded that there was sufficient evidence of a financial contribution or a benefit, in the form of government provision of a good or service at below market prices, to justify initiation under Article 11.3 of the SCM Agreement.[145] The evidence indicates that natural gas is purchased by the steel industry at prices determined by the market.

7.126 With respect to the second type of subsidy referred to in the additional application, namely indirect subsidization of the steel industry via subsidies provided to the natural gas industry, the Panel is not convinced that an unbiased and objective investigating authority could have found that the additional application included sufficient evidence of specificity to justify initiation under Article 11.3 of the SCM Agreement.

7.127 The Panel is satisfied that the additional application includes evidence of subsidies granted to the natural gas industry.[146] Regarding the existence of a benefit to the steel industry, the additional application includes an allegation, although no supporting evidence, of "pass-through" of the subsidies to the steel industry. The position of China appears to be that an allegation of pass-through of a subsidy from an upstream to a downstream producer is sufficient for the purposes of initiating an investigation. The Panel does not consider it necessary to resolve what type of evidence of pass-through is required at the stage of initiating an investigation. This is because, even assuming that the additional application included sufficient evidence of pass-through of the benefit to the steel industry, an unbiased and objective investigating authority could not have concluded that there was sufficient evidence of specificity.

7.128 Although the subsidies could be specific to the natural gas industry, the applicants alleged that the subsidies ultimately flow through to the steel industry, with steel being the product to be countervailed. In these circumstances, some evidence that the steel industry falls within a category of "certain enterprises" to which the subsidy is specific is required. However, there is no evidence that any pass-through that occurs is specific to the steel industry. In particular, if an allegation of pass-through is accepted for the purposes of the application, there is no reason to assume that the benefit did not pass-through to all purchasers of natural gas, rather than to the steel industry specifically. In this regard, we note the panel's statement in *US – Softwood Lumber IV* that where a subsidy is provided in the form of the provision of a good by the government, where the good is in the form of a natural resource, there is no implication that such a subsidy is necessarily specific, precisely because such goods may be used by an indefinite number of industries.[147] Similarly, in this case, the subsidy to the natural gas industry may "pass-through" to an indefinite number of industries that purchase natural gas.

7.129 Although China appears to rely upon evidence of price differentiation to indicate "the possibility of…specificity",[148] in circumstances where we have found that natural gas prices are set by the market, we have no basis to conclude that any price differentiation indicates that pass-through is

[145] Although it does not seem to be the case, if it was the intention of the applicants that countervailing duties be imposed to counteract injury arising from the time when the government did regulate prices, the application suffers from the same problem as it does in relation to the taxation programmes. In particular, it does not include any evidence or arguments to support the existence of present subsidization.

[146] See, for example, Annex 5 to the Additional Application, (Annex 5-2, Federal Financial Interventions and Subsidies in Energy Markets 2007).

[147] Panel Report, *US – Softwood Lumber IV*, para. 7.116.

[148] China's first written submission, para. 49.

specific to the steel industry. There is nothing to indicate this is the case rather than the price differentiation being due to market forces.

7.130 Finally, the Panel notes that China makes a general argument that evidence of specificity may not be "reasonably available" to applicants.[149] In the Panel's view, whether or not this is the case, an investigating authority must nevertheless have "sufficient evidence" of specificity before it, whether provided by the applicants or otherwise, before an investigation can be justified. The Panel is not convinced that this was the case.

7.131 Therefore, with respect to the second type of subsidy alleged in the additional application, namely indirect subsidization of the steel industry via subsidies provided to the natural gas industry, the Panel finds that an unbiased and objective investigating authority could not have concluded that the additional application included sufficient evidence of specificity to justify initiation under Article 11.3 of the SCM Agreement.

(x) Electricity

7.132 The issue in contention between the parties is whether the additional application included sufficient evidence of the existence of a financial contribution, benefit and specificity in accordance with Articles 11.2 and 11.3 of the SCM Agreement. The applicants alleged that the United States electricity industry, including its pricing, is largely controlled by the United States Government and that electricity is provided to the steel industry at a low price. The applicants also argued that subsidies provided to the electricity industry pass-through to the steel industry.

7.133 Before addressing the substance of the United States' claim, we note that the additional application includes a number of exhibits related to the electricity industry in the United States. For the purposes of our analysis, we have found the following information in the exhibits to be of most relevance:

(i) The Federal Energy Regulatory Commission regulates interstate power transmission and the wholesale electricity market. The regulation of the wholesale market includes examining and approving the power price. In particular, every power company submits a tariff table to the Federal Energy Regulatory Commission, which has the power to adjust and amend the table if it is not in line with the public interest[150];

(ii) There are also state-based electric power regulatory institutions that regulate the price for power distribution and in-state retail sales[151];

(iii) The additional application also indicates that there are four categories of companies that make up the United States electricity industry: (a) public power companies that are "operated by privates"; (b) independent power generating companies; (c) municipal power companies owned by local governments; and (d) the hydropower regulatory bureaus belonging to the Federal Government[152]; and

[149] See, for example, China's response to Panel question 1, para. 10.

[150] Annex 5 to the Additional Application, (Annex 5-16 Reform of the U.S. Electric Power System; Annex 5-11, Report of the U.S Regulatory System on Electric Power).

[151] Annex 5 to the Additional Application, (Annex 5--16 Reform of the U.S. Electric Power System; Annex 5-11, Report of the U.S Regulatory System on Electric Power).

[152] Annex 5 to the Additional Application, (Annex 5-11, Report of the U.S Regulatory System on Electric Power.)

(iv) There is differentiated pricing in the electricity market, with the steel industry receiving a lower price than some other industries and a lower price than the national average.[153]

7.134 In its comments on the additional application, the United States adds the following information about the United States electricity industry:[154]

(i) There are no national policies directing the electricity industry to provide energy to the steel industry at lower prices;

(ii) There is no agency that sets retail prices for electricity for the entire country;

(iii) Any difference in price paid by the steel industry for electricity is due to a "bulk discount" negotiated directly between the steel industry and the electricity company;

(iv) Differences in prices are due to market forces;

(v) Steel producers pay less for electricity because they purchase it from non-utilities at a substantial discount; and

(vi) One of the GOES companies in the United States receives its electricity purely from private entities.

7.135 With respect to the alleged direct subsidies to the steel industry, assuming *arguendo* that the additional application included sufficient evidence of the existence of a financial contribution, namely the provision of goods or services by the government, or by a private body entrusted or directed by the government, the Panel is not convinced that the additional application included sufficient evidence of the existence of a benefit, such that an unbiased and objective investigating authority could have considered initiation of an investigation to be justified. The additional application asserts that "the amount of subsidy for this program shall be the difference between the preferential electricity power price actually paid by the companies concerned and the normal market electricity power price payable to the companies concerned".[155] However, the additional application does not include evidence of the appropriate market benchmark price, or evidence that the comparison between the benchmark and the price charged to the steel industry was performed by the applicants. Although the additional application compares the price paid by the steel industry with the national average electricity price and with two selected industries, it is not clear why these constitute comparisons to an appropriate market benchmark. Indeed, if the electricity industry operates as the applicants asserted, namely that the government intervenes to set prices, rather than market forces doing so, a benchmark chosen from within this system would not appear to represent a market price.

7.136 Similarly, even assuming that the government intervenes in the electricity market to provide it to the steel industry at below market prices, there is nothing to suggest that the steel industry alone benefits from this intervention, or that access to this subsidy is otherwise limited to "certain enterprises". The additional application includes broad assertions regarding specificity, including "the [United States Government]… controls the electricity power price of electricity power companies owned or controlled by the government to provide low-priced electricity to the steel industry…such preferential treatment specific to a certain industry is clearly characterised as specific".[156] However,

[153] Annex 5 to the Additional Application, (Annex 5-13 Average Prices of Purchased Electricity, Natural Gas and Steam, 2002).

[154] United States' Comment Regarding the Initiation Based on the New Allegations (17 August 2009), Exhibit US-29, pp. 2-3 and attachments.

[155] Additional Application, Exhibit CHN-5, p. 10.

[156] Additional Application, Exhibit CHN-5, p. 10.

the additional application does not include evidence to indicate that the alleged subsidy is indeed only provided to the steel industry or to a limited group of beneficiaries. In our view, an unbiased and objective investigating authority could not have concluded that the differentiated pricing in the market provided sufficient evidence of specificity. In fact, the evidence of the wide range of prices charged by the electricity industry in the United States tends to suggest that deviation from the market benchmark price, whatever that may be, is widespread. In general, the arguments in the additional application that the Government intervenes in the pricing of electricity specifically to benefit the steel industry are somewhat speculative.

7.137 The additional application also includes an allegation of pass-through of subsidies from the electricity industry to the steel industry.[157] To the extent the allegation of pass-through relates to private companies that are entrusted or directed to provide electricity to the steel industry at particular prices, including being directed to pass-through subsidies, the preceding paragraph of our reasoning applies. In particular, apart from assertion, there was not sufficient evidence in the additional application for an unbiased and objective investigating authority to conclude that the steel industry specifically benefits from this intervention.

7.138 To the extent the allegation of pass-through refers to subsidies provided to private electricity companies that are not directed by the government to provide electricity to the steel industry at particular prices, we refer to our analysis of the allegations of pass-through in relation to the natural gas industry.[158] Even assuming that the additional application included sufficient evidence of pass-through of the benefit to the steel industry, an unbiased and objective investigating authority could not have found that the additional application included sufficient evidence of specificity. Although the subsidies could be specific to the electricity industry, the applicants alleged that the subsidies ultimately flowed through to the steel industry, with steel being the product to be countervailed. In these circumstances, some evidence that the steel industry falls within a category of "certain enterprises" to which the subsidy is specific is required. However, there is no evidence that any pass-through that occurs is specific to the steel industry. In particular, if an allegation of pass-through is accepted for the purposes of the application, there is no reason to assume that the benefit did not pass-through to all purchasers of electricity, rather than to the steel industry specifically. Although China appears to rely upon evidence of price differentiation for this purpose,[159] in circumstances where a private company is setting the price for electricity, without direction from the government, which is the focus of our analysis in this paragraph as opposed to the preceding one, there is no basis to conclude that any price differentiation indicates that pass-through is specific to the steel industry. There is nothing to indicate this is the case rather than the price differentiation being due to market forces.

7.139 Therefore, the Panel finds that the additional application included insufficient evidence for an unbiased and objective investigating authority to conclude that initiation was justified under Article 11.3 of the SCM Agreement.

(xi) Coal

7.140 The issue in contention between the parties is whether the additional application included sufficient evidence of the existence of a financial contribution, benefit and specificity for the purposes of Articles 11.2 and 11.3 of the SCM Agreement. The additional application alleges that the

[157] Additional Application, Exhibit CHN-5, pp. 8-10.
[158] See paras. 7.126-7.130 of this Report.
[159] China's first written submission, para. 47.

United States Government provides subsidies to the coal industry and that the subsidies "pass-through" to the steel industry, which is a major user of coal.[160]

7.141 The Panel notes that the additional application included some evidence of subsidization of the coal industry, although not through the American Clean Energy Security Act 2009, which did not exist during the proposed period of investigation.[161]

7.142 In relation to whether the additional application included sufficient evidence of pass-through of the benefit of the subsidies from the coal industry to the steel industry, we note that the additional application included an allegation that the subsidies to the coal industry would "no doubt allow the subsidized companies to…confer considerable benefits to the GOES producers".[162] The additional application does not include any supporting evidence for this statement.

7.143 Again, in a similar manner to our reasoning in relation to the alleged pass-through of natural gas subsidies, the Panel does not consider it necessary to determine what evidence would be "sufficient" under Articles 11.2 and 11.3 for the purposes of tending to prove the "pass-through" of a benefit from an upstream to a downstream entity. This is because, in any event, in the Panel's view an unbiased and objective investigating authority could not have concluded that the additional application included sufficient evidence tending to indicate that any subsidy to the steel industry was specific. Although the subsidies may have been specific to the coal industry, the applicants alleged that the subsidies ultimately flow through to the steel industry, with steel being the product to be countervailed. In these circumstances, some evidence that the steel industry falls within a category of "certain enterprises" to which the subsidy is specific is required.

7.144 In the section on specificity, the additional application asserts that "coal is an important energy input for the steel industry".[163] Further, China argues that "the steel industry's substantial use of coal…goes to the issue of *de facto* specificity".[164] However, this is not evidence indicating or tending to prove specificity. It does not demonstrate that the coal subsidies pass-through to a limited number of enterprises or in a disproportionately large amount to the steel industry, for example.

7.145 The application also relies upon a history of government support to the steel industry as evidence of specificity.[165] However, as indicated in our analysis of the Medicare Prescription Drug, Improvement and Modernization Act, Article 11.2(iii), which sets out categories of evidence for which sufficient evidence is necessary before an investigation is justified under Article 11.3, requires evidence of the nature "of the subsidy in question". In our view, this requires evidence of the specificity of each alleged subsidy programme. General information about government policy, with no direct connection to the programme at issue, is not "sufficient evidence" of specificity.

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[160] Additional Application, Exhibit CHN-5, pp. 15-16.

[161] For evidence of subsidization see Annex 5 to the Additional Application, (Annex 5-2, Federal Financial Interventions and Subsidies in Energy Markets 2007). Also, see Annex 5 to the Additional Application, (Annex 5-19, US House of Representatives Passes the American Clean Energy Security Act) for evidence that the American Clean Energy Security Act was only at the House of Representatives stage in mid-2009. See also, United States' Comment Regarding the Initiation Based on the New Allegations (17 August 2009), Exhibit US-29, p. 3 and United States' first written submission, para. 78.

In its response to Panel question 1, para. 14, China suggests that the Clean Energy Security Act provides a direct financial contribution to the steel industry. In response to this, we refer to the foregoing evidence indicating that the Act did not exist during the period of investigation.

[162] Additional Application, Exhibit CHN-5, p. 16.

[163] Additional Application, Exhibit CHN-5, p. 16.

[164] China's first written submission, para. 51.

[165] Additional Application, Exhibit CHN-5, p. 16 and China's first written submission, para. 51.

7.146 Although China argues that evidence of *de facto* specificity is typically not reasonably available to applicants, in the Panel's view, an investigating authority must nevertheless have "sufficient evidence" of specificity before it to justify an investigation under Article 11.3 of the SCM Agreement.

7.147 In the light of the preceding reasons, the Panel concludes that an unbiased and objective investigating authority would not have found that the additional application contained sufficient information of specificity to justify initiation of the investigation. Consequently, China acted inconsistently with Article 11.3 of the SCM Agreement.

(f) Conclusion

7.148 The Panel concludes that China acted inconsistently with Article 11.3 of the SCM Agreement in relation to each of the 11 programmes at issue.

C. WHETHER CHINA ACTED INCONSISTENTLY WITH ARTICLES 12.4.1 OF THE SCM AGREEMENT AND 6.5.1 OF THE ANTI-DUMPING AGREEMENT BECAUSE MOFCOM FAILED TO REQUIRE ADEQUATE NON-CONFIDENTIAL SUMMARIES

1. Provisions at issue

7.149 Article 12.4.1 of the SCM Agreement and Article 6.5.1 of the Anti-Dumping Agreement provide:

> The authorities shall require [interested Members or] interested parties providing confidential information to furnish non-confidential summaries thereof. These summaries shall be in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence. In exceptional circumstances, such [Members or] parties may indicate that such information is not susceptible of summary. In such exceptional circumstances, a statement of the reasons why summarization is not possible must be provided.[166]

2. Factual Background

7.150 The applicants sought and obtained from MOFCOM confidential treatment in relation to a number of types of information, listed in Part II-1 of the application.[167] Consequently, broad categories of information about GOES were redacted from the application, including the total domestic output, the applicants' total output, the domestic sales price, domestic consumption and the applicants' sales revenue, costs and pre-tax profit. The United States argues that the applicants did not provide adequate non-confidential summaries of the information.

3. Arguments of the United States

7.151 The United States submits that Article 12.4.1 of the SCM Agreement and Article 6.5.1 of the Anti-Dumping Agreement require parties to furnish adequate non-confidential summaries, allowing for a reasonable understanding of the substance of the confidential information.[168] The United States interprets China's position as claiming the existence of "exceptional circumstances", to excuse it from

[166] Where only the SCM Agreement includes the references to Members.
[167] Application, Exhibit US-2, p. 79. Part II-1 of the application lists 15 categories of information in relation to which the applicants sought and obtained confidential treatment from MOFCOM.
[168] United States' second written submission, para. 38.

the obligation of providing non-confidential summaries. The United States notes that this was never asserted during the course of the investigation and is *post hoc* rationalization.[169]

7.152 According to the United States, an examination of the petition demonstrates that the applicants intended Part II of the petition to constitute the non-confidential summary of the redacted information. This is clear because page 2 of the petition states that "a non-confidential summary of the confidential information was provided along with this petition" and Part I of the petition directs the reader to consult Part II of the petition for the purported non-confidential summaries. Further, Part II is entitled "non-confidential summary".[170] The United States argues that the purported non-confidential summaries in Part II are "utterly inadequate" and say almost nothing about the "substance" of the confidential information submitted.[171]

7.153 The United States suggests that MOFCOM could have used any of a number of techniques to summarize the information in a manner that would have preserved its confidentiality, while still allowing interested parties to have a reasonable understanding of the substance of the information submitted. The United States gives the example of presenting numerical data as a trend-line or in indexed fashion, instead of in absolute terms.[172]

7.154 The United States characterizes China's response to its claim as suggesting that an "adequate" non-confidential summary need only be provided if an interested party objects to the manner in which confidential information is summarized. However, the United States argues that whether an interested party objects during the proceeding to the adequacy of a summary is irrelevant to whether the obligations in Articles 12.4.1 of the SCM Agreement and 6.5.1 of the Anti-Dumping Agreement are met.[173] The United States also argues that China's submissions reflect a mistaken view that an investigating authority's obligation to ensure that the interested parties furnish adequate non-confidential summaries may be excused if there is some subsequent "non-confidential analysis" contained in the investigating authority's own determinations.[174]

7.155 The United States' primary position is that Part II of the petition contains the purported non-confidential summaries. However, the United States contends that even if the general statements "scattered" throughout Part-I of the petition could be relied upon as summarizing the confidential information, as argued by China, the supposed summaries in the body of the petition are inadequate. Unlabelled trend lines and year-over-year percentage changes without the necessary context of absolute values (in the form of an average, for example) are inadequate. Further, the absence of a label or other form of identification linking the purported non-confidential summaries, found throughout the petition, with the redacted information, is a factor that undermines the adequacy of the summaries. According to the United States, it was not practicable for interested parties to piece together information from the record to create non-confidential summaries.[175] The United States addresses the arguments of China in relation to each of the categories of confidential information that it challenges as inadequately summarized:

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[169] United States' second written submission, para. 46.

[170] United States' second written submission, para. 47; United States' response to Panel question 9, para. 21; and United States' opening statement at the first meeting of the Panel, para. 17.

[171] United States' first written submission, para. 83 and United States' second written submission, para. 47.

[172] United States' first written submission, para. 86.

[173] United States' second written submission, paras. 39-40.

[174] United States' second written submission, paras. 41-42 and United States' response to Panel question 8, para. 19.

[175] United States' second written submission, paras. 37 and 48; United States' response to Panel question 9, para. 22 and United States' response to Panel question 45, para. 8.

(i) Output of the applicants, total output of GOES in China, proportion of the applicant's output in relation to China's total output

7.156 According to the United States, at no point does China assert that the non-confidential summary of the output of the applicants was sufficient. Rather, China contends that the "details are not needed" or that the "main point" was standing and that this was evident from the other information provided. The United States argues that China requires the respondents to engage in guesswork to surmise an understanding or "the point" of the substance of the confidential information. Further, China's reliance on "Appendix 13" as summarizing the output of the applicants is inapposite. The petition does not contain a single reference to Appendix 13 and it is impossible to determine whether the applicants relied on Appendix 13 for their output figures. Therefore, it is not possible to determine whether Appendix 13 provides an adequate non-confidential summary.[176]

(ii) The Chinese Industry

7.157 Regarding trends in domestic consumption, the United States argues that redacting the data on the consumption of GOES in China and stating that it represents "a growth of about 50% over 2006", does not provide a reasonable understanding of the redacted information. Without absolute values, it is impossible to attribute any meaning to the statement that there was 50% growth.

7.158 With respect to the trends in domestic production, the United States argues that stating domestic output grew less rapidly than imports does not shed light on the contents of the redacted information, namely the numerical data on domestic output over the period 2006-2008. Further, China's reliance on percentage changes more than fifty pages later in the petition is not credible and would require respondents to engage in a fishing expedition for the missing information.

7.159 Regarding trends in domestic prices, the United States contends that stating "the price of subject imports was always lower than that of the applicants" does not shed light on the contents of the redacted information, namely the domestic price per ton. China's reliance on unlabelled trend lines in a section of the petition disconnected from the Chinese domestic industry discussion is an inadequate summary of the information.[177]

(iii) Similarity or likeness of production techniques

7.160 The United States notes that the application simply redacts certain information. Therefore, the respondents could not comment meaningfully on the "like product" issue.[178]

(iv) Change of price

7.161 The United States' position is that the trend lines found in the petition are an inadequate summary of the pricing data. The United States argues that trend lines need to be labelled to provide necessary context.[179]

(v) Dumping margin of GOES imports from the United States

7.162 In response to China's position that the United States could have performed reverse engineering to obtain the redacted data, the United States argues that this is an admission that the non-

[176] United States' second written submission, paras. 49-51.
[177] United States' second written submission, paras. 52-56.
[178] United States' second written submission, para. 57.
[179] United States' second written submission, para. 58.

confidential summary was inadequate. It is not acceptable to require respondents to make educated guesses regarding information for which a non-confidential summary was not provided. [180]

(vi) Apparent consumption of GOES in China

7.163 The United States contends that the purported summaries of the consumption of GOES in China are inadequate. The reliance by China on Table 23 of the petition does not advance China's case, because the information in it is entirely redacted, with no cross-reference to a summary in any other section of Part I of the petition.[181] Further, the "percentage change" discussed fifty pages earlier in the petition is merely a statement that consumption grew by 50% between 2006 and 2008. Finally, in relation to China's reliance upon Table 32 of the petition, the United States notes that the table does not provide a proper contextual framework to allow the substance of the information to be understood.[182]

(vii) Suppressing or depressing effects on domestic prices

7.164 The United States argues that year-on-year percentage changes in domestic average prices are not an adequate non-confidential summary because the significance of the absolute changes is not revealed. Unlabelled trend lines are also inadequate.[183]

(viii) Influence on the Chinese domestic industry

7.165 The United States contends that a significant portion of the injury indicia data is missing some or all of the non-confidential summary information. In particular, aside from the fact that year-over-year percentage changes are not an adequate non-confidential summary, they are not provided on a consistent basis for all indicators.[184]

(ix) Statistics and information about dumping by the United States

7.166 According to the United States, China does not contest its claim that the petitioners provided an inadequate summary of this category of confidential information.[185]

4. Arguments of China

7.167 China disputes the United States' claims under Articles 12.4.1 of the SCM Agreement and 6.5.1 of the Anti-Dumping Agreement. In particular, China argues that proper non-confidential summaries were provided in Part I of the petition and that these summaries were later supplemented by the non-confidential analysis by MOFCOM in its determination and by the parties in their arguments to MOFCOM.[186] China does *not* invoke the "exceptional circumstances" exemption under Articles 12.4.1 of the SCM Agreement and 6.5.1 of the Anti-Dumping Agreement. Rather, China argues that the adequacy of the non-confidential summaries should be assessed in the context of the circumstances of the investigation. In particular, China argues that in the GOES investigation the fact that there were only two Chinese producers constitutes an "exceptional circumstance".[187] In this context, if an authority were to aggregate the data provided by all domestic producers in order to provide a non-confidential summary to interested parties, each domestic producer would be able to

[180] United States' second written submission, para. 59.
[181] United States' response to Panel question 46, paras. 12-13.
[182] United States' second written submission, paras. 60-61.
[183] United States' second written submission, para. 62.
[184] United States' second written submission, para. 63.
[185] United States' response to Panel question 12, para. 23.
[186] China's first written submission, paras. 71 and 87.
[187] China's response to Panel question 11, paras. 40-41.

disaggregate the data to reveal the confidential information submitted by its competitor. This would not adequately protect the confidential information.[188]

7.168 According to China, Article 12.4.1 of the SCM Agreement and Article 6.5.1 of the Anti-Dumping Agreement do not require complete or perfect disclosure. Rather, the summary must be in "sufficient detail" to allow a reasonable understanding of the information, in the light of the purpose for which the information is submitted.[189] In determining whether a summary permits a "reasonable understanding" of the confidential information, relevant context, such as the importance of precise numerical information to an argument and whether there is public information that can provide context for the missing information, should be considered. China argues that the United States' approach, requiring a statement of reasons if a single number is missing, is too impractical and mechanical.[190]

7.169 China contends that the United States mistakenly focuses on the statements in Part II of the petition, assuming that they are the non-confidential summaries. Part II of the petition clearly states that the "petitioners made explanations in the public version of the petition about the part that were applied for confidential treatment".[191] Part II was included "to identify each category of information for which confidential treatment was requested, to justify confidential treatment on the basis of competitive or adverse effects, and to ensure that other parties fully understood what information was redacted".[192]

7.170 In addressing Part I of the petition, China understands the United States to be arguing that it cannot comprehend the non-confidential summaries because they are in the substantive portion of the text of the petition (Part I), rather than in the portion of the text which describes the categories of information for which confidential treatment was sought.[193] China responds to this argument by noting that Articles 12.4.1 of the SCM Agreement and 6.5.1 of the Anti-Dumping Agreement do not address the manner in which a non-confidential summary should be identified or the form it should take. In particular, there is no requirement for the non-confidential information to be "linked" to the information being summarized.[194]

7.171 China addresses each of the topic areas that United States claims was treated confidentially but was not adequately summarized:

(i) Output of petitioners and standing

7.172 China acknowledges that a table regarding the production of the petitioners was redacted. However, China reasons that the information was relevant to the standing of the petitioners. As the public version of the petition makes a factual assertion of standing, this is sufficient to allow a reasonable understanding of the table. China also argues that there was evidence in the public version of the petition indicating that the two petitioners make up the entire Chinese GOES industry, therefore satisfying the standing criteria under WTO rules.[195]

[188] China's first written submission, para. 136.
[189] China's first written submission, para. 89.
[190] China's response to Panel question 11, para. 44.
[191] China's first written submission, para. 90.
[192] China's response to Panel question 10, para. 39.
[193] China's second written submission, para. 30.
[194] China's second written submission, paras. 24 and 31.
[195] China's first written submission, paras. 93-96.

(ii) Chinese domestic industry

7.173 China notes that a section of the petition detailing trends in the Chinese GOES industry had specific numbers deleted. China argues that the deleted information was summarized either in the same section or elsewhere in the public version of the petition. For example, trends in consumption were summarized through the provision of percentage changes in domestic apparent consumption; trends in domestic production were summarized by contrasting the rate of growth of imports with the rate of growth of domestic shipments and by providing the specific growth percentages in another section of the petition; trends in domestic prices were summarized by asserting that import average unit values were below the average unit values of the petitioners and by graphing trend lines.[196]

(iii) Similarity or likeness of production techniques

7.174 China argues that information about specific production processes was confidential but that a "general overview of the basic points" of this information was provided. [197]

(iv) Change of price

7.175 China notes that information on specific average unit values of the petitioners' product was removed from a table. However, the public version of the petition includes a non-confidential version of the information in the form of trend lines, comparing relative domestic and import prices.[198] According to China, when read in conjunction with public import prices, the trend lines allow interested parties to understand both the relative trend in prices and the magnitude of the price differential over time.[199]

(v) Dumping margins for GOES from the United States

7.176 China notes that the petitioners' estimates of freight costs and the numbers derived from that information are deleted from the petition. However, China contends that disclosing the relevant methodology and the majority of numbers is an adequate summary. Further, based on the formula and numbers disclosed, some of the missing information could have been derived by the United States.[200]

(vi) Apparent consumption of GOES in China

7.177 China argues that deleted information about the apparent level of domestic consumption was summarized in the form of year-to-year percentage changes. [201]

(vii) Suppressing or depressing effects on domestic prices

7.178 China submits that data on average unit values for the domestic product was summarized through the use of trend lines and percentage changes.[202]

[196] China's first written submission, paras. 97-101.
[197] China's first written submission, paras. 102-103.
[198] China's first written submission, para. 104.
[199] China's second written submission, para. 33.
[200] China's first written submission, paras. 105-109.
[201] China's first written submission, paras. 110-116.
[202] China's first written submission, paras. 117-121.

(viii) Influence on the Chinese domestic industry

7.179 Actual numbers regarding the state of the domestic industry were deleted. However, China states that for each indicator a percentage change was provided as a non-confidential summary.[203]

(ix) Statistics and information about dumping by the United States

7.180 China relies upon the same summary as it does for the category "dumping margin of GOES".[204]

5. Arguments of third parties

(i) Argentina

7.181 Argentina submits that the objective of Article 6.5.1 of the Anti-Dumping Agreement and Article 12.4.1 of the SCM Agreement is to guarantee a right of defence to interested parties. MOFCOM should have required the interested parties to furnish non-confidential summaries.[205]

7.182 According to Argentina, providing year-on-year percentage changes and trend lines not labelled to scale does not constitute an adequate non-confidential summary because information on absolute values should be provided. However, Argentina submits that absolute values should not be required for production costs, due to the sensitivity of this information.

(ii) European Union

7.183 The European Union argues that Articles 6.5.1 of the Anti-Dumping Agreement and 12.4.1 of the SCM Agreement not only impose an obligation on the interested party to provide a non-confidential statement, but also impose an obligation on investigating authorities to require that such a statement be provided.[206]

7.184 The European Union is not convinced by China's position that "exceptional circumstances" within the meaning of Articles 6.5.1 of the Anti-Dumping Agreement and 12.4.1 of the SCM Agreement exist when there are only two producers. In the European Union's view, in cases where there are only two producers, it is still possible to prepare non-confidential summaries (in the form of indices, for example).[207]

(iii) India

7.185 India submits that Article 6.5.1 of the Anti-Dumping Agreement is of critical importance in preserving the balance between the interests of confidentiality and the ability of interested parties to defend their rights in an investigation.[208]

(iv) Korea

7.186 Korea notes that in its anti-dumping investigations, the Korea Trade Commission utilizes "percentage numbers" in lieu of actual numbers, as a form of non-confidential summary. However, if indices or other alternative means of summarization would reveal confidential information (for

[203] China's first written submission, paras. 122-128.
[204] China's response to Panel question 12, para. 45.
[205] Argentina's third party submission, paras. 8 and 11.
[206] European Union's third party submission, para. 4.
[207] European Union's third party statement, para. 16.
[208] India's third party statement, para. 3.2.

example, when only two or three firms are involved), "such information may warrant confidential treatment".[209]

6. Evaluation by the Panel

(a) Articles 12.4.1 of the SCM Agreement and 6.5.1 of the Anti-Dumping Agreement

7.187 The issue in contention between the parties is whether the applicants provided non-confidential summaries of the confidential information redacted from the application, in accordance with the requirements of Articles 12.4.1 of the SCM Agreement and 6.5.1 of the Anti-Dumping Agreement.

7.188 Articles 12.4.1 of the SCM Agreement and 6.5.1 of the Anti-Dumping Agreement oblige investigating authorities to require interested parties, and interested Members in the case of the SCM Agreement, to furnish non-confidential summaries of any confidential information provided. The summaries must permit a "reasonable understanding" of the substance of the confidential information submitted. In the Panel's view, the broad nature of the requirement to furnish non-confidential summaries applies to confidential information submitted in an application, as well as to information submitted in the course of an investigation. Articles 12.4.1 and 6.5.1 permit an exemption to the requirement to provide non-confidential summaries when "exceptional circumstances" exist, which render the confidential information incapable of summarization. However, in such a case, a statement of reasons why summarization is not possible must be provided.

7.189 The obligations in Articles 12.4.1 of the SCM Agreement and 6.5.1 of the Anti-Dumping Agreement fall upon the investigating authorities. The Appellate Body agreed with this interpretation in *EC – Fasteners (China)*. The Appellate Body found that in respect of information treated as confidential under Article 6.5, Article 6.5.1 imposes an obligation on the investigating authority to require that a non-confidential summary of the information be furnished.[210] The Appellate Body noted that this accommodates the concerns of confidentiality, transparency and due process.[211] Where "exceptional circumstances" exist, such that non-confidential information is not susceptible of summary, Article 6.5.1 requires that the party identify the exceptional circumstances and provide a statement explaining why summarization is not possible. The investigating authority must scrutinize such statements to determine whether they establish "exceptional circumstances".[212]

7.190 An issue in contention between the parties in the circumstances of this case is when the obligation to furnish a non-confidential summary arises. In particular, China argues that the "non-confidential summaries provided in the application itself were later supplemented by non-confidential analysis provided by MOFCOM in its determination, and by the parties in their arguments to MOFCOM".[213] In the Panel's view, China's reasoning in this regard is not convincing. Given the Appellate Body's statement that Article 6.5.1 of the Anti-Dumping Agreement affords "due process" to interested parties in an investigation, China's argument that non-confidential information submitted in the application can be summarized in the investigating authority's determination is problematic. In order to allow an interested party the opportunity to defend its interests, the summary of the

[209] Korea's third party response to Panel question 2.
[210] Appellate Body Report, *EC – Fasteners (China)*, para. 542.
[211] Appellate Body Report, *EC – Fasteners (China)*, para. 542.
[212] Appellate Body Report, *EC – Fasteners (China)*, para. 544. A number of panels have also taken this approach, see in particular, Panel Reports, *Guatemala – Cement II*, para. 8.213; *Mexico – Steel Pipes and Tubes*, para. 7.379; *EC – Fasteners (China)*, para. 7.515, *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*, para. 7.135; and *Mexico – Olive Oil*, para. 7.89. These panels held that meaningful interpretation of the provisions must impose an obligation on the *investigating authorities* to require interested parties to provide a statement of reasons regarding why summarization is not possible.
[213] China's first written submission, para. 84.

confidential information needs to be provided before the investigating authority has reached its determination. Further, Articles 12.4.1 of the SCM Agreement and 6.5.1 of the Anti-Dumping Agreement expressly provide that the authorities shall require "*interested parties* providing confidential information to furnish non-confidential summaries thereof". It is difficult to read this obligation as being fulfilled when an *investigating authority* produces a summary of information submitted to it.

7.191 The parties also disagree regarding the relevance of whether a respondent contests the issue the subject of the summary. In its first written submission, in defending the adequacy of its non-confidential statements with respect to certain categories of information, China variously notes that "this issue was not seriously contested" by the respondents. However, whether or not a respondent makes a substantive challenge regarding the subject matter that has been treated confidentially does not affect the standard for an adequate non-confidential summary under Articles 12.4.1 of the SCM Agreement or 6.5.1 of the Anti-Dumping Agreement. Indeed, without an adequate non-confidential summary, the ability of an interested party to contest the relevant issue is compromised.

7.192 Finally, with respect to whether the "exceptional circumstances" exemption is at issue, in response to a Panel question, China clarifies that, in the event the Panel finds the non-confidential summaries inadequate, it does *not* invoke the exceptional circumstances exemption. Indeed, the text of the provisions at issue, and the Appellate Body and panel reports, clearly state that if information is not susceptible of summarization, the party must identify the exceptional circumstances and provide a statement explaining why summarization is not possible. The investigating authority is required to scrutinize such statements to determine whether they establish "exceptional circumstances". It is clear that this did not occur in the context of this case. However, although it does not rely on the exemption, China contends that the adequacy of the non-confidential summaries should be assessed in the light of the "exceptional circumstance" that there were only two Chinese producers of GOES, making it difficult for summaries of aggregate data adequately to protect the confidentiality of the information.

7.193 In considering China's argument in this regard, we note that Articles 12.4.1 of the SCM Agreement and 6.5.1 of the Anti-Dumping Agreement explicitly establish the standard by which the sufficiency of non-confidential summaries is to be assessed, namely by reference to whether the summaries "permit a reasonable understanding of the substance of the information submitted in confidence". If the information is not susceptible of summary, for example because it would not be possible to summarize the information while still preserving its confidentiality, the provisions allow for an exemption to the requirement to furnish a non-confidential summary. However, if this "exceptional circumstance" exemption is not invoked, as in this case, there is no basis to conclude that purported "exceptional circumstances" alter the standard that applies under Articles 12.4.1 and 6.5.1. Therefore, the Panel will assess the adequacy of the non-confidential summaries by reference to whether they "permit a reasonable understanding of the information submitted in confidence". If they do not, the fact that there were only two Chinese producers of GOES will not alter the conclusion that China acted inconsistently with Articles 12.4.1 and 6.5.1.

(b) Part II of the application

7.194 The major issue in contention between the parties is where in the application the non-confidential summaries can be found. While the United States contends that the purported non-confidential summaries are the general statements found in Part-II of the application, China contends that non-confidential summaries can be found throughout Part-I of the application.

7.195 We note that within Part-I of the application, there are several sections in which confidential information, generally numerical, has been redacted. The end of each section containing redacted information includes the phrase "[p]lease see Part II-2, Non-confidential summary [x] for confidential

information".[214] Part II-2 of the application is entitled "non-confidential summary" and its introductory paragraph, in China's version of the English translation, provides:

> For the convenience of interested parties to have a general idea about the confidential information, the petitioner hereby summarize the confidential information applied including the narratives and annex marked **.

7.196 By contrast, the United States' translation of the opening paragraph of Part II-2 provides:

> To help other interested parties to access to comprehensive information the petitioners applied for confidential treatment, the petitioners made explanations in the public version of the petition about the part that were applied for confidential treatment, and below are non-confidential summaries of the appendices that have been applied for confidential treatment.[215]

7.197 A review of the application provides support for the United States' position that the applicants intended Part II-2 of the application to provide the non-confidential summaries of the redacted information. This is due to the consistent instructions in the body of the application, following redacted sections, to consult Part II of the application for summaries of the non-confidential information. Further, the title to Part II-2 is "non-confidential summary", which somewhat undermines China's argument that Part II merely identifies each category of information for which confidential treatment was requested and justifies the confidential treatment for each category. Further, China's English translation of the introductory paragraph to Part II-2 states that "the petitioner hereby summarize[s] the confidential information applied".

7.198 We note that Part II-2 of the application consists of short and general statements regarding the nature of the information treated as confidential. For example, the section in Part II-2 that refers to the redacted information regarding "change in price" provides:

> This part involves sales price of the subject merchandise by the petitioners from 2006 to February 2009. As they are business proprietary of the petitioners, disclosure of which will seriously harm the interest of the petitioners; therefore, the petitioners applied for confidential treatment of the information.

7.199 Therefore, in the Panel's view, the "summaries" in Part II-2 provide minimal descriptions of the nature, rather than the substance, of the information treated as confidential. Indeed, China does not even attempt to argue that the summaries in Part II-2 are sufficient under Articles 12.4.1 of the SCM Agreement and 6.5.1 of the Anti-Dumping Agreement.

7.200 Consequently, the Panel concludes that Part II of the application was intended to provide the non-confidential summaries of the confidential information, but the summaries are inadequate under Articles 12.4.1 of the SCM Agreement and 6.5.1 of the Anti-Dumping Agreement.

(c) Part I of the application

7.201 Although the Panel concludes that Part II of the application was intended to provide the non-confidential summaries, we note China's argument that neither Article 12.4.1 of the SCM Agreement nor Article 6.5.1 of the Anti-Dumping Agreement specify that the required non-confidential

[214] Application, Exhibit US-2 (English translation), see for example pp. 4 and 5.
[215] Application, Exhibit US-2 (English translation), p. 79. We note that the equivalent paragraph in the English translation of the application submitted by China does not include a statement that earlier parts of the application included non-confidential summaries (see, Exhibit CHN-2, p. 126).

summaries must take a particular form or be labelled in a particular manner. Consequently, China argues that non-confidential summaries can be interspersed throughout the body of an application and still provide a reasonable understanding of the substance of the confidential information. Even if we were to accept China's argument that non-confidential summaries can be found in Part I of the application, as indicated in the reasons which follow the Panel is not convinced that the purported summaries provide a reasonable understanding of the substance of the confidential information.

7.202 At the outset, we note certain problems with some of the summaries relied upon by China. In particular, in some instances, China's position is that a non-confidential summary has been furnished within the meaning of Articles 12.4.1 of the SCM Agreement and 6.5.1 of the Anti-Dumping Agreement when it is possible to infer the "main point" of the confidential information from the context surrounding the redaction. In our view, this is not what is envisaged as a non-confidential summary under the SCM and Anti-Dumping Agreements. Articles 12.4.1 and 6.5.1 explicitly require the interested party furnishing the confidential information to provide a summary thereof, rather than requiring other interested parties to infer, derive and piece together a possible summary of the confidential information. The following analysis of a selection of the categories of confidential information redacted from the application highlights the problems with the purported summaries relied upon by China. Given our conclusion that certain categories of confidential information were not adequately summarized in Part I of the application, we have not considered it necessary to proceed to analyse each of the nine categories set out in the United States' first written submission.[216]

(i) Output of the petitioners, total output of GOES in China, proportion of the petitioners' output in China's total output

7.203 Table 1 of the application includes information about the output of each applicant, the total output of GOES in China and the proportion of total output of each of the two applicants over the period 2006 through the first quarter of 2009. All of the numerical information in the table is redacted. The information in the application that China claims summarizes the table includes:

(i) an assertion that the applicants met the standing requirements under the Chinese regulations;

(ii) the discussion of the domestic industry in the application, which mentions only two producers. China argues that this indicates that the applicants account for 100% of the domestic industry; and

(iii) Appendix 13 to the application, which provides figures for the total domestic GOES output and the output of each applicant over the period 2006-2007, and estimates for 2008 and beyond.[217]

7.204 China argues that Table 1 was included in the application for the purpose of demonstrating that the applicants met the standing requirements under the Anti-Dumping and SCM Agreements. Although the United States argues that "standing" was not mentioned in the application, it is included in China's version of the English translation of the application. While the United States' translation does not include the term "standing", the description under Table 1 makes clear that whether the two companies "qualify for petitioners" was at issue.[218]

[216] United States' first written submission, para. 83.

[217] GOES Supply: Domestic Output Growth Insignificant, while Import Pressure Mounts, CICC (Appendix 13 of the Application), Exhibit CHN-13.

[218] Application, Exhibit CHN-2, p. 9 and Exhibit US-2, pp. 3-4.

7.205 According to China, the assertion that the applicants met the standing requirements under WTO rules is an adequate summary of the confidential information redacted from Table 1 of the application. However, we recall the Appellate Body's statement that Article 6.5.1 of the Anti-Dumping Agreement accommodates the concerns of confidentiality, transparency and due process. In the Panel's view, to accommodate the concern of due process, interested parties must have access to a summary of the confidential information that is relied upon to draw certain conclusions, so that those conclusions may be challenged. Simply relying on the conclusion as the non-confidential summary does not provide interested parties with a means to challenge whether the confidential information in fact provides a basis for the conclusion drawn. China's position is that interested parties reading the application should assume that the applicants correctly interpreted the redacted data to reach the conclusion relating to standing. In our view, this is not what is envisaged by Articles 12.4.1 of the SCM Agreement and 6.5.1 of the Anti-Dumping Agreement. Rather, it is necessary to provide a summary of the substance of the confidential information and not merely to assert the conclusions that may be drawn from it.

7.206 With respect to the discussion of the domestic industry, China relies on Part I(1)(i)(d) of the application, which discusses the technology investments made by the two applicants and also states that "in recent years, major steelmakers in China are making huge investments to expand GOES production capacity to satisfy domestic demand. Up to now, most capacities built with newly added investment are ready for production".[219] In our view, this does not make it as clear as China asserts that the domestic industry consisted of only two producers. Although China argues that "it was common knowledge" that there were only two producers in the Chinese GOES industry and "this was widely known from the public press reports about the Chinese industry", this begs the question of why the information was treated as confidential.[220] If information is treated as confidential in an application or investigation, the obligation to provide a non-confidential summary of it cannot be avoided by claiming that the information is public in any event.

7.207 Finally, China relies upon Appendix 13 as a summary of Table 1 of the application. However, we find reliance on this appendix to be problematic. Appendix 13 is referenced twice in the body of the application: first, in explaining the use of the export price to the European Union as the normal value, and second, in claiming the existence of threat of material injury. In both instances, it is relied upon for the information it includes regarding the state of the steel markets in the United States and Russia.[221] In no place in the application, least of all in relation to Table 1, is the information in Appendix 13 regarding domestic output of GOES in China referenced. It is uncertain whether the data in Appendix 13 is the source for the confidential information in Table 1 or provides a summary of it. Indeed, the information in Appendix 13 includes actual values only up to and including 2007, with estimates of output provided for 2008 and beyond. Given this mismatch between the data in Table 1 and Appendix 13, and the stated purpose in the body of the application for the inclusion of Appendix 13, in our view it does not provide readers of the application with a summary of the confidential information redacted from Table 1.

7.208 Consequently, even if we were to accept China's argument that the non-confidential summaries are to be found in Part I rather than Part II of the application, the information relied upon by China as the summary of the confidential information redacted from Table 1 is inadequate under Articles 12.4.1 of the SCM Agreement and 6.5.1 of the Anti-Dumping Agreement.

[219] Application, Exhibit US-2, pp. 4-5.
[220] China's first written submission, para. 95.
[221] Application, Exhibit CHN-2, pp. 36, 116.

(ii) Apparent consumption of GOES in China

7.209 Tables 23 and 24 of the application redact data on the annual domestic apparent consumption of GOES over the period 2006 through the first quarter of 2009. China relies upon the following sections of the application as the non-confidential summaries of this information:

(i) Percentage changes in domestic apparent consumption on page 5 of the application. In particular, page 5 states that since 2006, domestic apparent consumption has maintained a year-on-year growth rate of 20%. By 2008, there had been a growth of 50% over 2006 levels.

(ii) Table 32 of the application provides year-on-year percentage changes from 2006 to 2007 and from 2007 to 2008. These figures are also discussed in the commentary on causation following Tables 32 and 33.

(iii) Appendix 13 to the application, which provides public data on apparent domestic consumption over the period 2006-2007, with estimates for 2008 and beyond.

7.210 The United States and China disagree regarding whether year-on-year percentage changes can provide an adequate non-confidential summary of the confidential information on the apparent domestic consumption of GOES in China. According to the United States, it is impossible to gain a reasonable understanding of the substance of the redacted information because, in the absence of information about the absolute values, "growth of about 50%" could mean growth from 100 to 150 or 100,000 to 150,000.[222] The United States argues that absolute values could have been reported as an average without disclosing the confidential information.[223] However, a review of Tables 23 and 24 in the application indicates that the tables report data in the form of annual averages, including redacting the data on the annual average domestic apparent consumption. Therefore, it is the annual averages of domestic apparent consumption of GOES that is treated as confidential in the application. Given that the United States has not brought a claim regarding the classification of particular types of information, including annual averages, as confidential under Articles 6.5 of the Anti-Dumping Agreement or 12.4 of the SCM Agreement, its argument that the very information treated as confidential should have been disclosed under Articles 6.5.1 of the Anti-Dumping Agreement and 12.4.1 of the SCM Agreement is not convincing.

7.211 However, in the Panel's view, there remain significant problems with the purported summaries of the confidential information relied upon by China. In particular, there is a mismatch between the redacted information and the alleged summaries. Table 32 includes the percentage change in domestic apparent consumption between 2006 to 2007 and between 2007 to 2008. Although the information redacted from Tables 23 and 24 includes a figure for apparent domestic consumption in the first quarter of 2009, no percentage change or other form of summary is provided for this in Table 32 or elsewhere in the application, including on page 5. Therefore, even accepting China's arguments regarding the adequacy of year-on-year percentage changes as a means of summarizing confidential information, the summary is deficient in any event, with respect to the data for the first quarter of 2009.

7.212 With respect to China's reliance upon Appendix 13 of the application as a form of non-confidential summary, we recall our previous discussion of this Appendix at paragraph 7.207 of this Report.

[222] United States' second written submission, para. 60.
[223] United States' response to Panel question 45, para. 8.

7.213 Finally, we note the United States' argument that China would require respondents to "piece together a puzzle of data and information scattered throughout the petition". This is because information 50 pages prior to, and 8 pages after, Tables 23 and 24 is supposed to summarize the information redacted from Tables 23 and 24.[224] On the one hand, the Panel notes that Articles 12.4.1 of the SCM Agreement and 6.5.1 of the Anti-Dumping Agreement do not include any requirements regarding the form a non-confidential summary must take. However, on the other hand, given the lack of cross-referencing and the mismatch between the redacted information and the purported non-confidential summaries, a respondent may be confused regarding whether the summary information is based on the same data source as the redacted information and thus represents the "non-confidential" summary. In this sense, the due process objective of Articles 12.4.1 and 6.5.1 may be undermined, as an interested party may not be aware that the redacted information has in fact been summarized and can be contested.

7.214 In the light of this reasoning, even if we were to accept China's argument that year-on-year percentage changes in domestic apparent consumption may constitute non-confidential summaries, there remain significant problems with the summaries relied upon by China, such that they are inadequate under Articles 12.4.1 and 6.5.1 of the SCM and Anti-Dumping Agreements.

(iii) Influence on the Chinese domestic industry

7.215 The section of the application describing the impact of the dumped imports on the domestic industry includes 24 tables of data, from which either all or a significant portion of the data is redacted.[225] China relies upon year-on-year percentage changes as the relevant non-confidential summaries, provided either within the relevant tables or in the accompanying commentary. China again relies upon Appendix 13 as providing a non-confidential summary of some of the factors at issue.

7.216 Again, even accepting that year-on-year percentage changes may constitute a form of non-confidential summary, there remain certain gaps in the summaries provided in the section of the application examining the impact of the dumped imports on the domestic industry, as outlined in the following paragraphs.

7.217 Figures for the injury indicators are provided separately for each applicant, WISCO and Baosteel. Generally, the percentage change in each indicator from 2006 to 2007 and from 2007 to 2008 is provided for WISCO. However, summary data is generally not provided for Baosteel. We note that Baosteel commenced production in May 2008 and therefore, the redacted information presumably included absolute values for Baosteel for 2008 and the first quarter of 2009.[226] Further, China did not claim that such information was incapable of summarization due to "exceptional circumstances" under Articles 12.4.1 of the SCM Agreement or 6.5.1 of the Anti-Dumping Agreement. In Table 38, summary data is provided for Baosteel, by breaking the data down and providing quarter-on-quarter changes, indicating that some form of summarization was possible for Baosteel. Therefore, for those tables where no summary data is provided for Baosteel, and the subsequent commentary also fails to summarize the information, we cannot conclude that China acted consistently with Articles 12.4.1 of the SCM Agreement or 6.5.1 of the Anti-Dumping Agreement.[227]

7.218 For some of the tables in which no summary data is provided for Baosteel, year-on-year changes for WISCO and for the total industry are provided. Therefore, it is possible to derive

[224] United States' second written submission, para. 61.
[225] Application, Exhibit US-2, pp. 61-72.
[226] Application, Exhibit US-2, p. 67.
[227] Application, Exhibit US-2. For instances of this, see Tables 27, 34, 42 and 50, pp. 61, 65-66, 69 and 72.

Baosteel's contribution in 2008 and the first quarter of 2009.[228] However, where an interested party is required to perform its own calculations in order to derive its own summary of the confidential information, this is an indication that the party providing the confidential information did not furnish an adequate summary to the investigating authority in accordance with Articles 12.4.1 of the SCM Agreement and 6.5.1 of the Anti-Dumping Agreement.

7.219 Although year-on-year percentage changes are generally provided for WISCO, in relation to a number of tables a percentage change for only one year is provided, with the summary data for the other annual change missing.[229] Finally, in a number of instances, no year-on-year summary is provided for either WISCO or Baosteel. In these cases, there is some limited commentary following the redacted tables.[230]

7.220 In the light of these observations, even if we were to accept China's theory that the non-confidential summaries can be found in Part I of the application, the purported summaries relied upon by China are deficient in a number of respects. Consequently, we cannot conclude that the summaries provide a reasonable understanding of the substance of the confidential information in accordance with Articles 6.5.1 of the Anti-Dumping Agreement and 12.4.1 of the SCM Agreement.

(iv) Dumping Margin of GOES imports from the United States

7.221 China argues that the dumping margins for GOES were adequately summarized because the methodology for calculating the margins was outlined and the vast majority of numbers were provided in Part I of the application. Given the Panel's conclusions regarding the numerous problems with the purported non-confidential summaries in relation to the three preceding categories of confidential information, we do not consider it necessary to reach a definitive conclusion regarding whether, in this context, outlining the methodology for calculating the dumping margins was sufficient to permit a reasonable understanding of substance of the redacted information.

7.222 However, in relation to China's argument that, based on the formulas and numbers disclosed, interested parties could derive much of the missing data, the Panel feels it necessary to comment that this kind of process is not what is envisaged by Articles 12.4.1 of the SCM Agreement and 6.5.1 of the Anti-Dumping Agreement. The Articles explicitly require parties to furnish non-confidential summaries of any information submitted in confidence. Where other interested parties are required to derive their own summary and make educated guesses about the substance of the redacted information, the requirements of Articles 6.5.1 and 12.4.1 are not met.

(d) Conclusion

7.223 The Panel concludes that Part II-2 of the application was furnished by the applicants as the non-confidential summary required under Articles 12.4.1 of the SCM Agreement and 6.5.1 of the Anti-Dumping Agreement. However, the purported summaries in Part II are inadequate in permitting a reasonable understanding of the substance of the information submitted in confidence.

[228] Application, Exhibit US-2. For instances of this, see Tables 28, 29, 31 and 40, pp. 61-62, 63-64, and 68.

[229] Application, Exhibit US-2. For instances of this, see commentary following Tables 41 and 45 on pp. 69 and 71.

[230] For example, the commentary accompanying Table 30 indicates that the sales volume to output rate was dropping for the applicants over the period 2006-2009. With respect to Table 33, the commentary indicates that market share for the applicants rose between 2006 and 2007 and then fell in 2008. Finally, with respect to Table 36, no summary information is provided for Baosteel, apart from a statement that its capacity utilization rate was low (see Application, Exhibit US-2, pp. 63, 65 and 67.)

7.224 As highlighted in the preceding reasons, the Panel has analysed the information on the basis of China's argument that the non-confidential summaries can be found in Part I of the application. The Panel has concluded that, for at least some of the categories of confidential information, there are deficiencies in the purported summaries relied upon by China, such that they do not provide a reasonable understanding of the substance of the confidential information. In addition, we are not convinced by that aspect of China's defence which suggests that a non-confidential summary exists where an interested party is able to derive, or infer from the context, the possible nature of the confidential information. Rather, there is an explicit obligation under Articles 6.5.1 of the Anti-Dumping Agreement and 12.4.1 of the SCM Agreement for an interested party submitting confidential information to furnish a summary of it. It is not for other interested parties to derive their own summary based on the context from which the information is redacted.[231]

7.225 Accordingly, the Panel concludes that China acted inconsistently with Articles 12.4.1 of the SCM Agreement and 6.5.1 of the Anti-Dumping Agreement.

D. WHETHER CHINA ACTED INCONSISTENTLY WITH ARTICLE 12.7 OF THE SCM AGREEMENT IN ITS USE OF FACTS AVAILABLE IN CALCULATING THE SUBSIDY RATES (FOR THE TWO KNOWN RESPONDENTS) UNDER CERTAIN PROCUREMENT PROGRAMMES

1. Introduction

7.226 MOFCOM applied facts available to calculate the subsidy rates for the two known respondents, AK Steel and ATI. MOFCOM found that the respondents had not cooperated with its investigation, since they had failed to provide certain sales data.

7.227 The United States contends that MOFCOM's reliance on facts available was improper, and therefore contrary to China's obligations under Article 12.7 of the SCM Agreement.

7.228 China asks the Panel to reject the United States' claim.

2. Arguments of the United States

7.229 The United States denies that the two respondents failed to provide requested information, or that they otherwise impeded MOFCOM's investigation. The United States asserts that the respondents cooperated, responded to MOFCOM's questionnaires, and to the extent they did not provide information it was because MOFCOM's own questionnaires did not require it. The United States asserts that the two respondents engaged with MOFCOM on its terms throughout the investigation.

7.230 Regarding the information actually used by MOFCOM once it resorted to facts available, the United States also contends that there were no facts available on the record supporting MOFCOM's choice of a 100% utilization rate, i.e. a rate indicating that all domestic sales of GOES and non-GOES products by the respondents were subsidized.

(a) Failure to cooperate / provide data

7.231 The United States notes that, in its original August 2009 questionnaire, MOFCOM gave the following general instructions for the respondents:

[231] Although not expressly stipulated in Articles 12.4.1 of the SCM Agreement or 6.5.1 of the Anti-Dumping Agreement, the Panel notes the important contribution to transparency, and to assisting parties in gaining a reasonable understanding of the substance of the confidential information, that labelling non-confidential summaries as such provides.

> Please read questions carefully before answering. When answering a question, please write the question down first and put your answer directly below it and point out the support evidence to it. If the question does not apply to you, please write down explicitly, "this question does not apply to my company" and state the reasons.[232]

7.232 The United States asserts that, in addition, MOFCOM posed the following questions under the heading "government procurement programs" relating to the applicants' government procurement allegations:

> (1) Please answer all the questions listed by Annex I.
>
> (2) Does your company attend bidding when selling products to government? If yes, please explain the specific bidding procedure and bidding rules as well as the agencies and departments to which your company submit bid tender.
>
> (3) Please provide all the relevant information (not limited to the subject merchandise), in the form of tables, regarding government procurement signed within the POI as well as those not performed within the POI, which includes: the specific names of the purchaser, purchasing time, name of purchased products, the supply quantity, [value], price, payment and the contract progress, etc. The contract, bid tender etc. related evidence shall be provided. The selling price of the involved products that are sold to other private purchaser shall be provided as well.
>
> (4) Please provide the information regarding domestic sales of all the products in POI, in the form of tables. The quantity and [value] of each product sold to each client shall be provided.[233]

7.233 The United States contends that, in response to questions 2 and 3, AK Steel answered that, as demonstrated by the sale data for subject merchandise provided in the parallel anti-dumping proceeding, the company did not sell any GOES to any government entity during the POI. AK Steel continued: "[a]s a result, this alleged subsidy program is not relevant to AK Steel."[234] The United States asserts that ATI provided a similar answer.[235] The United States asserts that, pursuant to MOFCOM's instructions, AK Steel noted that no government procurement was signed during the POI, and therefore the question was inapplicable.

7.234 The United States submits that, in response to Question 4, which only relates to the POI, and which does not contain the proviso "not limited to the subject merchandise" found in Question 3, AK Steel referred MOFCOM to the sale data for subject merchandise provided in the parallel anti-dumping proceeding.[236] ATI indicated that the question was "[n]ot applicable."[237] The United States contends that, in the light of the fact that AK Steel and ATI did not use the alleged program, and none of the predicates for reporting data in response to Question 3 were met, the summary quantity and value data requested in Question 4 were superfluous.

7.235 The United States acknowledges that MOFCOM issued a deficiency letter regarding the respondents' replies to the above questions. The United States asserts that, in its deficiency letter

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[232]AK Steel, Original Questionnaire Response, Aug. 10, 2009 (BCI), Exhibit US-11, p. 6; AK Steel, Revised Questionnaire Response, Sept. 9, 2009 (BCI), Exhibit US-14, p. 6.

[233] China's first written submission, para. 147.

[234] AK Steel, Original Questionnaire Response, (BCI), Exhibit US-11, pp. 21-22.

[235] Exhibit US-38, at 19 ("not applicable").

[236] AK Steel, Original Questionnaire Response, (BCI), Exhibit US-11, pp. 21-22.

[237] Excerpt from ATI Questionnaire Response, Exhibit US-38, p. 19.

issued 10 August 2009, regarding government procurement, MOFCOM appears to request transaction data, but at the same time explains that if the facts are such that the request is not applicable, the respondents should demonstrate inapplicability:

> The prima facie evidence owned by the Investigating Authority showed that your company's products (not limited to the product concerned) could have been sold to the USG or public bodies, or have been sold to contractors of relevant projects who have been bound by the Buy America Act. There was a possibility that the prices of these transactions was higher than then market prices and consequently brought benefit to your company. Therefore, so long as your company's products were sold in the domestic market, the transactions shall be reported. If your company was of the view that, regarding the product concerned and your company's other products, there was no purchase from the government or public body, or there was no transaction bound by the Buy America Act, it was your company who shall bear the burden of proof.[238]

7.236 According to the United States, both of MOFCOM's requests are predicated on the existence of government procurement transactions. In the original questionnaire, MOFCOM asked for volumes of information for "signed" procurement contracts and sales of "involved" products to private parties. In the new subsidy questionnaire, MOFCOM asked for sales "under the influence" of any "Buy American" law. The United States submits that, in the absence of any procurement sales, a company would have no transactional data to report, and the quantity and value data requested by MOFCOM for the POI in the original questionnaire would be irrelevant.

7.237 The United States explains that, in its revised questionnaire response dated 9 September 2009, AK Steel attached a customer list showing that the government did not purchase any AK Steel products (i.e. GOES or non-GOES) during the POI – including products unrelated to subject merchandise, and revised its narrative response to address the question as clarified by the deficiency letter.[239] In its separate deficiency letter response, also dated September 9, 2009, AK Steel explained that it was impossible to know what its customers did with its products. According to the United States, AK Steel's customer list and explanation were responsive to the deficiency letter.[240] According to the United States, therefore, AK Steel did not impede the investigations; it explained why the question was not applicable. The United States notes, moreover, that MOFCOM did not follow-up with any additional questions on this subject or otherwise suggest that AK Steel's explanation was not adequate. The United States asserts that AK Steel only learned of MOFCOM's dissatisfaction with its response when MOFCOM issued the preliminary determination.

7.238 Regarding ATI, the United States asserts that ATI attached a customer list to its revised questionnaire response and pointed to the financial statements submitted with its original questionnaire response to establish the fact that ATI made no sales of the subject merchandise (i.e. GOES) to the United States Government. ATI also pointed out that MOFCOM could confirm the inapplicability of the question to ATI when MOFCOM conducted the on-site verification.

7.239 The United States asserts that MOFCOM failed to react to the respondents' supplemental questionnaire responses until issuance of its preliminary determination on 14 December 2009. The United States asserts that this appears to be the *first instance* where MOFCOM highlighted any need for transaction data *without conditions*. The United States contends that, in response to MOFCOM's

[238]AK Steel Deficiency Letter (26 August 2009), Exhibit CHN-19, p. 3; ATI Deficiency Letter (26 August 2009), Exhibit CHN-20, p. 3.

[239] AK Steel, Revised Questionnaire Response (BCI), Exhibit US-14, p. 25.

[240] GOES Supply: Domestic Output Growth Insignificant, while Import Pressure Mounts, CICC (Appendix 13 of the Application), Exhibit CHN-13, p. 3.

approach in the preliminary determination, AK Steel submitted the sales data for subject merchandise as an exhibit to its comments on the preliminary determination about a week before the verification began.[241] The United States asserts that ATI appeared to have decided that it no longer had an opportunity to engage with MOFCOM, as it concluded that MOFCOM had a pre-determined result in mind. The United States suggests that, as demonstrated by MOFCOM's treatment of AK Steel's sales data, ATI's decision was correct.

7.240 The United States submits that, in its January 2010 CVD verification memo, MOFCOM acknowledges that the sales data submitted by AK Steel is at least partially responsive, but nonetheless rejects the sales data because of past supposed "non-cooperation":

> Since the investigation authority had already given explanations to relevant issues and offered the respondent a chance of re-submitting the responses, the investigation regret to see that AK Steel Corporation still didn't answer the questions for Government Procurement Program as required by the questionnaire. Therefore, though AK Steel Corporation provided some of its domestic sales data in the Comments on Preliminary Determination, the investigation authority would not verify those sales data in the anti-subsidy verification.[242]

7.241 According to the United States, MOFCOM therefore refused to verify the sales data, which were already in its possession, and had been verified in the parallel anti-dumping proceeding. Regarding the customer lists, AK Steel submitted a written request to verify the customer lists. The United States asserts that MOFCOM, however, did not verify the lists.[243]

7.242 The United States notes that China complained that the companies' failure to provide transaction data prior to the verification denied MOFCOM "the ability to plan efficiently" for verification.[244] The United States suggests that, to the extent that MOFCOM may have suffered any inconvenience, however, this was simply the result of its own questionnaire and the apparent differences between the instructions in the questionnaire and what MOFCOM actually wanted. The United States contends that if MOFCOM deemed transactional data necessary from the outset without regard to whether a company participated in government procurement during the relevant period, its questionnaire should have so stated from the outset.

(b) Factual basis for 100% utilization rate

7.243 The United States contends that, even if an investigating authority is entitled to resort to facts available, the investigating authority does not have carte blanche in choosing which facts, or information, to rely on. The United States asserts that the investigating authority must take into account the information actually provided by the exporter. The United States relies in this regard on the following findings of the Appellate Body in *Mexico – Anti-Dumping Measures on Rice*:

> We understand that recourse to facts available does not permit an investigating authority to use any information in whatever way it chooses....to the extent possible, an investigating authority using "facts available" in a countervailing duty investigation must take into account all the substantiated facts provided by an interested party, even if those facts may not constitute the complete information

[241] AK Steel, Comments on Preliminary Determination, Exhibit 1, Customer Lists (BCI), Exhibit US-23.

[242] MOFCOM, the Disclosure Letter for Fundamental Facts of the Verification on AK Steel Corporation in the GOES Anti-Subsidy Investigation, 3 Mar. 2010 (BCI), Exhibit US-24, p. 3.

[243] United States' first written submission, para. 105.

[244] China's first written submission, para. 151.

> requested by the party...the facts available to the agency are generally limited to those that may reasonably replace the information that an interested party failed to provide.[245]

7.244 Regarding the context of Article 12.7 of the SCM Agreement, the United States submits that the Appellate Body has compared the Anti-Dumping Agreement to the SCM Agreement, and stated that an investigating authority is obliged to consider information submitted by an interested party:

> Like Article 6 of the Anti-Dumping Agreement, Article 12 of the SCM Agreement as a whole sets out evidentiary rules that apply throughout the course of the...investigation, and provides also for due process rights that are enjoyed by interested parties throughout...an investigation....[T]his due process obligation...requires the investigating authority...to take into account the information submitted by an interested party.[246]
>
> Though the SCM Agreement does not have a facts available Annex, "it would be anomalous if Article 12.7 of the SCM Agreement were the permit the use of facts available in countervailing duty investigations in a manner markedly different from that in anti-dumping investigations."[247]

7.245 The United States argues that MOFCOM appears to have concluded that if a company does not provide *some* information, or if the information provided does not perfectly fit the request to which it responds, MOFCOM may reject *all* information provided by the company. The United States recalls that the respondents provided sales data showing that they did not sell subject merchandise to the United States Government. AK Steel additionally provided customer lists showing that it did not make any direct sales to the United States Government. The United States contends that MOFCOM rejected these facts, which were verifiable, and assumed that the United States companies sold *all* of their output to the United States Government, and that this output garnered a 25% price premium. The United States submits that there are no facts available on the record to support MOFCOM's conclusion that the respondents sold all of their output to the Government.

7.246 The United States contends that MOFCOM ignored information on the record demonstrating that the respondents did not sell exclusively to the US Government or Government contractors. The United States explains that, to calculate the amount of the alleged "subsidy" to producers resulting from the procurement programs, MOFCOM assumed that AK Steel and ATI sold *all* of their output to the government under programs requiring the payment of a 25% price premium. Had MOFCOM not entirely disregarded the factual information actually supplied by the companies, it could not have assumed that the companies sold all of their output to the government. At most, AK Steel, for example, could have sold 29% of its output to industries with some relation to construction. MOFCOM required AK Steel's 10-K annual report be translated in its entirety. Page 2 of that report provides the percentage of AK Steel's sales attributable to three market segments. In 2008, the percentages were:

- Automotive: 32%;
- Infrastructure and Manufacturing: 29%; and
- Distributors and Converters: 39%.[248]

[245] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, at para. 294.
[246] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, at para. 292.
[247] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, at para. 295.
[248] AK Steel Annual Report for 2008, (Annex 15-4 of the Application), Exhibit CHN-3, p. 2.

7.247 The United States asserts that MOFCOM improperly ignored this information on the record. The United States contends that, to the extent that any AK Steel products could have made their way through commerce to government construction contractors, these sales would be included in the infrastructure and manufacturing segment. Because neither automotive manufacturers nor distributors and converters include construction contractors, sales to these market segments are necessarily unaffected by the government procurement statutes under investigation. The United States asserts that if MOFCOM was going to ignore all evidence indicating that AK Steel sold nothing to the government, MOFCOM should have at least limited its subsidy calculation to AK Steel's United States sales of products for the infrastructure and manufacturing segment, or 29% of the company's United States sales.

3. Arguments of China

(a) Failure to cooperate / provide data

7.248 China submits that MOFCOM's requests for data, and the underlying theory of indirect subsidization, were well articulated and plainly understood by the respondents. Regarding question 3 in MOFCOM's original questionnaire, China asserts that Question 3 went to the issue of acknowledged utilization under the program. The exporters were to report all transactions during the POI involving government purchases, not limited to the subject merchandise, as well as information on the selling price for the same products in transactions outside the program. Question 4 was broader. It sought a simple tabulation of all domestic sales by product in the POI, including quantity, value, and customer. According to China, the questions were unambiguous in referring to both GOES and non-GOES products.

7.249 China notes that AK Steel's response to Question 3 only concerned sales of GOES to government entities during the POI. AK Steel did not provide any information regarding sales of non-GOES products to government entities during the POI. China notes that AK Steel's reply to Question 4 referred only to sales data for GOES transactions submitted for the purpose of the anti-dumping proceeding. Regarding ATI, China notes that ATI merely stated that Questions 3 and 4 were inapplicable to the company or its affiliates. China notes that, ultimately, AK Steel provided transaction data for GOES products only, whereas ATI submitted no transaction data at all (not even for GOES). According to China, therefore, neither respondent provided sales data for *all* (i.e. GOES and other steel) products over the period of investigation, as requested by MOFCOM. China asserts that both respondents had understood the questions to refer to both GOES and non-GOES products, as AK Steel argued that data for non-GOES products was irrelevant, and ATI stated that it did not benefit from any subsidies for either GOES or non-GOES products.[249]

7.250 China submits that MOFCOM's deficiency letter was even clearer in requiring transaction data for all products, since it stated that "so long as your company's products were sold in the domestic market, the transactions shall be reported". The deficiency letter also stated that, before making any arguments as to whether or not transactions involved government entities, or were bound by the Buy America Act, "it was of the first importance that [respondents] respond completely and accurately to the questions of the Investigating Authority". China submits that MOFCOM's deficiency letter could not have been clearer.[250]

7.251 China contends that AK Steel's response to the deficiency letter was similar to its reply to the original questionnaire, although AK Steel did provide a table listing all customers of its products (i.e. GOES and non-GOES). However, China notes that AK Steel still did not provide non-GOES

[249] China's response to Panel question 19, paras. 74 and 76.
[250] China's response to Panel question 19, para. 78.

transaction data. In addition, China notes that AK Steel also made the following remarks in an accompanying letter:

> With regard to government procurement, AK Steel provides in Exhibit II.3 of the Revised Subsidy Questionnaire Response a list of all its customers during the period of investigation ("POI") grouped by product category. This list demonstrates that AK Steel did not sell either the subject merchandise or any other product to any government entity during the POI.
>
> To the extent MOFCOM is requiring AK Steel to demonstrate that none of the steel it sold to non-government entities was used in a project that was subject to the "Buy America" or similar act, MOFCOM is imposing an impossible burden. AK Steel has no reason to know what its customers do with their purchases. Because such a substantial proportion of AK Steel's products are sold to service centers, which resell the products to end users, there is no way to find out. Moreover, as stated in AK Steel's questionnaire response, even if the government ultimately overpaid for a project incorporating steel that may have originated with AK Steel, the entity that received the overpayment did not provide any of that overpayment to AK Steel, which received only a market-determined price for its product.[251]

7.252 According to China, "AK Steel had thrown down the gauntlet" by being argumentative.[252] China further contends that MOFCOM needed the transaction data precisely in order to test AK Steel's assertions that it "has no reason to know what its customers do with their purchases", and that "even if the government ultimately overpaid for a project incorporating steel that may have originated with AK Steel, the entity that received the overpayment did not provide any of that overpayment to AK Steel, which received only a market-determined price for its product". China submits that AK Steel's continued refusal to respond again seriously impeded the investigation. China submits that ATI's response to the deficiency letter was even less forthcoming, since it provided only a customer list for GOES, and stated that it did not sell GOES to any government entities.

7.253 China acknowledges that AK Steel did ultimately submit transaction data for sales of GOES during the POI (i.e. the same data that had already been submitted in the anti-dumping proceeding), after issuance of MOFCOM's preliminary determination. According to China, though, the data came 150 days after the original deadline for submission, 142 days after the extended deadline for submission, 126 days after the deadline for the second opportunity provided by MOFCOM to respond, and just 3 business days before the commencement of verification. Moreover, the data was limited to GOES transactions even though AK Steel clearly understood that Question 4 of the initial questionnaire was seeking POI transaction data on all sales.

7.254 Furthermore, China notes that even the United States appears to concede that, at the very latest, MOFCOM's requests for data were clear as of issuance of the 26 August 2009 deficiency letter. China notes in this regard the US statement, in describing the deficiency letter, that "MOFCOM… demanded that the respondents prove non-use of the alleged programs by providing detailed sales information for all products and all customers over the POI and the preceding 14 years".[253]

(b) Factual basis for 100% utilization rate

7.255 China contends that MOFCOM reasonably determined, based on the "facts available", the degree of utilization of the Government Purchase of Goods Program. China notes the United States'

[251] AK Steel, Response to Deficiency Letter (9 September 2009), Exhibit US-13, pp. 3-4.
[252] China's response to Panel question 19, para. 79.
[253] United States' response to Panel question 8, para. 30.

argument that, according to AK Steel's 10-K report, only sales within the infrastructure and manufacturing segment, representing 29% of total sales, could be relevant to the program at issue.[254] China contends that the use of this 29% figure, however, does not represent the most reasonable "facts available," given the circumstances of this particular case. China asserts that MOFCOM had four alternatives before it: (1) find 0% utilization; (2) find 29% utilization; (3) find some other degree of utilization; or (4) find 100% utilization, as it did in the preliminary determination. China submits that, after considering these alternatives, and comparing each of them relative to the others based on the facts before MOFCOM – including critically the nature and degree of non-cooperation – MOFCOM reasonably determined that 100% utilization was the most reasonable "facts available" in this particular case.

7.256 China asserts that the first option, 0% utilization, was inconsistent with the record, which showed at least some degree of utilization of the program. China asserts that this fact has been conceded by the United States. China also asserts that the various arguments by the United States respondents had always focused on direct utilization, and consciously avoided (or admitted) indirect utilization. China states that, given the MOFCOM focus on both direct and indirect utilization, the available facts strongly suggested that the degree of utilization was not 0% and was some other figure.

7.257 China identifies "several serious problems" with the second option of 29% utilization. First, although AK Steel asserted that only the relevant segment was the "facility and manufacturing industry segment" – which represented 29% of the AK Steel sales for calendar year 2008 – MOFCOM had no factual support for this assertion. China contends that a customer in the "automobile manufacturing" segment might well have produced items that were sold to the government or were used in some construction project. Similarly, a customer in the "distributor and converters" segment might well have resold items to the government or government related construction projects.

7.258 Second, China asserts that the 29% figure came from a financial report prepared for the calendar year 2008, which does not relate specifically to the period of investigation (March 2008 through February 2009). MOFCOM had no equivalent figure for the period of investigation.

7.259 Third, China asserts that the 29% alternative came very late in the process, in AK Steel's comments on the preliminary determination, a submission not filed until 30 December 2010. Coming on the very eve of the verification, MOFCOM was unable fully to evaluate and test this alternative during the verification.

7.260 Fourth, this alternative was filed on the same day – 30 December 2010 as the final AK Steel effort belatedly to respond to the MOFCOM request for information. Yet even at this late date, AK Steel still did not respond properly, and provided transaction data only for a subset of the customers that had been previously identified. Indeed, AK Steel did no more than submit data that it had readily available for months. So instead of making a good faith effort finally to respond to the request, AK Steel yet again decided it could pick and choose how and whether to respond. Thus, rather than submitting data that would allow MOFCOM to ascertain the actual rate of utilization, AK Steel submitted proposed 29% without any factual basis.

7.261 Regarding the third option, of some other rate of utilization, China identifies two "fundamental flaws". First, as a factual matter MOFCOM had no data from respondents that would allow it to determine some other number in which it would have any degree of confidence. Second, as a legal matter a utilization figure not grounded in the record evidence would not qualify as "facts available", for it would not be a "fact" in any sense of that term, and would be pure speculation by MOFCOM.

[254] United States' first written submission, paras. 97-98.

7.262 Regarding the fourth option, of 100% utilization, China contends that MOFCOM had announced this figure in its preliminary determination, and thereby squarely put this alternative into play and made that fact clear to all the parties. China notes that, with full knowledge that MOFCOM was actively considering 100% utilization, AK Steel still refused to cooperate. Instead, it made a calculated judgment that it was somehow better off proposing 29% rather than submitting the information needed to determine the actual degree of utilization, and allowing that information to be verified.

7.263 According to China, MOFCOM knew the correct utilization was more than 0%. MOFCOM also had a reasonable basis to believe the correct utilization was more than 29%, since AK Steel had proposed that alternative rather than providing the requested data. Furthermore, MOFCOM had no information with which it could determine some alternative more than 29% but less than 100%, in large part due to the refusal of ATI to provide any information and AK Steel to provide complete information. In these circumstances, China asserts that the "facts available" announced in the preliminary determination proved still to be the most reasonable "facts available" for the final determination.

4. Arguments of third parties

(a) Korea

7.264 Korea argues that Annex II of the Anti-Dumping Agreement sheds some light on the application of facts applicable in the context of countervailing duty investigations. In particular, according to Korea, an investigating authority is required to consider the information actually provided by a respondent, even if the respondent does not submit all the requested information.[255]

(b) Saudi Arabia

7.265 In Saudi Arabia's view, the standards that apply to the use of facts available in anti-dumping proceedings apply equally to countervailing duty proceedings. Saudi Arabia argues that if an authority receives information from a respondent, it must use that information if the respondent acted to the best of its ability. Facts available should only be used to fill in gaps in the necessary information. Further, facts available must not be used in a punitive manner.[256]

5. Evaluation by the Panel

7.266 There are two main issues raised by the United States' Article 12.7 claim. First, did MOFCOM properly find that the respondents failed to cooperate with MOFCOM's requests to provide transaction data for domestic sales of GOES and non-GOES products during the POI? Second, did MOFCOM properly apply a 100% utilization rate when determining the extent to which respondents' domestic sales of GOES and non-GOES products during the POI were subsidized? We address each of these issues in turn, after first considering the text and obligations inherent in the relevant provision.

(a) Provision at issue

7.267 The United States' claim is brought under Article 12.7 of the SCM Agreement, which provides:

[255] Korea's third party submission, paras. 19 and 21.
[256] Saudi Arabia's third party submission, paras. 14, 16 and 20-21.

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

(b) Did MOFCOM properly find that the respondents failed to cooperate with MOFCOM's requests to provide transaction data for domestic sales of GOES and non-GOES products during the POI?

7.268 In order to resolve this first issue, we begin by examining the relevant requests for information made by MOFCOM, and the respondents' responses to those requests. We then examine MOFCOM's finding of non-cooperation, and consider whether that finding was justified by the facts. Thereafter, we consider a United States argument that data requested by MOFCOM was not "necessary" within the meaning of Article 12.7 of the SCM Agreement.

7.269 The relevant requests for information were set out in Questions 3 and 4 of MOFCOM's original questionnaire, as clarified by deficiency letters issued by MOFCOM on 26 August 2009. Questions 3 and 4 of the original questionnaire were worded as follows:

> (3) Please provide all the relevant information (not limited to the subject merchandise), in the form of tables, regarding government procurement signed within the POI as well as those not performed within the POI, which includes: the specific names of the purchaser, purchasing time, name of purchased products, the supply quantity, [value], price, payment and the contract progress, etc. The contract, bid tender etc. related evidence shall be provided. The selling price of the involved products that are sold to other private purchaser shall be provided as well.
>
> (4) Please provide the information regarding domestic sales of all the products in POI, in the form of tables. The quantity and [value] of each product sold to each client shall be provided.[257]

7.270 In its initial questionnaire response, AK Steel replied to Question 3 in the following terms:

> As demonstrated in Table 4-2 of AK Steel's Antidumping questionnaire response, the company did not sell any GOES to any government entity during the POI. As a result, this alleged subsidy program is not relevant to AK Steel.[258]

7.271 AK Steel provided a similar response to Question 4:

> Please see Table 4-2 in AK Steel's Antidumping Questionnaire Response for a list of companies that purchased GOES from AK Steel during the POI.[259]

7.272 In its initial questionnaire response, ATI made the following introductory remarks to its replies to inter alia Questions 3 and 4.

> This question does not apply to Allegheny Ludlum or the ALC Affiliates because no subsidies provided pursuant to the [relevant procurement programmes] benefitted the Subject

[257] China's first written submission, para. 147.
[258] AK Steel, Original Questionnaire Response (BCI), Exhibit US-11, p. 22.
[259] AK Steel, Original Questionnaire Response (BCI), Exhibit US-11, p. 22.

> Merchandise or like or similar products during the POI and the 14-year period prior to March 1, 2008.[260]

7.273 Thereafter, ATI simply asserted that Questions 3 and 4 were "not applicable".

7.274 On 26 August 2009, MOFCOM issued letters identifying a number of deficiencies in the respondents' replies to the original questionnaire. For present purposes, we first note that the deficiency letter addressed to AK Steel explained that MOFCOM was maintaining separate records for the parallel anti-dumping and countervail proceedings. Accordingly, MOFCOM stated that the consequence of AK Steel referring to Table 4-2 of its anti-dumping questionnaire response (as it did in response to Question 3) "was that essentially, the company failed to respond to relevant questions…"[261]

7.275 Second, we note that the deficiency letters addressed to AK Steel and ATI explained that MOFCOM was investigating the possibility of both direct and indirect subsidization. In particular, MOFCOM explained that "the subsidy that could be investigated in an anti-subsidy proceeding is not limited to a subsidy that is directly related to the product concerned". The deficiency letter also stated:

> Regarding **Government Purchase of Goods Program**, the *prima facie* evidence owned by the Investigating Authority showed that your company's products (not limited to the product concerned) could have been sold to the USG or public bodies, or have been sold to contractors of relevant projects who have been bound by the *Buy America Act*. There was a possibility that the prices of these transactions was higher than the market prices and consequently brought benefit to your company. Therefore, so long as your company's products were sold in the domestic market, the transactions shall be reported. If your company was of the view that, regarding the product concerned and your company's other products, there was no purchase from the government or public body, or there was no transaction bound by the *Buy America Act*, it was your company who shall bear the burden of proof. If your company was of the view that even if other products were benefited by subsidizations but no effect would be conferred to the product concerned, it was your company who shall prove the benefit generated through purchase of other products did not have any effect to various aspects of the product concerned such as the cost and the pricing. Before making these arguments, it was of the first importance that your company respond completely and accurately to the questions of the Investigating Authority.[262]

7.276 AK Steel filed a revised questionnaire response on 9 September 2009. In its revised response, AK Steel submitted a table listing all customers for all its products. AK Steel also stated:

> With regard to government procurement, AK Steel provides in Exhibit II.3 of the Revised Subsidy Questionnaire Response a list of all its customers during the period of investigation ("POI") grouped by product category. This list demonstrates that AK Steel did not sell either the subject merchandise or any other product to any government entity during the POI.
>
> To the extent MOFCOM is requiring AK Steel to demonstrate that none of the steel it sold to non-government entities was used in a project that was subject to the "Buy America" or similar act, MOFCOM is imposing an impossible burden. AK Steel has

[260] Excerpt from ATI Questionnaire Response, Exhibit US-38, p. 19.
[261] AK Steel Deficiency Letter (26 August 2009), Exhibit CHN-19, p. 1.
[262] AK Steel Deficiency Letter (26 August 2009), Exhibit CHN-19, p. 3 (emphasis in original).

> no reason to know what its customers do with their purchases. Because such a substantial proportion of AK Steel's products are sold to service centers, which resell the products to end users, there is no way to find out. Moreover, as stated in AK Steel's questionnaire response, even if the government ultimately overpaid for a project incorporating steel that may have originated with AK Steel, the entity that received the overpayment did not provide any of that overpayment to AK Steel, which received only a market-determined price for its product.[263]

7.277 In its revised initial questionnaire response dated 9 September 2009, ATI submitted a list of its GOES customers, and stated that it did not sell GOES to any government agencies. ATI did not submit any information relating to sales of non-GOES products.

7.278 In its preliminary determination, MOFCOM made the following findings regarding the nature of MOFCOM's requests for information, and the quality of the respondents' replies:

> [T]he Investigating Authority asked the responding companies to provide information about the domestic sales for all of their products;
>
> …
>
> Because the responding companies did not provide transaction information, the Investigating Authority could not determine whether their products were sold to the government or public bodies or their project contractors, and whether the transaction prices were abnormal, etc. Therefore, the transaction price between the responding companies and the entity which might have received the payment of premium cannot be proved to be market price;
>
> …
>
> The responding companies did not cooperate in the investigation as they did not provide relevant information and data;[264]

7.279 MOFCOM made the following findings in its final determination:

> the original questionnaire issued to the responding companies on 26 June 2009 put forward the requirement that the responding companies should report the status of all domestic sales, which has never changed;
>
> …
>
> with regard to the government purchase of goods program, under the circumstances that the responding companies failed to cooperate and provide the status of their domestic sales, the Investigating Authority considered that their products (not limited to the product concerned) may be sold to the USG or public bodies, or relevant project contractors…;
>
> …

[263] AK Steel, Response to Deficiency Letter, (9 September 2009), Exhibit US-13, pp. 3-4.

[264] Preliminary Determination [2009] No. 99 (10 December 2009) ("Preliminary Determination") Exhibit CHN-17, pp. 34-37.

> for examining if the subsidy confers any benefits to recipients, the responding companies should cooperate with the investigation and provide the domestic sales of all the products;
>
> …
>
> Although AK Steel Corporation submitted the domestic sales of the product concerned as exhibit to its comment on preliminary determination this responding company nonetheless failed to submit the required information i.e. the information about domestic sales of all of its products in a reasonable time as requested by the Investigating Authority and by doing so, impeded future investigation;[265]

7.280 On 30 December 2009, in comments on MOFCOM's preliminary determination, AK Steel submitted POI transaction data for GOES. This was the same sales data that AK Steel had submitted in the parallel anti-dumping investigation. ATI provided no additional information to MOFCOM.

7.281 In considering whether or not MOFCOM's finding of non-cooperation was justified by the facts, we first examine the issue of whether or not MOFCOM could properly be considered to have requested transaction data for domestic sales (of both GOES and non-GOES products) by respondents during the POI. We then examine the extent, if any, to which respondents complied with this request.

7.282 According to China, both Questions 3 and 4 of MOFCOM's initial questionnaire required respondents to provide transaction data for sales of all products during the POI.[266] China asserts that MOFCOM repeated its request for transaction data in its deficiency letters, with an accompanying explanation as to the need for such data. The United States disagrees. According to the United States, it only became clear that MOFCOM was making unqualified requests for transaction data when MOFCOM issued its preliminary determination. Until then, the United States contends that MOFCOM's requests for transaction data (in its original questionnaire and deficiency letters) were predicated on the existence of government procurement transactions. According to the United States, in the original questionnaire MOFCOM only requested transaction data for "government procurement signed within the POI". In the deficiency letter, MOFCOM requested transaction data, but permitted the respondents to prove that the government did not purchase their products, or that other transactions were not subject to the alleged procurement programs.

7.283 We do not read Questions 3 and 4 of MOFCOM's initial questionnaire as requiring the submission of transaction data for all domestic sales of all products during the POI, as alleged by China. The request for transaction data in Question 3 is predicated on the existence of government procurement contracts. While we accept China's argument that Question 3 relates to both GOES and non-GOES products ("not limited to the subject merchandise"), the request for transaction data contained in Question 3 is contingent on the existence of government procurement contracts. In the absence of government procurement contracts, no transaction data need be provided.

7.284 Nor do we read Question 4 of the initial questionnaire as requiring the submission of transaction data for all domestic sales of all products during the POI. While the reference to "sales of all the products" could be understood to mean both GOES and non-GOES (even though the "not

[265] Final Determination [2010] No. 21 (10 April 2010) ("Final Determination"), Exhibit CHN-16, pp. 41-43.

[266] See, for example, China's response to Panel question 19, para. 73 ("Question 3 went to the issue of acknowledged utilization under the program. The exporters were to report all transactions during the POI involving government purchases, not limited to the subject merchandise, as well as information on the selling price for the same products in transactions outside the program. Question 4 was broader. It sought a simple tabulation of all domestic sales by product in the POI, including quantity, value, and customer") (emphasis in the original).

limited to the subject merchandise" formulation of Question 3 is not used), we do not understand Question 4 to require transaction data. Rather, the instruction to provide "the quantity and [value] of each product sold to each client" could legitimately be understood by respondents as requiring only the submission of aggregate, rather than transaction-specific, data.

7.285 That being said, we consider that the scope of Questions 3 and 4 was effectively revised by the deficiency letters issued to respondents on 26 August 2009. While we regret MOFCOM's failure to reformulate Questions 3 and 4 so as to remove all uncertainty, on balance we consider that MOFCOM was entitled to consider that the overall effect of the deficiency letters was to put the respondents on notice that MOFCOM was in fact seeking transaction data for all domestic sales of all products during the POI. In this regard, we note MOFCOM's explanation of its concern that the respondents' products ("not limited to the subject merchandise") could have been sold to the United States Government, public bodies or government contractors, and that "the prices of these transactions" could have been above market. Of greater significance is MOFCOM's instruction that "so long as your company's products were sold in the domestic market, the transactions shall be reported". In our view, MOFCOM was entitled to consider that it had informed respondents (through the deficiency letters) that, notwithstanding the more limited scope of Questions 3 and 4 of the original questionnaire, MOFCOM was actually seeking transaction data for all domestic sales of all products during the POI. To the extent respondents still considered MOFCOM's request to be unclear, they could have contacted MOFCOM to seek further clarification. There is no evidence that they did so. Nor is there any evidence that respondents sought additional time in which to comply with MOFCOM's request.

7.286 As explained above, the United States accepts that MOFCOM requested transaction data, but claims that the requests for transaction data were conditional until issuance of MOFCOM's preliminary determination. According to the United States, the deficiency letter "permitted the respondents to prove that the government did not purchase their products, or that other transactions were not subject to the alleged procurement programs."[267] We disagree. While the deficiency letter referred to the possibility of respondents demonstrating that there were no government procurement transactions, or transactions involving government contractors under the Buy America Act, or that there was no pass through of subsidies on non-GOES products to GOES, the deficiency letter clearly stated that "[b]efore making these arguments, it was of the first importance that your company respond completely and accurately to the questions of the Investigating Authority".[268] MOFCOM was therefore entitled to consider that it had properly informed respondents that transaction data should in any event be provided, notwithstanding the possibility of respondents presenting additional arguments regarding the question of indirect subsidization.[269]

[267] United States' second written submission, para. 74.

[268] AK Steel Deficiency Letter (26 August 2009), Exhibit CHN-19, p. 3.

[269] We also note that the United States' argument is inconsistent with its assertion that MOFCOM's 26 August 2009 deficiency letter "demanded that the respondents prove non-use of the alleged programs by providing detailed sales information for all products and all customers over the POI and the preceding 14 years in a revised submission" (United States' response to Panel question 23, para. 30, footnote omitted). It is also inconsistent with the United States' statement that "[i]n the subsidy questionnaires issued to AK Steel and ATI, MOFCOM demanded volumes of information unrelated to the subject merchandise. For example, MOFCOM demanded that AK Steel provide detailed transaction data for billions of dollars in transactions involving carbon steel, stainless steel, non-oriented electrical steels, and tubular products – products that are neither inputs for GOES nor substitutable for GOES" (United States' first written submission, para. 19, footnotes omitted). Furthermore, comments made by the United States during the underlying proceeding indicate that the United States understood MOFCOM to have requested transaction-specific data. Thus, in comments made on MOFCOM's preliminary determination, the United States asserted that MOFCOM had "unreasonably requested that the two respondent companies report *all* individual domestic sales of *all* products produced by the companies of whatever type" (Exhibit US-4, p. 3, emphasis in original). The context of this statement makes it

7.287 Having established that MOFCOM could properly be considered to have requested POI transaction data for domestic sales of GOES and non-GOES products, we now consider the extent, if any, to which respondents complied with this request. As explained above, ATI failed to provide any transaction data for any domestic sales of any products for any period. In our view, MOFCOM was consequently entitled to treat ATI as non-cooperative for the purpose of Article 12.7 of the SCM Agreement.

7.288 AK Steel provided transaction data for domestic sales of GOES during the POI. However, AK Steel only submitted that data on 30 December 2009, in its comments on MOFCOM's preliminary determination. AK Steel did not submit this data in response to the requests set forth in MOFCOM's deficiency letter.[270] Given AK Steel's failure to respond adequately to MOFCOM's deficiency letter, and given AK Steel's failure to include any non-GOES data when it did finally provide transaction data in its comments on MOFCOM's preliminary determination, we consider that MOFCOM was also entitled to treat AK Steel as non-cooperative for the purpose of Article 12.7 of the SCM Agreement.

7.289 The United States asserts that AK Steel had actually made a timely submission of its GOES sales data, as it was submitted within the deadline provided for comments on MOFCOM's preliminary determination. We understand the United States to be referring to Annex II, paragraph 3 of the Anti-Dumping Agreement, which provides that "[a]ll information which is … supplied in a timely fashion … should be taken into account when determinations are made". In the light of the guidance provided by the Appellate Body in *Mexico – Anti-Dumping Measures on Rice*,[271] and given "the need for the consistent resolution of disputes arising from anti-dumping and countervailing duty measures",[272] we agree that, as a matter of law, Annex II of the Anti-Dumping Agreement provides relevant context for our evaluation of the United States' claim under Article 12.7 of the SCM Agreement. As a matter of fact, though, the United States' argument is only valid if one accepts that the relevant deadline was that concerning comments on the preliminary determination. As explained above, this was not the case, as the request for transaction data had effectively been made in MOFCOM's deficiency letters (and AK Steel failed to submit its GOES transaction data within the deadline for responses to those deficiency letters). Accordingly, AK Steel's submission was not "timely".

7.290 We note the additional United States argument that transaction data for sales of GOES was not "necessary" within the meaning of Article 12.7 of the SCM Agreement because MOFCOM was only going to use this data as a tool to inform its verification strategy, and because this data had already been provided in the parallel anti-dumping proceeding.[273] The issue of whether or not the requested data is "necessary" is important, as Article 12.7 of the SCM Agreement only concerns the provision of "necessary" information. If respondents had failed to provide information that was not "necessary", the Article 12.7 facts available mechanism would not have been available to MOFCOM.

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clear that the United States was referring to a request made before the preliminary determination was issued, thereby further undermining the United States' argument that MOFCOM's unqualified request for transaction data only became apparent in the preliminary determination.

[270] We have already explained that MOFCOM effectively requested this data in its deficiency letter dated 26 August 2009, and that the deadline for responses to the deficiency letter was 9 September 2009 (see para. 7.285).

[271] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 295.

[272] *Declaration on Dispute Settlement Pursuant to the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 or Part V of the Agreement on Subsidies and Countervailing Measures*, adopted by the Trade Negotiations Committee on 15 December 1993.

[273] United States' response to Panel question 52(iv). The United States also contends that the aggregate quantity and value data requested in MOFCOM's Question 4 was not "necessary", since aggregate data would not have helped MOFCOM to identify allegedly anomalous transactions (United States' response to Panel question 52 (iii), para. 21). As explained above, we consider that, through its deficiency letters, MOFCOM had effectively made it clear to respondents that it was no longer interested in merely aggregate sales data. Accordingly, the United States' argument has no merit.

7.291 Regarding the use to which the requested data was to be put, we acknowledge that China has asserted that the requested data was needed to allow planning for verification.[274] However, China also contends that "it is wrong to consider the requested data as only a tool for verification".[275] According to China, MOFCOM might have used the data to identify anomalous transactions, to identify needs for additional information, or to determine that a different approach should be used. We accept China's argument. Given MOFCOM's investigation of alleged indirect subsidization, we are not persuaded that MOFCOM would only have used the data to prepare for verification. Furthermore, even if the requested data were only to be used to assist the authority in planning for verification, verification forms an important part of the investigative process. Thus, even information that is only needed to prepare for verification might still be treated as "necessary" for the purpose of Article 12.7 of the SCM Agreement.

7.292 Nor are we persuaded by the United States' argument that transaction data was not "necessary" for MOFCOM's countervail investigation because it was on MOFCOM's record in the parallel anti-dumping proceeding. First, we recall that MOFCOM's deficiency letter to AK Steel specifically addressed this issue, informing AK Steel that the consequence of AK Steel referring to Table 4-2 of its anti-dumping questionnaire response "was that essentially, the company failed to respond to relevant questions…"[276] Second, the anti-dumping record only contained data for domestic sales of GOES. It did not contain data for non-GOES transactions. In the light of these considerations, we do not consider that MOFCOM was precluded from treating the requested data as "necessary" within the meaning of Article 12.7 of the SCM Agreement for the purpose of its countervailing duty investigation.

7.293 Finally, we note that the United States has made a number of references to the "burden"[277] imposed by MOFCOM's requests for information, particularly concerning MOFCOM's apparent request for data covering a total of 15 years. China submits that "this might constitute part of the exercise in determining whether the respondents acted to the best of their ability within the meaning of Annex II, paragraph 5 of the *AD Agreement*, and the implications thereof under Annex II, paragraph 7. But this is left to speculation. The argument is not articulated anywhere".[278] We agree that the United States has not explained how the alleged burden imposed on respondents might influence our evaluation of the United States' claim under Article 12.7 of the SCM Agreement.[279] Nor has the United States explained how an overly burdensome request for transaction data, if any were made, would have prevented respondents from submitting any transaction data in a timely manner. Although the United States asserts that "[b]ecause of the volumes of information requested, neither AK Steel nor ATI could fulfil all of the requests made in the CVD proceeding",[280] there is no evidence that either respondent stated that they were unable to provide the relevant transaction data within the deadline imposed by MOFCOM. Rather, respondents complained that the requested data, concerning alleged indirect subsidization, was not relevant.[281]

[274] China's response to Panel question 20, para. 86.
[275] China's response to Panel question 56, para. 30.
[276] AK Steel Deficiency Letter (26 August 2009), Exhibit CHN-19, p. 1.
[277] See, for example, United States' first written submission, para. 24.
[278] China's second written submission, para. 44.
[279] We recall that the United States has not filed any substantive claim concerning MOFCOM's reliance on the theory of indirect subsidization.
[280] United States' first written submission, para. 20.
[281] See, for example, ATI's assertion that MOFCOM's request for non-GOES data "is overly-burdensome, unreasonable, and will yield information that is completely irrelevant to the determination of whether GOES benefited from countervailable subsidies during the POI" (Excerpt from ATI Supplementary Response, Exhibit US-39, pp. 21-22).

7.294 For the above reasons, we conclude that MOFCOM properly found that the respondents failed to cooperate with MOFCOM's requests to provide transaction data for domestic sales of GOES and non-GOES products during the POI.

(c) Did MOFCOM properly apply a 100% utilization rate when determining the extent to which respondents' domestic sales of GOES and non-GOES products during the POI were subsidized?

7.295 We recall that the United States' claim is based on Article 12.7 of the SCM Agreement, which allows investigating authorities to use information or facts to fill gaps in the record resulting from non-cooperation on the part of interested parties.

7.296 The facts available mechanism provided for in Article 12.7 of the SCM Agreement means that the work of an investigating authority should not be frustrated or hampered by non-cooperation on the part of interested parties. As stated by the Appellate Body, though, "[w]ith respect to the facts that an agency may use when faced with missing information, the agency's discretion is not unlimited".[282] The Appellate Body has also stated that, in applying facts available, the investigating authority is expected to employ the best information, or facts, available.[283] Implicit in the requirement that the best facts available be used is a more fundamental requirement that facts must be used. In other words, even when applying facts available, an investigating authority's determination must have a factual foundation.[284] We emphasise this point because of the United States' argument that there was no factual support for MOFCOM's decision to apply a 100% utilization rate.

7.297 In response to the United States argument, China suggests that MOFCOM had to choose a rate between 0 and 100%, but knew that a rate of 0% would be inaccurate, because of record evidence allegedly showing certain sales to the United States Government. China also suggests that MOFCOM considered the rate of 29% proposed by AK Steel to be inadequate, as AK Steel was presumed to be proposing a rate that was less than actual utilization. China suggests that the 100% rate was appropriate because the facts available announced in MOFCOM's preliminary determination "proved still to be the most reasonable 'facts available' for the final determination".[285]

7.298 We begin our evaluation with the observation that there is no justification for the application of a 100% utilization rate, or any indication of the factual foundation for this rate, in MOFCOM's final determination. Nor has China referred to extracts from the final determination in support of its arguments.

7.299 However, China has directed the Panel to facts available allegedly announced in MOFCOM's preliminary determination. In response to a question from the Panel asking China to identify precisely which facts available were announced in the preliminary determination, China referred the Panel to 11 pages of the preliminary determination. China summarized the relevant facts available as: (i) statutes and regulations denying effective access to foreign-produced steel, (ii) evidence from applicants concerning the use of the respondents' products in construction, (iii) the refusal of respondents to provide requested information, and the reasonable inference to be drawn from that refusal to cooperate, and (iv) data indicating that the United States composite price for steel was seven per cent higher than a World composite price.[286] In reviewing the 11 pages identified by China, we

[282] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 289.
[283] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 289.
[284] This basic point is acknowledged by China. See China's first written submission, para. 187 ("Legally, a utilization figure not grounded in the record evidence would not qualify as 'facts available' – it would not be a 'fact' in any sense of that term, and would be pure speculation by MOFCOM").
[285] China's second written submission, para. 75.
[286] In its comments on China's response to Panel question 55, the United States contends that MOFCOM improperly assumed that all sales concerned carbon steel, and that all of the procurement

see no explanation by MOFCOM of how the factors identified by China were used by MOFCOM to support MOFCOM's determination that all of the respondents' domestic sales of all products were made to government entities or government contractors. Instead, MOFCOM simply stated:

> The responding companies did not cooperate in the investigation as they did not provide relevant information and data. Therefore, pursuant to Article 21 of the *Regulations on Countervailing Measures*, the Investigating Authority determined the benefits under this program based on the facts available. Under the circumstance that the Investigating Authority did not get answers to the relevant questions of the questionnaire from the responding companies, it was deduced that all the products of the responding companies sold in domestic sales were sold to the government, public bodies or project contractors thereof, at the highest premium, i.e., at a price 25% higher than that of foreign products.[287]

7.300 There is no additional explanation by MOFCOM of the basis on which "it was deduced" that all sales were made to government entities or government contractors. MOFCOM did observe that it "cannot be ruled out that these products may have been sold to the USG and public bodies, or to those project contractors who are subject to the *Buy American Act*".[288] However, a statement by MOFCOM that products "may" have been sold to government entities, or government contractors, does not provide any factual basis for the conclusion that *all* domestic sales (of all products) were made to government entities or government contractors.

7.301 The above extract from MOFCOM's preliminary determination begins with a reference to the respondents' failure to cooperate. MOFCOM's reference to the respondents' failure to cooperate suggests that MOFCOM considered that the fact of non-cooperation by itself was sufficient to justify the application of a 100% utilization rate. Indeed, China has stated that MOFCOM drew "reasonable inferences" from such non-cooperation.[289] China also contends that "authorities may draw certain inferences – plainly adverse -- from [the] failure to cooperate, and the breadth of inferences available grows commensurate with the level of non-co-operation".[290]

7.302 We disagree with China. In our view, the use of facts available should be distinguished from the application of adverse inferences. While paragraph 7 of Annex II of the Anti-Dumping Agreement states that non-cooperation by an interested party "could lead to a result which is less favourable to the party than if the party did cooperate", we see no basis in Annex II for the drawing of

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programmes applied a 25% price premium. We are presently considering the extent, if any, to which MOFCOM was entitled to determine that all domestic sales were made to government entities or government construction contractors. We do not consider that the United States' claim under Article 12.7 of the SCM Agreement has been argued in a way that challenges MOFCOM's finding of a 25% price premium, or MOFCOM's finding that all sales concerned carbon steel. In its first written submission, the United States asserts that "to calculate the amount of the alleged 'subsidy' to producers resulting from the procurement programs, MOFCOM assumed that AK Steel and ATI sold *all* of their output to the government under programs requiring the payment of a 25% price premium. Had MOFCOM not entirely disregarded the factual information actually supplied by the companies, it could not have assumed that the companies sold all of their output to the government" (United States' first written submission, para. 89, footnote omitted). Thus, the focus of the United States is on MOFCOM's alleged disregard of factual information in finding that respondents sold all of their output to the government, rather than on MOFCOM's finding that all such sales benefited from a 25% price premium.

[287] Preliminary Determination, Exhibit CHN-17, p. 37.

[288] Preliminary Determination, Exhibit CHN-17, p. 36. A similar observation was made on p. 35: "the Investigating Authority considered that their products (not limited to the product concerned) may be sold to the USG or public bodies, or relevant project contractors constrained by the "Buy American Act".

[289] China's response to Panel question 55, para. 28.

[290] China's first written submission, para. 163.

adverse inferences. In our view, the purpose of the facts available mechanism is not to punish non-cooperation by interested parties. As explained by the Appellate Body, the purpose of Article 12.7 of the SCM Agreement is rather to "ensure that the failure of an interested party to provide necessary information does not hinder an agency's investigation", in the sense that "the provision permits the use of facts on record solely for the purpose of replacing information that may be missing".[291] While non-cooperation triggers the use of facts available, non-cooperation does not justify the drawing of adverse inferences. Nor does non-cooperation justify determinations that are devoid of any factual foundation. Accordingly, MOFCOM was still required to establish a factual foundation for its determination that the utilization rate of certain subsidy programmes by the respondents was 100%. In the light of our review of both the preliminary and final determination, we find that MOFCOM failed to do so.

7.303 We further observe that, not only did MOFCOM fail to establish any factual basis for a 100% utilization rate, but MOFCOM's application of this rate was actually at odds with information on the record suggesting that a lesser rate of utilization should be applied.[292] In considering such record information, we note that the 100% utilization rate effectively means that the two respondents made all of their sales, for both GOES and non-GOES products, to government entities or to government contractors operating under the relevant government procurement programmes. Concerning sales of GOES to government entities, we note that the record included statements by the United States Government to the effect that it had not purchased GOES from either of the respondents. In addition, both respondents provided customer lists indicating that they had not sold any GOES to government entities.

7.304 Pursuant to MOFCOM's theory of indirect subsidization,[293] the absence of sales to government entities leaves open the possibility that respondents had sold all of their GOES to government contractors. Given the nature of the government procurement programmes at issue, though, this would have meant that all sales were made to government *construction* contractors.[294] In this regard, the United States had explained to MOFCOM that "GOES, which is primarily used in transformers, has no direct application in construction projects".[295] ATI had similarly explained to MOFCOM that GOES is used in power transformers, and that nearly all of its GOES was "sold directly to end-use customers".[296] Indeed, MOFCOM itself found that "the main applications [of GOES] include [a] variety of industries such as transformers, rectifiers, reactors, and large electric motors etc. industries".[297] Given information in MOFCOM's record attesting to the limited application of GOES, there would seem to be extremely little likelihood that of all of the respondents'

[291] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 293.

[292] To be clear, we do not find that MOFCOM was required by Annex II(5) of the Anti-Dumping Agreement to use all of the information provided by the respondents. This is because Annex II(5) only applies in respect of interested parties that have "acted to the best of [their] ability". In failing to cooperate with MOFCOM's requests for data, the respondents did not act to the best of their ability. However, MOFCOM was still required to base its determination on "facts" available.

[293] We recall that the United States has not filed any substantive claim concerning MOFCOM's reliance on the theory of indirect subsidization.

[294] The fact that MOFCOM's investigation concerned government construction contractors, rather than contractors generally, is evident from MOFCOM's final determination (see, for example, Final Determination, Exhibit CHN-16, p. 39: "even if the USG had not purchased the product concerned or other steel product through supply contracts, it failed to prove that this program had not been used because the government purchase of goods included not only the supply contract but also the construction contract. The USG did not prove that the contractor had not purchased American steel in the construction contract.").

[295] United States Questionnaire Response, 17 August 2009, Exhibit US-3, p. 65.

[296] Excerpt from ATI Supplementary Response, Exhibit US-39, pp. 21-22 (quoting from ATI's 2008 financial statements, which were submitted to MOFCOM as Exhibit I to ATI's response to the Enterprise Questionnaire on GOES Anti-Subsidy Investigation, 10 August 2009).

[297] Final Determination, Exhibit CHN-16, p. 2.

sales of GOES would have been made to government contractors operating in the construction sector. Based on the information in the record, therefore, and in the absence of further explanation by MOFCOM, we do not consider that an objective and impartial investigating authority could properly have found that all of the respondents' sales of GOES were made to government entities or government construction contractors.

7.305 We consider that MOFCOM's determination is particularly flawed in its treatment of AK Steel. AK Steel had submitted lists identifying all of its GOES and non-GOES customers. These lists indicated that AK Steel did not sell any GOES or non-GOES products to government entities. Regarding the possibility of all of AK Steel's sales being made to government construction contractors (pursuant to MOFCOM's uncontested theory of indirect subsidization), MOFCOM's record contained AK Steel's 2008 10-K report, which indicates that 32% of AK Steel's net sales in 2008 were attributed to the Automotive segment, 29% to the Infrastructure and Manufacturing segment, and 39% to Distributors and Converters. AK Steel asserted that, to the extent that any of its products could have made their way through commerce to government construction contractors, these sales would be included in the "Infrastructure and Manufacturing" segment. According to AK Steel, its 2008 10-K report indicates that sales to government construction contractors could not have accounted for more than 29% of its business.

7.306 According to China, MOFCOM declined to rely on AK Steel's 2008 10-K report for a number of reasons.[298] First, China asserts that MOFCOM had no factual support for the assertion that all relevant contractor sales would have been booked to the Infrastructure and Manufacturing sector. In this regard, we note MOFCOM's statement that "it cannot be ascertained that the sales to distributors and resellers were not related to government purchase and construction contractor's purchase".[299] Upon examining AK Steel's 2008 10-K report, we find that immediately below the list of the relevant segments is a statement that "[t]he Company historically has referred to these markets by somewhat different names…More specifically, the market previously described as 'Appliance, Industrial Machinery and Equipment, and *Construction*' now is referred to as Infrastructure and Manufacturing".[300] In our view, this explanation would have prevented - at least without further justification - an objective and impartial investigating authority from rejecting AK Steel's assertion that sales to government construction contractors would have been booked to the Infrastructure and Manufacturing segment.[301]

7.307 Second, China asserts that AK Steel's 2008 10-K report did not relate specifically to the POI. In our view, though, the factual record before an investigating authority that has found that respondents failed to provide necessary information will necessarily be compromised to some extent, precisely because the necessary information initially requested by the investigating authority has not been provided. However, the fact that information in the record is not perfect does not mean that the investigating authority is entitled to ignore it. AK Steel's 10-K report concerned the calendar year 2008, which coincided with three-quarters of the POI. In addition, the 10-K report also included data concerning the attribution of AK Steel's net sales in 2006 and 2007. According to this data, 29% and

[298] China's first written submission, paras 181-184.

[299] Final Determination, Exhibit CHN-16, p. 45.

[300] Exhibit I.II.ii to the AK Steel Revised Original Questionnaire Response (AK Steel's 10-K report, 2008), Exhibit US-9, p. 2, (emphasis added).

[301] Furthermore, although MOFCOM refers to the possibility of the relevant sales being booked to the "Distributors and Converters" segment, MOFCOM does not address the possibility of sales to government construction contractors being booked to the "Automotive" segment. While China argues that "[a] customer in the 'automobile manufacturing' segment might well have produced items that were sold the government or were used in some construction project", (China's first written submission, para. 181), China does not identify any part of MOFCOM's Final Determination exploring this possibility, or the likelihood thereof. This would suggest that MOFCOM accepted that AK Steel's sales to government construction contractors would not have been booked to the "Automotive" segment.

26% of net sales were attributed to Infrastructure and Manufacturing in 2006 and 2007 respectively. This data suggests stability in the proportion of AK Steel's net sales attributed to the Infrastructure and Manufacturing segment. In these circumstances, we do not consider that an objective and impartial investigating authority could properly have dismissed outright AK Steel's 2008 10-K report simply because its reporting period did not coincide exactly with the POI.

7.308 Third, China suggests that, because AK Steel's 10K report came only "on the very eve of the verification, MOFCOM was unable to fully evaluate and test this alternative during the verification".[302] In fact, AK Steel's 10K report was attached to the application, and had therefore been in MOFCOM's possession throughout the investigation.[303]

7.309 In the light of the above considerations, we consider that an objective and impartial investigating authority would have attached relevance to AK Steel's 10-K report when determining the applicable utilization rate. While we do not conclude that the above considerations should necessarily have led MOFCOM to apply a utilization rate of 29%,[304] at a minimum a proper consideration of AK Steel's 10-K report should have caused MOFCOM to apply a utilization rate of less than 100%.

7.310 For the above reasons, we find that there is no factual basis for MOFCOM's determination to apply a 100% utilization rate. We also find that, in making this determination, MOFCOM ignored record information and evidence indicating that a utilization rate of less than 100% should have been applied.

(d) Conclusion

7.311 We reject the United States' claim that MOFCOM's decision to resort to facts available is inconsistent with Article 12.7 of the SCM Agreement. However, we uphold the United States' claim that MOFCOM's application of a 100% utilization rate is inconsistent with Article 12.7 of the SCM Agreement.

E. WHETHER CHINA ACTED INCONSISTENTLY WITH ARTICLE 12.2.2 OF THE ANTI-DUMPING AGREEMENT BECAUSE IT DID NOT DISCLOSE THE DATA AND CALCULATIONS USED TO ESTABLISH THE DUMPING MARGINS

1. Provision at issue

7.312 Article 12.2.2 of the Anti-Dumping Agreement 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 otherwise make available through a separate report, all relevant information on the 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 requirement for the protection of

[302] China's first written submission, para. 183.

[303] Furthermore, we query what sort of analysis would have been required for an authority to prepare itself to verify the contents of the 10-K report. While the requisite review might take a considerable amount of time *during* the verification visit, we fail to see what sort of time-consuming analysis would be needed *before* verification.

[304] The United States' claim is not limited to this specific issue. The United States' claim concerns the broader question of whether or not MOFCOM was entitled to apply a 100% utilization rate. It is not directly concerned with whether or not MOFCOM should, instead, have applied a 29% utilization rate.

> 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 claims made by the exporters and importers, and the basis for any decision made under subparagraph 10.2 of Article 6.

7.313 Article 12.2.1 of the Anti-Dumping Agreement provides, relevantly, that a public notice or separate report "shall, due regard being paid to the requirement for the protection of confidential information, contain…(iii) the margins of dumping established and a full explanation of the reasons for the methodology used in the establishment and comparison of the export price and the normal value under Article 2".

2. Factual Background

7.314 Following the issuance of the preliminary determination and the final disclosure documents, on 10 April 2010, MOFCOM issued its final determination for the anti-dumping and countervailing duty investigations.

3. Arguments of the United States

7.315 The United States notes MOFCOM included only bare summaries of its methodologies, adjustments and calculations in its preliminary determination, final disclosure document and final determination. The United States argues that this is inconsistent with Article 12.2.2 of the Anti-Dumping Agreement.[305]

7.316 According to the United States, the calculations employed by an investigating authority to determine dumping margins, and the data underlying the calculations, constitute "relevant information on matters of fact and law and reasons which have led to the imposition of final measures" within the meaning of Article 12.2.2. Given that Article 12.2.2 requires that "all" such relevant information be made available, it follows that Article 12.2.2 requires an investigating authority to release to the affected interested parties its final calculations, which are the mathematical basis for arriving at the dumping margins.[306]

7.317 In response to China's argument that Article 12.2 pertains only to "public notice", the United States notes that Article 12.2.2 mentions the possibility of a "separate report" in addition to a "public notice". The "separate report" is a vehicle for making available all relevant information on matters of fact and law and it *need not* be public. Further, Article 12.2.2 mandates that "due regard be…paid to the requirement for the protection of confidential information".[307] Therefore, the United States' position is that China cannot rely on the fact that the calculations included confidential data as an excuse for not making them available. The United States does not suggest that MOFCOM was obliged to disclose confidential information to parties other than to those parties that the information already belonged. Rather, a respondent company is entitled to see the calculations performed to arrive at the dumping margin applied to it.[308] In this regard, the United States argues that footnote 23 of the Anti-Dumping Agreement should be read in the context of the requirement in Article 12.2.2 to pay "due regard…to the…protection of confidential information". The United States argues that the requirement under footnote 23 to make the "separate report" available to the public cannot outweigh this requirement.[309]

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[305] United States' first written submission, para. 113.
[306] United States' first written submission, para. 112.
[307] United States' second written submission, para. 106.
[308] United States' first written submission, para. 115.
[309] United States' response to Panel question 28, paras. 45-46.

7.318 In response to China's argument that if there is any obligation to disclose the final dumping calculations it is found under Article 6.9 of the Anti-Dumping Agreement, the United States argues that Article 6.9 pertains to the disclosure of essential facts *before* the final determination is made. However, the *final* dumping calculations, to which the United States' claim relates, cannot be disclosed before the final determination.[310]

7.319 Turning to the facts of this case, the United States argues that the preliminary determination, final disclosure and final determination contain only MOFCOM's vague reasoning and description of its methodologies for determining and adjusting the export price and normal value. They do not include the actual data used in the dumping margin calculations or the calculations themselves. MOFCOM should at least have made available (i) adjustments to the starting price to account for differences in the circumstances of sale; (ii) revisions to the data reported by the respondent; and (iii) the calculation of constructed normal value.[311]

7.320 In response to China's argument that the two exporters were able to replicate the dumping calculations on their own, the United States submits that MOFCOM did not disclose sufficient information to allow this. In any event, even if the exporters were able to replicate the calculations, this would not relieve China of its obligation to disclose the calculations performed by MOFCOM. Without access to the actual calculations, the exporters could not check MOFCOM's methodology or mathematics for errors. The United States argues that the ability to check for errors is crucial, in the event that an interested party chooses to exercise its rights to judicial review under Article 13 of the Anti-Dumping Agreement, or in the event a Member seeks WTO dispute settlement.[312]

4. Arguments of China

7.321 With respect to the United States' argument that MOFCOM was obliged under Article 12.2.2 of the Anti-Dumping Agreement to release the actual calculations performed in determining the margins of dumping, China contends that the United States has misinterpreted Article 12.2.2. According to China, the United States' claim is based on bald assertion and is not supported by the plain meaning of Article 12.2.2 or any WTO jurisprudence.[313]

7.322 Regarding the text of Article 12.2.2 of the Anti-Dumping Agreement, China notes that there is no reference in the Article to the "calculation" of margins of dumping. The only reference to margins is in Article 12.2.1(iii), which is incorporated into Article 12.2.2, and which requires that the "margins of dumping established", rather than the calculations themselves, be disclosed in the relevant notice.[314] Further, the references in Article 12.2.2 to "relevant information on matters of fact and law and reasons which have led to the imposition of final measures" and to "the reasons for the acceptance or rejection of relevant arguments or claims" do not articulate any requirement that authorities disclose the actual calculations of the margins of dumping. Finally, there is nothing in the text of the provision to suggest that, by virtue of the disclosures under Article 12.2.2, a respondent should be in a position to replicate or check the calculations of the margins of dumping.[315]

7.323 According to China, reading Article 12.2.2 of the Anti-Dumping Agreement in its context does not support the United States' position. The title of Article 12, "Public Notice and Explanation of Determinations", indicates that the Article imposes a requirement upon investigating authorities to

[310] United States' second written submission, para. 105 and United States' opening statement at the first meeting of the Panel, para. 44.
[311] United States' first written submission, para. 113.
[312] United States' second written submission, paras. 107-110; United States' response to Panel question 27, paras. 40-44 and United States' opening statement at the first meeting of the Panel, paras. 45-47.
[313] China's second written submission, para. 35.
[314] China's first written submission, para. 203.
[315] China's first written submission, paras. 204-206.

explain their determinations. China argues that an explanation does not require a repetition of all facts, but rather a sufficient description of the facts to permit an understanding of the causes, context and consequences of those facts.[316] Further, China contends the requirement in Article 12.2 to disclose those findings and conclusions considered "material" by the investigating authority indicates that the methodology, the source of the data and the final margins should be disclosed, as these are the "material" findings in the context of determining margins of dumping. According to China, this interpretation is also supported by the requirement in Articles 12.2 and 12.2.1 to provide "sufficient" rather than full detail in the explanations. Finally, China notes that Article 12.2.1(iii) requires that authorities provide a "full explanation of the reasons for the methodology used", which is quite distinct from requiring the calculations of the margins of dumping.[317]

7.324 With respect to the object and purpose of Article 12.2.2, China argues that this is to provide interested parties with notice of determinations made by authorities and an explanation of the determinations. The context suggests that this notice should consist of the reasons for the determination, the methodology used in arriving at the determination and the results actually reached, namely the margins of dumping. China contrasts this with the object and purpose of Article 6.9 of the Anti-Dumping Agreement, which is to provide the "essential facts" to enable interested parties "to defend their interests". China suggests that perhaps the United States' complaint regarding the disclosure of the actual calculations may more properly lie under Article 6.9. However, even if such an Article 6.9 claim were properly before the Panel, China is not convinced that Article 6.9 requires the level of disclosure sought by the United States.[318]

7.325 Although China's principal argument is that Article 12.2.2 of the Anti-Dumping Agreement does not include a requirement to disclose the calculations for the margins of dumping used by an investigating authority, China argues that, in any event, the information disclosed by MOFCOM was sufficient to allow the respondents to replicate the authority's calculations.[319]

5. Arguments of third parties

(a) European Union

7.326 In the European Union's view, the calculations and data underlying the dumping margins are "essential facts under consideration" that are required to be disclosed under Article 6.9 of the Anti-Dumping Agreement. However, if after the disclosure under Article 6.9, which occurs prior to the final determination, there is any revision to the data or calculations, this constitutes relevant information on matters of fact leading to the imposition of final measures. Consequently, this should be set out and explained in the public notice or separate report under Article 12.2.2 of the Anti-Dumping Agreement. The European Union notes that Article 12.2.2 requires due regard to be paid to the protection of confidential information. Consequently, to the extent the calculations and data are confidential information, their disclosure would be made through a "separate report".[320]

[316] China's first written submission, paras. 207-209 and China's opening statement at the first meeting of the Panel, para. 33.
[317] China's first written submission, paras. 210-214.
[318] China's first written submission, paras. 215-218.
[319] China's first written submission, paras. 222-224 and China's opening statement at the first meeting of the Panel, para. 34.
[320] European Union's third party response to Panel questions 3 and 4.

(b) India

7.327 India submits that if authorities have provided a sufficiently detailed explanation on how they established the margin of dumping, it may not be necessary to include the actual data in the public notice under Article 12.2.2, keeping in mind the need for protection of confidential information.[321]

(c) Japan

7.328 Japan contends that Article 12.2.2 of the Anti-Dumping Agreement requires an explanation that includes the export price and normal value, the comparison of these figures and the calculation of dumping.[322] In its third party statement, Japan submits that the disclosure under Article 12 of the entire dumping margin calculation is critical for the exporter to present an effective defence, because even a tiny mistake could result in a grave distortion of the margin calculation.[323] However, in response to a Panel question, Japan notes that anti-dumping investigations involve a large volume of data and it would be impractical to require the authorities to cite every individual piece of information in the public notice or separate report. Nevertheless, the public notice or separate report must include all "relevant information", which at least includes the identity of the data and the margin calculation methodology. The information disclosed must be such as to allow an exporter to replicate the entire dumping margin calculation based on the raw data the exporter submitted.[324]

7.329 Japan notes that Article 12.2.2 requires an authority to satisfy two requirements at the same time, namely the statement of "all relevant information" and the protection of confidential information. The provision does not provide guidance regarding how the authorities should satisfy both obligations. However, it is clear that the requirement to protect confidential information does not absolve the authority of the responsibility to provide all relevant information.[325]

6. Evaluation by the Panel

7.330 The United States complains that MOFCOM did not disclose the data and calculations it used to arrive at the dumping margins for AK Steel and ATI and that this is inconsistent with Article 12.2.2 of the Anti-Dumping Agreement. Therefore, the issue for the Panel to determine is whether an investigating authority is required to include such calculations and data in the "public notice…or…separate report" under Article 12.2.2 of the Anti-Dumping Agreement.

7.331 The information that MOFCOM did include in the final determination consists of a description of the methodology used to establish and adjust the normal value and export prices for the two respondent companies. It also includes the dumping margins and a brief description of the methodology used to calculate these margins.[326]

7.332 The text of Article 12.2.2 of the Anti-Dumping Agreement provides that a "public notice…or…separate report" shall contain "all relevant information on the matters of fact and law which have led to the imposition of final measures…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 claims". Therefore, the list in Article 12.2.1 of the Anti-Dumping Agreement is incorporated into the information on matters of fact and law that must be included in the public notice or separate report under Article 12.2.2. We note that Article 12.2.1(iii) provides that "the margins of

[321] India's third party statement, para. 5.3.
[322] Japan's third party submission, para. 30.
[323] Japan's third party statement, para. 3.
[324] Japan's response to Panel question 6, para. 5.
[325] Japan's response to Panel question 6, paras. 7-8.
[326] Final Determination, Exhibit US-28, pp. 21-27.

dumping established and a full explanation of the reasons for the methodology used in the establishment and comparison of the export price and the normal value" shall be included in the public notice or separate report.

7.333 Although the requirement to give public notice of "all relevant information on matters of fact and law" may appear wide enough to encompass the data and calculations used to determine the dumping margins, this requirement must be read in the light of the more particular obligation spelt out in Article 12.2.1(iii), which is incorporated by reference into Article 12.2.2. In the Panel's view, it is significant that the text in Article 12.2.1(iii) sets out in detail the information regarding dumping margins that must be included in a public notice or separate report, but omits any reference to the calculations or data. While Article 12.2.2 provides that its disclosure obligations apply "in particular" to the factors in Article 12.2.1(iii) and to the reasons for acceptance or rejection of relevant arguments or claims, we acknowledge that this is not an exhaustive description of the "relevant information" that may be included in a public notice or separate report under Article 12.2.2. Nevertheless, some relevance must be attributed to the fact that the drafters of Article 12.2 specified with some particularity a list of the information required in the public notice or separate report and chose not to list the data and calculations used to arrive at a dumping margin, even though, on the United States' argument, this is "relevant information" that should be included in every public notice or separate report issued at the conclusion of an anti-dumping investigation. Therefore, on the text of Article 12.2.2, which by cross-reference includes the text of Article 12.2.1, it is difficult to conclude that there is an obligation to disclose the calculations and data underlying a dumping margin.

7.334 We find support for this position when reading Article 12.2.2 of the Anti-Dumping Agreement in its context. The title to Article 12, "Public Notice and Explanations of Determinations", indicates that Article 12 requires *public* notification. Although Article 12.2.2 also provides for disclosure through a "separate report", footnote 23 to the Anti-Dumping Agreement states that "where authorities provide information and explanation under the provisions of this Article in a separate report, they shall ensure that such report is readily available to the public". Article 12.2.3 of the Anti-Dumping Agreement also provides relevant context. It indicates that only the "non-confidential part" of an undertaking need be disclosed in the public notice or separate report following the acceptance of an undertaking. This also provides an indication that Article 12 of the Anti-Dumping Agreement is concerned with public disclosures and that the obligations it contains do not extend to confidential information. The Panel notes that the data underlying a dumping margin calculation is confidential to the respondent providing it. Therefore, it is not surprising that an obligation to disclose such data cannot be found in the text of Article 12.2.2, which requires notification to the public.

7.335 In this regard, when confidential information does fall within the notification obligations under Article 12.2.2, an investigating authority is under dual obligations. The investigating authority must treat the information confidentially, in accordance with Article 6.5 of the Anti-Dumping Agreement, but must also disclose the "relevant information on matters of fact and law" under Article 12.2.2, subject to its requirement to pay due regard to the protection of confidential information. In the Panel's view, the way in which an investigating authority should meet these dual obligations is to include only a non-confidential summary of relevant confidential information in the public notice or separate report (which must also be public). This would meet the requirements of Article 6.5 and also disclose the relevant information under Article 12.2.2, while paying due regard to the protection of confidential information. This method of protecting confidential information finds expression elsewhere in the Anti-Dumping Agreement. For instance, under Article 6.5.1, when an interested party submits confidential information to an investigating authority, a non-confidential summary of such information must also be furnished to provide interested parties with a reasonable understanding of the information.

7.336 In the case of confidential data and calculations underlying a dumping margin, we cannot find within the text of Article 12.2.2 an obligation to include this information in the relevant public notice

or separate report. In our view, a non-confidential summary of such information is provided for in the disclosure obligations under Article 12.2.1(iii). In particular, disclosure of the dumping margins and an explanation of the methodology used to arrive at the margins seems to provide a non-confidential summary of the relevant information regarding the margins and their calculation. There is no additional obligation to disclose the actual data and calculations and to do so would be inconsistent with Article 6.5 of the Anti-Dumping Agreement.

7.337 Although the United States argues that the "separate report" can be provided on a confidential basis to each respondent, and in this way the data and calculations can be disclosed under Article 12.2.2 of the Anti-Dumping Agreement, it is difficult to reconcile this with footnote 23, which requires the separate reports to be "readily available to the public". Therefore, given the confidentiality of the data and calculations at issue, we cannot conclude that MOFCOM was required to include this information in the public notice or the public separate report. We find support for this conclusion in the reasoning of a number of other panels. These panels concluded that a failure to disclose confidential data could not be a violation of Article 12.2.2.[327]

7.338 According to the United States, the data and calculations used to arrive at dumping margins must be included in the public notice or separate report to allow respondents to check the calculations used by an investigating authority. Although we do not disagree with the United States that the disclosure of the data and calculations may be very useful for respondents in this regard, we cannot find this obligation within the terms of Article 12.2.2. While Article 6.9 of the Anti-Dumping Agreement expressly provides that the disclosure it requires allows "parties to defend their interests", a similar statement cannot be found within Article 12. Rather, Article 12.2.2 provides the public with notice of affirmative determinations and interested parties with a public explanation, in sufficient detail, of the facts and reasons underlying such determinations. In the light of the text of Article 12.2.2, and the context in which it is found, there is no basis to conclude that it requires inclusion of the data and calculations underlying the dumping margin in the public notice or separate report.

7.339 Therefore, the Panel concludes that China did not act inconsistently with Article 12.2.2 of the Anti-Dumping Agreement in failing to include in the final determination the data and calculations upon which its dumping margin calculations were based.

F. WHETHER CHINA ACTED INCONSISTENTLY WITH ARTICLE 22.3 OF THE SCM AGREEMENT BECAUSE IT FAILED TO PROVIDE SUFFICIENT INFORMATION ON THE FINDINGS AND CONCLUSIONS OF LAW IT CONSIDERED MATERIAL WITH RESPECT TO THE BENEFIT DETERMINATION UNDER THE GOVERNMENT PROCUREMENT STATUTES

1. Provision at issue

7.340 Articles 22.3 of the SCM Agreement provides, relevantly:

> Public notice shall be given of any preliminary or final determination, whether affirmative or negative…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.

[327] Panel Reports, *EC – Tube or Pipe Fittings*, paras. 7.427 and 7.443; *Korea – Certain Paper*, paras. 7.208, 7.210, 7.314 and 7.316.

2. Factual Background

7.341 Following the issuance of the preliminary determination and the final disclosure documents, on 10 April 2010, MOFCOM issued its final determination for the anti-dumping and countervailing duty investigations.

3. Arguments of the United States

7.342 According to the United States, China acted inconsistently with Article 22.3 of the SCM Agreement because MOFCOM did not provide any rationale for its conclusion in the preliminary and final determinations that competitive bidding under United States procurement laws does not result in market prices.

7.343 The United States notes that Article 22.3 of the SCM Agreement requires an investigating authority to "set forth…in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities". The United States interprets this as an obligation to explain findings or conclusions that are "important", "essential" or "relevant" in the public notice of a preliminary or final countervailing duty determination.[328] In response to a Panel question, the United States confirms that the focus of Article 22.3 is on the findings and conclusions actually reached by an investigating authority.[329]

7.344 According to the United States, in its preliminary and final determinations, MOFCOM stated that "although there is a competitive bidding process" under the Buy American Act, the scope of "participating products" is restricted and therefore the competitive bidding process does not reflect full market competition. Further, with some exception, the competition is only among United States steel producers and therefore the price obtained does not reflect true market conditions.[330] However, at various times throughout the investigation, the United States argued before MOFCOM that the prices generated as a result of competitive bidding under the federal procurement laws reflect market conditions. [331]

7.345 The United States complains that MOFCOM did not provide a sufficient rationale for its conclusion that the competitive bidding process under the procurement laws does not result in market prices. Further, MOFCOM did not explain why it disregarded the arguments presented by the United States. According to the United States, MOFCOM's reasoning does not explain its *benefit* determination. MOFCOM merely concluded that the United States price was higher than foreign prices and that some foreign producers were excluded from the competitive bidding process, leading to a distorted market. However, under Article 14(d) of the SCM Agreement, authorities are to use market prices in the country of purchase unless they establish that prices are so distorted that the market price is unusable. According to the United States, MOFCOM's flawed logic appears to be based on the assumption that any government involvement in a market leads to distortion and unusable benchmark prices.[332] Without an adequate explanation, it is impossible to identify how MOFCOM arrived at this conclusion. An adequate explanation would have discussed how the level of government involvement distorted the market to such an extent that a price derived from a competitive bidding process was unusable.[333] The United States argues that merely stating vague and conclusory assertions is insufficient.[334]

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[328] United States' first written submission, para. 117.
[329] United States' response to Panel question 65, para. 45.
[330] United States' first written submission, para. 119.
[331] United States' first written submission, para. 120.
[332] United States' second written submission, paras. 115-117.
[333] United States' response to Panel question 68, para. 51.
[334] United States' comments on China's response to Panel question 65, para. 48.

7.346 Therefore, the United States claims that China acted inconsistently with Article 22.3 of the SCM Agreement because it did not explain how it found that market prices resulting from the competitive bidding process were distorted.[335]

4. Arguments of China

7.347 China rejects the United States' argument that it acted inconsistently with Article 22.3 of the SCM Agreement. According to China, MOFCOM provided sufficient detail on why the government procurement programmes at issue led to a benefit, in the form of above-market rate payments for the provision of goods, to ATI and AK Steel. Further, MOFCOM addressed the arguments advanced by the respondents during the investigation.

7.348 With respect to the preliminary determination, China disputes the United States' argument that MOFCOM failed to explain why, if a foreign producer is excluded from a competitive bidding process, the resulting price is not a market price. The preliminary determination explains that United States producers are afforded a 25% price cushion over competing foreign prices and that in certain states, foreign participation is prohibited. On the basis of these facts, MOFCOM reached the conclusion in the preliminary determination that the resulting price would not reflect a competitive market price.[336]

7.349 In relation to the final determination, China rejects the United States' contention that it merely repeats the findings in the preliminary determination and did not address the arguments made by the respondents. According to China, the final determination includes a factual finding by MOFCOM that the import volume excluded from the market was approximately 15% of United States total steel consumption. MOFCOM also quantified the price difference between North American and non-North American prices, based upon a submission from AK Steel. Finally, MOFCOM presented evidence from verification noting the extremely limited use of foreign products within Buy American projects.[337] MOFCOM based its conclusion, namely that the resulting bidding price could not be competitive, on these facts. China argues that this was an expansion upon the detail in the preliminary determination for the purpose of responding to the arguments advanced by AK Steel and ATI.[338]

7.350 China agrees with the United States that the obligation under Article 22.3 refers to the findings actually reached by an investigating authority, rather than to an objective standard of what the authorities should have found.[339] According to China, Article 22.3 of the SCM Agreement contains obligations of a procedural nature and that it is not appropriate for the United States to attempt to bootstrap a substantive claim relating to Article 14 of the SCM Agreement to its challenge under Article 22.3.[340]

5. Arguments of third parties

(a) India

7.351 India notes that MOFCOM was obliged to provide sufficient details regarding how it found that the competitive bidding price was not an acceptable market benchmark.[341]

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[335] United States' first written submission, paras. 118 and 121.
[336] China's first written submission, paras. 229-231.
[337] China's opening statement at the first meeting of the Panel, para. 41.
[338] China's first written submission, paras. 223-234.
[339] China's response to Panel question 65, para. 54.
[340] China's opening statement at the second meeting of the Panel, paras. 39-40.
[341] India's third party statement, para. 7.1.

(b) Japan

7.352 Japan contends that the public notice must explain how the evidence on the record supports the findings of the market price or benchmark.[342]

(c) Korea

7.353 Korea argues that the sufficiency of the explanation provided by MOFCOM under Article 22.3 of the SCM Agreement should be assessed in the light of Article 14 of the SCM Agreement, which is the substantive provision governing the benefit determination. Korea notes that the benchmark in a benefit determination should be based on the prevailing conditions in the market in question, unless the market is distorted. In Korea's view, it is not obvious that exclusion of certain foreign producers automatically supports the proposition that the market in question is distorted. Korea submits that the Panel should consider whether MOFCOM conducted such an inquiry and whether it adequately explained it in accordance with Article 22.3 of the SCM Agreement.[343]

6. Evaluation by the Panel

7.354 The United States complains that MOFCOM did not adequately explain, in either the preliminary or final determinations, why the exclusion of foreign producers from the competitive bidding process under the United States Government procurement statutes led to the conclusion that the resulting prices were not market prices for the purposes of the benefit determination. According to the United States, this is inconsistent with Article 22.3 of the SCM Agreement.

7.355 Article 22 of the SCM Agreement sets out a series of requirements regarding the public notices and separate reports that must be issued by investigating authorities. Article 22.3 of the SCM Agreement requires a public notice of a preliminary or final determination, or a separate report, to set forth "in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities". By way of contrast, Article 22.3, unlike Article 22.5, does not explicitly require public notice of "all relevant information on matters of fact and law and reasons which have led to the imposition of final measures" or "the reasons for the acceptance or rejection of relevant arguments or claims made by interested Members and by the exporters and importers".

7.356 In the Panel's view, and as the parties agree, the obligation in Article 22.3 of the SCM Agreement is procedural in character, relating to the nature of the public notice an investigating authority must provide with respect to its substantive determinations.[344] The text of Article 22.3 indicates that the disclosure required relates to the findings and conclusions *actually* reached by an investigating authority, rather than the findings and conclusions that should reasonably have been reached under an objective standard and by reference to the substantive obligations at issue. This is evident because the text of Article 22.3 refers to the "findings and conclusions reached on all issues of fact and law", rather than the findings and conclusions that should reasonably have been reached for a given substantive claim. Further, the obligation relates to the "issues of fact and law considered material by the investigating authorities". This indicates that the disclosure obligation relates to those issues that an investigating authority subjectively considers material. Therefore, in our view, Article 22.3 is a procedural provision that does not discipline the substantive adequacy of an investigating authority's reasoning. If this were not the case, claims under Article 22.3 may be difficult to distinguish from substantive claims relating to preliminary and final determinations.

[342] Japan's third party submission, para. 33.
[343] Korea's third party submission, paras. 40-41.
[344] See United States' response to Panel question 64, para. 44 and China's response to Panel question 64, paras. 52-53.

7.357 The United States' claim relates to MOFCOM's benefit determination under the United States government procurement laws. The preliminary determination indicates that MOFCOM applied facts available in determining the price paid by the government in purchasing GOES. Seemingly based upon the fact that the obligations regarding domestic steel procurement do not apply where the use of domestic materials increases a project cost by 25%, MOFCOM determined that the Government purchased GOES from AK Steel and ATI at a price 25% higher than that of foreign steel prices. For the purposes of the benefit determination, this purchase price was compared to a market benchmark based on the price of carbon steel in the United States steel market.[345] The United States' claim relates to the explanation provided by MOFCOM for its conclusion that the price paid by the Government, as a result of a competitive bidding process, did not reflect "market competition in the usual sense", leading to the conclusion that a benefit was conferred through the purchase of GOES for more than adequate remuneration (i.e. for a price above the market price).

7.358 In the preliminary determination, MOFCOM provided the following explanation for its conclusion that the prices paid by the United States Government were not market prices:

> The Investigating Authority found that, according to provisions in the *Buy American Act* and other regulations, although there is competitive bidding process, using steel and finished products produced in the U.S. is required unless there is a waiver. The Investigating Authority holds that this fact shows that the scope of products allowed for bidding under *Buy American Act* has actually been limited to some extent, and thus the bidding is not market competition in the usual sense. In addition to the public interest exception, the conditions for using foreign products include that, the quantity of U.S. iron and steel products is not enough, or the purchase of U.S. iron and steel products would cost 25% higher than foreign products. In other words, when purchases of U.S. iron and steel products do not cost 25% more than foreign products, the foregoing so-called competitive bidding is only competition among U.S. products. Of course, it may include a part of foreign products which can participate in U.S. government procurement in accordance with international agreements (such as *Agreement on Government Procurement*). However, the Investigating Authority noticed that at the state level of the U.S., there were still more than a dozen states which excluded members of the *Agreement on Government Procurement* when purchasing construction steel and other goods (including requirements for the sub-contract). That is, in these states (including Pennsylvania), only U.S. iron and steel can be used. Therefore, the Investigating Authority considered that the competitive bidding restricted the scope of participating products, and thus could not reflect the full market competition. Even if there is competition, it is competition only among the U.S. domestic steel products (may include part of the foreign products at the federal level and in some regions). Hence the price obtained through competitive bidding does not reflect the true market conditions.[346]

7.359 In the final determination, MOFCOM did not alter its conclusion and offered the following reasoning:

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[345] Preliminary Determination, Exhibit CHN-17, pp. 37-38. MOFCOM explained that it could not find information on the prices of all steel products, so it used prices in the carbon steel market on the basis that carbon steel accounts for the "vast majority of steel products". The price of foreign steel was also limited to carbon steel, for the purpose of constructing the price paid for GOES by the United States Government. See also, China's opening statement at the second meeting of the Panel, para. 41, in which China emphasizes that an out-of-country benchmark was not used, despite the United States' apparent discussion of out-of-country benchmarks in its second written submission, para. 115.

[346] Preliminary Determination, Exhibit CHN-17, pp. 33-34.

> The USG argued in the comment on the preliminary determination that 'the Ministry of Commerce did not make any actual analysis before drawing the conclusion that the price obtained by competitive bidding could not reflect real market conditions. This conclusion was not based on explicit evidence and it did not take into account that if there were enough bidders, the price afforded by the government would be reduced to the minimum production cost. Under such circumstances, the lowest bidding price would become the market price.' AK Steel Corporation argued in the comment on the preliminary determination that without any evidence that demonstrated the purchase at premium, the Ministry of Commerce simply equalled the exclusion of some foreign products with the absolute purchase at premium by the USG or government contractor. The Investigating Authority found in further investigation that the import volume of the excluded foreign products usually accounted for 15% of total steel consumption in the U.S.; maybe this rate was not significant, but if this part of foreign products had an even lower price, then the competitive bidding excluded these relatively cheaper steel, so the competitive bidding cannot demonstrate the real market competition. AK Steel Corporation once mentioned such data in the comment on the preliminary determination and claimed: 'when calculating the price difference between the American steel or foreign steel, comparisons should be made between the North American price with the foreign price or non-North American price (such as Asian and European prices). Only such calculations could reflect the price gap between the North American steel and steel from other markets. If the North American price was excluded from the global price, then the calculated price difference between the U.S. and foreign steel products was even more accurate, the result would be 11.02%.' The Investigating Authority considered that according to the claim, at least it could be confirmed at least that the American steel price (due to the existence of North American Free Trade Area, the North American price can be regarded as the American price) was 10% higher than the non-North American steel prices. The Investigating Authority considered that the bidding price obtained within a bidding range that excluded potential low-priced bidders cannot reflect real market prices. The competitive bidding had excluded these foreign products of relatively lower price, therefore this competitive bidding cannot reflect the real market competition. In addition, in the verification, the verification team was informed by the Federal Expressway Administration that the use of foreign products in their projects according to exclusion requirements was less than 1%, while in Pennsylvania, the verification team got to know that the steel produced in America must be used in the infrastructure construction in this state. In light of the above facts, the Investigating Authority did not accept in the definitive determination the claim from the USG and relevant interested parties that government purchase through bidding could obtain the market price so that there was no benefit in this program.[347]

7.360 The United States variously claims that MOFCOM's explanation in relation to the benefit determination was deficient under Article 22.3 of the SCM Agreement in the following respects:

(i) MOFCOM does not explain why, if a foreign producer is excluded, a price derived from the competitive bidding process does not reflect a market price. MOFCOM does not explain how the evidence supports this conclusion or why it disregarded the arguments made before it by the United States[348];

(ii) MOFCOM did not explain how it arrived at the conclusion that the price resulting from a competitive process did not reflect market conditions. Vague and conclusory

[347] Final Determination, Exhibit CHN-16, pp. 40-41.
[348] United States' first written submission, para. 121.

assertions are insufficient.[349] Rather, an investigating authority should adequately disclose its logic[350];

(iii) MOFCOM did not explain its benefit determination. Rather, "all MOFCOM did was conclude that the U.S. price was higher than foreign prices, and that some foreign producers are excluded from the competitive bidding process, leading to a distorted market"[351]; and

(iv) MOFCOM's "flawed logic appears to be based on the assumption that any government involvement in a market leads to a distorted market with prices that are unusable as a benchmark price."[352]

7.361 Therefore, the crux of the United States' complaint is that, in the light of MOFCOM's statement that "there is a competitive bidding process", MOFCOM did not adequately explain why a price derived from such a process, namely the purchase price paid by the government, would not be equal to the market price (and consequently result in a finding of no benefit).

7.362 At the outset, we note that the United States' claim under Article 22.3 of the SCM Agreement relates to the adequacy of the explanation in both the preliminary and final determinations. However, given that it is the final determination that is currently in force and providing the basis for the imposition of the countervailing duties, we consider it necessary to make a finding only in relation to it. In our view, making a finding in relation to the preliminary determination would not assist in securing a positive solution to this dispute. In response to a Panel question, the United States agreed that it "does not consider it necessary [for the Panel] to reach a conclusion in relation to both the preliminary and final determination".[353]

7.363 In the Panel's view, the United States has not made out its claim under Article 22.3 of the SCM Agreement. The United States argues that MOFCOM did not explain why a price derived from a competitive bidding process would not be equal to the market price. However, in its explanation in the final determination, MOFCOM set forth the factual findings that it considered supported its legal conclusion that the United States Government purchased domestically produced GOES for more than adequate remuneration. In particular, MOFCOM found:

(i) the scope of foreign products competing in the bidding process is restricted. The import volume of excluded foreign products accounts for 15% of steel consumption in the United States;

(ii) although, in accordance with the Government Procurement Agreement, there may be some competition from foreign products, in certain states, including Pennsylvania, foreign products are completely excluded; and

(iii) the North American price for steel is 10% higher than non-North American prices.

7.364 On the basis of the partial or complete exclusion of lower priced foreign products from the "competitive bidding"[354] process, MOFCOM concluded that the bidding would not result in a market price. The United States argues that there is a step missing in this logic, namely an explanation of how this exclusion could result in a non-market price, despite the existence of a "competitive bidding

[349] United States' comments on China's responses to Panel questions 64 and 65.
[350] United States' response to Panel question 68, para. 52.
[351] United States' second written submission, para. 114.
[352] United States' second written submission, para. 115.
[353] United States' response to Panel question 67, para. 50.
[354] Final Determination, Exhibit CHN-16, p. 39.

process". However, MOFCOM explained that, in its view, the lower prices of the excluded goods would result in a non-market price even despite its conclusion that a "competitive bidding process" of some sort existed. The United States does not agree with this conclusion. It refers to the "flawed logic" and "flawed discussion" proffered by MOFCOM.[355] It also argues that "[t]he fact that one foreign company may have been excluded from what China admitted was a competitive bidding process does not mean that a given transaction was not conducted based on prevailing market conditions".[356]

7.365 The Panel notes that Article 22.3 does not discipline the substantive adequacy of an investigating authority's reasoning.[357] MOFCOM included in its public notice the findings and conclusions on matters of law that it considered material, and also referred to the material facts it was relying upon to reach those conclusions. There is nothing to suggest that MOFCOM reached other findings or conclusions that it considered material yet did not disclose. In this respect, we recall that Article 22.3 requires only the findings and conclusions *actually* reached by an investigating authority to be included in the public notice or separate report, rather than the findings and conclusions that should reasonably have been reached, by reference to the substantive matter at issue.

7.366 The United States argues that MOFCOM did not explain why it "chose to disregard arguments from the United States". Unlike Article 22.5 of the SCM Agreement, Article 22.3 does not explicitly require the disclosure of the "reasons for the acceptance or rejection of relevant arguments or claims made by interested Members and by the exporters and importers". In any event, in the final determination MOFCOM in fact outlined and responded to the arguments presented to it by the United States and by AK Steel. For instance, in response to the United States' contention that, with enough bidders, the lowest bid becomes the market price, MOFCOM explained that, in its view, the exclusion of foreign GOES, priced lower than United States GOES, and accounting for 15% of steel consumption in the United States, would not lead to a market price, even if the bidding between the non-excluded steel manufacturers was competitive. Although the United States may not agree with the substance of this explanation, and may consider that there are certain flaws and gaps in this logic, this does not lead to the conclusion that MOFCOM failed to give public notice of the "findings and conclusions reached on all issues of facts and law" it considered material, in accordance with Article 22.3 of the SCM Agreement.

7.367 Consequently, the Panel concludes that China did not act inconsistently with Article 22.3 of the SCM Agreement in relation to the explanation of its benefit determination under the government procurement statutes. We have no basis to find that MOFCOM reached other findings and conclusions on issues of fact and law that it considered material to the issue but did not include in the final determination.

[355] United States, second written submission, paras. 112 and 115.
[356] United States, second written submission, para. 117.
[357] The United States' claim was not one of substance, for example under Articles 1.1(b) or 14(d) of the SCM Agreement. In our view, the fact that the United States may disagree with the substance of MOFCOM's reasoning is not relevant to an analysis under Article 22.3 of the SCM Agreement.

G. WHETHER CHINA ACTED INCONSISTENTLY WITH ARTICLES 6.8, 6.9, 12.2, 12.2.2 AND ANNEX II OF THE ANTI-DUMPING AGREEMENT IN RELATION TO THE "ALL OTHERS" RATE FOR UNKNOWN EXPORTERS IN THE ANTI-DUMPING DUTY INVESTIGATION

1. Whether China acted inconsistently with Article 6.8 and paragraph 1 of Annex II of the Anti-Dumping Agreement in using facts available to calculate the dumping margins for unknown exporters

(a) Provisions at issue

7.368 The United States' claim relates to Article 6.8 and paragraph 1 of Annex II of the Anti-Dumping Agreement. Article 6.8 provides:

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

7.369 Annex II, paragraph 1 reads:

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

(b) Factual Background

7.370 In calculating the anti-dumping rates, MOFCOM applied "facts available" to exporters/producers that were "unknown" to it, but did not apply "facts available" to the two investigated exporters, namely AK Steel and ATI. MOFCOM applied a "facts available" duty rate of 64.8% to unknown exporters.

7.371 In relation to the unknown exporters, in initiating the GOES anti-dumping and countervailing duty investigations, MOFCOM issued public notices of initiation. In these notices, MOFCOM indicated that any interested party should register for investigation and that failure to register would result in the application of best information available. MOFCOM provided the initiation notices to the two known exporters/producers of GOES in the United States and placed the notices on its website and in its public reading room. MOFCOM also notified the United States Embassy in Beijing of the initiations and requested that the Embassy notify the relevant exporters and producers. However, apart from AK Steel and ATI, no United States producers/exporters of GOES registered for investigation. As a result, in calculating the dumping rate for producers/exporters other than AK Steel and ATI, namely for "unknown" exporters, MOFCOM applied "facts available".

(c) Arguments of the United States

7.372 The United States claims that China acted inconsistently with Article 6.8 and paragraph 1 of Annex II of the Anti-Dumping Agreement, due to the improper use of "facts available" in calculating the "all others" dumping rate for unknown exporters. The United States argues that Article 6.8 and paragraph 1 of Annex II of the Anti-Dumping Agreement, read in the light of Article 6.1, clearly

establish that a dumping margin based on facts available may only be applied to an entity when the authority has specifically asked the party to provide certain information.[358]

7.373 The United States argues that China acted inconsistently with Article 6.8 and paragraph 1 of Annex II because MOFCOM applied facts available to firms it did not investigate and to which it did not send copies of the questionnaire or give notice of the consequences of failing to provide the required information. Apart from AK Steel and ATI, MOFCOM made no attempt to identify other United States exporters/producers of GOES. Rather, MOFOM merely requested that the United States Embassy in Beijing "notify the relevant exporters and producers".[359]

7.374 The United States rejects China's position that MOFCOM was within its rights to base the "all others" rate on facts available because, while Article 6.10 of the Anti-Dumping Agreement limits the anti-dumping rate that can be applied to known producers/exporters that are not individually examined, there are no such limits placed on unknown producers/exporters. The United States argues that this overlooks the clear direction in Article 6.1 and paragraph 7 of Annex II to notify all interested parties of the information required of them. Further, China's argument overlooks the fact that Article 6.8 and paragraph 7 of Annex II address situations where a party does not cooperate and withholds information from the investigating authority. A failure to cooperate cannot be found where there is no evidence that any other producer/exporter was aware of the investigation or the specific information required of it.[360]

(d) Arguments of China

7.375 China's response to the United States' claim is twofold, namely that (i) it adequately notified all exporters/producers of GOES of the investigation and its requirements; and (ii) in circumstances where there is no explicit guidance in the Anti-Dumping Agreement regarding how to determine margins of dumping for unknown exporters/producers, Article 6.8 is the most relevant provision to apply.

7.376 China contends that MOFCOM issued a public notification of the initiation of the GOES investigation and indicated in the notice that all exporters/producers of GOES should register for investigation. The notification stated that failure to register within a specified time period would result in the application of best information available. China submits that the initiation notice was provided to the United States, ATI and AK Steel. It was also posted on MOFCOM's website and placed in the MOFCOM reading room. According to China, this satisfied the notice requirements under Article 6.1 of the Anti-Dumping Agreement.[361]

7.377 China submits that it followed the general rule in Article 6.10 of the Anti-Dumping Agreement by determining individual margins of dumping for each known exporter or producer and therefore, Article 9.4 did not apply. China argues that neither Article 6.10 nor any other provision of the Anti-Dumping Agreement addresses the issue of treatment of exporters or producers that are not known to the authority and therefore cannot be individually examined. This means that an investigating authority must exercise its own discretion in determining how to calculate margins of dumping for such exporters or producers.[362]

7.378 China reasons that, in the circumstances of the case, where "unknown exporters/producers [did] not cooperate by making themselves known and participating in the investigation", the provision

[358] United States' first written submission, paras. 158-161.
[359] United States' first written submission, para. 166.
[360] United States' opening statement at the first meeting of the Panel, paras. 59-60.
[361] China's first written submission, paras. 243-244.
[362] China's first written submission, paras. 241-242.

most relevant for calculating the anti-dumping margins for "unknown and unresponsive" exporters is Article 6.8 of the Anti-Dumping Agreement.[363] China's position is that the exporters or producers that did not register for the investigation were "not cooperating" and therefore the application of facts available under Article 6.8 was warranted. According to China, this position is supported by paragraph 7 of Annex II of the Anti-Dumping Agreement, which provides that if a party does not cooperate, this can lead to a less favourable result for the party. China argues that if it were to apply to unknown exporters an "all others" rate based on the rates applied to cooperating respondents, "there would be no incentive for unknown companies to make themselves known and participate in the investigation".[364]

7.379 Although China is aware of the Appellate Body's decision in *Mexico – Anti-Dumping Measures on Rice*, it argues that there is an important factual distinction between that case and the case at hand. In particular, China contends that in *Mexico – Anti-Dumping Measures on Rice*, "the authority was apparently dealing with many other known exporters. Indeed a rice association entered an appearance on behalf of those other exporters that were not individually investigated".[365] Therefore, China argues it is unclear to what extent the Appellate Body considered the significance of the lack of any other exporters or producers, as was the case in the GOES investigation, when it issued its findings. Further, it is not clear to China that the panel and the Appellate Body in *Mexico – Anti-Dumping Measures on Rice* considered the policy implications of their decisions. China has not been able to reconcile *Mexico – Anti-Dumping Measures on Rice* with the need to encourage co-operation by unknown respondents and with the absence of any guidance in the Anti-Dumping Agreement on how unknown respondents should be treated in the context of an investigation in which the authority is seeking to implement the general rule of Article 6.10.[366]

(e) Arguments of third parties

(i) India

7.380 According to India, based on Article 6.8 and paragraph 1 of Annex II of the Anti-Dumping Agreement, it appears that facts available may not be applied to an interested party that has not been asked to submit any information.[367]

(ii) Japan

7.381 Japan argues that the Anti-Dumping Agreement clearly establishes that an investigating authority may not use facts available to determine the margin of dumping for exporters/producers that were not given notice of the information required of them.[368] According to Japan, a mere request in a public notice of initiation posted on a website, that interested parties make themselves known to the authorities, cannot be the basis to apply facts available.[369] MOFCOM's notice of initiation did not request exporters and producers to submit specific information, but merely requested them to register with MOFCOM. Therefore, there was no basis to apply facts available.[370]

[363] China's first written submission, paras. 241 and 245.
[364] China's first written submission, paras. 245-246.
[365] China's response to Panel question 15, para. 49.
[366] China's response to Panel question 15, paras. 49-50.
[367] India's third party statement, para. 6.3.
[368] Japan's third party submission, para.43.
[369] Japan's third party submission, para. 47.
[370] Japan's third party statement, para. 14.

(iii) Saudi Arabia

7.382 In Saudi Arabia's view, the use of facts available is permissible only when the parties have been given proper notice both of the information required by the investigating authority, and of the possibility that facts available will be applied in the event of non-cooperation with the authority.[371]

(f) Evaluation by the Panel

7.383 In relation to the United States' claim under Article 6.8 and paragraph 1 of Annex II of the Anti-Dumping Agreement, the question before the Panel is whether the conditions for the application of "facts available" were met.

7.384 Article 6.8 of the Anti-Dumping Agreement provides that resort to facts available may occur when an interested party (i) refuses access to necessary information within a reasonable period; (ii) otherwise fails to provide necessary information within a reasonable period; or (iii) significantly impedes an investigation. The application of Article 6.8 is also subject to the provisions of Annex II of the Anti-Dumping Agreement, paragraph 1 of which provides that an investigating authority should "specify in detail the information required from any interested party" and "ensure that the party is aware that if information is not supplied within a reasonable time, the authorities will be free to make determinations on the basis of the facts available". Further, the United States argues that Article 6.8 should be read in the light of Article 6.1 of the Anti-Dumping Agreement, which states that interested parties "shall be given notice of the information which the authorities require".

7.385 Therefore, Annex II imposes additional preconditions for the application of resort to facts available, including that investigating authorities give interested parties notice of the precise information required of them and of the consequences of failure to provide the information. This requirement to notify interested parties of the necessary information also finds expression in Article 6.1 of the Anti-Dumping Agreement, which is relied on as context by the United States. In the circumstances of this case, China argues that MOFCOM satisfied the notice requirement of Article 6.1 by providing the notice of initiation to the United States, AK Steel and ATI, posting it on its website and placing it in its reading room. The United States notes that MOFCOM also asked United States embassy officials in Beijing to notify interested parties of the investigation.

7.386 The Anti-Dumping Agreement does not include explicit guidance regarding the form in which the notice required by Annex II must be provided to interested parties. However, paragraph 1 of Annex II provides that authorities should "ensure that the party is aware" of the consequences of not supplying necessary information. Arguably, posting a notice in a public place or on the internet will not necessarily ensure this awareness in each interested party. In any event, in the circumstances of this case, it is not necessary for the Panel to resolve whether notice can ever be adequate if given through a public reading room or an internet posting. This is because the notice of initiation, relied upon by China as providing the requisite notification, did not specify in detail the information required of the interested parties for the purposes of the anti-dumping investigation. While the notice of initiation requested interested parties to provide some general information at the time of registering with MOFCOM, namely "the volume and value of exports to China from March 2008 to February 2009", MOFCOM replaced more information than this with "facts available" for the purposes of arriving at an "all others" anti-dumping rate. Therefore, it is clear that MOFCOM should have provided detailed notice of this further required information, although the Panel does not comment on the form or manner in which this notice should have been conveyed. In the view of the Panel, paragraph 1 of Annex II and Article 6.1 place the notification obligation on investigating authorities and it is difficult to find in the terms of the Anti-Dumping Agreement any obligation on unknown exporters to come forward after a general public notice of initiation is published.

[371] Saudi Arabia's third party statement, para. 13.

Consequently, in the Panel's view, China's argument that the notice of initiation met the notification requirements embodied in paragraph 1 of Annex II and Article 6.1 cannot be sustained.

7.387 In relation to the other preconditions for the application of facts available found in Article 6.8 of the Anti-Dumping Agreement, given that the unknown exporters were not notified of the "necessary information" required of them, the Panel cannot conclude that they refused access to or failed to provide the information. Further, China does not advance evidence to suggest that the unknown exporters impeded the investigation. This conclusion is all the more compelling in the light of China's acknowledgment that, apart from AK Steel and ATI, there were no other exporters of GOES in existence during the period of investigation.[372] It is not clear how non-existent exporters could possibly refuse to provide information or impede an investigation.

7.388 The Panel finds support for its reasoning in the report of the Appellate Body in *Mexico – Anti-Dumping Measures on Rice*. In that case, the Mexican investigating authority, Economía, sent the public notice of initiation and a questionnaire to two known exporters and to the United States embassy in Mexico City. Further, the public notice of initiation gave 30 days for interested parties to appear before Economía to submit an official investigation form. Two exporters as well as an industry association appeared of their own initiative and received a questionnaire.[373] The investigating authority ultimately used facts available against all exporters apart from the four that received a questionnaire. The Appellate Body held that the second sentence of paragraph 1 of Annex II of the Anti-Dumping Agreement conditions the use of facts available on making the interested party aware that if necessary information is not supplied by it within a reasonable time, the investigating authority will be free to resort to facts available. According to the Appellate Body, this indicates that an exporter must be given the opportunity to provide the information required by the investigating authority, before the latter resorts to the use of facts available. An exporter that is unknown to the investigating authority, and therefore not notified of the information required of it, is denied the opportunity to provide the information. Consequently, the Appellate Body concluded that an investigating authority that applies facts available to such exporters acts inconsistently with paragraph 1 of Annex II of the Anti-Dumping Agreement and therefore, with Article 6.8.[374] A similar conclusion was reached by the panel in *Argentina – Ceramic Tiles.* The panel held that paragraph 1 of Annex II "strongly implies that investigating authorities are *not* entitled to resort to best information available in a situation where a party does not provide certain information if the authorities failed to specify in detail the information which was required".[375]

7.389 The conduct of the investigating authorities in this case and in *Mexico – Anti-Dumping Measures on Rice* in attempting to give notice to interested parties is remarkably similar. In response to a Panel question, China attempts to distinguish the facts of the cases by arguing that in *Mexico – Anti-Dumping Measures on Rice* there were many other known exporters, including the members of the rice association that appeared in the investigation, and that this was not the case before MOFCOM, where there were no other known exporters/producers.[376] China argues that the Appellate Body may not have considered the significance of the "lack of any other producers/exporters" when it issued its findings. However, the Panel does not agree with China's interpretation of the Appellate Body's findings. In particular, we are of the view that the Appellate Body found that only the four exporters for which Economía calculated an individual margin of dumping were "known", while other exporters, including those that may have been members of the industry association that came forward during the investigation, were "unknown". This is evident from the Appellate Body's finding that, in calculating individual dumping margins for the two exporters included in the application for initiation

[372] China's response to Panel question 13, para. 47.
[373] Panel Report, *Mexico – Anti-Dumping Measures on Rice*, para. 7.179.
[374] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, paras. 259-260.
[375] Panel Report, *Argentina – Ceramic Tiles*, para. 6.55.
[376] China's response to Panel question 15, para. 49.

and the two that came forward of their own initiative, Economía determined an individual margin of dumping for "each exporter of which it knew at the time" and therefore did not act inconsistently with Article 6.10 of the Anti-Dumping Agreement.[377] Therefore, the Panel is not convinced by China's attempt to distinguish the facts of *Mexico – Anti-Dumping Measures on Rice*. If China is attempting to highlight that, in this case, apart from AK Steel and ATI, there were in fact no other exporters/producers of GOES in existence during the period of investigation, this fact does not seem to diminish the relevance of the Appellate Body's findings. The Appellate Body suggests that a consequence of an exporter being "unknown" is that it is not possible to give it notice of the required information.[378] The same reasoning extends to, and in fact applies more forcefully, to non-existent exporters.

7.390 China also argues that in *Mexico – Anti-Dumping Measures on Rice*, the Appellate Body did not consider the policy implications of its decision. In particular, China submits that preventing resort to facts available for unknown exporters creates a lacuna in the Anti-Dumping Agreement, because neither Article 6.10, Article 9.4 nor any other provision addresses how an investigating authority should determine margins of dumping for unknown exporters. While the Panel agrees that there is indeed a gap in the Anti-Dumping Agreement regarding how dumping margins should be calculated for unknown exporters, Article 6.8 and Annex II are very explicit regarding the conditions that must exist before an investigating authority may resort to facts available. The existence of a lacuna in the Anti-Dumping Agreement does not mean that the conditions should be ignored in order to fill the gap. Although the lack of guidance in the Anti-Dumping Agreement may leave investigating authorities with some discretion regarding the calculation of margins of dumping for unknown exporters, in our view, this discretion should not extend to acting inconsistently with the express terms of Article 6.8 and paragraph 1 of Annex II.

7.391 China also submits that it is unable to reconcile the Appellate Body's decision in *Mexico – Anti-Dumping Measures on Rice* with the need to encourage unknown respondents to cooperate so that margins can be established on an individual company basis in accordance with the general rule expressed in Article 6.10 of the Anti-Dumping Agreement. To support its position that adverse facts available can be applied to the disadvantage of companies that do not make themselves known to investigating authorities, China relies upon one part of paragraph 7 of Annex II, namely "if an interested party does not cooperate…the situation could lead to a result which is less favourable to the party than if the party did cooperate". However, paragraph 7 also provides that authorities should use "special circumspection" when basing their findings on information from a secondary source. This suggests that the recourse to facts available is not intended to lead to excessive margins of dumping in order to encourage cooperation by interested parties. Rather, special care to attain as accurate a margin as possible must be used, with an acknowledgment that non-cooperation could nevertheless lead to a less favourable result compared with cooperation. In this regard, we recall our previous discussion in which we concluded that an investigating authority's discretion is not unlimited in the use of facts available and nor is the use of facts available equivalent to the application of adverse inferences. Rather, the best information available must be used and facts available should not be applied in a manner to punish non-cooperation.[379] We note that the general rule expressed in Article 6.10 explicitly applies to each "known" exporter or producer.[380] It is not clear that Article 6.10 establishes a general objective relating to unknown exporters. In any event, even if an overriding

[377] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 256.

[378] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 259: "An exporter that is *unknown* to the investigating authority - *and, therefore, is not notified* of the information required to be submitted" (emphasis added).

[379] See paras. 7.296 and 7.302 of this Report.

[380] Indeed, the Appellate Body found in *Mexico – Anti-Dumping Measures on Rice*, para. 255, that "the rule set out in the first sentence of Article 6.10…covers the exporters or foreign producers of which the investigating authority knows at the time the calculation of margins of dumping is made".

objective exists to encourage unknown exporters to participate in an investigation, so that individual margins of dumping can be applied to them, the achievement of this objective would not justify a violation of the express terms of Article 6.8 of the Anti-Dumping Agreement, which establishes clear conditions regarding when it is permissible to resort to the use of facts available.

7.392 Therefore, while there is no system of precedent under the DSU, China has not advanced a convincing reason for the Panel to depart from the reasoning of the Appellate Body in *Mexico – Anti-Dumping Measures on Rice.*

7.393 In sum, in the view of the Panel, MOFCOM did not notify the "all other" exporters of the necessary information required of them and so did not meet one of the preconditions for the application of facts available, as found in paragraph 1 of Annex II of the Anti-Dumping Agreement. Further, exporters that were unknown to MOFCOM, and indeed that were non-existent, cannot reasonably be held to have refused to provide necessary information or to have impeded an investigation within the meaning of Article 6.8 of the Anti-Dumping Agreement.

7.394 Therefore, the Panel finds that China acted inconsistently with Article 6.8 and paragraph 1 of Annex II of the Anti-Dumping Agreement.

2. Whether China acted inconsistently with Article 6.9 of the Anti-Dumping Agreement by failing to inform interested parties of the essential facts under consideration in calculating the "all others" dumping margin

(a) Provision at issue

7.395 Article 6.9 of the Anti-Dumping Agreement provides:

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

(b) Factual Background

7.396 Following the preliminary determination, and prior to issuing its final determination, MOFCOM issued a final disclosure document, including certain disclosures regarding the dumping margins and subsidy rates to be applied to the investigated companies and to the "unknown" exporters.

(c) Arguments of the United States

7.397 The United States notes that in its preliminary determination, MOFCOM established an "all others" dumping rate of 25%, with the explanation that its calculation relied upon facts available for "the other U.S. companies who failed to register responses or to submit responses". In its final disclosure document, MOFCOM revealed that it was increasing the "all others" rate to 64.8%, "based on transaction information of the respondents" pursuant to the facts available method. In its final determination, MOFCOM applied the "all others" dumping rate of 64.8%, based upon "facts available and the information submitted by respondent companies".[381]

7.398 The United States argues that MOFCOM did not disclose the "essential facts" forming the basis for applying an "all others" dumping rate of 64.8%. Although China argues that it could not

[381] United States' first written submission, paras. 168-170.

disclose the essential facts because to do so would have compromised the confidentiality of the information supplied by the two respondent companies, the United States submits that the facts forming the basis to apply facts available in the first place would not have been confidential to the respondent companies. Further, MOFCOM could have publicly summarized the information used or at least disclosed the methodology it employed. According to the United States, disclosure of the essential facts was particularly important, because it is difficult to understand how MOFCOM used the information of the two respondent companies and arrived at an "all others" dumping margin more than three times as high as the margin for one of the respondent companies and more than eight times as high as the margin for the other.[382] The United States argues that without the disclosure of this information, it was unable to defend its interests.[383]

(d) Arguments of China

7.399 In relation to the application of facts available to the calculation of the "all others" dumping rate, China argues that it provided an adequate explanation of the basis for the "all others" rate. In the preliminary determination MOFCOM indicated that the "all others" dumping margins were based on the information alleged and contained in the petition. In relation to the "all others" rate that was revealed in the final determination, China argues that MOFCOM could provide only a general explanation because the "all others" rate was based upon confidential information of one of the responding companies.

7.400 China argues that because the unknown companies did not cooperate, the investigating authority had an unlimited discretion to arrive at a result less favourable to the non-cooperating parties. Therefore, failing to disclose the details of the calculation had no effect on the ability of the parties to defend their interests.[384]

(e) Arguments of third parties

(i) European Union

7.401 The European Union agrees with the United States on the "essential facts" that should have been disclosed in relation to the "all others" dumping rate. The European Union submits that if the United States' allegations are confirmed with respect to the lack of disclosure, China has acted inconsistently with Article 6.9 of the Anti-Dumping Agreement.[385]

(ii) Japan

7.402 With respect to the disclosure required under Article 6.9 of the Anti-Dumping Agreement, Japan submits that the disclosure of the "essential facts" must be distinguished from mere individual items of evidence.[386] Japan argues that the normal value and export prices used to calculate margins of dumping in the final determination, and the process to reach ex-factory prices, are "essential facts" that should have been disclosed in relation to the calculation of the "all others" dumping rate.[387]

[382] United States' second written submission, paras. 132-133 and United States' opening statement at the first meeting of the Panel, para. 66.
[383] United States' first written submission, para. 175.
[384] China's first written submission, paras. 247-248 and China's opening statement at the first meeting of the Panel, para. 47.
[385] European Union's third party submission, paras. 21-24.
[386] Japan's third party submission, para. 6.
[387] Japan's third party submission, para. 19.

(iii) Saudi Arabia

7.403 Saudi Arabia notes that the disclosure of "essential facts" under Article 6.9 of the Anti-Dumping Agreement must occur prior to the final determination, to allow sufficient time for parties to defend their interests. Further, the "essential facts" must be explicitly identified as such, so that the parties know whether a particular fact is important.[388]

(f) Evaluation by the Panel

7.404 In its preliminary determination, MOFCOM established an "all others" dumping rate of 25% for unknown exporters. In the final disclosure document, released prior to the final determination, MOFCOM indicated that the rate had increased to 64.8%.

7.405 In relation to the "all others" dumping rate, the following disclosures were made by MOFCOM:

(i) The preliminary determination stated "[r]egarding the other U.S. companies who failed to register to respond or to submit responses, in accordance with Article 21 of the Anti-Dumping Regulation, the Investigation Authority decided to adopt the obtained and best information available to make the determination as for dumping and dumping margin".[389]

(ii) The final disclosure document provided that the "margin for all other American companies was calculated based on transaction information of the respondents pursuant to Article 21 of the Antidumping Regulations".[390]

7.406 The United States argues that MOFCOM did not disclose the "essential facts" forming the basis for applying an "all others" dumping rate of 64.8%. In particular MOFCOM did not reveal:

(i) the facts relating to the United States companies refusing access to necessary information or significantly impeding the investigation[391];

(ii) the facts leading to the conclusion that 64.8% was the appropriate "all others" rate;

(iii) the "transaction information" from the two respondents that formed the basis for the 64.8% "all others rate"; or

(iv) the facts underpinning the calculation of the 64.8% rate and the details of the calculation.[392]

7.407 In the Panel's view, the obligation under Article 6.9 of the Anti-Dumping Agreement requires investigating authorities to disclose those facts underlying the final findings and conclusions in respect of the essential elements that must exist for the application of definitive anti-dumping duties.[393] In an anti-dumping investigation, the essential elements include the existence of dumping,

[388] Saudi Arabia's third party submission, para. 25.
[389] Preliminary Determination, Exhibit US-5, p. 17.
[390] Memorandum Regarding The Factual Disclosure On The Dumping Margin and Ad Valorem Subsidy Rate for Grain Oriented Flat-Rolled Electrical Steel Antidumping and Countervailing Cases, 15 March 2010, ("Final Disclosure form"), Exhibit US-26, p. 41.
[391] United States' opening statement at the first meeting of the Panel, para. 65.
[392] United States' first written submission, para. 173.
[393] In this regard, see Panel Report, *Mexico - Olive Oil*, para. 7.110, where the Panel examines the analogous provision under the SCM Agreement.

injury and causation. We agree with those panels that have noted the disclosure obligation does not apply to the *reasoning* of the investigating authorities, but rather to the "essential facts" underlying the reasoning.[394]

7.408 In our view, China acted inconsistently with its disclosure obligations under Article 6.9 of the Anti-Dumping Agreement in relation to the "all others" dumping rate. In particular, in reaching its conclusion on the existence of dumping by "all other" exporters, MOFCOM must have considered a number of facts leading to the conclusion that the use of "facts available" was warranted. In the circumstances of this case where, apart from AK Steel and ATI, there were in fact no other exporters of GOES, it is not clear on what basis MOFCOM concluded that non-existent exporters refused access to necessary information or otherwise impeded the investigation. Therefore, in order to allow the United States, as an interested party, to defend its interests, it was vital that MOFCOM disclose the factual basis for its use of best information available.

7.409 Further, MOFCOM revealed that it relied upon certain facts submitted by the respondents in finding the existence of dumping by "all other" exporters at a margin of 64.8%. However, MOFCOM did not disclose the particular information from the respondents upon which the dumping margin was based. In the circumstances of this case, some indication of the information from the respondents which formed the basis of the "all others" dumping rate seems particularly important given the large disparity between the "all others" rate and the rates for the respondents. It is certainly not self-evident how such a large disparity could have arisen, in circumstances where the rates were apparently based upon the same set of facts. In our view, some disclosure in this regard to allow the United States to defend its interests was required under Article 6.9 of the Anti-Dumping Agreement.

7.410 We note China's argument that the transaction information upon which MOFCOM relied in calculating a dumping rate of 64.8% was confidential to the respondents. In this regard, we note that where information which is by nature confidential, or is submitted to an investigating authority on a confidential basis, is also part of the "essential facts under consideration", an investigating authority is under dual obligations. On the one hand, Article 6.5 of the Anti-Dumping Agreement requires that confidential information be treated as such and not be disclosed without the permission of the party submitting it. On the other hand, Article 6.9 requires that the essential facts be disclosed so that interested parties may defend their interests. Article 6.9 does not include a carve-out in relation to confidential information. Therefore, in our view, when information is both confidential but also part of the "essential facts under consideration", the obligation to disclose the information is nevertheless binding. However, where the party submitting the confidential information does not give permission for the information to be disclosed, the investigating authority could meet its obligations under Article 6.9 through the use of non-confidential summaries of the "essential" but confidential facts. Therefore, in our view, a non-confidential summary of the information from the respondents which formed the factual basis of the "all others" dumping rate should have been prepared and disclosed for the purposes of Article 6.9 of the Anti-Dumping Agreement.

7.411 In failing to disclose these facts underlying the "all others" dumping rate, the ability of the United States to defend its interests was compromised. We disagree with China's suggestion to the contrary, which is based on the argument that MOFCOM had "unlimited discretion" to arrive at a result less favourable to the unknown companies that did not cooperate. As indicated in our reasoning in relation to the United States' claim under Article 6.8 of the Anti-Dumping Agreement, the premise of China's argument fails, due to our conclusion that the unknown, non-existent companies did not fail to cooperate. Further, as indicated in our analysis of Article 6.8 and Annex II of the Anti-Dumping

[394] Panel Reports, *Argentina – Poultry Anti-Dumping Duties*, para. 7.228; *US – Oil Country Tubular Sunset Reviews (Article 21.5 – Argentina)*, para. 7.148 and *EC – Salmon (Norway)*, para. 7.808.

Agreement, an investigating authority does not have unlimited discretion in applying facts available.[395]

7.412 Consequently, we find that China acted inconsistently with Article 6.9 of the Anti-Dumping Agreement in failing to disclose certain "essential facts" forming the basis of the conclusion that "all other" exporters were dumping at a rate of 64.8%.

3. Whether China acted inconsistently with Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement in relation to the public notice and explanation of its determination of the "all others" dumping margin

(a) Provisions at issues

7.413 Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement provide, relevantly:

> 12.2 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.
>
> 12.2.2 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 otherwise make available through a separate report, all relevant information on the 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 requirement for the 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 claims made by the exporters and importers, and the basis for any decision made under subparagraph 10.2 of Article 6.

(b) Factual Background

7.414 Following the issuance of the preliminary determination and the final disclosure document, on 10 April 2010, MOFCOM issued its final determination for the anti-dumping and countervailing duty investigations.

(c) Arguments of the United States

7.415 The United States claims that China acted inconsistently with Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement. In particular, in the preliminary determination, the final disclosure document and the final determination, MOFCOM failed to disclose the rationale for its decision to apply facts available in calculating the "all others" dumping margin. The United States argues that the single sentence in the preliminary and final determinations, simply stating that the "all others" rate was calculated on the basis of facts available, is insufficient to satisfy the requirements of Articles 12.2 and 12.2.2.[396]

[395] See, for example, para. 7.391 of this Report.
[396] United States' first written submission, paras. 179-182.

(d) Arguments of China

7.416 China argues that it provided an adequate explanation of the basis for the "all others" rate. In this regard, China relies upon the same arguments as it did in relation to the United States' claim under Article 6.9 of the Anti-Dumping Agreement. In particular, China argues that MOFCOM could provide only a general explanation in the final determination because the "all others" rate was based upon confidential information of one of the responding companies. [397]

(e) Arguments of the third parties

(i) Japan

7.417 According to Japan, under Article 12.2.2 of the Anti-Dumping Agreement the reasons for all factual and legal issues related to an authority's final determination must be disclosed. Authorities cannot pick and choose the issues on which they will provide an explanation.[398]

(ii) Saudi Arabia

7.418 According to Saudi Arabia, the public notices referred to in Article 12.2.2 of the Anti-Dumping Agreement must contain sufficient detail to allow interested parties to discern either the significance or lack thereof of the factors the investigating authority was obligated to address in its analysis.[399]

(f) Evaluation by the Panel

7.419 The United States argues that China acted inconsistently with its obligations under Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement on the basis that MOFCOM did not provide the factual and legal basis underlying its resort to "facts available" for the purposes of calculating the "all others" dumping rate for unknown exporters.[400]

7.420 We note that a number of other panels have exercised judicial economy in relation to claims under Articles 12.2 or 12.2.2 of the Anti-Dumping Agreement in circumstances where a substantive inconsistency with another provision of the Anti-Dumping Agreement has been found.[401] However, in the circumstances of this case, the Panel is of the view that findings under the public notice provisions may be relevant in the context of implementation. Consequently, we consider that such findings will be useful in reaching a positive solution to the dispute and therefore we will proceed to examine the United States' claims in this regard.[402]

7.421 The information in the preliminary determination relating to the "all others" dumping rate is set forth in paragraph 7.405 of this Report. The final determination states that for those United States companies that neither responded to the investigation nor submitted questionnaire responses,

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[397] China's first written submission, paras. 247-248 and China's opening statement at the first meeting of the Panel, para. 47. See also, summary of China's argument at para. 7.399 of this Report.

[398] Japan's third party submission, para. 26.

[399] Saudi Arabia's third party submission, para. 44.

[400] In its first written submission, the United States quotes the text of Article 12.2 of the Anti-Dumping Agreement. Although in paras. 180 and 182 of its first written submission the United States refers to "Article 12" of the Anti-Dumping Agreement, the arguments in paras. 179-180 are based on the text of Article 12.2. Therefore, we infer that the United States' reference to Article 12 in paras. 180 and 182 is intended to be a reference to Article 12.2, and we have made a finding accordingly. This is consistent with the United States' panel request (see WT/DS414/2, para. 11).

[401] See, for example, Panel Report, *EC – Bed Linen*, para. 6.259.

[402] See also, the United States' response to Panel question 29.

MOFCOM applied "the best information available and facts already known and [used] the information submitted by the responding companies to make determination on dumping and dumping margin".[403]

7.422 The United States' position is that the preliminary and final determinations should have disclosed the factual and legal basis for MOFCOM's resort to "facts available", including the facts supporting a finding that the unknown exporters refused access to, or otherwise did not provide, necessary information within a reasonable period, or significantly impeded the investigation.[404]

7.423 Although the United States' claim relates to both the preliminary and final determinations, given that it is the final determination that is currently in force and providing the basis for the imposition of anti-dumping duties, we consider it necessary to make findings only in relation to it. In our view, making a finding in relation to the preliminary determination would not assist in the securing a positive solution to the dispute.

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

7.425 Further, the final determination does not set forth the relevant matters of fact, or the findings and conclusions reached on all issues of fact, leading to the conclusion the 64.8% was the appropriate anti-dumping margin for "all other" exporters. Although the final determination states that best information available was used, including information submitted by the responding companies, it is now clear that MOFCOM applied *adverse* facts available to calculate the dumping margin. However, there is no indication of this in the final determination and it still remains unclear exactly what factual findings MOFCOM made to support a dumping of margin of 64.8%, which differs markedly from the rate calculated for the two respondent companies.

7.426 Consequently, the Panel concludes that MOFCOM did not disclose in "sufficient detail the findings and conclusions reached on all issues of fact" or "all relevant information on matters of fact". Therefore, we find that China acted inconsistently with Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement.

H. WHETHER CHINA ACTED INCONSISTENTLY WITH ARTICLE VI:2 OF THE GATT 1994

1. Provision at issue

7.427 Article VI:2 of the GATT 1994 provides, relevantly:

> In order to offset or prevent dumping, a contracting party may levy on any dumped product an anti-dumping duty not greater in amount than the margin of dumping in respect of such product.

[403] Final Determination, Exhibit CHN-16, p. 31.
[404] United States' first written submission, para. 181.

2. Arguments of the United States

7.428 The United States claims that China acted inconsistently with Article VI:2 of the GATT 1994 because the duties China levied on the "all other" companies that were unknown to the investigating authority were greater in amount than the appropriate margin of dumping.

7.429 The United States refers to its argument that China impermissibly assigned an adverse facts available margin of 64.8% when calculating the "all others" margin for companies that were unknown to the investigating authority. As a result of the adverse assumptions made in this calculation, the anti-dumping duty levied on the unknown companies was greater in amount than the margin of dumping that could have permissibly been calculated under the Anti-Dumping Agreement.[405]

3. Arguments of China

7.430 In response to the United States' claim under Article VI:2 of the GATT 1994, China refers the Panel to its substantive arguments regarding the "all others" anti-dumping duty rate.[406]

4. Evaluation by the Panel

7.431 The United States' claim under Article VI:2 of the GATT 1994 challenges the amount of the anti-dumping duty levied by MOFCOM on the "all other" unknown exporters. The Panel has previously concluded that the manner in which MOFCOM calculated the "all others" anti-dumping duty rate, and the way in which it disclosed the facts underlying this calculation, are inconsistent with both substantive and procedural provisions of the Anti-Dumping Agreement, namely Articles 6.8, 6.9 and 12.2.2.

7.432 Given that we have upheld the United States' claims under the Anti-Dumping Agreement with respect to the "all others" anti-dumping duty rate, it is not necessary also to make a finding with respect to this measure under Article VI:2 of the GATT 1994. The Appellate Body found in *Canada – Wheat Exports and Grain Imports* that the practice of judicial economy "allows a panel to refrain from making multiple findings that the same measure is inconsistent with various provisions when a single, or a certain number of findings of inconsistency, would suffice to resolve the dispute".[407] In our view, the findings made under Articles 6.8, 6.9, 12.2 and 12.2.2 of the Anti-Dumping Agreement with respect to the "all others" anti-dumping duty rate are such as to allow the DSB to make sufficiently precise recommendations and rulings in order to ensure the effective resolution of this dispute.[408] Therefore, we exercise judicial economy in relation to the United States claim under Article VI:2 of the GATT 1994.

[405] United States' first written submission, para. 185.
[406] China's first written submission, para. 251.
[407] Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para. 133.
[408] See also, Appellate Body Reports, *Brazil – Retreaded Tyres*, para. 257 and *Australia – Salmon*, para. 223.

I. WHETHER CHINA ACTED INCONSISTENTLY WITH ARTICLES 12.7, 12.8, 22.3 AND 22.5 OF THE SCM AGREEMENT IN RELATION TO THE "ALL OTHERS" RATE FOR UNKNOWN EXPORTERS IN THE COUNTERVAILING DUTY INVESTIGATION

1. Whether China acted inconsistently with Article 12.7 of the SCM Agreement in using facts available to calculate the subsidy rate for unknown exporters

(a) Provision at issue

7.433 The United States' claim relates to Article 12.7 of the SCM Agreement. Article 12.7 provides:

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

(b) Factual Background

7.434 In calculating the subsidy rates, MOFCOM applied "facts available" to both the investigated and the "unknown" exporters, although the rationale for doing so, and the "facts available" relied upon, were different for the two categories of exporters. MOFCOM's method for notifying the initiation of an investigation was the same as that outlined in relation to the anti-dumping investigation, described at paragraph 7.371 of this Report. We recall that, apart from AK Steel and ATI, no United States producers/exporters of GOES registered for investigation. As a result, in calculating the "all others" subsidy rate for producers/exporters other than AK Steel and ATI, MOFCOM applied "facts available".

(c) Arguments of the United States

7.435 The United States notes that in its final determination MOFCOM published an "all others" subsidy rate of 44.6%, a rate more than two times higher than the highest rate for an investigated company. MOFCOM provided no explanation regarding how it arrived at this figure, apart from a reference indicating that it had made use of "facts available".[409]

7.436 The United States argues that the use of facts available in calculating the "all others" rate is inconsistent with Article 12.7 of the SCM Agreement. MOFCOM appears to have determined that by failing to register as respondents, "all other" producers/exporters failed to provide MOFCOM with necessary information and thereby triggered the use of facts available. However, the United States' position is that, read in the context of Article 12.1, the use of facts available under Article 12.7 is conditioned on the investigating authority specifying in sufficient detail the information required and alerting the interested party that failure to supply such information will result in a determination based on facts available.[410] According to the United States, apart from AK Steel and ATI, MOFCOM did not identify the existence of any other United States exporters/producers of GOES. Indeed, the United States notes China's response to a Panel question, in which it acknowledges that "there are no other U.S. producers" of GOES, apart from AK Steel and ATI. According to the United States, this

[409] United States' first written submission, para. 124.
[410] United States' first written submission, para. 129.

begs the question of what basis China had to apply adverse facts available to non-existent entities for failure to cooperate.[411]

7.437 Even if it were appropriate for MOFCOM to make use of facts available, the United States maintains that the manner in which MOFCOM applied facts available was incorrect. According to the Appellate Body in *Mexico – Anti-Dumping Measures on Rice*, in applying facts available, all substantiated facts on the record of the investigation must be taken into account and "facts available" must only fill in information an interested party refused access to or failed to provide. The United States argues that to obtain a facts available subsidy rate of 44.6%, MOFCOM must have included in its calculation the unsupported factual assertions contained in the petition, relating to subsidy programmes that MOFCOM ultimately found to be non-countervailable.[412] In so doing, MOFCOM ignored substantiated facts on the record, namely that certain programmes did not provide specific subsidies.[413]

(d) Arguments of China

7.438 In response to the United States' argument that MOFCOM did not give notice to all interested parties before applying facts available, China responds that MOFCOM provided notice to the United States Government, AK Steel and ATI. It also placed a copy of the petition in its public reading room and published public notices of initiation. On this basis, China concludes that "notice was thereby given to each known interested party".[414]

7.439 In relation to the United States' complaint that the manner in which MOFCOM applied facts available was inconsistent with Article 12.7 of the SCM Agreement because substantiated facts on the record were ignored, China confirms that the facts are "as identified by the United States". Further, in response to a Panel question, China explicitly acknowledges that "the 'all others' subsidy rate for unknown exporters contained programmes found by MOFCOM not to confer countervailable subsidies on the two known respondents".[415]

(e) Arguments of the Third Parties

(i) European Union

7.440 The European Union argues that the inclusion of programmes found during the course of the investigation not to be countervailable in the calculation of the all others subsidy rate constitutes an abusive use of facts available, contrary to Article 12.7 of the SCM Agreement.[416]

(ii) India

7.441 According to India, the conclusion that can be drawn from Article 6.8 and paragraph 1 of Annex II of the Anti-Dumping Agreement, namely that facts available may not be applied to an

[411] United States' second written submission, para. 120. In the United States' response to Panel question 13, the United States submits that even though it knows of no other producers of GOES, apart from AK Steel and ATI, the "all others" rates would apply to any new United States shipper of GOES to China.

[412] United States' second written submission, para. 124.

[413] United States' first written submission, paras. 136-137.

[414] China's first written submission, para. 238 and China's opening statement at the first meeting of the Panel, para. 43.

[415] China's response to Panel question 14, para. 48. See also, China's first written submission, para. 239, where China indicates that the "all others" rate was derived from the estimate of the subsidy margin found in the petition and based on all programmes under investigation.

[416] European Union's third party submission, para. 16.

interested party that has not been asked to submit any information, can also be drawn from Article 12.7 of the SCM Agreement.[417]

(iii) Japan

7.442 According to Japan, the "basic discipline" under the Anti-Dumping Agreement, namely that an investigating authority may not use facts available to determine the margin of dumping for exporters/producers that were not given notice of the information required of them, also applies under the SCM Agreement, by virtue of Articles 12.1 and 12.7. This is supported by the Appellate Body's comment in *Mexico – Anti-Dumping Measures on Rice* that "it would be anomalous if Article 12.7 of the SCM Agreement were to permit the use of 'facts available' in countervailing duty investigations in a manner markedly different from that in anti-dumping investigations".[418]

(iv) Korea

7.443 According to Korea, Article 12.7 is concerned with due process, and the Panel should carefully review whether the due process rights have been adequately respected in this case.[419]

(v) Saudi Arabia

7.444 In Saudi Arabia's view, the standards that apply to the use of facts available in anti-dumping proceedings apply equally to countervailing duty proceedings. Further, facts available should only be used to fill in gaps in the necessary information and must not be used in a punitive manner.[420]

(f) Evaluation by the Panel

7.445 The United States' claim under Article 12.7 of the SCM Agreement raises two questions for the Panel to determine. First, whether the conditions for the application of facts available to the unknown exporters were met and second, whether the manner in which facts available were applied was consistent with Article 12.7.

(i) Whether the conditions for the application of facts available were met

7.446 The Panel recalls that the investigating authority took the same steps to attempt to notify interested parties as it did in the context of the anti-dumping investigation.[421] The United States' claim raises the question of whether, despite the absence in the SCM Agreement of an equivalent to Annex II of the Anti-Dumping Agreement, an investigating authority is required to notify interested parties of the "necessary information" before the investigating authority may resort to facts available.[422] In this regard, the Panel considers that Article 12.1 provides relevant context for the interpretation of "necessary information" in Article 12.7. In particular, Article 12.1 provides that interested parties "shall be given notice of the information which the authorities require". This confirms that it is for the investigating authorities to define the parameters of the "necessary information" and to give interested parties notice of this information. Therefore, even in the absence of an equivalent to Annex II, the Panel considers that a similar conclusion to that reached under Article 6.8 of the Anti-Dumping Agreement is appropriate. In particular, in the absence of being notified of the "necessary information" in the context of a particular investigation, it is difficult to conclude that unknown exporters refused access to or failed to provide necessary information or

[417] India's third party statement, paras. 6.3-6.4.
[418] Japan's third party statement, para. 16.
[419] Korea's third party statement, para. 10.
[420] Saudi Arabia's third party submission, paras. 14, 16 and 20-21.
[421] See para. 7.371 of this Report.
[422] This issue is also considered at para. 7.289 of this Report.

otherwise impeded the investigation. Indeed, in the circumstances of this case, where there were in fact no other exporters/producers of GOES during the period of investigation, apart from AK Steel and ATI, a conclusion that non-existent exporters refused to provide information or impeded the investigation seems illogical.[423]

7.447 We note that our conclusion finds support in the reasoning used by other panels to have considered Article 12.7 of the SCM Agreement. In particular, the panel in *Mexico – Anti-Dumping Measures on Rice* noted that exporters not given notice of the information required of them cannot be considered to have failed to provide necessary information.[424] Further, in *US – Anti-Dumping and Countervailing Duties (China)*, the United States' investigating authority did not request specific necessary information because it did not realize the need for such information until late in the investigation. The panel held that this circumstance did not warrant the resort to facts available. The panel noted that Article 12.7 of the SCM Agreement permits recourse to facts available only when an interested party (i) refuses access to necessary information within a reasonable period; (ii) otherwise fails to provide such information within a reasonable period; or (iii) significantly impedes the investigation.[425] The panel held that the exporters in question did not refuse access to necessary information. Rather, it was clear that the investigating authority did not ever request the information to be provided.[426] Consequently, the panel found that none of the conditions permitting the recourse to facts available were satisfied and the United States had acted inconsistently with Article 12.7.[427]

7.448 In sum, the Panel concludes that in applying "facts available" to exporters that were not notified of the information required of them, and that did not refuse to provide necessary information or otherwise impede the investigation, China acted inconsistently with Article 12.7 of the SCM Agreement.

(ii) The manner in which facts available were applied

7.449 In the Panel's view, the United States' has a strong claim that MOFCOM applied facts available in a manner inconsistent with Article 12.7 of the SCM Agreement by including programmes found by MOFCOM not to confer countervailable subsidies in the calculation of the "all others" subsidy rate. Indeed, China does not seriously contest this aspect of the United States' case, but merely confirms that the calculation of the "all others" subsidy rate occurred in this manner.

7.450 The Panel recalls the Appellate Body's findings in *Mexico – Anti-Dumping Measures on Rice* regarding the way in which facts available may be applied under Article 12.7 of the SCM Agreement. The Appellate Body noted that although the SCM Agreement does not include an equivalent to Annex II of the Anti-Dumping Agreement, this does not mean that there are no conditions under the SCM Agreement to govern which "facts" might be "available" for an investigating authority to use when a respondent fails to provide necessary information.[428] According to the Appellate Body, Article 12 of the SCM Agreement "set[s] out evidentiary rules that apply throughout the course of the…investigation".[429] The Appellate Body held that the due process obligation under Article 12.1, namely that an interested party be permitted to present all the evidence it considers relevant, concomitantly requires that the investigating authority, where appropriate, take into account the information submitted by an interested party. Further, the Appellate Body found that Article 12.7 is intended to ensure that the failure of an interested party to provide necessary information does not

[423] See China's response to Panel question 13, para. 47.
[424] Panel Report, *Mexico – Anti-Dumping Measures on Rice*, footnote 211.
[425] Panel Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 16.9.
[426] Panel Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 16.15.
[427] Panel Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 16.16.
[428] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 291.
[429] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 292.

hinder an agency's investigation. Therefore, the provision permits the use of facts available only for the purpose of replacing information that may be missing, in order to arrive at an accurate subsidization or injury determination.[430] The Appellate Body concluded that the recourse to facts available does not permit an investigating authority to use any information in whatever way it chooses. The recourse to facts available is "not a licence to rely on only part of the evidence provided".[431] Rather, to the extent possible, an investigating authority making use of facts available must take into account all of the substantiated facts on the record.

7.451 In the view of the Panel, the conclusion reached by the Appellate Body finds support within the terms of Article 12.7 of the SCM Agreement. The fact that resort to facts available is conditioned on refusal to supply necessary information suggests that it should be used to replace only that information to which the refusal relates. Further, the Panel accords significance to the fact that China does not address the Appellate Body's findings or suggest any reasons for the Panel to depart from them, despite a specific Panel question to China asking it to comment on this aspect of the reasoning in *Mexico – Anti-Dumping Measures on Rice*.[432]

7.452 Therefore, the Panel concludes that by ignoring substantiated facts on the record, namely that certain programmes included in the application did not confer countervailable subsidies, China acted inconsistently with Article 12.7 of the SCM Agreement.

2. Whether China acted inconsistently with Article 12.8 of the SCM Agreement by failing to inform interested parties of the essential facts under consideration in calculating the "all others" subsidy rate

(a) Provision at issue

7.453 Article 12.8 of the SCM Agreement provides:

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

(b) Factual Background

7.454 Following the preliminary determination, and prior to issuing its final determination, MOFCOM issued a final disclosure document, including certain disclosures regarding the subsidy rates to be applied to the investigated companies and to the "unknown" exporters.

(c) Arguments of the United States

7.455 The United States explains that in its preliminary determination, MOFCOM established an "all others" subsidy rate of 12%. Prior to the final determination, MOFCOM released its final disclosure document, in which it revealed that the "all others" subsidy rate had increased to 44.6%. The only explanation given for the increase was that MOFCOM had relied on "facts available" in its calculation.[433] Although the United States objected to the unexplained increase, MOFCOM imposed

[430] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, paras. 292-293.
[431] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 294.
[432] China's response to Panel question 15.
[433] United States' first written submission, para. 144.

an "all others" subsidy rate of 44.6% in its final determination. MOFCOM explained that the rate was calculated according to information submitted by the petitioner.[434]

7.456 The United States argues that MOFCOM did not disclose the "essential facts" forming the basis for its imposition of a 44.6% all others subsidy rate. The United States argues that this is particularly troublesome given that MOFCOM changed its calculation, and the basis for its calculation, including to the use of facts available, between the preliminary and final determinations, resulting in a nearly quadrupling of the subsidy rate. The United States and interested companies were unable adequately to defend their interests because they were unaware of the factual basis for MOFCOM's determination.[435]

(d) Arguments of China

7.457 In response to the United States' claim that MOFCOM failed to inform the parties of the "essential facts" under consideration forming the basis of the application and calculation of the all others subsidy rate, China argues that the final disclosure and the final determination revealed that the all others rate was based upon information disclosed by the petitioners. China states that in its submissions, the United States readily identified this as the source of the information underlying the all others rate.[436]

(e) Arguments of third parties

(i) European Union

7.458 The European Union agrees with the United States on the "essential facts" that should have been disclosed in relation to the "all others" subsidy rate. The European Union submits that if the United States' allegations are confirmed with respect to the lack of disclosure, China has acted inconsistently with Article 12.8 of the SCM Agreement.[437]

(ii) Japan

7.459 In relation to the "all others" subsidy rate, Japan argues that the government actions which the investigating authority characterizes as a subsidy, and the calculation of the per-unit *ad valorem* subsidy rates, are "essential facts" to be disclosed in accordance with Article 12.8 of the SCM Agreement.[438]

(iii) Saudi Arabia

7.460 Saudi Arabia notes that the disclosure of "essential facts" under Article 12.8 of the SCM Agreement must occur prior to the final determination, to allow sufficient time for parties to defend their interests. [439]

[434] United States' first written submission, para. 145.
[435] United States' first written submission, paras. 149-152.
[436] China's first written submission, para. 240; China's opening statement at the first meeting of the Panel, para. 44 and China's response to Panel question 25, para. 101.
[437] European Union's third party submission, paras. 17-20.
[438] Japan's third party submission, paras. 23-24.
[439] Saudi Arabia's third party submission, para. 25.

(f) Evaluation by the Panel

7.461 In its preliminary determination, MOFCOM established an "all others" subsidy rate of 12% for unknown exporters. In the final disclosure document, released prior to the final determination, MOFCOM indicated that the rate had increased to 44.6%. The final disclosure stated:

> "The margin for all other American companies was calculated based on information submitted by the petitioners pursuant to article 21 of the CVD regulations" [where Article 21 of the Chinese regulations pertains to the use of facts available].[440]

7.462 According to the United States, MOFCOM should also have disclosed:

(i) the facts leading to the conclusion that the use of "facts available" was appropriate;

(ii) the facts leading to the conclusion that 44.6% was the appropriate subsidy rate; and

(iii) the facts underpinning the calculation of the 44.6% rate and the details of the calculation.[441]

7.463 Article 12.8 of the SCM Agreement requires the disclosure of the essential facts under consideration "which form the basis of the decision whether to apply definitive measures". We agree with the statement of the panel in *Mexico – Olive Oil* that "essential facts" are those that underlie an investigating authority's final findings and conclusions in respect of the essential elements that must be present for the application of definitive measures. In the case of a countervailing duty investigation, these elements are subsidization, injury and causation.[442] Given that an investigation must be terminated and countervailing duties cannot be imposed where the amount of subsidization is *de minimis*, the rate of subsidization also forms the basis of the decision whether to apply definitive measures. Therefore, the essential facts underlying an investigating authority's conclusions regarding the amount of subsidization should also be disclosed under Article 12.8.

7.464 In our view, China acted inconsistently with the disclosure obligations under Article 12.8 of the SCM Agreement. In particular, MOFCOM's finding of subsidization was based upon a number of underlying facts, including those leading to the conclusion that the application of "facts available" was warranted. In the circumstances of this case, where China acknowledges that there were in fact no other exporters of GOES, apart from AK Steel and ATI, it is not clear how non-existent exporters failed to provide necessary information or otherwise impeded the investigation. MOFCOM should have disclosed the facts leading to this conclusion in order to allow interested parties to defend their interests.

7.465 Further, the "facts available" actually relied upon by MOFCOM, resulting in a subsidy rate of 44.6%, should have been disclosed in accordance with Article 12.8 of the SCM Agreement. Given the significant increase in the "all others" subsidy rate between the preliminary determination and the final disclosure, and the large disparity between the all others "facts available" subsidy rate and the rates calculated for the known exporters, a more detailed disclosure of the "essential facts" under consideration leading to an "all others" rate of 44.6% was required to allow the United States to defend its interests.

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[440] Final Disclosure document, Exhibit US-26, p. 41.

[441] United States' first written submission, para. 148 and United States' opening statement at the first meeting of the Panel, para. 62.

[442] Panel Report, *Mexico – Olive Oil*, para. 7.110.

7.466 Therefore, the Panel finds that China acted inconsistently with Article 12.8 of the SCM Agreement in failing to disclose certain essential facts underlying its decision to apply an "all others" subsidy rate of 44.6%.

3. Whether China acted inconsistently with Articles 22.3 and 22.5 of the SCM Agreement in relation to the public notice and explanation of its determination of the "all others" subsidy rate

(a) Provisions at issue

7.467 Articles 22.3 and 22.5 of the SCM Agreement provide:

> 22.3 Public notice shall be given of any preliminary or final determination, whether affirmative or negative…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.
>
> 22.5 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…shall contain…all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures…due regard being paid to the requirement for the protection of confidential information. In particular, the notice…shall contain…the reasons for the acceptance or rejection of relevant arguments or claims made by…the exporters and importers.

(b) Factual Background

7.468 Following the issuance of the preliminary determination and the final disclosure documents, on 10 April 2010, MOFCOM issued its final determination for the anti-dumping and countervailing duty investigations.

(c) Arguments of the United States

7.469 The United States claims that China acted inconsistently with Articles 22.3 and 22.5[443] of the SCM Agreement on the basis that MOFCOM did not provide, in the public notice of the final determination, any rationale for its decision to apply adverse facts available to "all other" United States producers/exporters of GOES. Further, the final determination did not include information on the facts and reasons that led MOFCOM to conclude that a 44.6% subsidy rate was an appropriate "all others" rate, an explanation of which was particularly necessary given that the subsidy rates for the two respondent companies were substantially lower. The United States also complains that MOFCOM did not reveal the facts underpinning the calculation of the 44.6% rate and the details of the calculation itself.[444] The United States argues that MOFCOM's failure is particularly troublesome given that MOFCOM changed its "all others" rate calculation, and the basis for it, between the preliminary and final determinations.[445]

[443] United States' response to Panel question 30.
[444] United States' response to Panel question 30, para. 50.
[445] United States' response to Panel question 30, para. 52.

(d) Arguments of China

7.470 China does not provide arguments in response to the United States' claim.[446]

(e) Arguments of third parties

(i) Japan

7.471 Japan notes that under Article 22.5 of the SCM Agreement, the reasons for all factual and legal issues related to an authority's final determination must be disclosed. Authorities cannot pick and choose the issues on which they will provide an explanation.[447]

(f) Evaluation by the Panel

7.472 The United States' claims under Articles 22.3 and 22.5 of the SCM Agreement relate to the explanation in the final determination regarding the "all others" subsidy rate for unknown exporters. The final determination states "[f]or other U.S. companies who did not submit questionnaire responses, the Investigating Authority made a determination on *Ad Valorem* subsidy rate according to the information submitted by the Petitioners pursue to Article 21 of the *Anti-Subsidy Regulations*" (where Article 21 relates to the use of facts available).[448]

7.473 Articles 22.3 and 22.5 of the SCM Agreement require that the public notice of a final determination (or otherwise a separate report), set forth in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities. Article 22.5 also requires that the reasons leading to the imposition of final measures be disclosed.

7.474 The final determination does not set forth the relevant matters of fact leading to the conclusion that 44.6% was the appropriate subsidy rate for "all other" exporters. Although the final determination states that the "all others" subsidy rate was based upon information submitted by the applicants, it is now clear that this included information on programmes that MOFCOM had found not to constitute countervailable subsidies. However, there was no indication of this in the final determination and it was not clear from the determination what relevant facts led to an "all others" rate that was substantially higher than the subsidy rate calculated for the two known exporters. Consequently, the Panel concludes that MOFCOM did not disclose in "sufficient detail the findings and conclusions reached on all issues of fact" or "all relevant information on matters of fact". Therefore, China acted inconsistently with Articles 22.3 and 22.5 of the SCM Agreement.

J. PRICE EFFECTS ANALYSIS

1. Whether China acted inconsistently with Articles 15.1 and 15.2 of the SCM Agreement and Articles 3.1 and 3.2 of the Anti-Dumping Agreement in relation to MOFCOM's analysis of the price effects of subject imports

(a) Introduction

7.475 MOFCOM conducted a single injury and causation analysis pertinent to both the anti-dumping and countervailing duty investigations. Further, a cumulative assessment of injury was performed, which collectively took into account GOES imports from both the United States and

[446] See Part F of China's first written submission, where China responds only to the claims under Articles 12.7 and 12.8 of the SCM Agreement in relation to MOFCOM's determination of the "all others" countervailing duty rate for unknown exporters.

[447] Japan's third party submission, para. 26.

[448] Final Determination, Exhibit US-28, p. 49.

Russia. In its final determination, MOFCOM found that China's GOES industry sustained material injury and that there was a causal link between this injury and the dumped imports of GOES from Russia, and the dumped and subsidized imports of GOES from the United States. In the course of its injury analysis, MOFCOM found that the effect of subject imports was to "significantly depress[] and suppress[] the price of domestic like products."[449]

7.476 The United States challenges MOFCOM's finding that the dumped and subsidized imports had significant price effects. In particular, the United States challenges MOFCOM's findings on price undercutting, price depression and price suppression. The United States contends that MOFCOM's analysis of these price effects is conclusory, fails to reflect an objective examination of the evidence, and is not based on positive evidence. The United States contends that MOFCOM's price effects analysis is therefore contrary to Articles 3.1 and 3.2 of the Anti-Dumping Agreement, and Articles 15.1 and 15.2 of the SCM Agreement.

7.477 China submits that MOFCOM properly found adverse price effects from the increasing volume of subject imports. In particular, China asserts that MOFCOM properly found price suppression and price depression in 2008 and 2009. China submits that MOFCOM did not make specific findings about price undercutting, and was not required to do so. Furthermore, China contends that even if the Panel were to find MOFCOM's analysis of price effects to be WTO-inconsistent, the Panel should still affirm the overall finding of causation under Article 3 of the Anti-Dumping Agreement and Article 15 of the SCM Agreement.

(b) Provisions at issue

7.478 Articles 3.1 and 3.2 of the Anti-Dumping Agreement provide:

> 3.1 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.
>
> 3.2 With regard to the volume of the dumped imports, the investigating authorities shall consider whether there has been a significant increase in dumped imports, either in absolute terms or relative to production or consumption in the importing Member. With regard to the effect of the dumped imports on prices, the investigating authorities shall consider whether there has been a significant price undercutting by the dumped imports as compared with the price of a like product of the importing Member, or whether the effect of such imports is otherwise to depress prices to a significant degree or prevent price increases, which otherwise would have occurred, to a significant degree. No one or several of these factors can necessarily give decisive guidance.

7.479 Articles 15.1 and 15.2 of the SCM Agreement are identical, except that the phrase "dumped imports" is replaced by the phrase "subsidized imports".

(c) Arguments of the United States

7.480 The United States submits that Article 3.1 of the Anti-Dumping Agreement and Article 15.1 of the SCM Agreement impose two important requirements regarding injury determinations. The first is that the determination be based on "positive evidence", which the Appellate Body has described as

[449] Final Determination, Exhibit CHN-16, page 59.

evidence that is "relevant and pertinent with respect to the issue being decided, and that has the characteristics of being inherently reliable and trustworthy".[450] The second requirement is that the injury determination involve an "objective examination" of the volume of the dumped or subsidized imports, their price effects and the impact on the domestic industry. The Appellate Body has found that an "objective examination" must be conducted in good faith, must be based on data that provides an accurate and unbiased account of what is being examined and must be conducted without favouring the interests of any particular party.[451]

7.481 The United States also notes that Article 3.2 of the Anti-Dumping Agreement and Article 15.2 of the SCM Agreement describe in further detail the nature of the examination that authorities must conduct to determine the price effects of dumped or subsidized imports. In particular, the investigating authority must consider whether the imports have resulted in price undercutting, price depression or price suppression in the domestic market. The United States challenges each of these three alleged aspects of MOFCOM's analysis.[452] In doing so, the United States first establishes that MOFCOM's determination was indeed based on both volume and price effects, rather than volume effects only.

(i) Price Undercutting

7.482 The United States notes that MOFCOM does not expressly make a finding of significant price undercutting. Nevertheless, the United States argues that several of its findings suggest that an essential predicate of the price effects analysis is that the prices for the imports under investigation were lower than the prices of domestically produced products. The United States notes that China has acknowledged that MOFCOM made findings about the "low prices" of subject imports.[453] According to the United States, MOFCOM purported to rely on information about the price levels of the imports, and found that these price levels were "low" in comparison with the domestic like product.

7.483 Furthermore, although the United States accepts the proposition (as argued by China) that an investigating authority can make a finding of significant price effects without finding significant underselling, the United States relies on the panel report in *EC – Salmon (Norway)* to argue that the question of significant price underselling must in any event be *considered* (even if there is ultimately no determination that significant price underselling exists). Furthermore, the United States contends that examination of relative price levels of the domestically produced product and the imports under investigation is an important element in ascertaining whether price depression or suppression is actually the effect of the imports, as opposed to some other factor.

7.484 With respect to the substance of MOFCOM's alleged price undercutting findings, the United States argues that MOFCOM never disclosed any underlying facts that would support the finding that the exporters of GOES adopted a "low price" strategy. There is no indication regarding how MOFCOM conducted a price comparison and the only price comparison result reported is that the imports under investigation were not priced lower than domestically produced products during the first quarter of 2009.[454] Further, the United States contends that the undisclosed and unspecified "records" of the petitioners in which the low price strategy of the exporters is allegedly reflected

[450] United States' first written submission, para. 207.
[451] United States' first written submission, para. 208.
[452] United States' first written submission, para. 209.
[453] China's first written submission, para. 296. See also, China's opening statement at the first meeting of the Panel, para. 57.
[454] United States' first written submission, paras. 210-211.

cannot constitute positive evidence of low "prices" absent some proof that the records reflect the prices actually charged by the exporters.[455]

(ii) Price Depression

7.485 The United States makes arguments about both (i) the actual existence of significant price depression during the period of investigation, and (ii) whether any such price depression can properly be attributed to subject imports. According to the United States, it is not enough for the investigating authority merely to demonstrate price depression. The authority must also establish that any price depression was an effect of the dumped or subsidized imports.

7.486 Regarding the existence of significant price depression *per se*, the United States argues that MOFCOM's price depression analysis is devoid of evidentiary support and is contradicted by the only available evidence. The sole price depression finding made by MOFCOM was that "[b]ecause subject merchandise was kept at a low price, and the import volumes of subject merchandise increased greatly since 2008, domestic producers had to lower their prices to keep market share". The United States notes MOFCOM's finding that domestic prices increased by 6.66% in 2007 and by 14.53% in 2008. The United States contends that MOFCOM never made a finding that depression occurred in 2008. The United States notes that, according to China, MOFCOM had quarterly domestic price data showing that prices decreased by 15.3% in the last quarter of 2008.[456] However, the United States contends that the only finding made by MOFCOM in respect of 2008 was that domestic prices increased by 14.53% in that year. The United States asserts that, according to the information disclosed by MOFCOM, the only period during which prices for domestically produced GOES declined was the first quarter of 2009, when prices dropped by 30.25%. The United States further asserts that MOFCOM failed to explain how any such price depression was "significant".

7.487 The United States asserts that MOFCOM purported to show that price depression was an effect of subject imports by relying on comparisons between "low" import prices and allegedly higher prices for domestically produced products. The United States contends that this finding was not supported by positive evidence. The United States asserts that MOFCOM did not collect information in a manner designed to yield accurate or unbiased information about price levels. For instance, nothing in MOFCOM's determinations indicates that it relied upon actual pricing data. Rather, MOFCOM references only average unit values for the imports, without providing an explanation of why average unit data was a reasonable proxy for pricing data. Further, MOFCOM relied upon average unit values that were an aggregate of Russian and United States imports, even though separate data would have been available.[457] Finally, MOFOCM collapsed all transactions for 2006, 2007 and 2008 into a single observation for each calendar year. In the light of this, the United States argues that MOFCOM manipulated the data to minimize its accuracy and comprehensiveness.[458]

7.488 Concerning the issue of whether any price depression in the last quarter of 2008 could properly be attributed to subject imports, the United States asserts that China does not contend, and there is no indication in the portions of the MOFCOM record disclosed to the Panel, that MOFCOM conducted any similar quarterly analysis concerning other factors pertinent to whether price depression was the effect of the imports. Without the comprehensive quarterly analysis that MOFCOM failed to conduct, the record indicates no more than increasing imports were coincident with increasing domestic prices for certain portions of 2008, but were coincident with declining prices for other portions of 2008. In such circumstances, attributing the price declines for a portion of the year to the imports under investigation is not a conclusion that "is reasoned and adequate, in light of

[455] United States' first written submission, para. 214.
[456] See China's response to Panel question 33, para. 121.
[457] United States' first written submission, paras. 216-217.
[458] United States' first written submission, para. 221.

the evidence on the record and other plausible alternative explanations."[459] MOFCOM's use of quarterly data for 2008 only for the purpose of examining domestic price levels "was selective and provided only a part the picture" of what might have caused any pricing declines in the fourth quarter.[460] The United States contends that MOFCOM therefore failed to undertake an objective examination of the data.

7.489 The United States notes MOFCOM's finding that price depression existed in the first quarter of 2009. The United States contends, though, that the import volume of GOES during this period, relative to Chinese consumption, did not increase "greatly". The market share of imports increased by 1.17%, which was almost the same as the increase in the domestic industry's market share, namely 1.04%. Further, the price of the imports under investigation during the first quarter of 2009 was in fact higher than the prices for domestically produced products.[461] For these reasons, the United States submits that price depression in the first quarter of 2009 could not properly be treated as an effect of subject imports.

(iii) Price Suppression

7.490 As for price depression, the United States makes arguments about both (i) the actual existence of significant price suppression during the period of investigation, and (ii) whether any such price suppression can properly be attributed to subject imports. According to the United States, it is not enough for the investigating authority merely to demonstrate price suppression. The authority must also establish that any price suppression was an effect of the dumped or subsidized imports.

7.491 The United States notes that MOFCOM's price suppression conclusion concerning 2008, namely that "the sales price for the domestic like product failed to cover rising costs", is not supported by positive evidence. In particular, MOFCOM disclosed no information regarding the domestic industry's cost levels during the period of investigation. In fact, the information that MOFCOM did disclose indicates that pre-tax profits increased in 2008. The United States argues that this is not consistent with the usual understanding of price suppression, namely that prices and sales revenue do not increase commensurately with cost. The United States argues that, contrary to the requirements of Article 3.2 of the Anti-Dumping Agreement and Article 15.2 of the SCM Agreement, China did not identify any evidence to demonstrate that the imports under investigation prevented price increases that would otherwise have occurred.[462] The United States contends that, in the light of MOFCOM's finding that domestic prices increased by 14.53% in 2008, MOFCOM would need to have established that the imports under investigation precluded the domestic industry from achieving price hikes significantly greater than 14.53%. This MOFCOM failed to do.

7.492 The United States contends that materials China introduced to the Panel in connection with the first written submission raise serious questions about whether MOFCOM's analysis of changes in the "price-cost differential" was objective. MOFCOM's analysis assumes that the underlying cost structure of the industry was static from 2007 to 2008, and that the only factors that changed were the volume and pricing of the imports under investigation. According to the United States, though, there were significant changes in the domestic industry's structure from 2007 to 2008. In particular, the United States notes that, according to the applicants, domestic producer Baosteel began production operations in May 2008.[463] When they begin production, steel production facilities frequently incur

[459] The United States refers to the Appellate Body Report in *US – Anti-Dumping and Countervailing Duties (China)*, para. 516.

[460] The United States refers in this regard to the Appellate Body Report in *Mexico – Anti-Dumping Measures on Rice*, para. 176.

[461] United States' first written submission, paras. 223-226.

[462] United States' first written submission, paras. 229-230.

[463] Application, Exhibit CHN-2, pp. 95, 102-03.

high start-up costs.[464] The increased costs associated with a new facility can skew any analysis of the industry's ability to recover costs. The United States asserts that MOFCOM apparently did not examine, and certainly made no findings, whether the Chinese industry in 2007 and the Chinese industry in 2008 were actually comparable for purpose of cost comparisons.

7.493 The United States contends that, even assuming *arguendo* that a comparison of 2007 and 2008 cost data is valid, China overlooks a central point that is critical to the analysis required by Article 3.2 of the Anti-Dumping Agreement and Article 15.2 of the SCM Agreement. In certain circumstances, an industry may forego price increases for its own benefit, and not as a response to import competition. If an industry can sell greater quantities exercising some price restraint – which may be achieved either by cutting prices or 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. According to the United States, the experience of China's GOES industry during 2008 illustrates this. During 2008, sales quantities of the Chinese GOES industry increased by 5.04%. Because, as previously explained, the prices the domestic industry charged also increased that year, sales revenues increased by 20.3%. As a result, the industry's pre-tax profit increased by 1.24% in 2008.[465] Thus, the information disclosed by MOFCOM indicates that, because it was able to garner additional sales, the Chinese industry's financial condition improved in 2008 notwithstanding the increase in the per unit ratio of cost to sales revenues. In the light of these circumstances, to satisfy the requirements of Articles 3.2 and 15.2, MOFCOM needed to provide some reasoned explanation of why the change in the per-unit ratio was significant. It did not do so.

7.494 With respect to MOFCOM's price suppression finding for the first quarter of 2009, the United States argues that the finding was not based upon an objective examination of the record. MOFCOM found that the "great increase" in quantity of imports during the first quarter of 2009 was the cause of the adverse change in the domestic industry's price-cost differential during the first quarter of 2009. However, in reaching this conclusion, MOFCOM relied on data relating to only three months of a 39 month period of investigation.[466] According to the United States, an analysis of the entire data set for the period of investigation as a whole indicates that there was not a sufficient nexus between increasing quantities of subject merchandise and significant price suppression. For example during the period 2006-2008, although the quantity of imports increased, the domestic industry's prices and profits also increased.[467] Therefore, the evidence indicates that the Chinese GOES industry was able to increase revenues more rapidly than its costs rose, notwithstanding a large increase in the quantity of imports under investigation. The United States argues that by confining its examination to data relating to the first quarter of 2009, MOFCOM's analysis was skewed and failed to reflect an objective examination of the evidence.[468] The United States also contends that, although China argues that the 2009 data indicate a continuation of the price suppression found in 2008, the absence of any basis for MOFCOM's finding of price suppression in 2008 also undermines its finding of price suppression in the first quarter of 2009.

7.495 Furthermore, the United States submits that MOFCOM's stated reason for finding that the increasing ratio of costs to sales revenues in the first quarter of 2009 was the effect of the subject imports was the purported "low price" strategy adopted by the importers under investigation.[469] The

[464] See "Scheduling a Successful Start-Up", *Iron Age*, July 1992, Exhibit US-40, p. 2 (noting that new steel production facilities can be characterized by various start-up problems which can seriously impact earnings).

[465] Essential Facts Under Consideration Which Form the Basis of the Determination on Industry Injury, 5 March 2010, ("Final Injury Disclosure document"), Exhibit CHN-29, sec. VI(3), (5), (6).

[466] United States' first written submission, paras. 231-232.

[467] United States' first written submission, paras. 232-234.

[468] United States' first written submission, paras. 234 and 236.

[469] Final Determination, Exhibit CHN-16, sec. VI (Industry Injury)(III)(3).

United States recalls its argument (in respect of price depression) that there is no positive evidence that the imports followed a "low price" policy and China does not even attempt to defend this finding.

(d) Arguments of China

7.496 China argues that MOFCOM correctly analysed price effects and that the United States' arguments to the contrary are without merit.

(i) Price undercutting

7.497 China notes that the United States' arguments concerning price undercutting rest on the mistaken premise that MOFCOM made price undercutting findings. However, China submits that MOFCOM relied on the low prices of subject imports only as a supporting factor and did not make a specific finding of price undercutting.[470] Furthermore, China contends that MOFCOM had positive evidence supporting its statements regarding "low prices". While China asserts that MOFCOM did not go into as much detail about this secondary issue because it not make any detailed and specific findings of price undercutting, China contends that the record clearly supported MOFCOM's statements about "low price". China refers in this regard to evidence in the public version of the application which, according to China, was confirmed by confidential information collected by MOFCOM.

7.498 Further, contrary to the United States' arguments, China contends that it was under no obligation to find price undercutting under Article 3.2 of the Anti-Dumping Agreement or Article 15.2 of the SCM Agreement.[471] In this regard, China notes that the United States itself concedes that an authority is not required to make a determination of price undercutting. As to the issue of whether or not price undercutting must be "considered", China disagrees with the finding by the panel in *EC – Salmon (Norway)* that the question of price undercutting must be considered. China contends that the text of both Article 3.2 and Article 15.2 uses the key term "or." In other words, the authority "shall consider" either price undercutting or price depression or price suppression. Nothing in the text suggests that all three must each be considered. An authority may "consider" price depression and price suppression, and by doing so fully comply with the obligations in Article 3.2 and Article 15.2. In addition, the United States' view that analysis of price undercutting is essential is at odds with the absence of any requirement for the authorities to use any particular methodology. To the extent that an obligation to "consider" price undercutting does exist, China contends that MOFCOM's determination properly discussed the issue of relative prices. After considering all the facts, though, MOFCOM chose to base its determination on price depression and price suppression.

7.499 Furthermore, China submits that any concerns about price undercutting do not affect MOFCOM's conclusions about price depression or price suppression. China contends that both price depression and price suppression can occur regardless of whether subject import prices are higher or lower than domestic prices.

7.500 Regarding the United States' argument that MOFCOM failed to engage in an analysis of "transaction prices,"[472] China contends that MOFCOM did not pursue specific findings on price undercutting in this particular case because it did not believe such findings were the most appropriate analytic tool given the data available in this case. Moreover, MOFCOM also had to take into account the fact that it would be conducting analysis based on cumulated subject imports, so that any transaction specific data would be blurred and obscured when combined on a cumulated basis. For

[470] China's first written submission, paras. 255-256.
[471] China's first written submission, para. 301.
[472] United States' response to Panel question 32, para. 63.

both of these reasons, MOFCOM focused the broader measure of average prices as reflected in average unit values.

(ii) Price depression

7.501 China submits that MOFCOM properly made findings of price depression for 2008 and 2009 on the basis of positive evidence. Although the United States argues that a price depression finding was made only for 2009, China states that MOFCOM found price depression in both 2008 and 2009 and cites statements on the record to support this. China argues that the positive evidence to support this finding was the domestic pricing data before MOFCOM.[473] Although in the final determination MOFCOM's findings were based on average domestic prices over an annual basis, which did not demonstrate price depression over 2008, China submits that MOFCOM had collected quarterly data showing that domestic prices fell by 15.3% in the last quarter of 2008.[474]

7.502 In relation to the price depression finding for the first quarter of 2009, China submits that the United States' arguments are related to causation and do not acknowledge the "undisputed fact" that in early 2009 domestic prices fell by more than 30%. China further contends that, even if the gain in subject import volume in early 2009 was modest relative to the market,[475] the increase was still an increase of more than 23% compared to the comparable period in 2008. Moreover, domestic prices still fell sharply in early 2009. China contends that the United States argument looks at early 2009 in isolation, and ignores the fact that the 1.17 percentage point gain in market share was in addition to the 5.6 percentage point increase in market share that had just taken place the year before. Even more telling, the United States overlooks the impact of the further gain in United States market share. China asserts that the gain of 1.17 percentage points of market share over one quarter would annualize to a gain of 4.7 percentage points – almost as large as the gain in subject import market share in 2008. Moreover, the United States argument does not acknowledge the effect of subject import volume in 2008 on prices in 2009. China asserts that, in the light of the large increase of subject imports in 2008 and the 5.5 percentage point gain of market share, domestic producers began 2009 concerned about their shipments and market share and decided to lower prices to stop the loss of market share. According to China, the underlying facts and MOFCOM's discussion of those facts mean that the pricing trends in late 2008 and early 2009 need to be considered together.

7.503 China notes the United States argument that MOFCOM found that price depression was an effect of the low price of subject imports. China asserts that price depression can occur with or without price undercutting, in the sense that price depression does not depend on any comparison with subject import price levels. China further asserts that price depression can result from the volume of subject imports. China contends that the United States implicitly admits as much, when it argues that the price depression "was not *solely* because imports were increasing."[476] China contends that this is what MOFCOM found, in the sense that the volume of subject imports increased significantly in 2008 and began to capture market share, and the domestic industry reacted by lowering their prices to try to retain market share, which lead to the price depression. According to China, MOFCOM found that the "sharp increase" in the volume of subject imports depressed domestic industry prices. Furthermore, China submits that Article 3.2 of the Anti-Dumping Agreement and Article 15.2 of the SCM Agreement require only the showing of the *existence* of the adverse price effects – the declining prices (price depression), or the price-cost squeeze and declining profitability (price suppression) – and do not require any explanation as to the causes of these adverse price effects.

[473] China's first written submission, paras. 280-288.
[474] China's response to Panel question 33, para. 121.
[475] United States' first written submission, para. 226.
[476] United States' first written submission, para. 72 (emphasis added).

(iii) Price suppression

7.504 China contends that MOFCOM had positive evidence for the findings of price suppression in 2008 and 2009. According to China, in relation to the price suppression findings in 2008, the United States ignores some of the evidence relied upon by MOFCOM, and misunderstands other aspects of it. In particular, the United States ignores the statement in the final determination that in 2008 domestic GOES products failed to absorb rising costs, resulting in a 7% drop in the cost-price differential. According to China, this was the positive evidence to support MOFCOM's price suppression finding for 2008.[477] Further, China rejects the United States' claim that MOFCOM failed to disclose cost data, since the price-cost squeeze documented by MOFCOM for both 2008 and the first quarter of 2009 was demonstrated by the drop in per unit profits. China asserts that the fall in per unit profits in the first quarter of 2009 was even more pronounced than the fall in 2008. China contends that MOFCOM was entitled to analyse price suppression on the basis of per unit profits, as neither Article 3.2 of the Anti-Dumping Agreement nor Article 15.2 of the SCM Agreement impose any specific requirements as to the methodology for analysing the price suppression. China contends that the United States misunderstands the data in arguing that the small gain in pre-tax profits in 2008 is inconsistent with price suppression.[478]

7.505 China denies that MOFCOM "assume[d]" that increasing subject imports "caused" the decline in per unit profits.[479] Rather, MOFCOM explained that the significant increasing volume of subject imports captured significant market share, and this volume of subject imports forced the domestic industry to react by lowering its prices so as to stop the continued loss of market share. China asserts that the prices were lowered because of this competition with subject imports, and were thus lower than they otherwise would have been.

7.506 In relation to MOFCOM's price suppression findings for 2009, China contends that the United States "essentially concedes the existence of price suppression in the first quarter of 2009".[480] According to China, the United States' arguments about the 2009 price suppression findings are essentially arguments about causation, rather than the existence of price suppression. China repeats its argument that there is no need to show that adverse price effects were caused by subject imports. According to China, Article 3.2 of the Anti-Dumping Agreement and Article 15.2 of the SCM Agreement require only the showing of the *existence* of the adverse price effects – the declining prices (price depression), or the price-cost squeeze and declining profitability (price suppression) – and do not require any explanation as to the causes of these adverse price effects.

(e) Arguments of third parties

(i) European Union

7.507 With respect to MOFCOM's price undercutting analysis, the European Union notes that it is unclear what evidence supports the comparative analysis of prices mentioned by MOFCOM or the finding of the exporters' strategy of charging low prices. According to the European Union, it seems that MOFCOM did not rely on any information about actual pricing levels. It is also not evident that MOFCOM objectively evaluated the exporters' arguments.[481]

7.508 The European Union also submits that it is not clear on what positive evidence MOFCOM based its price depression analysis. MOFCOM did not specify the period to which its finding of price

[477] China's first written submission, paras. 256-264.
[478] China's first written submission, paras. 270-271.
[479] United States' first written submission, para. 79.
[480] China's first written submission, para. 275.
[481] European Union's third party submission, paras. 40-41.

depression refers. Further, the available evidence does not support the conclusion that such a finding would apply to 2008 or the first quarter of 2009.[482]

7.509 The European Union argues that MOFCOM's price suppression findings do not seem to be supported by positive evidence. For example, MOFCOM did not disclose any data concerning the domestic industry's cost levels or trends. Further, MOFCOM does not seem to have provided an explanation for its finding that in 2008, while the price of domestic products and producers' profits were increasing, imports prevented greater price increases than those which occurred. Finally, MOFCOM's price suppression analysis appears to be based upon data concerning only the last three months of the investigated period of 39 months.[483]

7.510 Therefore, the European Union agrees with the United States that MOFCOM's price undercutting, price depression and price suppression analyses are inconsistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement and 15.1 and 15.2 of the SCM Agreement.[484]

(f) Evaluation by the Panel

7.511 The United States claims that MOFCOM's price effects analysis is not based on positive evidence and that, in conducting its price effects analysis, MOFCOM did not engage in an objective examination of the evidence.

7.512 We begin by considering the relevant issues regarding MOFCOM's finding of significant price depression. We then turn to MOFCOM's finding of significant price suppression. Before concluding, we also address the United States' claim regarding MOFCOM's alleged finding of price undercutting.

7.513 In addressing these issues, we recall that it is well established that the role of the Panel is not to conduct a *de novo* review nor simply defer to the conclusions of the investigating authority. Rather, we must determine whether the explanation for the conclusions reached by the investigating authority is reasoned and adequate in the light of other plausible alternative explanations.[485] Furthermore, we must determine whether the quality of the evidence relied on by MOFCOM met the "positive evidence" standard set forth in Article 3.1 of the Anti-Dumping Agreement and Article 15.1 of the SCM Agreement. In this regard, we recall that in *US – Hot Rolled Steel*, the Appellate Body clarified that "positive evidence" relates to the quality of the evidence that authorities may rely upon in making a determination, and that the evidence "must be of an affirmative, objective and verifiable character, and it must be credible".[486] In addition, 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."[487] We must also determine whether MOFCOM undertook an objective examination of the evidence. We note that the Appellate Body has found that an "objective examination" must be conducted in good faith, must be based on data that provides an accurate and unbiased account of what is being examined, and must be conducted without favouring the interests of any particular party.[488]

[482] European Union's third party submission, para. 43.
[483] European Union's third party submission, paras. 44-45.
[484] European Union's third party submission, paras. 42, 43 and 46.
[485] See, for example, Appellate Body Report, *US – Tyres (China)*, para. 280.
[486] Appellate Body Report, *US – Hot Rolled Steel*, para. 192.
[487] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, paras. 163-164.
[488] United States' first written submission, para. 208.

(i) Price depression

7.514 The United States challenges both MOFCOM's finding of the existence of significant price depression *per se*, and MOFCOM's finding that such price depression was an effect of subject imports. We address each issue in turn.

The existence of price depression *per se*

7.515 MOFCOM found that domestic prices rose and then fell[489] during the period of investigation. Specifically, MOFCOM found that:

> [C]ompared with the same period of the previous year, the price of domestic like products increased by 6.66% and 14.53% in 2007 and 2008 respectively, and it dropped by 30.25% in Q1 2009.[490]

7.516 The United States' arguments regarding the existence of price depression *per se* are focused on the year 2008. The United States asserts that any finding of price depression in 2008 would be inconsistent with the above-mentioned evidence that prices rose by 14.53% from 2007 to 2008. In response, China argues that MOFCOM found price depression in both 2008 and the first quarter of 2009. Regarding the existence of price depression in 2008, China refers to evidence on MOFCOM's record allegedly indicating that prices fell in the last quarter of 2008.

7.517 We do not consider it necessary to address the dispute between the parties regarding the existence of price depression in 2008. Even if prices did not fall in 2008, MOFCOM's final determination contains a finding that domestic prices did fall by 30.25% in the first quarter of 2009. The United States has not challenged this finding.[491] Nor has the United States contended that MOFCOM was not entitled to treat price depression of this magnitude as "significant" within the meaning of Article 3.2 of the Anti-Dumping Agreement and Article 15.2 of the SCM Agreement. In these circumstances, there is no basis for us to conclude that MOFCOM's determination of significant price depression could not rest on its finding that prices fell by 30.25% in the first quarter of 2009.

Whether price depression was an effect of subject imports

7.518 Having upheld MOFCOM's finding of the existence of significant price depression *per se*, we now consider the United States' claim against MOFCOM's finding that such price depression was an effect of subject imports. We begin by examining whether the provisions relied on by the United States, i.e. Article 3.2 of the Anti-Dumping Agreement and Article 15.2 of the SCM Agreement, require an investigating authority to demonstrate that the relevant price depression is an effect of subject imports. We then evaluate the relevant findings made by MOFCOM in the light of the principal arguments of the parties. While MOFCOM found that significant price depression was an effect of both the increase in volume of subject imports, and the low price thereof, the United States' arguments relate primarily to MOFCOM's finding that subject imports were priced lower than domestic products. Accordingly, we limit our examination to MOFCOM's finding that price depression was an effect of the low price of subject imports. We complete our evaluation by considering whether, even if MOFCOM's analysis of the price effects of subject imports was flawed, MOFCOM's finding that price depression was an effect of subject imports might nevertheless stand

[489] Final Determination, Exhibit CHN-16, p. 58.
[490] Final Determination, Exhibit CHN-16, p. 58.
[491] The United States' challenge regarding the first quarter of 2009 is directed at MOFCOM's finding that price depression was an effect of subject imports (see, for example, United States' first written submission, para. 226).

on the basis of MOFCOM's analysis of the effect of the increase in the volume of subject imports in depressing domestic prices.

> Whether Article 3.2 of the Anti-Dumping Agreement and Article 15.2 of the SCM Agreement require an investigating authority to demonstrate that the relevant price depression is an effect of subject imports.

7.519 The United States challenges MOFCOM's determination that the significant price depression found to exist was an effect of subject imports. The United States' arguments are premised on its position that, as a matter of law, an investigating authority is required by Article 3.2 of the Anti-Dumping Agreement or Article 15.2 of the SCM Agreement to demonstrate that any price depression found to exist is an effect of subject imports. China denies that any such obligation is contained in these provisions. According to China, the need to establish a link between price effects and subject imports is part of the broader obligations in Article 15.5 of the SCM Agreement and Article 3.5 of the Anti-Dumping Agreement to establish a causal link between subject imports and material injury suffered by the domestic industry.

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

7.521 In support of its argument that Article 3.2 of the Anti-Dumping Agreement and Article 15.2 of the SCM Agreement do not require an authority to show that adverse price effects are an effect of subject imports, China relies on the statement by the panel in *EC – Countervailing Measures on DRAM Chips* that:

> Article 15.2 of the SCM Agreement does not, as such, require an investigating authority to establish a causal link between the subsidized imports and the domestic prices which would require it to examine all other factors affecting domestic prices at the same time…. As written, Article 15.2 focuses on the effect of the subsidized imports on prices.[492]

7.522 In our view, the panel in *EC – Countervailing Measures on DRAM Chips* was dealing with a different issue than the one at hand. In particular, that panel had to consider Korea's claim that the European Communities should have examined a variety of factors known to have been affecting domestic prices, in addition to subject imports. The panel reasoned that such analysis of all known factors was not required under Article 15.2 of the SCM Agreement, but noted that such analysis was required under Article 15.5 of the SCM Agreement. The Panel in the present case is not confronted with this issue. The United States is not suggesting that MOFCOM should have considered the effect of other known factors on domestic prices. The United States is merely suggesting that MOFCOM was required, by Article 15.2 of the SCM Agreement, to consider the effect of subject imports on prices. Furthermore, the panel's statement that "Article 15.2 focuses on the effect of subsidized imports on prices" seems to be premised on the notion that subject imports should, in the context of Article 15.2 of the SCM Agreement, be shown to have an effect on domestic prices. Indeed, the very next sentence in the panel's report (which was omitted by China) states that "[t]he EC examined the effect of the subsidized imports on domestic prices and thus, in our view, complied with Article 15.2".

[492] Panel Report, *EC – Countervailing Measures on DRAM Chips*, para 7.338.

Accordingly, we do not accept that the report of the panel in *EC – Countervailing Measures on DRAM Chips* stands for the proposition that an authority is not required by Article 15.2 of the SCM Agreement to show that the relevant price depression is an effect of subject imports. As a result, we consider that the United States is entitled to pursue a claim under Article 3.2 of the Anti-Dumping Agreement and Article 15.2 of the SCM Agreement against MOFCOM's finding that the relevant price depression was an effect of subject imports. We now examine the merits of this claim.

Whether MOFCOM properly found that price depression was an effect of the low price of subject imports.

7.523 The United States' primary arguments against MOFCOM's finding that price depression was an effect of subject imports relate to MOFCOM's analysis of the effect of the price of subject imports on domestic prices, and MOFCOM's determination that subject imports were priced lower than domestic products. The United States contends that MOFCOM's findings are not based on an objective examination of positive evidence.

7.524 In this regard, we note MOFCOM's finding that subject import prices were "low" relative to domestic prices, and that there was a "pricing policy" of setting subject import prices lower than domestic prices.[493] According to China, these findings were based on positive evidence in the application, and positive evidence collected by MOFCOM during its investigation.[494] We shall examine the probative value of both types of evidence.

7.525 Turning first to evidence of "low" prices allegedly found in the application, we note that China refers to two tables showing that the weighted average price of imports from the United States and Russia together, and from the United States separately, was lower than the average price charged by the applicants during the period of investigation.[495] We note that this evidence in the application was not expressly referenced, or incorporated into, MOFCOM's final determination. Furthermore, regarding the reliability of the evidence, we note that the evidence indicates that subject import prices were lower than domestic prices in both 2008 and the first quarter of 2009. The fact that this is at odds with MOFCOM's own finding that subject import prices were not less than domestic prices during the first quarter of 2009[496] undermines the reliability of the evidence. For these reasons, we do not consider that the applicants' evidence could properly be treated as "positive evidence" supporting MOFCOM's finding that price depression was an effect of subject imports.

7.526 Turning next to the evidence collected by MOFCOM during its investigation, we shall first examine MOFCOM's reliance on a comparison of the average unit values ("AUVs") of subject imports and domestic sales. We shall then examine MOFCOM's reliance on certain contractual documents regarding an alleged "pricing policy" of setting subject import prices lower than domestic prices.

7.527 Regarding the AUV data collected by MOFCOM, China asserts that this data revealed a gap of 8 to 12% between the AUVs of subject imports and domestic sales.[497] Given the absence of any such evidence in MOFCOM's final determination, the Panel asked China to provide the confidential AUV data. In response, China provided ranges of the relevant AUVs, in order "to protect the sensitive [Business Confidential Information] of showing the exact level of the domestic AUV" of

[493] See, for example, Final Determination, Exhibit CHN-16, pp. 58 and 59.
[494] China's second written submission, para. 102.
[495] Application, Exhibit CHN-2, p. 98.
[496] Final Determination, Exhibit CHN-16, p. 70: "the Investigating Authority did not conclude that import price of the product concerned was lower than the price of the domestic like product in Q1 of 2009".
[497] China's second written submission, footnote 95. The AUVs relied on by MOFCOM represent the volume weighted average unit values for all transactions during a given calendar year.

each of the two domestic producers at issue.[498] Although China failed to respond fully to the Panel's request,[499] ultimately the Panel was able to address the issues raised by the United States using the more limited data provided by China.

7.528 We have a number of misgivings regarding the AUV data relied on by MOFCOM, particularly concerning MOFCOM's failure to consider the need for adjustments to ensure price comparability. First, we note that China has failed to rebut the United States' argument that the subject import and domestic AUVs were fixed at different levels of trade. According to the United States, the domestic AUVs reflected transactions between the domestic producer and the end user, whereas subject import AUVs were fixed at a higher level of trade, between the exporter and the first Chinese purchaser, which is typically an importer who resells to end users. Second, we note that the relevant AUVs included products of different grades, without any attempt by MOFCOM to adjust for differences in physical characteristics.[500] The inclusion of different grades is reflected in Exhibit US-41, which shows that the relevant grades were classified under at least two different tariff headings. China did not contest any of the data set forth in that Exhibit.[501] Third, the determination of a single price point intended to represent prices throughout the course of an entire year does not provide a sufficiently precise basis, in our view, for comparing prices. Given the possibility of prices varying over time, an objective and impartial investigating authority would rather conduct contemporaneous price comparisons, or at least comparisons during a relatively short period of time.

7.529 China does not deny that MOFCOM failed to make any form of adjustment to ensure price comparability. Rather, China argues that because MOFCOM did not make findings of price undercutting, "price comparability did not arise as an issue".[502] China contends that adjustments were not necessary because MOFCOM was not relying on the magnitude of price undercutting, but simply noting the existence[503] of price undercutting as a supporting fact for its findings on price depression, price suppression, and causation.[504]

7.530 We are not persuaded by China's argument. China concedes that MOFCOM relied on the existence of price undercutting. MOFCOM did so to show that price depression was an effect of the low price of subject imports relative to the price of domestic products. Thus, even though MOFCOM did not make a finding of significant price undercutting (i.e. price undercutting of a certain magnitude), MOFCOM did rely on a finding that subject import prices undercut domestic prices. In our view, a proper finding of the existence of price undercutting necessarily entails a comparison of prices,[505] and the authority should ensure that the prices it is using for its comparison are properly

[498] China's 25 November 2011 response to question (a) of the Panel questions dated 18 November 2011, p. 1.

[499] The panel notes that China had previously indicated that it was prepared to submit this confidential data (China's second written submission, footnote 95).

[500] Even if domestic products and subject imports are "like", adjustments to reflect differences in physical characteristics might still be necessary.

[501] The United States has also criticised MOFCOM's failure to report separate AUVs for subject imports from the United States and Russia respectively (United States' first written submission, para. 217). We recall that MOFCOM undertook a cumulative assessment of injury, which the United States has not challenged. Accordingly, there is no basis for us to find that MOFCOM should have reported separate AUVs for subject imports from the two target countries.

[502] China's response to Panel question 101, para. 142.

[503] China's response to Panel question 105, para. 161.

[504] China's response to Panel question 105, para. 161.

[505] MOFCOM itself acknowledged that it had undertaken a comparison of prices: "the relevant content of the determination makes a comparative analysis of price. There is an analysis on the low-price sales of the product concerned" (Final Determination, Exhibit CHN-16, p. 70). While China denies that this refers to any finding of price undercutting (China's first written submission, para. 299), we see no basis on which to conclude

comparable.[506] As soon as price comparisons are made, price comparability necessarily arises as an issue. MOFCOM's reliance on AUVs, without any consideration of the need for adjustments to ensure price comparability, is neither objective, nor based on positive evidence.

7.531 Regarding the evidence supporting MOFCOM's finding that there was a "pricing policy" of setting subject import prices lower than domestic prices, MOFCOM stated:

> During the on-the-spot verification, the petitioner provided contracts and records of price setting to show that a pricing policy aiming at setting the price down to a level lower than the price of the domestic like product was adopted by producers of product concerned.[507]

7.532 China submitted the relevant "contracts and records of price" to the Panel in the form of four BCI Exhibits, in response to a request from the Panel dated 18 November 2011. Exhibit CHN-37 contains a contract between a Russian trading company and a Chinese buyer of subject imports. Exhibits CHN-38, 39, and 40 provide examples of price negotiations between a Chinese supplier and its customers. China contends that in all three examples, "the Chinese supplier quoted a price, the customer responded by noting the specific amount by which the Chinese offer was higher than the alternatives available from Russian or U.S. suppliers, and the Chinese supplier was then forced to lower its price".[508]

7.533 Turning first to Exhibit CHN-37, we note that this contract establishes prices for certain subject imports. The contract also contains a provision whereby, in the words of the applicants, "the Russian companies … set their prices lower than [WISCO]".[509] While this contract may be of relevance regarding the broader relationship between domestic and subject import prices, we note that the contract is dated 9 January 2009. Accordingly, the contract was applicable during the first quarter of 2009. Since MOFCOM found that subject import prices were not lower than domestic prices in this period,[510] there was no valid basis for MOFCOM to determine that the Exhibit CHN-37 contract actually translated into price undercutting by subject imports. Rather, MOFCOM's finding that there was no price undercutting in this period undermines the probative value of Exhibit CHN-37. In the absence of any explanation as to why the Exhibit CHN-37 contract should trump MOFCOM's finding that subject imports were not priced lower than domestic products in the first quarter of 2009, we do not consider that an objective and impartial investigating authority could properly have relied on this contract to support a finding that subject imports were priced "lower" than domestic products in that period.

7.534 Regarding Exhibits CHN-38 and 40, we note that these price negotiations occurred in February 2009, with delivery scheduled in March and April 2009. The price negotiations referred to in Exhibit CHN-39 occurred in December 2008, with delivery scheduled for January 2009. Thus, the deliveries for all three sets of price negotiations were scheduled for the first quarter of 2009. Again, we note that MOFCOM found that subject import prices were not lower than domestic prices in that period. MOFCOM's finding that there was no price undercutting in this period undermines the

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that MOFCOM is referring to anything other than a comparative analysis of the price of subject imports relative to domestic sales.

[506] It may be, as alleged by China (China's response to Panel question 95(iii), para. 128), that certain adjustments would actually inflate subject import price. In our view, this observation simply confirms the need for appropriate adjustments to ensure that any price comparisons made are accurate and valid.

[507] Final Determination, Exhibit CHN-16, p. 58.

[508] China's 25 November 2011 response to question (b) of the Panel questions dated 18 November 2011, p. 2.

[509] Final Determination, Exhibit CHN-16, p. 59.

[510] Final Determination, Exhibit CHN-16, p. 70: "the Investigating Authority did not conclude that import price of the product concerned was lower than the price of the domestic like product in Q1 of 2009".

probative value of Exhibits CHN-38 and 40. In the absence of any explanation as to why the evidence contained in these Exhibits should trump MOFCOM's finding that subject imports were not priced lower than domestic products in the first quarter of 2009, we do not consider that an objective and impartial investigating authority could properly have relied on these negotiations to support a finding that subject imports were priced "lower" than domestic products in that period.

7.535 Finally, we note that MOFCOM also relied on "the drop of the import price of the product concerned in Q1 2009" when finding that price depression was an effect of subject imports. In this regard, we note MOFCOM's finding that subject import prices fell by 1.25% from the first quarter of 2008 to the first quarter of 2009.[511] However, MOFCOM also found that subject import prices increased by 2.97% and 17.57% in 2007 and 2008 respectively.[512] In addition, MOFCOM also found that the subject import price was not lower than the domestic price in the first quarter of 2009. In the absence of any further clarification by MOFCOM, we are not persuaded that an objective and impartial investigating authority could properly have found that, following a 17.57% increase in subject import price in 2008, a 1.25% decrease in subject import price in the first quarter of 2009 could have had the effect of depressing domestic prices, particularly as subject imports prices in any event remained higher than domestic prices in that period.

7.536 For all of the above reasons, we do not consider that the evidence available to MOFCOM could have allowed an objective and impartial investigating authority to determine that subject imports were priced lower than domestic products.

> Whether MOFCOM's finding that price depression was an effect of subject imports might nevertheless stand on the basis of MOFCOM's analysis of the effect of the increase in the volume of subject imports in depressing domestic prices.

7.537 We note China's argument that MOFCOM's finding that price depression was an effect of subject imports remains valid, despite any flaws in MOFCOM's analysis of the relative prices of subject imports and domestic products, because MOFCOM's finding of causation was also based on the effect of the increase in volume of subject imports. According to China, since MOFCOM based its analysis of causation on both volume effects and price effects, those price effects can support an overall finding of causation, even if they might not have been sufficient to justify finding a causal link on their own.[513] In considering this argument, we also note China's statements that "MOFCOM properly found adverse price effects from the increasing volume of subject imports,"[514] that MOFCOM drew a "key connection … between the domestic industry lowering prices in an effort to regain market share that had been lost to subject imports",[515] and that MOFCOM "relied heavily"[516] on volume effect. In addition, we note China's assertion that "[t]he low prices of subject imports were discussed more generally as a supporting factor for the analysis, not as the primary basis of the overall finding about price effects."[517]

7.538 Having regard to the various statements made by China, we understand China to argue that the increase in the volume of subject imports was the primary basis for MOFCOM's finding that price depression was an effect of subject imports, and that this primary basis for MOFCOM's finding is sufficient in and of itself to uphold that finding, even if MOFCOM's analysis of the supporting basis, i.e. the price effects of subject imports, is flawed. This argument raises the issue of whether the Panel

[511] Final Determination, Exhibit CHN-16, p. 58.
[512] Final Determination, Exhibit CHN-16, p. 58.
[513] China's first written submission, para. 328.
[514] China's first written submission, heading at para. 257.
[515] Chinas' second written submission, para. 81.
[516] China's second written submission, para. 121.
[517] China's first written submission, para. 295.

could uphold MOFCOM's finding that price depression was an effect of subject imports purely on the basis of MOFCOM's findings regarding the volume effects of subject imports. In addressing this issue, we begin by considering whether or not MOFCOM's final determination supports China's argument that volume effects were the primary basis for MOFCOM's finding that price depression was an effect of subject imports. We then consider certain guidance offered by the Appellate Body.

7.539 We do not consider that MOFCOM's final determination supports China's argument that volume effects were the primary basis for MOFCOM's finding that price depression was an effect of subject imports. In suggesting that MOFCOM relied more heavily on the volume of subject imports than the low price thereof, China actually refers to extracts from MOFCOM's final determination that appear to lend equal weight to considerations of both subject import volume and price. For example, when arguing that MOFCOM drew a "key connection … between the domestic industry lowering prices in an effort to regain market share that had been lost to subject imports",[518] China refers to MOFCOM's determination that:

> Under the impact of the large volume of imports of the product concerned *at a low price*, in order to keep the market share, the price of the domestic like product was lowered.[519]

7.540 Thus, MOFCOM refers both to the increased volume of subject imports, and the allegedly low price thereof. In addition, we note that the relevant sub-section in the final determination is entitled "The impact of the import *price* of the product concerned on the price of domestic like products".[520] In these circumstances, it is difficult to accept that MOFCOM's finding that price depression was an effect of subject imports was based primarily on the volume effect of subject imports. In our view, there is nothing in MOFCOM's determination to indicate that MOFCOM relied more heavily on the increase in the volume of subject imports than it did on the low price thereof for the purpose of establishing that price depression was an effect of subject imports.

7.541 Furthermore, we note the Appellate Body's finding in *Japan – DRAMs (Korea)* that:

> [T]here may be cases in which certain intermediate findings may be so central to the ultimate conclusion of an investigating authority that an error at an intermediate stage of reasoning may invalidate the final conclusion. Indeed, an evaluation of the significance of the different factors considered by an investigating authority is at the heart of the assessment a panel must make.[521]

7.542 We agree with this finding by the Appellate Body, and we consider that a panel must exercise great caution in determining whether or not to engage in analyses not undertaken by the investigating authority itself.[522] There is nothing in MOFCOM's determination to indicate that MOFCOM relied more heavily on the volume effects of subject imports than it did on the price effects thereof for the purpose of establishing that price depression was an effect of subject imports. Accordingly, we consider that MOFCOM's finding that subject imports were priced lower than domestic products was so central to MOFCOM's overall conclusion that price depression was an effect of subject imports that the above-mentioned flaws in this finding must invalidate MOFCOM's overall conclusion that price depression was an effect of subject imports. In these circumstances, it is not possible to

[518] Chinas' second written submission, para. 81.
[519] Final Determination, Exhibit CHN-16, p. 65 (emphasis added).
[520] Final Determination, Exhibit CHN-16, p. 58.
[521] Appellate Body Report, *Japan – DRAMs (Korea)*, paras. 131-135 (footnotes deleted).
[522] There is 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.

conclude that MOFCOM's finding that price depression was an effect of subject imports might be upheld purely on the basis of MOFCOM's findings regarding the effect of the increase in the volume of subject imports.

Conclusion

7.543 In the light of the foregoing, we find that MOFCOM's determination that price depression was an effect of subject imports was neither made pursuant to an objective examination, nor based on positive evidence.

(ii) Price suppression

7.544 MOFCOM found that there was significant price suppression in 2008 and the first quarter of 2009. MOFCOM's principal findings on price suppression were drafted in the following terms:

> Starting from 2008, the selling price of the domestic like products failed to absorb the rising costs, the price-cost differential dropped by 7% compared with 2007. In Q1 of 2009, while the unit cost of sales was rising compared to the same period of last year, the selling price greatly dropped by 30.25%, which resulted that the cost-price differential dropped continually and greatly by 75% compares to the same period of last year.[523]
>
> …
>
> To be more specific, the sharp increase of the import volume of the product concerned since the beginning of 2008 and the drop of the import price of the product concerned in Q1 2009 significantly depressed and suppressed the price of domestic like products.[524]

7.545 We begin by examining the United States' challenge against MOFCOM's finding of the existence of price suppression *per se*. We then consider the United States' arguments against MOFCOM's finding that price suppression was an effect of subject imports.

The existence of price suppression *per se*

7.546 We are not persuaded by the United States' argument that MOFCOM was precluded from relying on changes in the price-cost ratio between 2007 and 2008, and between the first quarter of 2008 and the first quarter of 2009, to establish the existence of price suppression. We note that neither Article 3.2 of the Anti-Dumping Agreement nor Article 15.2 of the SCM Agreement prescribes the manner in which an investigating authority must establish the existence of price suppression. Nor do these provisions exclude an investigating authority's reliance on changes in per unit price-cost ratios. In the light of the text of these provisions, we consider that an authority is entitled to find price suppression whenever prices have not been able to match increases in costs. Accordingly, we find no flaws in MOFCOM's reliance on changes in the price-cost ratio to find the existence of price suppression in 2008 and the first quarter of 2009.

Whether price suppression was an effect of subject imports

7.547 To challenge MOFCOM's finding that price suppression was an effect of subject imports, the United States relies on the same arguments as it did to challenge MOFCOM's finding that price

[523] Final Determination, Exhibit CHN-16, p. 58.
[524] Final Determination, Exhibit CHN-16, p. 59.

depression was an effect of subject imports. The United States also makes the additional argument that MOFCOM failed to consider whether, in the relevant factual circumstances, changes in the price-cost ratio merely reflected changes in the underlying cost structure of the domestic industry. In considering these arguments, we recall our finding that, pursuant to Article 3.2 of the Anti-Dumping Agreement and Article 15.2 of the SCM Agreement, an investigating authority must demonstrate that price depression is an effect of subject imports.[525] The same necessarily applies in respect of an authority's finding of price suppression. Since MOFCOM relied on the same analysis of the price effects of subject imports to show that both price depression and price suppression was an effect of subject imports, the same flaws that undermined MOFCOM's finding that price depression was an effect of subject imports also undermine MOFCOM's finding that price suppression was an effect of subject imports. In these circumstances, we are not required to consider the United States' additional argument concerning alleged changes in the underlying cost structure between 2007 and the later stages of the period of investigation. We shall do so, though, for the sake of completeness.

7.548 In the factual circumstances of the underlying investigation, we consider that the commencement of Baosteel's operations in May 2008 should have caused MOFCOM to examine whether the 2008 change in the price-cost ratio was merely a function of the inclusion of the additional start-up costs incurred by Baosteel,[526] rather than an adverse effect of subject imports on price. In particular, because of the risk of Baosteel's start-up costs distorting the results of a simple analysis of changes in the price-cost ratio, 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. While China argues that the cost structures in 2007 and 2008 were comparable because Baosteel would also have incurred start-up costs in 2007, we note that MOFCOM's record only includes costs booked by Baosteel as of 2008.[527] Accordingly, there is no basis in the record for the argument that Baosteel's start-up costs were also incurred prior to 2008, in a period when no price suppression occurred.

7.549 We do acknowledge that, prior to the arrival of Baosteel in 2008, the existing producer, WISCO, had already been expanding capacity. However, while some new capacity was introduced in 2007, a significantly greater amount of new capacity was introduced in 2008.[528] In our view, the introduction of such a significant amount of new capacity in 2008 should have caused MOFCOM to consider the possibility that the change in the price-cost ratio between 2007 and 2008 was, at least in part, a reflection of the start-up costs associated with the commencement of Baosteel's operations in May 2008, rather than an effect of subject imports. An objective and impartial investigating authority would have recognized the need to check that the underlying cost structures of 2007 and 2008 were comparable, and would have investigated accordingly.[529]

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[525] See paras. 7.519 - 7.522 of this Report.

[526] We note that China does not deny the United States' argument that the introduction of new steel production facilities incurs start-up costs.

[527] Application, Exhibit CHN-2, p. 109, Table 40. We note that China failed to rebut the United States' assertion (made in its reply to Panel question 75, para. 71) that "[t]he only pertinent information in the record available to the Panel and the United States indicates that, for purposes of the application, Baosteel did not provide MOFCOM with financial performance data for any period prior to 2008".

[528] According to the Final Injury Disclosure document, Exhibit CHN-29, p. 12, capacity increased by 35.33% in 2007, and by 53.67% in 2008. In addition, the capacity added by Baosteel was entirely new, whereas the capacity added by WISCO in 2007 was not entirely the result of opening new production facilities, but involved improving the efficiency of existing production facilities (See United States' response to Panel question 75, para. 71, referring to the Application, Exhibit CHN-2, pp. 100 and 107). We accept the United States' view (not contested by China) that the introduction of entirely new capacity is likely to engender greater start-up costs than mere improvements to existing capacity.

[529] The same applies to changes in the price-cost ratio between the first quarter of 2008 and the first quarter of 2009, when capacity increased by 80.13%. As Baosteel commenced operations only in May 2008,

7.550 China contends that even if there were start-up costs in 2008, such costs are a natural part of business. China asserts that a domestic industry should be able to expand, incur start-up costs, and yet still maintain its profitability. China asserts that the domestic industry could not do this because of the surge in the volume of subject imports during 2008. We accept that, up to a certain point, the market may allow companies to increase prices to recover increased costs, including costs associated with starting-up new production facilities. This process of price matching increasing cost cannot continue indefinitely, though. After a certain point, the market will consider that the increased costs are not commercially reasonable, and that prices should not be allowed to rise accordingly. The point at which this occurs will depend on many factors, including the relationship between capacity, supply (domestic and foreign) and demand. It is not for the Panel to determine *de novo* whether the start-up costs incurred by the domestic industry were commercially reasonable, such that domestic prices should have been able to rise to the full extent of such costs. This is a complex issue that should have been considered by MOFCOM. Instead, 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.

7.551 In the light of the foregoing, we find that MOFCOM's determination that price suppression was an effect of subject imports was not made pursuant to an objective examination, based on positive evidence.

(iii) Price undercutting

7.552 The basic issue raised by the parties is whether or not MOFCOM made a finding of "significant price undercutting" within the meaning of Article 3.2 of the Anti-Dumping Agreement and Article 15.2 of the SCM Agreement. The United States acknowledges that MOFCOM did not make an express finding of significant price undercutting, but contends that an essential predicate of MOFCOM's price effects analysis is that prices for subject imports were lower than domestic prices.[530] China denies that MOFCOM made any finding of significant price undercutting.

7.553 In examining MOFCOM's final determination, we are unable to find any express finding by MOFCOM that there was significant price undercutting by subject imports. Although, as discussed above, MOFCOM purported to establish the existence of price undercutting for the purpose of showing that price depression and price suppression were an effect of the relatively lower prices of subject imports, MOFCOM did not rely on the magnitude of such price undercutting. In particular, MOFCOM did not conclude that such price undercutting was "significant" within the meaning of Article 3.2 of the Anti-Dumping Agreement or Article 15.2 of the SCM Agreement. In these circumstances, there is no finding of "significant price undercutting" for us to review.

(iv) Conclusion

7.554 For the above reasons, we conclude that MOFCOM's findings regarding the price effects of subject imports are inconsistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement, and Articles 15.1 and 15.2 of the SCM Agreement.

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data for the first quarter of 2008 would not have included Baosteel's start-up costs. Accordingly, MOFCOM should also have considered whether the underlying cost structure of the first quarter of 2009 was comparable with that of the first quarter of 2008.

[530] United States' first written submission, paras. 210 and 211.

2. Whether China acted inconsistently with Articles 12.8 of the SCM Agreement and 6.9 of the Anti-Dumping Agreement in failing to disclose the essential facts under consideration in relation to its price effects analysis

(a) Provisions at issue

7.555 Articles 12.8 of the SCM Agreement and 6.9 of the Anti-Dumping Agreement provide:

> The authorities shall, before a final determination is made, inform all [interested Members and] interested parties of the essential facts under consideration which form the basis of the decision whether to apply definitive measures. Such disclosure should take place in sufficient time for the parties to defend their interests.[531]

(b) Factual Background

7.556 Following the preliminary determination, and prior to issuing its final determination, MOFCOM issued a final injury disclosure document, with the stated purpose of disclosing the "basic facts upon which the final injury determination is made".

(c) Arguments of the United States

7.557 The United States argues that the price effects analysis is inconsistent with Article 12.8 of the SCM Agreement and Article 6.9 of the Anti-Dumping Agreement because MOFCOM did not disclose the "essential facts" underlying the analysis and ultimately forming the basis for its decision to apply definitive measures. The United States explains that MOFCOM's injury determination is based upon a finding that the allegedly dumped and subsidized imports had significant price effects on the like domestic product. However, in its final injury disclosure document and its final determination, MOFCOM disclosed "strikingly few facts" regarding pricing. The United States submits that the findings are cursory and lack any apparent evidentiary basis.

7.558 According to the United States, China does not dispute MOFCOM's failure to disclose any information about price levels for the domestically produced product or any comparisons between prices for this product and the imports under investigation. The United States rejects China's argument that such information was not "essential" because MOFCOM did not rely on an underselling analysis. According to the United States, even if MOFCOM did not make a finding of significant underselling, it repeatedly referred to the purportedly "low prices" of the imports under investigation to justify its findings of price depression and price suppression. Information about the prices of domestically produced products, and whether these prices exceeded import prices, was an essential element in MOFCOM's finding that import prices were "low". However, MOFCOM did not disclose this information.[532]

7.559 The United States argues that MOFCOM did not disclose the following information central to its price effects analysis: [533]

(i) information about price levels for the domestically produced product;

(ii) the source of the information provided concerning pricing trends for the domestically produced product;

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[531] Where the text in brackets is included only in Article 12.8 of the SCM Agreement and not in Article 6.9 of the Anti-Dumping Agreement.

[532] United States' second written submission, para. 162.

[533] United States' first written submission, para. 191 and United States' second written submission, para. 164.

(iii) any comparisons between prices of the domestically produced product and prices of the imports under investigation. The United States notes that this information would not normally be confidential[534];

(iv) the purported "strategies" that the exporters of GOES from Russia and the United States devised to undercut domestic prices;

(v) the levels or trends of the domestic industry costs. The United States argues that this information is no more confidential than the other trends concerning the domestic industry that MOFCOM disclosed;

(vi) general information about what aspects of domestic producers' costs were increasing. The United States argues that to the extent the domestic industry's costs increased in 2009, information about the type of costs that increased is critical to understanding the basis of MOFCOM's findings on price suppression and depression; or

(vii) should the Panel agree that MOFCOM found declining prices for domestically produced GOES during the fourth quarter of 2008, information about quarterly price trends should have been disclosed. [535]

7.560 The United States argues that these facts were critical to MOFCOM's price effects analysis, which in turn was critical to its affirmative injury determination. The failure to disclose these "essential facts" seriously impaired the ability of interested parties to defend their interests.[536] Further, China provides no explanation regarding why non-confidential summaries of the information on pricing and costs could not be disclosed.[537]

(d) Arguments of China

7.561 China asserts that, contrary to the United States' claim, MOFCOM disclosed all of the "essential facts" under consideration, as required by Article 6.9 of the Anti-Dumping Agreement and Article 12.8 of the SCM Agreement. The disclosures can be found in the preliminary determination and the final injury disclosure report, which are the two documents containing all of the "essential facts" on which China relied in the final determination.[538]

7.562 According to China, the United States' claim overlooks the obligations on investigating authorities to protect confidential information, which can be found in Articles 6.5 and 12.2.2 of the Anti-Dumping Agreement and Articles 12.4 and 22.5 of the SCM Agreement. In the light of the fact that there were so few companies involved in the investigation, it was not possible to present aggregated information without breaching confidentiality obligations.[539] According to China, the United States has not identified any specific piece of information that was both an "essential fact" and could be disclosed while maintaining confidentiality.[540]

[534] United States' second written submission, para. 163.
[535] United States' second written submission, para. 165.
[536] United States' first written submission, paras. 195-196.
[537] United States' second written submission, para. 166.
[538] China's first written submission, para. 306 and China's opening statement at the first meeting of the Panel, para. 51.
[539] China's first written submission, paras. 307-308.
[540] China's opening statement at the first meeting of the Panel, para. 52.

7.563 In relation to the five specific pieces of information that the United States complains were not disclosed, China responds as follows:[541]

(i) Domestic prices - MOFCOM presented the trend in domestic prices, showing the percentage change from year to year. The actual level of prices was confidential information;

(ii) Source of information concerning domestic price trends - the source of information is not an "essential fact". Moreover, it was "quite clear" to any "reasonable reader" that the domestic industry pricing was drawn from the questionnaire responses submitted by the Chinese producers;

(iii) Price comparisons between domestically produced GOES and the subject imports - MOFCOM did not make a price undercutting finding and therefore the price comparisons were not "essential facts" forming the basis of its decision;

(iv) Evidence of description of the pricing strategies used by the exporters of GOES - MOFCOM disclosed the basic facts concerning the pricing strategies and was under no obligation to disclose evidence supporting its factual statements or further details that could compromise the confidentiality of the information; and

(v) Levels and trends of costs - MOFCOM did disclose the trends in costs. The level of costs was confidential information and therefore could not be disclosed.

7.564 China concludes that the United States has not made a *prima facie* case in relation to its claims under Article 6.9 of the Anti-Dumping Agreement and Article 12.8 of the SCM Agreement.[542]

(e) Arguments of third parties

(i) European Union

7.565 If information about price levels for domestically produced products was never disclosed to the interested parties, the European Union agrees with the United States that this should result in a finding that China acted inconsistently with Articles 12.8 of the SCM Agreement and 6.9 of the Anti-Dumping Agreement.[543]

(ii) Japan

7.566 With respect to MOFCOM's price effects analysis, Japan notes that MOFCOM seems to have made certain price comparisons. For example, in the final determination MOFCOM found that "the sale of the product concerned was kept at a low price".[544] According to Japan, the results of such a price comparison were "essential facts" which should have been disclosed, subject to confidentiality issues.[545]

(f) Evaluation by the Panel

7.567 According to the United States, five principal areas of MOFCOM's price effects analysis were not accompanied by adequate disclosure of the "essential facts under consideration" in accordance

[541] China's first written submission, paras. 310-314.
[542] China's first written submission, para. 317.
[543] European Union's third party submission, paras. 28-29.
[544] Japan's third party statement, para. 8.
[545] Japan's third party submission, paras. 11-13.

with Articles 12.8 of the SCM Agreement and 6.9 of the Anti-Dumping Agreement. In particular, the United States claims that MOFCOM did not disclose (i) the price levels for the domestically produced product; (ii) the source of the information on pricing trends for the domestically produced product; (iii) price comparisons between the domestically produced and imported products; (iv) information regarding the purported low price "strategies" adopted by the United States and Russian exporters of GOES; or (iv) the levels or trends of the domestic industry's costs.

7.568 The Panel will commence its analysis with a consideration of whether MOFCOM adequately disclosed essential facts on the price comparison between domestically produced and imported products. China's primary response to the United States on this point is that MOFCOM did not make a price undercutting finding. Rather, MOFCOM simply noted the low price of subject imports, and the relative price levels of such imports in comparison to the GOES produced in China, as supporting evidence for its conclusions regarding price suppression and price depression. Consequently, China argues that there were no "essential facts" relating to price comparisons that needed to be disclosed.

7.569 Articles 12.8 of the SCM Agreement and 6.9 of the Anti-Dumping Agreement require investigating authorities to "inform all interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures". In order to apply definitive measures at the conclusion of countervailing and anti-dumping investigations, an investigating authority must find dumping or subsidization, injury and a causal link Therefore, the "essential facts" underlying the findings and conclusions relating to these elements form the basis of the decision to apply definitive measures and should be disclosed. China characterizes its injury analysis as based on its price suppression and price depression findings. Even accepting China's argument that it did not make a price undercutting finding, nevertheless, its conclusion regarding the "low price" of subject imports was repeatedly referenced throughout its determination.[546] In the Panel's view, this conclusion formed an essential part of the reasoning MOFCOM used to support its price suppression and price depression findings. Therefore, MOFCOM was required to disclose not only the conclusion regarding the existence of a "low price", but also the "essential facts" supporting this conclusion, in order to allow interested parties to defend their interests.

7.570 In response to a Panel question regarding where in MOFCOM's determinations information regarding "low" or "lower" subject import prices can be found, China responds that the determinations included non-confidential summaries of the information underlying its findings of "low" subject import prices.[547] In this regard, China relies upon the following disclosures in the preliminary determination and the final injury disclosure document:

(i) The preliminary determination announces significant margins of dumping, demonstrating that United States exporters were charging lower prices in China than in their home market;

(ii) The preliminary determination and the final injury disclosure document state that a "pricing policy aiming at setting the price to a level lower than that of the domestic like product was adopted when selling the product concerned in China"[548];

(iii) The preliminary determination states that "there was no evidence supporting the claim" that Russian prices were not causing price suppression. According to China, this is a reference to the evidence that the parties had submitted;

[546] See, for example, Final Determination, Exhibit CHN-16, pp. 58, 59, 60, 61, 62, 63, 65.
[547] China's response to Panel question 90.
[548] Final Injury Disclosure Document, Exhibit CHN-29, p.15.

(iv) The final injury disclosure document refers to "data obtained from investigation" to highlight that Russian producers had a pricing policy of "setting the price to a lower level than that of the domestic like product"[549]; and

(v) The preliminary determination notes that the United States sales were below normal value and were supported by subsidies. It also notes the declining trend in subject import average unit values.

7.571 We acknowledge China's argument that the price comparison data at issue is confidential. As indicated in our reasons at paragraph 7.410 of this Report, where confidential information is an "essential fact under consideration", the disclosure obligations under Articles 12.8 of the SCM Agreement and 6.9 of the Anti-Dumping Agreement should be met through the use of non-confidential summaries.

7.572 In the Panel's view, the non-confidential disclosures relied upon by China do not provide a summary of the "essential facts" supporting the finding of "low" subject imports prices. In particular, disclosures regarding the existence of dumping and subsidization are not on point as they do not relate to the prices of subject imports, relative to GOES produced by the domestic Chinese industry, which is the matter at issue. In our view, the existence of dumping or subsidization cannot be used to infer the relative prices of subject imports and the domestically produced product.[550] Similarly, information on the trends in subject import average unit values does not indicate that the values are "lower" than the values of domestically produced GOES. Further, a mere reference to the existence of evidence to support a certain finding does not disclose or summarize the "essential facts" underlying the finding.

7.573 In the Panel's view, the references in the preliminary determination and the final injury disclosure document to the low pricing strategies of the Russian and United States exporters are also insufficient as a summary of the "essential facts" supporting the conclusion of "low" import prices. In order to allow the respondents to defend their interests, a summary of the "essential facts" supporting the finding of a "low price strategy" was required, rather than merely stating the conclusion that such a strategy existed. In response to a Panel question, China was able to provide additional non-confidential information regarding the price setting behaviour it was relying upon to conclude that a "low price strategy existed". For example, China stated that "the Chinese supplier quoted a price, the customer responded by noting the specific amount by which the Chinese offer was higher than the alternatives available from Russian or U.S. suppliers, and the Chinese supplier was then forced to lower its price".[551] This is more specific than the information included in the preliminary determination and the final injury disclosure document.[552] More importantly, in response to a Panel question, China provided non-confidential information regarding the dates of the transactions in which the "pricing strategies" were allegedly employed. Once provided with this information

[549] Final Injury Disclosure Document, Exhibit CHN-29, p.13.

[550] See also the United States' arguments on this point in United States' comments on China's response to Panel question 90, footnote 100.

[551] China's 25 November 2011 response to question (b) of the Panel questions dated 18 November 2011.

[552] The preliminary determination and the final injury disclosure included the following statements regarding the "pricing strategies" of the United States and Russian producers of GOES: "the pricing policy aiming at setting the price down to a level lower than the price of the domestic like product adopted by producers of product concerned"; "the price of imported GOES was set according to the variation of price of like products"; "the materials provided by the petitioner…demonstrated a pricing policy adopted by the producers of the product concerned who watched closely the price of the products of major producers in China and sold the imported products in a lower price"; and "relevant evidence shows that a pricing policy aiming at setting the price to a level lower than that of the domestic like product was adopted when selling the product concerned to the Chinese market".

regarding the timing of the transactions, the United States was able to challenge before the Panel the relevance of the transactions relied upon by China to support its price depression finding.[553] This information clearly formed a part of the "essential facts" underlying the finding of "low" import prices and ultimately the price depression finding.

7.574 It is clear MOFCOM considered a number of facts leading to the conclusion of "lower" subject import prices. For instance, in its second written submission, China disclosed that over the period 2006-2008, the average unit values of subject imports was 8%-12% below the average unit value of domestic shipments. In response to a request from the Panel, China provided, in the form of a non-confidential range, the percentage difference between the average unit values of subject imports and the average unit value of the domestic product for 2006, 2007 and 2008. In the Panel's view, these facts were "essential" to MOFCOM's conclusion that subject import prices were "low". China's disclosures during the Panel proceedings demonstrated that the facts could be summarized in non-confidential format. In the Panel's view, such summaries should have been included in the preliminary determination or the final injury disclosure document to allow interested parties to defend their interests.

7.575 The Panel concludes that the failure to disclose the "essential facts" underlying MOFCOM's finding of "low" subject import prices was inconsistent with Articles 12.8 of the SCM Agreement and 6.9 of the Anti-Dumping Agreement. Given this conclusion, the Panel does not consider it necessary to proceed to consider whether MOFCOM's disclosures on other matters, such as costs, were also inconsistent with Articles 12.8 of the SCM Agreement and 6.9 of the Anti-Dumping Agreement.

3. Whether China acted inconsistently with Articles 22.5 of the SCM Agreement and 12.2.2 of the Anti-Dumping Agreement in relation to the public notice and explanation of its price effects determination

(a) Provisions at issue

7.576 Articles 22.5 of the SCM Agreement and 12.2.2 of the Anti-Dumping Agreement provide, relevantly:

> 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…shall contain, or otherwise make available through a separate report, all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures…due regard being paid to the requirement for the protection of confidential information. In particular, the notice shall contain…the reasons for the acceptance or rejection of relevant arguments or claims made by…the exporters and importers.

(b) Factual Background

7.577 Following the issuance of the preliminary determination and the final disclosure documents, on 10 April 2010, MOFCOM issued its final determination for the anti-dumping and countervailing duty investigations.

[553] China's 25 November 2011 response to question (b) of the Panel questions dated 18 November 2011 and United States' 14 December 2011 comments on China's 25 November 2011 response to question (b). Also, see paras. 7.533-7.534 of this Report for the Panel's analysis of the relevance of the contracts, in the light of their timing, to the price effects analysis.

(c) Arguments of the United States

7.578 The United States claims that China acted inconsistently with Article 22.5 of the SCM Agreement and Article 12.2.2 of the Anti-Dumping Agreement because its final determination did not contain sufficient information regarding its price effects analysis.

7.579 In the United States' view, it is indisputable that MOFCOM's analysis of price effects was a consideration leading to the imposition of definitive measures. Consequently, Article 12.2.2 of the Anti-Dumping Agreement and Article 22.5 of the SCM Agreement require that MOFCOM provide "all relevant information" on the facts underlying the price effects analysis.[554] However, the United States argues that the price effects analysis is based upon the mere assertion that importers of GOES had "policies" or "strategies" of charging low prices.[555] The United States contends that the final determination does not contain any facts supporting this. Further, the final determination does not provide any information concerning price levels for the domestically-produced product and so does not contain any facts supporting a finding that prices of the merchandise under investigation were at any time lower than the prices of the domestically produced product.[556]

7.580 In response to China's argument that MOFCOM relied upon confidential information when making its findings on adverse price effects, the United States contends that China has not identified what, if any, document may contain the confidential findings MOFCOM failed to articulate in the final determination. According to the United States, the parties to an investigation, the exporting Member and much less members of a dispute settlement panel are not supposed to be placed in a position of guessing the basis for an authority's findings.[557]

7.581 The United States also argues that China acted inconsistently with Article 12.2.2 of the Anti-Dumping Agreement and Article 22.5 of the SCM Agreement because MOFCOM did not provide adequate reasons for the rejection of the arguments of the parties opposing the imposition of measures. For example, Russian and United States exporters argued that Chinese producers were actually the price leaders in the Chinese GOES market. MOFCOM dismissed this in a single sentence, which was utterly devoid of evidentiary basis: "[t]he relevant evidence shows that the low price policy was adopted when selling the subject merchandise in the Chinese market and forced Petitioners to drop the price of like products and caused the differential between price and cost to continue decreasing".[558]

(d) Arguments of China

7.582 China asserts that MOFCOM provided the "relevant information" and the "reasons" required under Article 22.5 of the SCM Agreement and Article 12.2.2 of the Anti-Dumping Agreement in relation to its price effects findings. The obligations under the provisions at issue must be considered in the light of an investigating authority's discretion to decide what is material to its determination and also the authority's obligations, as expressed in both provisions, to protect confidential information.[559]

7.583 In response to the United States' argument that MOFCOM did not provide sufficient detail regarding the "pricing strategy" employed by the exporters of GOES, China argues that MOFCOM provided as much information as it could, in the light of the need to protect confidential information. Further, MOFCOM was not obliged to disclose every detail about the pricing strategy. Rather, only

[554] United States' first written submission, paras. 200-201.
[555] United States' first written submission, para. 198.
[556] United States' first written submission, para. 201.
[557] United States' second written submission, para. 168.
[558] United States' first written submission, paras. 202-203.
[559] China's first written submission, paras. 319-321 and 327.

the information an investigating authority considers "material" need be provided.[560] Finally, China argues that the United States is mistaken in thinking that the "pricing strategy" was the centrepiece of MOFCOM's findings. The pricing strategy information was merely used as corroborating evidence to support its price suppression and depression findings.[561] China also rejects the United States' contention that MOFCOM did not provide sufficient reasons for rejecting the arguments of the exporters.[562]

(e) Arguments of third parties

(i) European Union

7.584 The European Union argues that if the United States' allegations regarding MOFCOM's failure to provide a meaningful description of numerous facts critical to its price effects analysis are correct, then China has acted inconsistently with Article 22.5 of the SCM Agreement and Article 12.2.2 of the Anti-Dumping Agreement.[563]

(ii) Japan

7.585 Japan submits that because the analysis of price effects was relevant to the injury determination, the authorities were required to provide a sufficiently detailed explanation of it.[564]

(iii) Saudi Arabia

7.586 According to Saudi Arabia, the public notices referred to in Article 12.2.2 of the Anti-Dumping Agreement and Article 22.3 of the SCM Agreement must contain sufficient detail to allow interested parties to discern either the significance or lack thereof of the factors the investigating authority was obligated to address in its analysis.[565]

(f) Evaluation by the Panel

7.587 The United States argues that China acted inconsistently with Articles 22.5 of the SCM Agreement and 12.2.2 of the Anti-Dumping Agreement on the basis that MOFCOM's final determination did not include facts supporting a finding that the United States and Russia had a strategy of charging low prices and supporting a finding that the prices of GOES from the United States and Russia were at any time lower than prices for the domestically produced product. The United States also complains that MOFCOM did not provide reasons for the acceptance or rejection of the relevant arguments of the exporters and importers.

7.588 The Panel will commence its analysis with a consideration of whether MOFCOM provided adequate public notice and explanation regarding its finding that the prices of GOES from the United States and Russia were "lower" than prices for the domestically produced product.

7.589 Articles 22.5 of the SCM Agreement and 12.2.2 of the Anti-Dumping Agreement require that the public notice or separate report released at the conclusion of an investigation contain "all relevant information on matters of fact and law and reasons which have led to the imposition of final measures…due regard being paid to the protection of confidential information". As indicated at paragraph 7.335 of this Report, when confidential information also forms part of the "relevant

[560] China's first written submission, para. 322.
[561] China's first written submission, para. 323.
[562] China's first written submission, paras. 324-326.
[563] European Union's third party submission, para. 34.
[564] Japan's third party submission, para. 37.
[565] Saudi Arabia's third party submission, para. 44.

information on matters of fact and law", within the meaning of Articles 22.5 and 12.2.2, an investigating authority can meet its dual obligations to disclose the relevant information while also protecting its confidentiality, by providing only a non-confidential summary of the confidential information in the public notice or separate report.

7.590 It is clear that the price effects analysis, in particular the findings of price suppression and price depression, were essential elements in MOFCOM's reasoning leading to the imposition of final measures. Even accepting China's argument that MOFCOM did not make a price undercutting finding, but rather relied upon the existence of "low" subject import prices to support its price suppression and price depression findings, the final determination repeatedly refers to the "low" price of subject imports.[566] In the Panel's view, this indicates that the conclusion regarding the "low" price of subject imports was an important aspect of MOFCOM's reasoning leading to the imposition of final measures.

7.591 We recall the Appellate Body's observation in *US - Countervailing Duty Investigation on DRAMS* that "Article 22.5 does not require the agency to cite or discuss every piece of supporting record evidence for each fact in the final determination".[567] We agree with the Appellate Body in this regard. However, given the importance that the conclusion regarding the "lower" price of subject imports played in MOFCOM's reasoning, the Panel is of the view that further information on the matters of fact leading to this conclusion was required under Articles 22.5 of the SCM Agreement and 12.2.2 of the Anti-Dumping Agreement. It is clear that MOFCOM had before it information on the prices of subject imports and the prices of the domestic product and undertook a comparative analysis of this information. For example, in its second written submission, China provided a non-confidential summary of the factual information which MOFCOM had before it and relied upon to support its conclusion regarding the "low price" of subject imports. In particular, China revealed that over the period 2006-2008, the average unit values of subject imports was 8%-12% below the average unit value of domestic shipments.[568] However, the final determination did not include any indication that a comparative analysis of prices had been performed or provide the factual information arising from the comparison.

7.592 Consequently, the Panel concludes that China acted inconsistently with Articles 22.5 of the SCM Agreement and 12.2.2 of the Anti-Dumping Agreement by failing adequately to disclose "all relevant information on matters of fact" underlying MOFCOM's conclusion regarding the existence of "low" import prices. Given this conclusion, the Panel does not consider it necessary to proceed to consider the remainder of the United States' arguments regarding whether China met its obligations under Articles 22.5 and 12.2.2.

K. CAUSATION ANALYSIS

1. Whether China acted inconsistently with Articles 3.1 and 3.5 of the Anti-Dumping Agreement and 15.1 and 15.5 of the SCM Agreement with respect to MOFCOM's causation analysis

(a) Introduction

7.593 The United States argues that MOFCOM's causation analysis is inconsistent with Article 3.5 of the Anti-Dumping Agreement and Article 15.5 of the SCM Agreement. The United States also claims that MOFCOM's analysis is inconsistent with Article 3.1 of the Anti-Dumping Agreement and

[566] See, for example, Final Determination, Exhibit CHN-16, pp. 58, 59, 60, 61, 62, 63, 65.
[567] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 164.
[568] China's second written submission, footnote 95.

Article 15.1 of the SCM Agreement because it does not comply with the "objective examination" and "positive evidence" requirements embodied in those provisions.

7.594 China asks the Panel to reject the United States' claim.

(b) Provisions at issue

7.595 Article 3.1 of the Anti-Dumping Agreement and Article 15.1 of the SCM Agreement are set out above.

7.596 Article 3.5 of the Anti-Dumping Agreement provides:

> It must be demonstrated that the dumped imports are, through the effects of dumping…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…the export performance and productivity of the domestic industry.

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

(c) Factual Background

7.598 MOFCOM conducted a single causation analysis pertinent to both the anti-dumping and countervailing duty investigations. Ultimately, MOFCOM found that there was a causal link between the dumped imports of GOES from Russia, the dumped and subsidized imports of GOES from the United States and the material injury suffered by the domestic industry. In establishing causation, MOFCOM rejected arguments that alleged overexpansion and overproduction by the domestic industry was an alternative cause of injury.

(d) Arguments of the United States

7.599 The United States challenges two particular aspects of MOFCOM's causation analysis, namely MOFCOM's use of price effects findings, and MOFCOM's examination of the domestic industry's increase in capacity and production as a potential alternative cause of injury.

(i) Use of price effects findings

7.600 The United States relies upon its claim that MOFCOM's price effects analysis was inconsistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement and Articles 15.1 and 15.2 of the SCM Agreement, to argue that China has not established that the imports under investigation had any significant price effects. The United States contends that because price effects findings were an essential element of MOFCOM's causal link analysis, the flaws in MOFCOM's price effects analysis render MOFCOM's causation determination inconsistent with Article 3.5 of the Anti-Dumping Agreement and Article 15.5 of the SCM Agreement.

(ii) Other causes of injury: domestic capacity, production, demand and inventories

7.601 According to the United States, MOFCOM erroneously concluded that the rapid increase in capacity of the domestic GOES industry during the period of investigation, and the consequent overproduction and inventory build-up, could not have been a cause of injury to the domestic industry. The United States argues that there is no positive evidence to support the conclusion that the imports under investigation were the sole cause of the massive rise in inventory levels between 2008 and the first quarter of 2009. According to the United States, the domestic industry was at least in substantial share responsible for the increase because of its decision to expand capacity and production far in excess of growth in domestic demand.[569] The United States concludes that because there was a known factor other than dumped or subsidized imports causing injury, MOFCOM needed to examine this factor as part of a non-attribution analysis. However, MOFCOM failed to do so. As a result, the United States contends that China acted inconsistently with Articles 3.1 and 3.5 of the Anti-Dumping Agreement and 15.1 and 15.5 of the SCM Agreement.

7.602 The United States notes that MOFCOM provided three reasons for its determination that overexpansion and overproduction was not a cause of injury to the domestic industry. First, MOFCOM found that the domestic industry's capacity expansion was a response to an increase in domestic demand. The United States argues that there is nothing in the record disclosed by MOFCOM to support this view. According to the United States, the data on the record indicates that the capacity expansion far exceeded any historical or projected increases in domestic demand.[570] Furthermore, even if the domestic industry did not expand capacity in excess of demand, the United States asserts that the domestic industry was in any event not entitled to assume that it could expand capacity in such a way that it must displace all imports (whether fairly or unfairly traded) in order to be able to use that increased capacity to meet demand. The United States notes MOFCOM's additional finding that the domestic producers "restrained their new production,"[571] and did not increase their production to the same extent that they increased their capacity, with the result that capacity utilization decreased. The United States contends, though, that far from having been restrained, Chinese producers used their increased capacity to increase production far beyond what the market demanded, resulting in sharply increasing inventories, particularly in the first quarter of 2009. The United States notes in particular that between the first quarters of 2008 and 2009, the domestic industry's output increased by 55.23%, although demand only increased by 12.46%.[572]

7.603 The United States notes that the second reason relied on by MOFCOM was a purported absence of correlation between the domestic industry capacity increases and the inventory build-up. The United States argues that this conclusion, relating to a period when capacity and production increased far more rapidly than demand, is both counterintuitive and incorrect. According to the United States, an objective examination of the data corroborates the common sense proposition that the greater the disparity between increases in production capacity and increases in demand, the more likely it is that inventories will rise.[573]

7.604 Third, the United States notes MOFCOM's finding that "the volume of [subject imports] did not increase at a constant speed." According to the United States, MOFCOM seems to reason that the increase in imports of GOES was so rapid that the entire inventory overhang in the first quarter of 2009 can be attributed to the imports under investigation.[574] The United States argues that there is no discernible basis in the record for this finding. Rather, the evidence indicates that the domestic

[569] United States' first written submission, para. 253.
[570] United States' first written submission, para. 247.
[571] China's first written submission, para. 366.
[572] Final Injury Disclosure document, Exhibit CHN-29, secs. VI(1), (2).
[573] United States' first written submission, paras. 249-250.
[574] United States' first written submission, para. 251.

industry and imports were growing at approximately the same rate during the period of investigation, in response to growing domestic demand. It was not a case of the imports encroaching upon the market share of the domestic industry.[575]

7.605 The United States notes that, in addition to the three above-mentioned factors, MOFCOM also stated that the United States "did not submit any evidence to substantiate" its comments regarding the effect of overexpansion and overproduction on the domestic industry. The United States denies that the parties opposing imposition of duties had the obligation of submitting evidence to prove that the domestic industry's excessive production and consequent inventory overhang contributed to its injury.[576] According to the United States, the only obligation that the Agreements place on the parties is that of identifying "known" factors of injury other than the imports under investigation that the authorities should examine. The United States asserts in this regard that China has acknowledged[577] that United States exporter ATI brought to MOFCOM's attention that overproduction was contributing to any difficulties that the domestic industry may have experienced since 2008.[578] The United States submits that, because Articles 3.5 and 15.5 state that "[t]he *authorities* shall also examine any known factor other than the [unfairly traded] imports which at the same time are injuring the domestic industry" (emphasis added), the Agreements placed on MOFCOM the responsibility to conduct the requisite examination.

(e) Arguments of China

7.606 China denies the United States' claim. Further, China argues that the United States' claim must be analysed according to the standard of review set by the Appellate Body for injury determinations, namely the Panel should consider whether "the evidence and explanation relied upon by the investigating authority reasonably supports its conclusions". China contends that merely demonstrating that another conclusion might have been reached does not demonstrate inconsistency with the Anti-Dumping and SCM Agreements.[579]

(i) Use of price effects findings

7.607 In relation to the United States' argument that if its price effects arguments are successful, then China's causation analysis necessarily disintegrates, China argues that its causal link analysis includes a finding of *both* price and volume effects. China argues that even without its price effects findings, the adverse volume effects support the finding of a causal link.[580] China notes that the United States has not challenged MOFCOM's analysis of volume effects.

(ii) Other causes of injury: domestic capacity, production, demand and inventories

7.608 China disputes the United States' argument that MOFCOM erroneously concluded that the rapid increase in the capacity of the Chinese GOES industry was not a cause of injury. In particular, China notes that MOFCOM fully addressed this factor after it was raised by one of the respondents, ATI. China argues that, because MOFCOM received no new evidence from ATI, MOFCOM's

[575] United States' first written submission, para. 252.
[576] China's first written submission, para. 357; see also China's opening statement at the first meeting of the Panel, para. 57.
[577] China's response to Panel question 36, para. 134.
[578] ATI's Comments on the Preliminary Determination of the Antidumping Investigation on GOES from the U.S. and Russia and the Anti-subsidy Investigation on GOES from the U.S. (Industry Injury and Causal Link) (Public version) (30 December 2009) ("ATI's Comments on the Preliminary Determination"), Exhibit CHN-31, p. 9.
[579] China's first written submission, paras. 336-337.
[580] China's first written submission, paras. 339-341.

analysis must be viewed in the light of the lack of evidence to support it.[581] Furthermore, China contends that all reasons advanced by MOFCOM for dismissing the argument that the increase in domestic capacity severed the causal link were fully supported by the record.

7.609 China contends that the United States relies on misleading percentages to demonstrate that the increase in capacity exceeded the increase in demand. China asserts that percentage comparisons are misleading because of the different bases from which the relevant percentages are calculated. China argues that the evidence before MOFCOM confirms that domestic capacity did not increase more than demand.

7.610 China also argues that, because of the restraint exercised by domestic producers, the increased capacity was not actually fully utilized.[582] Although China concedes that the details were not included in the specific response to the alternative cause, China asserts that MOFCOM had earlier in its final determination explained that from 2007 to 2008, domestic capacity increased by 53.67% but that domestic production increased by only 23.91%.[583] China submits that this significant gap confirms the restraint by the domestic producers who did not produce more than the market could bear and instead allowed capacity utilization rates to fall.

7.611 According to China, MOFCOM's finding that there was no correlation between the production capacity change and the inventory change is supported by the data, which indicates that the inventory increase corresponds with the increase in volume of imports rather than the increase in production capacity.[584] MOFCOM found that the levels of inventory did not correspond with the deteriorating condition of the domestic industry, but that changing levels of imports did. According to China, this analysis thus confirmed what MOFCOM had already found – that increased domestic capacity was not the problem, but rather subject imports were the problem. China contends that MOFCOM's comparison of the relative trends to see whether there was any correlation in the trends that would suggest some adverse effects being improperly attributed "ensured that it did not 'attribute' any effects of the change in domestic industry capacity to subject imports".[585]

7.612 In addition, China submits that the United States has improperly re-characterized the nature of the alternative cause at issue here. China asserts that, during the proceedings, the arguments focused on excess production capacity, and did not discuss excess production. China contends that now the United States has shifted its argument to "overproduction,"[586] and "production growing far more rapidly than demand,"[587] even though these arguments about excess production had never been presented to MOFCOM during the investigation. China contends that MOFCOM addressed the alternative cause that respondents had raised – excess capacity – and it is improper for the United States now to propose an alternative cause that had never been raised before the authorities.

7.613 Overall, China submits that the United States has at most proposed an alternative explanation for one aspect of domestic industry performance. China asserts that prior panels have found as inadequate non-attribution arguments that do no more than posit an alternative explanation or a partial explanation for the condition of the domestic industry. China relies in this regard on the reports of the panels in *EC – Fasteners* and *US – Countervailing Duty Investigation on DRAMS*.[588]

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[581] China's first written submission, paras. 357-358.
[582] China's first written submission, para. 363.
[583] Final Determination, Exhibit CHN-16, page 60..
[584] China's first written submission, paras. 364-365.
[585] China's second written submission, para. 113.
[586] United States' opening statement at the first meeting of the Panel, para 86.
[587] United States' opening statement at the first meeting of the Panel, para 87.
[588] China refers specifically to Panel Reports, *EC – Fasteners (China)*, para 7.429, and *US – Countervailing Duty Investigation on DRAMS*, paras. 7.361-362.

(f) Arguments of third parties

(i) Argentina

7.614 Argentina submits that an investigating authority is required to carry out a non-attribution analysis as a part of its causation investigation. This may include examining whether, in the light of their volume or prices, the effects of non-subject imports are such to break the causal link between the subject imports and the injury. This may require an examination of the forms of competition in the relevant markets.[589]

(ii) European Union

7.615 The European Union argues that, in the light of its flawed price effects analysis, MOFCOM could not have conducted a correct causal link analysis. Unless imports have proven significant price effects, the investigating authorities cannot find such imports to be causing injury within the meaning of Article 3.1 of the Anti-Dumping Agreement and Article 15.1 of the SCM Agreement. Further, any causation analysis must take into account the "volume and prices" of imports.[590]

(iii) Saudi Arabia

7.616 Saudi Arabia argues that investigating authorities must separate and distinguish the injurious effects of dumped imports from the injurious effects of other factors. It is only through doing this that the degree of injury caused by the dumped or subsidized imports can be assessed. This process requires a satisfactory or meaningful explanation of the nature and extent of the injurious effects caused by other factors.[591]

(g) Evaluation by the Panel

7.617 The United States' claim raises issues regarding MOFCOM's use of price effects findings, and MOFCOM's examination of the domestic industry's increase in capacity and production as an alternative cause of injury. Before addressing the substance of these issues, we first make a number of observations regarding the applicable legal framework for the Panel's evaluation of the United States' claim.

(i) Legal framework

7.618 In terms of the applicable legal standard, we note that the Appellate Body has provided some guidance regarding the interpretation of Article 3.5 of the Anti-Dumping Agreement which we consider equally applicable to Article 15.5 of the SCM Agreement. Thus, in *US - Hot Rolled Steel* the Appellate Body noted that investigating authorities are required, as a part of their causation analysis, to examine all "known factors" other than dumped imports which are causing injury to the domestic industry. Where such other known factors are causing injury, the investigating authority must ensure that the injurious effects of these factors are not "attributed" to the dumped imports. The non-attribution analysis requires "separating and distinguishing the injurious effects of the other factors from the injurious effects of the dumped imports", rather than making "mere assumptions" about the effects of the imports and the other factors.[592]

[589] Argentina's third party submission, paras. 14-15.
[590] European Union's third party submission, paras. 47-48.
[591] Saudi Arabia's third party submission, paras. 38-39.
[592] See, for example, Appellate Body Report, *US – Hot-Rolled Steel*, para. 226.

7.619 We recall that it is well established that the role of the Panel is not to conduct a *de novo* review nor simply defer to the conclusions of the investigating authority. Rather, we must determine whether the explanation for the conclusions reached by the investigating authority is reasoned and adequate in the light of other plausible alternative explanations. Furthermore, we must determine whether the quality of the evidence relied on by MOFCOM met the "positive evidence" standard set forth in Article 3.1 of the Anti-Dumping Agreement and Article 15.1 of the SCM Agreement. We must also determine whether MOFCOM undertook an objective examination of the evidence. More details of our standard of review are set forth at paragraph 7.513 above.

(ii) Use of price effects findings

7.620 Our evaluation of MOFCOM's findings on price depression and price suppression has revealed a number of shortcomings in MOFCOM's analysis of the price effects of subject imports. Since MOFCOM relied on the price effects of subject imports in support of its finding that subject imports caused material injury to the domestic industry,[593] the abovementioned shortcomings also undermine MOFCOM's conclusion on the causal link between subject imports and the material injury suffered by the domestic industry.

7.621 We note China's argument that MOFCOM did not rely exclusively on the price effects of subject imports in the present case, such that MOFCOM's finding of causation might rest on MOFCOM's analysis of the adverse volume effects of the subject imports. We recall our earlier findings in this regard.[594] In particular, while MOFCOM did indeed rely on both the volume and price effects of subject imports, we recall that there is nothing in the final determination to suggest that volume effects were the primary basis for MOFCOM's findings, or that MOFCOM relied more heavily on volume effects than price effects. Rather, MOFCOM's finding that subject imports were priced lower than domestic products was central to MOFCOM's finding that price depression and price suppression was an effect of subject imports, and MOFCOM's overall conclusion that subject imports caused material injury to the domestic industry. In these circumstances, it is not appropriate for us to consider the possibility that MOFCOM's finding of causation might be upheld purely on the basis of MOFCOM's analysis of the volume effects of subject imports.

7.622 We now turn to the United States' argument regarding MOFCOM's evaluation of the domestic industry's increase in capacity and production.

(iii) Other causes of injury: domestic capacity, production, demand and inventories

7.623 For present purposes, we note that Article 3.5 of the Anti-Dumping Agreement and Article 15.5 of the SCM Agreement require an investigating authority to "examine any known factors other than" subject imports "which at the same time are injuring the domestic industry". These provisions also state that "the injuries caused by these other factors must not be attributed to" the subject imports. Before considering the applicability of these provisions, we must first clarify the precise nature of the "other factor" at issue. We must also clarify the precise nature of the finding made by MOFCOM in respect of that "other factor".

[593] Final Determination, Exhibit CHN-16, p. 65 ("The evidence available shows that during the investigation period, since the product concerned imported from the U.S. and Russia had been sold in the domestic market of China at a price below normal value and at the same time, the product concerned imported from the U.S. received subsidy from the USG, the import of the product concerned in large quantity and at a low price caused material injury to the domestic industry of China").

[594] See paras. 7.537-7.542 of this Report.

The nature of the "other factor"

7.624 China argues that the United States improperly re-characterized the "other factor" at issue, shifting its argument to "overproduction,"[595] and "production growing far more rapidly than demand."[596] According to China, during the proceedings, the arguments focused on excess production capacity, and did not discuss excess production. China contends that it is improper for the United States now to propose an alternative cause that had never been raised before the authorities.

7.625 We are not persuaded by China's argument. In comments made during the course of MOFCOM's investigation, the United States stated:

> In 2008, the Chinese industry increased both its capacity and production far in excess of any increase in demand. There is certainly a colorable argument that the enormous increase in Chinese producers' inventories due to the domestic industry's incorrect assessment of demand…forced the Chinese industry to engage in massive price cuts during the first quarter of 2009, resulting in operating performance declines during that period.[597]

7.626 The United States' comment clearly refers to the domestic industry's increase in production, in addition to the increase in capacity. Furthermore, ATI's comment included the statement that "[t]he huge gap between the production capacity and demand would necessarily change the supply-demand relation which further affected the domestic market price."[598] When addressing an unrelated matter in its first written submission, China sought to make "a very important point: capacity does not affect the supply-demand balance in the market until that capacity has been turned into production."[599] We agree with China's observation. For this reason, we consider that ATI's remark about the gap between capacity and demand affecting supply and demand was necessarily premised on the notion that such capacity had been turned into production. Furthermore, we note that MOFCOM itself referred to "production output" when responding to the interested parties' comments.[600] In these circumstances, China's argument that the issue of the domestic industry's increase in production was not raised before MOFCOM is not tenable.

The nature of MOFCOM's finding

7.627 We now turn to the nature of the finding made by MOFCOM, in order to resolve the disagreement between the parties regarding the *prima facie* case that needs to be established by the United States. The United States alleges that the only finding made by MOFCOM was that the domestic industry's increase in capacity and production did not cause injury to the domestic industry. The United States contends that it need only establish a *prima facie* case that MOFCOM's finding that the domestic industry's increase in capacity and production did not cause injury is flawed. The United States asserts that MOFCOM did not conduct any non-attribution analysis in respect of this factor. According to China, though, MOFCOM addressed both issues. First, MOFCOM found that excess capacity and excess production was not a cause of injury. Second, MOFCOM discussed (1) the correlation between inventory levels and subject imports, and (2) the lack of correlation between inventory levels and changes in production capacity. According to China, this second discussion both confirmed MOFCOM's finding that capacity changes were not a cause of injury, and served as a non-

[595] United States' opening statement at the first meeting of the Panel, para 86.
[596] United States' opening statement at the first meeting of the Panel, para 87.
[597] Anti-Subsidy Investigation on Imported Grain Oriented Flat-Rolled Electrical Steel Originating in the United States: United States' Comments on the Preliminary Determination, (30 Dec. 2009), Exhibit US-4, p. 9.
[598] ATI's Comments on the Preliminary Determination, Exhibit CHN-31, p. 9.
[599] China's first written submission, para. 363.
[600] Final Determination, Exhibit CHN-16, p. 72.

attribution analysis.[601] According to China, therefore, the United States must establish a *prima facie* case both that MOFCOM's finding that the domestic industry's increase in capacity and production did not cause injury is flawed, and that MOFCOM's non-attribution analysis is flawed.

7.628 It is well established that a proper non-attribution analysis requires the injury caused by "other factors" to be separated and distinguished from the injury caused by increased imports.[602] In other words, injury caused by other factors must be clearly identified, to ensure that it is not attributed to subject imports. In the present case, MOFCOM found that there was no injury caused by the domestic industry's increase in capacity and production. Having made this finding, we do not see how MOFCOM could then have identified the injury caused by that factor, and ensured that such injury - of which there was allegedly none - was not attributed to subject imports. Accordingly, we reject China's argument that MOFCOM undertook a non-attribution analysis in respect of the domestic industry's increase in capacity and production. In our view, the only finding made by MOFCOM was that this factor was not a cause of injury to the domestic industry. This, then, is the finding in respect of which the United States must establish a *prima facie* case. In particular, the United States has the burden of establishing a *prima facie* case that MOFCOM's finding that the domestic industry's increase in capacity and production did not cause injury is flawed. We shall now determine whether or not the United States has discharged that burden in the light of the parties' arguments.

7.629 The principal arguments set forth in the United States' first written submission concerned the relationship between, and changes in, capacity, production, inventories, demand, and the volume of subject imports.[603] MOFCOM's final determination contains only relatively limited information regarding these factors. After determining that additional information was necessary in order for the Panel to undertake a more complete evaluation of the issues raised by the United States, the Panel asked China to provide the confidential data supporting MOFCOM's finding, including data on demand, domestic capacity, capacity utilization, domestic production and inventories.[604] China failed, however, to provide the bulk of the requisite confidential data. Indeed, for the most part China failed to provide any actual data at all, preferring to submit indexed summaries and numerical ranges. Although the Panel was not provided with access to all of the relevant data, the Panel nevertheless evaluates the United States' claim with the more limited information at hand.

7.630 The United States has asserted, on the basis of the various estimates that it has prepared, that the inventory overhang exceeded the increase in the volume of subject imports.[605] We note that an

[601] China's response to Panel question 107(ii), para. 185.

[602] See, for example, Appellate Body Report, *US – Hot-Rolled Steel*, para. 226

[603] United States' first written submission, paras 246 - 255.

[604] The Panel addressed a fax to China dated 18 November 2011. In that fax, the Panel requested "certain confidential data from China". In particular, the Panel requested "[t]he data supporting MOFCOM's finding that the domestic industry's increase in capacity and production did not cause any injury, including data on demand, domestic capacity, capacity utilization, domestic production and inventories". China contends that the Panel asked only for "data", and "did not specify any particular documents, numbers, or time periods" (China's reply to Panel question 105(c), para. 167). We reject this argument. In our view, the relevant fax clearly requested "confidential data", "including data on demand, domestic capacity, capacity utilization, domestic production and inventories". By failing to provide this data, China failed to respond fully to the Panel's request.

[605] China has criticised some of those estimates on the basis that the United States made an error regarding the amount of domestic capacity as a per cent of demand (China's response to Panel question 105(c), para. 174). In our view, the number used by the United States was based on a not unreasonable reading of an assertion made by China. (China asserted that "[d]omestic capacity as a per cent of total apparent consumption was ranged between [x] and [y] during the period of investigation". The United States understood that the figure "y" corresponded to the capacity as a proportion of demand in 2008. In our view, it is not unreasonable to interpret China's assertion to mean that the figure "y" indicated the relevant value in the latter part of the period of investigation.) Furthermore, although China alleged an error by the United States, China failed to state what

important element in MOFCOM's reasoning was indeed that inventory overhangs were not explained by increases in domestic capacity and domestic production, but rather by the increase in the volume of subject imports from 2007 to 2008. This is clear from the various references made by MOFCOM to the increase in the volume of subject imports in the following extract from the final determination:

> Due to the increase of import volume of the product concerned in 2008, the increase rate of the domestic like product's sales volume decreased greatly. The normal sales of the domestic industry of China were seriously suppressed and consequently the inventory increased largely. Thirdly, the import volume of the product concerned did not increase at a constant speed. As the Investigating Authority had analysed in detail in the determination, the imports of the product concerned increased greatly in 2008. The increase rate of the import volume of the product concerned in 2008 and Q1 of 2009 were higher than the increase rate of the domestic demand of China by 42.55 percentage points and 11.11 percentage points respectively and higher than the increase rate of sales volume of domestic like product by 55.60 percentage points and by 8.74 percentage points.[606]

7.631 This understanding is consistent with China's own explanation of MOFCOM's finding.[607] Thus, China explains that, although production kept pace as capacity expanded in 2007, "that situation changed when subject imports increased in 2008 and Q1 2009".[608] China also explains that "[b]oth the large presence and growth of the unfairly traded imports … impeded domestic sales".[609] Furthermore, China asserts that "[e]ven with capacity increasing in 2007, before the surge in subject imports the domestic industry was able to increase its production and shipments, and draw down its inventory".[610] China asserts that this "situation changed dramatically in 2008", when "subject imports surged", allowing subject imports to gain more than 5.56 percentage points of market share "directly from the domestic industry".[611] According to China, the domestic industry "could not ship any additional volume because the unfairly traded subject imports seized a large portion of the market".[612]

7.632 Thus, according to MOFCOM, the increase in inventories was caused by the increase in subject imports, rather than by the increase in the domestic industry's capacity and production. Information before the Panel,[613] though, indicates that inventory overhangs would have occurred notwithstanding the increase in subject imports, thereby undermining MOFCOM's assessment of this issue. In this regard, we note that the upper end of the range of 2008 inventory data provided by China exceeds the increase in the volume of subject imports in 2008. Thus, the range of data provided by China indicates that inventories may have increased by more than subject imports. China's assertion that "the domestic production in 2008 that could not be shipped was due almost

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the correct number should be. In these circumstances, we do not consider that China's mere assertion of error, without providing the actual underlying data, should necessarily cause us to reject the basic point being made by the United States.

[606] Final Determination, Exhibit CHN-16, pp. 72-73.

[607] China's 25 November 2011 response to the Panel questions dated 18 November 2011, pp. 3-7.

[608] China's 25 November 2011 response to the Panel questions dated 18 November 2011, p. 4.

[609] China's 25 November 2011 response to the Panel questions dated 18 November 2011, p. 5. While China refers to the both the "presence" and "growth" of subject imports, MOFCOM did not make any finding of injury based on the "presence" of subject imports in 2007. (Indeed, according to China, "[t]he domestic industry had been doing fine in 2006 and 2007" (China's first written submission, para. 254). Rather, MOFCOM's determination, regarding the possible role of the domestic industry's increase in capacity and production, is focused on the "growth" in subject imports between 2007 and 2008).

[610] China's 25 November 2011 response to the Panel questions dated 18 November 2011, p. 5.

[611] China's 25 November 2011 response to the Panel questions dated 18 November 2011, pp. 5 and 6.

[612] China's 25 November 2011 response to the Panel questions dated 18 November 2011, p. 6.

[613] See Annex H: Annex Containing Business Confidential Information.

entirely to the gain in subject imports" confirms that this was indeed the case.[614] In particular, the fact that the increase in subject imports accounts for "almost" all of the inventory overhang indicates that part of that overhang was caused by something other than the increase in the volume of subject imports. In addition, China has provided a range of data for domestic production in 2008.[615] We developed an equivalent range for 2007 production, on the basis of China's assertion that the domestic industry increased its production by 24% between 2007 and 2008.[616] The absolute difference between both the lower and the upper numbers of the 2007 and 2008 ranges comfortably exceeds the absolute increase in the volume of subject imports over the same period. In other words, the increase in production by the domestic industry from 2007 to 2008 was greater than the increase in subject imports, and would have accounted for (at least some of) the inventory build-up that could not be attributed to the (lesser) increase in subject imports. In these circumstances, an objective and impartial investigating authority could not properly have found that the domestic industry's increase in production was not a cause of injury.

7.633 A similar picture emerges from the limited information available regarding the first quarter of 2009. The United States asserts that the domestic industry produced a significant number of tons of GOES more than it could ship during the first quarter of 2009. The United States contends that the "quantity of excess production is staggering".[617] Our own calculations confirm that the increase in subject imports could only account for a minor portion of the increase in inventories in the first quarter of 2009. Thus, the amount of domestic production directed to inventory in the first quarter of 2009 was significantly greater than the increase in subject imports from the first quarter of 2008 to the first quarter of 2009. Indeed, the increase in inventory in the first quarter of 2009 was even greater than the total volume of subject imports in the first quarter of 2009. Thus, even if there had not been any subject imports in the first quarter of 2009, there would still have been a substantial increase in inventories in this period.

7.634 Accordingly, the limited information available to us supports the United States' argument that domestic capacity[618] and domestic production increased by more than the increase in the volume of subject imports in 2008 and the first quarter of 2009. This is at odds with MOFCOM's determination that the increase in the domestic industry's capacity and production was not a cause of injury, and that the real cause of the injurious inventories was the increase in the volume of subject imports.

7.635 Before concluding, we note China's reliance on MOFCOM's finding that total domestic capacity did not exceed total domestic demand. We are unable to verify this finding, because of China's failure to provide the underlying data. However, even if this finding were accurate, it would not change the fact that subject imports did not account for the totality of the injurious inventory overhangs.

7.636 We also note China's argument that ATI had failed to support its assertions regarding this "other factor" with "public information". Given the difficulties we have experienced in obtaining all of the information necessary to evaluate the United States' claim, we are not persuaded that ATI could reasonably have been expected to provide "public information" regarding this matter. Furthermore, we do not consider that a respondent is required to provide evidence regarding "other factors". Article 3.5 of the Anti-Dumping Agreement and Article 15.5 of the SCM Agreement provide that

[614] China's response to Panel question 105(c), para. 176.
[615] China's response to Panel question 105(c), para. 175.
[616] China's 25 November 2011 response to the Panel questions dated 18 November 2011, p. 6.
[617] United States' comments on China's response to Panel question 105, para. 119.
[618] Since domestic producers were not utilizing 100% of their capacity in 2008 (China's 25 November 2011 response to the Panel questions dated 18 November 2011, p. 4. See also Final Determination, Exhibit CHN-16, p. 64: "Capacity utilization had a substantial decline" from 2007 to 2008), domestic capacity necessarily exceeded domestic production in 2008.

"[t]he authorities shall also examine any known factors other than the [subject] imports which at the same time are injuring the domestic industry". Accordingly, once the "other factor" becomes "known" to the investigating authority, it is for the investigating authority to investigate.

7.637 As explained above, the burden is on the United States to establish a *prima facie* case that MOFCOM's finding that the domestic industry's increase in capacity and production did not cause injury is flawed. Our evaluation of the United States' arguments in the light of the limited information available to us, and our analysis of that information, indicate that the domestic industry's increase in capacity and production were at least partly responsible for the accumulation of inventory in 2008 and the first quarter of 2009. Accordingly, we find that the United States has established a *prima facie* case that MOFCOM's determination that the domestic industry's increase in capacity and production was not a cause of injury is flawed. We further find that China has failed to rebut that *prima facie* case. As a result, we find that MOFCOM failed properly to examine whether a known factor other than subject imports was at the same time injuring the domestic industry, contrary to the obligation set forth in the third sentences of Article 3.5 of the Anti-Dumping Agreement and Article 15.5 of the SCM Agreement.

Conclusion

7.638 For all of the above reasons, we conclude that MOFCOM's finding that subject imports caused material injury to the domestic industry is inconsistent with Articles 3.1 and 3.5 of the Anti-Dumping Agreement, and Articles 15.1 and 15.5 of the SCM Agreement.

2. Whether China acted inconsistently with Articles 12.8 of the SCM Agreement and 6.9 of the Anti-Dumping Agreement in failing to disclose the essential facts under consideration in relation to non-subject imports in its causation anaylsis

(a) Provisions at issue

7.639 Articles 12.8 of the SCM Agreement and 6.9 of the Anti-Dumping Agreement provide:

> The authorities shall, before a final determination is made, inform all [interested Members and] interested parties of the essential facts under consideration which form the basis of the decision whether to apply definitive measures. Such disclosure should take place in sufficient time for the parties to defend their interests.[619]

(b) Factual Background

7.640 Following the preliminary determination, and prior to issuing its final determination, MOFCOM issued a final injury disclosure document, with the stated purpose of disclosing the "basic facts upon which the final injury determination is made".

(c) Arguments of the United States

7.641 The United States claims that MOFCOM's failure to disclose information concerning non-subject imports is inconsistent with Article 12.8 of the SCM Agreement and Article 6.9 of the Anti-Dumping Agreement. As MOFCOM purported to consider whether imports not subject to investigation were a cause of material injury to the domestic industry, facts pertaining to such imports were essential to its causal link analysis.[620] However, MOFCOM disclosed no information regarding

[619] Where the text in brackets is included only in Article 12.8 of the SCM Agreement and not in Article 6.9 of the Anti-Dumping Agreement.

[620] United States' first written submission, para. 259.

the volume and prices of imports from sources other than Russia and the United States. Consequently, the United States was unable to prepare a meaningful argument regarding the role of such imports in contributing to any material injury to the domestic GOES industry.[621] According to the United States, China does not seriously dispute that MOFCOM failed to disclose any information about the volume or prices of imports from sources other than Russia and the United States and nor does China dispute that such information is essential to a causation analysis.[622]

7.642 In response to China's argument that MOFCOM was not required to disclose further information about non-subject imports because the interested parties did not continue to submit arguments on the issue, the United States contends that this turns the purpose of Articles 12.8 of the SCM Agreement and 6.9 of the Anti-Dumping Agreement on its head. The provisions do not exist to allow authorities to counter arguments parties have made. Rather, they require authorities to provide information so that parties may defend their interests.[623]

7.643 According to the United States, in its first written submission China for the first time discloses detailed information about the volume and value of non-subject imports. The United States contends that if MOFCOM had disclosed this information, which was information essential to any reasoned analysis of the issue, the United States may well have developed arguments to submit to MOFCOM. [624]

(d) Arguments of China

7.644 China argues that it did disclose the "essential facts under consideration" with respect to the role of non-subject imports in the causation analysis. In particular, China cites the preliminary determination as identifying non-subject imports as an "other" factor under consideration. The preliminary determination also notes that the imports under investigation were capturing a larger share of the market than non-subject imports.[625] This provided notice that China was addressing non-subject imports and that subject imports were gaining a share of total imports. Further, China contends that by comparing the percentage loss in market share experienced by the domestic industry with the percentage gain by the imports under investigation, it was possible for interested parties to calculate the gain in market share by non-subject imports (namely, 0.09%).[626] With respect to the pricing of non-subject imports, China argues that MOFCOM considered this, but only indirectly. MOFCOM observed that there was no evidence of the dumping of non-subject imports, but did not otherwise investigate or consider the prices of such imports.[627]

7.645 China also argues that having identified in the preliminary determination that non-subject imports were being considered by MOFCOM, the interested parties did not comment on this issue. Therefore, China did not need to develop this issue further. In addition, China argues that the interested parties could have derived information about non-subject imports from publicly available sources.[628]

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[621] United States' first written submission, para. 260.
[622] United States' second written submission, para. 181.
[623] United States' second written submission, para. 185.
[624] United States' second written submission, paras. 186-187.
[625] China's first written submission, para. 373.
[626] China's first written submission, para. 374 and China's opening statement at the first meeting of the Panel, para. 58
[627] China's response to Panel question 70, para. 63.
[628] China's first written submission, para. 375 and China's opening statement at the first meeting of the Panel, para. 59.

(e) Arguments of third parties

(i) European Union

7.646 The European Union argues that any proper causation analysis must take into account the "volume and prices" of non-subject imports. MOFCOM appears to have undertaken such an assessment, but did not disclose any of the relevant data to the parties. Therefore, MOFCOM failed to comply with Articles 12.8 of the SCM Agreement and 6.9 of the Anti-Dumping Agreement.[629]

(ii) Japan

7.647 With respect to the causation analysis, Japan gives a number of examples of "essential facts" which may underlie an investigating authority's conclusions, including the facts found relating to the effect of non-subject imports and the analysis of the raw data supporting these findings.[630] In response to China's argument that MOFCOM disclosed the relevant facts in the preliminary determination, Japan notes that a preliminary determination does not always result in sufficient disclosure of the "essential facts" before the final determination. The "essential facts" may change between a preliminary determination and an "on-the-spot investigation". If so, an exporter should be informed of any changes in the "essential facts".[631]

(f) Evaluation by the Panel

7.648 The issue in contention between the parties is whether MOFCOM disclosed the essential facts under consideration in relation to its causation analysis, in particular in relation to the effect of non-subject imports on the domestic industry.

7.649 China argues that the following disclosures made in the preliminary determination met the requirements of Articles 12.8 of the SCM Agreement and 6.9 of the Anti-Dumping Agreement:

(i) The preliminary determination states, in the section analysing the other factors that may cause injury to the domestic industry, that "[d]uring the POI, the proportion of imports of the subject merchandise as a percentage of China's total imports increased, while the proportion of the volume of GOES imported from Other Countries and regions in total imports continued to drop. Meanwhile, there is no evidence that imports from other countries (regions) ever dumped or received subsidies. Therefore, there is no evidence suggesting that imported GOES from Other Countries and regions caused material injury to China's domestic industry"[632]; and

(ii) The preliminary determination also states, in the section analysing the economic factors and indices having a bearing on the state of the domestic industry, that "the market share of like product of China's domestic industry declined by 5.65%...at the same period, the share of product concerned in China market increased by 5.56%".[633] China argues that this indicates that non-subject imports were responsible for 0.09% of market share loss.

[629] European Union's third party submission, paras.48-49.
[630] Japan's third party submission, para. 17.
[631] Japan's third party statement, paras. 10-11.
[632] Preliminary Determination, Exhibit US-5, p. 57.
[633] Preliminary Determination, Exhibit CHN-17, p. 60.

7.650 The United States claims that more detailed information regarding non-subject imports, in particular their volumes and prices, should have been disclosed in accordance with Articles 12.8 of the SCM Agreement and 6.9 of the Anti-Dumping Agreement.

7.651 At the outset, we recall China's argument that it did not need to provide further disclosure regarding non-subject imports following the preliminary determination because the interested parties made no further arguments on the issue. The Panel does not find this line of reasoning convincing. Articles 12.8 of the SCM Agreement and 6.9 of the Anti-Dumping Agreement are not a means by which authorities respond to arguments made by interested parties. Rather, the provisions allow interested parties to "defend their interests" through review and response to the essential facts under consideration disclosed by the investigating authorities. Indeed, the ability of an interested party to submit arguments on the facts under consideration is dependent upon adequate disclosure of those facts. Consequently, if the requirement for an investigating authority to disclose information under Articles 12.8 and 6.9 were not triggered until interested parties submitted arguments, the provisions may become meaningless. Further, in relation to the argument that the interested parties could have consulted publicly available information regarding the non-subject imports of GOES into the Chinese market, the Panel notes that the obligations under Articles 12.8 and 6.9 fall upon investigating authorities and do not make any distinction between confidential and publicly available facts. It is not for a respondent to guess at and research the information being considered by an investigating authority.

7.652 Articles 12.8 of the SCM Agreement and 6.9 of the Anti-Dumping Agreement require investigating authorities to "inform all interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures". In order to apply definitive measures at the conclusion of countervailing and anti-dumping investigations, an investigating authority must find dumping or subsidization, injury and a causal link. Therefore, the "essential facts" underlying the findings and conclusions relating to these elements form the basis of the decision to apply definitive measures and should be disclosed. Our interpretation in this regard accords with that of the panel in *Mexico – Olive Oil*.[634]

7.653 In considering the disclosure obligations under Articles 12.8 of the SCM Agreement and 6.9 of the Anti-Dumping Agreement, the question arises regarding whether the "essential facts" are the facts that were actually under consideration by the investigating authority, or the facts that should have been considered by a reasonable investigating authority, depending upon the substantive obligations at issue. In this respect, the Panel interprets Articles 12.8 and 6.9 as requiring an investigating authority to disclose those facts that are actually under consideration by it (i.e. the body of facts before it). We find support for this in the text of the provisions, which state that the disclosure requirement applies to the "essential facts under consideration", rather than the essential facts that should reasonably be considered in resolving a claim. If the standard were otherwise, claims under Articles 12.8 and 6.9 may be difficult to distinguish from substantive claims relating to the application of definitive measures. Finally, the purpose of the disclosure in Articles 12.8 and 6.9 is to allow parties to "defend their interests". In order for this to be meaningful, the actual facts under consideration are the relevant facts to be disclosed, so that omissions or the use of incorrect facts can be challenged.

7.654 In the circumstances of this case, the United States claims that MOFCOM should have disclosed the volume and prices of imports from sources other than Russia and the United States. In examining this claim, it is necessary for the Panel to consider whether the volume and prices of non-subject imports were "essential facts" under consideration by MOFCOM in reaching its final determination and, if so, whether the disclosures relied upon by China were sufficient for the purposes of Articles 12.8 of the SCM Agreement and 6.9 of the Anti-Dumping Agreement.

[634] Panel Report, *Mexico – Olive Oil*, para. 7.110.

7.655 It is clear that in reaching its conclusion relating to causation, MOFCOM considered whether non-subject imports were an "other" factor that may have caused injury to the domestic industry.[635] In the preliminary determination, MOFCOM stated:

> During the POI, the proportion of imports of the subject merchandise as a percentage of China's total imports increased, while the proportion of the volume of GOES imported from Other Countries and regions in total imports continued to drop. Meanwhile, there is no evidence that imports from other countries (regions) ever dumped or received subsidies. Therefore, there is no evidence suggesting that imported GOES from Other Countries and regions caused material injury to China's domestic industry.[636]

7.656 Whether the volume and value of non-subject imports were facts actually under consideration by MOFCOM, rather than MOFCOM merely reaching a conclusion about the effect of non-subject imports based on the very general information about market share disclosed in the preliminary determination, is less clear. While reaching a conclusion about the effects of non-subject imports based purely on general information on market share trends could potentially be inconsistent with the substantive obligations under the SCM and Anti-Dumping Agreements, whether an investigating authority acts inconsistently with disclosure obligations under Articles 12.8 of the SCM Agreement and 6.9 of the Anti-Dumping Agreement depends upon whether it failed to disclose essential facts that were actually before it.

7.657 In the circumstances of this case, the Panel concludes that in reaching its finding on the effect of non-subject imports, MOFCOM had before it and considered data on the volume of such imports, rather than merely the market shares. In response to a Panel question, China states that "MOFCOM considered both the volume and prices of non-subject imports, but considered the volume directly and considered the prices indirectly".[637] In relation to volume, China argues that the market share trends for non-subject imports, disclosed in the preliminary determination, allowed MOFCOM to conclude that non-subject imports were not a source of injury to the Chinese GOES industry. In this regard, China states that "in the light of the *analysis* that MOFCOM conducted that showed non-subject imports were not gaining market share, MOFCOM properly considered and addressed this issue".[638] This suggests that MOFCOM had more detailed data on volume before it, which it analysed and used to derive the information on market share. Indeed, information about the volume and value of non-subject imports, at least for 2008, was submitted to MOFCOM in an annex to the application.[639] In the light of this, we conclude that data on the volume of non-subject imports was a part of the body of facts being considered by MOFCOM as a part of its causation analysis.

7.658 The Panel considers that the data on volume was an "essential fact under consideration" with respect to the causation analysis and finding. For the purposes of Articles 12.8 of the SCM Agreement and 6.9 of the Anti-Dumping Agreement, it is insufficient merely to state a general finding and conclusion regarding non-subject imports, namely that as a proportion of total imports into China, non-subject imports "continued to drop" and therefore were not a cause of injury to the domestic industry. Rather, the facts underlying these findings and conclusions should have been disclosed, in order to allow parties to "defend their interests" by challenging the basis for the findings and conclusions. In this case, disclosure of the data on the volume of imports was required.

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[635] MOFCOM expressly disclosed this in the Preliminary Determination, Exhibit CHN-17, p. 65.
[636] Preliminary Determination, Exhibit US-5, p. 57.
[637] China's response to Panel question 70, para. 61.
[638] China's opening statement at the second meeting of the Panel, para. 82.
[639] United States' second written submission, paras. 185-187. See, 2008 Customs Monthly Imports Data (Annex 6 of Petition for an Anti-Dumping and an Anti-Subsidy Investigations), Exhibit CHN-33.

7.659 Clearly the data on the volume of non-subject imports was not disclosed. Rather, the preliminary determination included (i) a general statement about the share of non-subject imports as a proportion of total imports; and (ii) a statement from which information regarding the market share of non-subject imports in 2008 could be derived, although was not expressly disclosed. This undermined the ability of interested parties to challenge the basis for MOFCOM's conclusion that non-subject imports were not a cause of injury to the domestic industry.

7.660 Consequently, the Panel concludes that China acted inconsistently with Articles 12.8 of the SCM Agreement and 6.9 of the Anti-Dumping Agreement in not disclosing the data on volume of non-subject imports. In the light of this conclusion, the Panel does not consider it necessary to proceed to consider whether MOFCOM also failed to disclose "essential facts under consideration" by not disclosing the prices of non-subject imports.

3. Whether China acted inconsistently with Articles 22.5 of the SCM Agreement and 12.2.2 of the Anti-Dumping Agreement in relation to the public notice and explanation of its causation analysis with respect to non-subject imports

(a) Provisions at issue

7.661 Articles 22.5 of the SCM Agreement and 12.2.2 of the Anti-Dumping Agreement provide, relevantly:

> 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…shall contain, or otherwise make available through a separate report, all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures…due regard being paid to the requirement for the protection of confidential information. In particular, the notice…shall contain…the reasons for the acceptance or rejection of relevant arguments or claims made by [interested Members and by] the exporters and importers.[640]

(b) Factual Background

7.662 Following the issuance of the preliminary determination and the final disclosure documents, on 10 April 2010, MOFCOM issued its final determination for the anti-dumping and countervailing duty investigations.

(c) Arguments of the United States

7.663 The United States claims that China acted inconsistently with Article 12.2.2 of the Anti-Dumping Agreement and Article 22.5 of the SCM Agreement because of its cursory and fact free analysis of the effect of non-subject imports.

7.664 The United States argues that information on the volume and prices of imports from sources other than Russia and the United States was directly relevant to MOFCOM's injury analysis. However, MOFCOM's final determination disclosed no information to support its finding that the non-subject imports were not a cause of injury, although such information would not have been

[640] Where the text in brackets is included only in the SCM Agreement and not in the Anti-Dumping Agreement.

confidential.[641] According to the United States, Article 12.2.2 of the Anti-Dumping Agreement and Article 22.5 of the SCM Agreement are intended to avoid such opacity in decision-making.[642]

7.665 In response to China's argument that non-subject import market share increased only modestly in 2008, the United States contends that MOFCOM made no such finding. Rather, MOFCOM found that imports "continued to drop", which is not consistent with China's response regarding an increase in market share for non-subject imports. According to the United States, the "divergence between China's proffered justification for the finding that non-subject imports were not a cause of injury to the domestic GOES industry and MOFCOM's stated justification indicates that the actual basis for the finding remains unclear". Consequently, the final determination does not contain "all relevant information on the matters of fact and law" which led MOFCOM to conclude that non-subject imports were not a cause of injury to the domestic GOES industry.[643] Further, the United States argues that China's acknowledgment that non-subject imports gained market share in 2008 cannot possibly serve as a factual justification for a conclusion that non-subject imports were not a cause of injury.[644]

(d) Arguments of China

7.666 China does not clearly distinguish between its arguments that relate to disclosing the "essential facts under consideration" and those that relate to the notice requirements under Article 12.2.2 of the Anti-Dumping Agreement and Article 22.5 of the SCM Agreement. In any event, in addition to the arguments outlined at paragraphs 7.644-7.645 of this Report, China also rejects the contention that MOFCOM did not provide any "factual substantiation" for its conclusions on non-subject imports. China submits that the demonstration that non-subject imports gained only 0.09% market share is factual substantiation. Further, in the light of the failure of the United States to use publicly available information to develop arguments on this issue, MOFOM provided adequate discussion of it.[645]

(e) Arguments of third parties

(i) European Union

7.667 The European Union argues that not providing information on non-subject imports in the context of the causation analysis falls short of the transparency requirements embodied in Articles 22.5 of the SCM Agreement and 12.2.2 of the Anti-Dumping Agreement.[646]

(ii) Saudi Arabia

7.668 According to Saudi Arabia, the public notices referred to in Article 12.2.2 of the Anti-Dumping Agreement and Article 22.5 of the SCM Agreement must contain sufficient detail to allow interested parties to discern either the significance or lack thereof of the factors the investigating authority was obligated to address in its analysis.[647]

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[641] United States' first written submission, paras. 263-264.
[642] United States' first written submission, paras. 264-265.
[643] United States' second written submission, para. 188.
[644] United States' second written submission, para. 189.
[645] China's first written submission, para. 376. It is evident from China's footnote reference to the United States' submission that this part of China's submission relates to the claim under Article 12.2.2 of the Anti-Dumping Agreement and Article 22.5 of the SCM Agreement, rather than Article 6.9 of the Anti-Dumping Agreement and 12.8 of the SCM Agreement.
[646] European Union's third party submission, para. 50.
[647] Saudi Arabia's third party submission, para. 46.

(f) Evaluation by the Panel

7.669 The United States argues that the final determination did not include "all relevant information on matters of fact and law" leading to the imposition of definitive measures. In particular, the United States argues that the final determination was "essentially devoid of information" relating to imports from sources other than Russia and the United States. According to the United States, the final determination contained no information concerning the volume and value of non-subject imports. Further, the lack of factual substantiation for MOFCOM's conclusion rendered it impossible to review.[648] Consequently, the United States claims that China acted inconsistently with Articles 22.5 of the SCM Agreement and 12.2.2 of the Anti-Dumping Agreement.

7.670 The final determination included the following statement about non-subject imports:

> During the POI, the proportion of imports of subject merchandise in China's total imports had been increasing, while the proportion of the volume of GOES imported from other countries and regions in total imports continued to drop. Meanwhile, there is no evidence that imports from other countries (regions) were ever dumped or subsidized. Therefore, there is no evidence suggesting that GOES imported from other countries or regions caused material injury to China's domestic industry.[649]

7.671 The final determination also stated, in the section analysing domestic industry indicators, that "in 2008, the market share of like product of China's domestic industry declined by 5.65%...in the same period, the share of the subject merchandise in the Chinese market increased by 5.56%".[650] China argues that this disclosed that non-subject imports were responsible for 0.09% of market share loss.

7.672 The text of Articles 22.5 of the SCM Agreement and 12.2.2 of the Anti-Dumping Agreement can be read relatively broadly, in that "all relevant information on matters of fact and law and reasons which have led to the imposition of final measures" must be included in the public notice or separate report. However, in contrast to Articles 12.8 of the SCM Agreement and 6.9 of the Anti-Dumping Agreement, Articles 22.5 and 12.2.2 do not provide that they allow interested parties to "defend their interests". Rather, the title to Articles 22 of the SCM Agreement and 12 of the Anti-Dumping Agreement, indicate that they are directed at providing the public with notice of the outcome of an investigation and providing interested parties with an explanation for the outcome reached. Although the explanations may form the basis of a party's request for review of a determination, either in domestic judicial review proceedings or at the WTO, the Panel is not convinced that Articles 22.5 and 12.2.2 necessarily require a second disclosure, this time public, of the same detailed information, such as datasets, that may have required disclosure under Articles 12.8 of the SCM Agreement and 6.9 of the Anti-Dumping Agreement.

7.673 In any event, it is clear that the causation analysis is one of the essential elements leading to the imposition of final measures. Therefore, the relevant information on matters of fact and law and reasons underlying the causation analysis must be set forth in the public notice or separate report in accordance with Articles 22.5 of the SCM Agreement and 12.2.2 of the Anti-Dumping Agreement. The causation analysis includes examination of other factors, apart from the dumped or subsidized imports, that may be injuring the domestic industry. In this context, MOFCOM considered the effect of non-subject imports on the domestic industry. However, MOFCOM's disclosure in the final determination on this point was extremely limited. In the section of the determination relating to other factors that may have been causing injury, MOFCOM stated that non-subject imports as a

[648] United States' first written submission, paras. 262, 264-265.
[649] Final Determination, Exhibit US-28, p. 61.
[650] Final Determination, Exhibit US-28, p. 57.

proportion of total imports "continued to drop". While China argues that information on the market share of non-subject imports during 2008 could be derived from disclosures in other sections of the determination, namely that non-subject imports increased by 0.09% in 2008, this disclosure was not explicit and its relevance to the analysis of the non-subject imports as a factor that could be injuring the domestic industry was not clear, particularly in the light of the fact that the information from which it could be derived was in a different section of the determination.

7.674 Even if we were to accept that MOFCOM disclosed that non-subject imports increased by 0.09% in 2008, the Panel is not convinced that MOFCOM adequately disclosed all relevant information on the matters of fact and law and reasons underlying the conclusion that non-subject imports were not injuring the domestic industry. As indicated in paragraph 7.657 of this Report, it is clear that MOFCOM had information before it and undertook some analysis of that information in addressing non-subject imports as an "other" cause of injury. However, there is no indication of this in the public notice. Indeed, China defends the merits of MOFCOM's conclusion by reference to reasons and facts which it states "underscores the reasonableness of MOFCOM's judgment on this issue". For instance, China argues that during the first and fourth quarters of 2008, "subject imports gained 21.3 million kgs, while non-subject imports gained only 8.9 million kgs. The overall market was growing, so both increased. But unfairly trade subject imports were gaining volume faster, and then gaining market share. Fairly traded non-subject imports increased more modestly and did not gain market share".[651] Given our earlier conclusion that MOFCOM had detailed data on the volume of non-subject imports before it[652], and that China argues that this data supports MOFCOM's conclusion, it is our view that the public notice fails to set forth "all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures". We do not consider it necessary to proceed to decide whether MOFCOM should also have disclosed the full set of data on the volume and prices of non-subject imports as a part of its final determination.

7.675 Consequently, in the light of this reasoning, the Panel concludes that China acted inconsistently with Articles 22.5 of the SCM Agreement and 12.2.2 of the Anti-Dumping Agreement.

L. WHETHER CHINA ACTED INCONSISTENTLY WITH ARTICLE 1 OF THE ANTI-DUMPING AGREEMENT AND ARTICLE 10 OF THE SCM AGREEMENT

1. Provisions at issue

7.676 Article 10 of the SCM Agreement provides, relevantly:

> Members shall take all necessary steps to ensure that the imposition of a countervailing duty on any product of the territory of any Member imported into the territory of another Member is in accordance with the provisions of Article VI of GATT 1994 and the terms of this Agreement.

7.677 Similarly, Article 1 of the Anti-Dumping Agreement provides, relevantly:

> An anti-dumping measure shall be applied only under the circumstances provided for in Article VI of GATT 1994 and pursuant to investigations initiated and conducted in accordance with the provisions of this Agreement.

[651] China's opening statement at the second meeting of the Panel, para. 88.
[652] See para. 7.657 of this Report.

2. Arguments of the United States

7.678 The United States argues that because China's conduct of the GOES investigation breached numerous other provisions of the SCM and Anti-Dumping Agreements, China also breached Articles 10 and 1 of these Agreements respectively.[653]

3. Arguments of China

7.679 China argues that to the extent it has addressed all the substantive claims raised by the United States and has acted consistently with its obligations, the claims under Articles 10 and 1 of the SCM and Anti-Dumping Agreements respectively, should be set aside.[654]

4. Evaluation by the Panel

7.680 The United States' claims under Article 1 of the Anti-Dumping Agreement and Article 10 of the SCM Agreement are dependent on the other claims it has brought in this dispute.

7.681 Therefore, to the extent we have upheld the United States' claims under the SCM and Anti-Dumping Agreements, we find that China has also acted inconsistently with Article 10 of the SCM Agreement and Article 1 of the Anti-Dumping Agreement.

[653] United States' first written submission, paras. 183 and 267.
[654] China's first written submission, paras. 249 and 377-378.

VIII. CONCLUSIONS AND RECOMMENDATION

A. CONCLUSIONS

8.1 In the light of the findings set forth in this Report, the Panel concludes that China acted inconsistently with:

(a) Article 11.3 of the SCM Agreement, on the basis that MOFCOM initiated countervailing duty investigations into each of the 11 programmes challenged before the Panel by the United States, without sufficient evidence to justify this;

(b) Articles 12.4.1 of the SCM Agreement and 6.5.1 of the Anti-Dumping Agreement, on the basis that MOFCOM did not require the applicants to furnish non-confidential summaries in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence;

(c) Article 12.7 of the SCM Agreement in connection with MOFCOM's use of a 100% utilization rate in calculating the subsidy rates for the two known respondents under certain procurement programmes;

(d) Articles 6.8, 6.9, 12.2, 12.2.2 and paragraph 1 of Annex II of the Anti-Dumping Agreement, in connection with the resort to facts available to calculate the "all others" dumping margin for unknown exporters and due to deficiencies in the related essential facts disclosure and public notice and explanation;

(e) Articles 12.7, 12.8, 22.3 and 22.5 of the SCM Agreement, in connection with the resort to facts available to calculate the "all others" subsidy rate for unknown exporters and due to deficiencies in the related essential facts disclosure and public notice and explanation;

(f) Articles 15.1, 15.2, 12.8 and 22.5 of the SCM Agreement and 3.1, 3.2, 6.9 and 12.2.2 of the Anti-Dumping Agreement, in connection with MOFCOM's findings regarding the price effects of subject imports and due to deficiencies in the related essential facts disclosure and public notice and explanation;

(g) Articles 15.1, 15.5, 12.8 and 22.5 of the SCM Agreement and 3.1, 3.5, 6.9 and 12.2.2 of the Anti-Dumping Agreement, in connection with MOFCOM's finding that subject imports caused material injury to the domestic industry and due to deficiencies in the related essential facts disclosure and public notice and explanation; and

(h) Article 10 of the SCM Agreement and Article 1 of the Anti-Dumping Agreement, as a consequence of the foregoing violations of these Agreements.

8.2 In the light of the findings set forth in this Report, the Panel concludes that the United States has **not** established that China acted inconsistently with:

(a) Article 12.2.2 of the Anti-Dumping Agreement by not including in a public notice or separate report the data and calculations used to determine the respondent companies' final dumping margins;

(b) Article 12.7 of the SCM Agreement due to MOFCOM's resort to facts available to calculate the subsidy rates for the two known respondents under certain procurement programmes; and

(c) Article 22.3 of the SCM Agreement in connection with MOFCOM's explanation of the findings and conclusions supporting its determination that the bidding process under the United States Government procurement statutes at issue did not result in prices that reflected market conditions.

8.3 In the light of the findings set forth in paragraphs 8.1 and 8.2 of this Report, the Panel does not consider it necessary to make findings with respect to the United States' claims under:

(a) Article 11.2 of the SCM Agreement; and

(b) Article VI:2 of the GATT 1994.

B. RECOMMENDATION

8.4 Under Article 3.8 of the DSU, in cases where there is infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment of benefits under that agreement. Accordingly, to the extent China has acted inconsistently with certain provisions of the SCM and Anti-Dumping Agreements, we conclude that it has nullified or impaired benefits accruing to the United States under those Agreements.

8.5 Pursuant to Article 19.1 of the DSU, having found China acted inconsistently with certain provisions of the SCM and Anti-Dumping Agreements, we recommend China bring its measures into conformity with its obligations under those Agreements.

WORLD TRADE ORGANIZATION

WT/DS414/R/Add.1
15 June 2012

(12-3104)

Original: English

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

Report of the Panel

Addendum

This *addendum* contains Annexes A to H to the Report of the Panel to be found in document WT/DS414/R.

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EXECUTIVE SUMMARY OF THE FIRST WRITTEN
SUBMISSION OF THE UNITED STATES

I. INTRODUCTION

1. In this dispute, the United States is challenging various aspects of the definitive anti-dumping and countervailing duty measures that the Government of the People's Republic of China ("China") has adopted with respect to imports of grain oriented flat-rolled electrical steel ("GOES") from the United States. Several aspects of these measures are inconsistent with China's obligations under the General Agreement on Tariffs and Trade 1994 ("GATT 1994"), the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("AD Agreement"), and the Agreement on Subsidies and Countervailing Measures ("SCM Agreement").

2. Transparency and due process commitments are important elements of the AD and SCM Agreements. From the very outset, China's conduct of the GOES investigation raised serious transparency and due process concerns. Following China's wide-ranging investigation, in which it requested detailed information on companies' entire production lines including products unrelated to GOES, data on sales stretching back fifteen years, and on laws and regulations that had no relation to the companies or product at issue, and after both the United States and U.S. companies provided over a dozen questionnaire responses, the serious due process and transparency problems evident from the beginning of the proceeding became even more apparent as China began issuing its determinations. These due process and transparency problems impaired the ability of the United States and interested parties to understand the basis for China's determinations or to defend their interests.

II. FACTUAL BACKGROUND

A. THE IMPOSITION OF DUTIES ON U.S. IMPORTS

1. The Petition

3. On 27 April 2009, two Chinese steel producers, Wuhan Iron and Steel (Group) Corporation and Baosteel Group Corporation, filed a petition with China's Ministry of Commerce ("MOFCOM") requesting relief under China's AD and CVD laws on behalf of China's domestic GOES industry. The petitioners alleged that U.S. producers of GOES, in particular AK Steel Corporation ("AK Steel") and ATI Allegheny Ludlum Corporation ("ATI"), had engaged in injurious dumping and benefitted from various countervailable subsidies.[1]

4. Regarding subsidies, the petitioners alleged that 27 federal and state laws provided countervailable subsidies to the U.S. companies. Among the laws challenged were several federal procurement statutes. Regarding the dumping allegations, petitioners estimated a dumping margin for GOES imports from the United States of 25 per cent. The petition alleged that imports of GOES from the United States and Russia caused and threatened injury to the Chinese industry. Citing China's AD regulations, the petitioners argued that a cumulative assessment of injury should be performed, which would collectively take into consideration GOES imports from the United States and Russia. The petition then alleged price undercutting, price depression, and price suppression caused by the imports.

[1] The petition also alleged that Russian producers of GOES engaged in injurious dumping.

5. To support virtually their allegations, the petitioners purportedly relied on a wide variety of data and information. Virtually none of this information was disclosed, however, because the petitioners sought and obtained from MOFCOM confidential treatment for nine broad categories of data and information that it claimed was confidential.

6. On 1 June 2009, MOFCOM initiated the anti-dumping, countervailing duty, and injury investigations. For the anti-dumping and countervailing duty proceedings, MOFCOM set a period of investigation from 1 March 2008 to 28 February 2009, and for injury, MOFCOM set the period of investigation from 1 January 2006 to 31 March 2009.

2. Subsidy Questionnaires and New Allegations

7. On 26 June 2009, MOFCOM issued initial subsidy questionnaires to AK Steel and ATI, as well as to the United States. MOFCOM asked the United States for purchase data relating to GOES during the period of investigation. The results of a search of the federal procurement database showed that GOES was not purchased by the U.S. government.

8. In the subsidy questionnaires issued to AK Steel and ATI, MOFCOM demanded volumes of information unrelated to the subject merchandise. For example, MOFCOM demanded that AK Steel provide detailed transaction data for billions of dollars in transactions involving non-subject merchandise – products that are neither inputs for GOES nor substitutable for GOES. Because of the volumes of information requested, neither AK Steel nor ATI could fulfil all of the requests made in the CVD proceeding. In addition, and in connection with demands for all sales data for all products, AK Steel referenced the fact that it had already submitted detailed sales data for GOES in the parallel anti-dumping proceeding, and asked MOFCOM to review that data for purposes of the CVD, since China's anti-dumping laws and regulations do not provide for separate investigative records.

9. The U.S. companies further demonstrated that they did not sell any GOES to any government entity. In addition to referring MOFCOM to detailed sales data for GOES, AK Steel provided MOFCOM customer lists for all products showing that no sales were made to the government. ATI provided customer lists for the subject merchandise.

10. On 20 July 2009, the petitioners filed new subsidy allegations regarding various federal and state laws. Despite serious deficiencies pertaining to these allegations, on 19 August 2009, MOFCOM initiated an investigation covering five programmes.

11. After filing its initial questionnaire response on 10 August 2009, in a span of just eight weeks, AK Steel received and responded to five lengthy supplemental questionnaires issued by MOFCOM in the CVD investigation. On 9 September 2009, AK Steel noted the considerable burden resulting from MOFCOM's investigation, and stressed its willingness to cooperate. AK Steel responded to all of MOFCOM's requests.

3. Preliminary Determination

12. On 20 December 2009, MOFCOM published the preliminary determination. Regarding the government procurement statutes, MOFCOM applied what it termed facts available and calculated a subsidy rate of 11.7 per cent for AK Steel and 12 per cent for ATI. MOFCOM asserted that it applied facts available to the U.S. companies because it determined that the U.S. companies did not cooperate in its investigation. MOFCOM specifically cited U.S. companies' failure to provide data on all sales of all steel products.

13. Regarding its benefit determination for the federal procurement statutes, MOFCOM concluded that competitive bidding under the procurement statutes does not result in a valid market

price. While conceding that competitive bidding exists, MOFCOM nonetheless concluded, without explaining it conclusion, that the qualification criteria for bid participants prevented the price from reflecting true market conditions.

14. MOFCOM calculated preliminary dumping margins of 10.7 per cent for AK Steel, 19.9 per cent for ATI, and 25 per cent for all others. The only explanation MOFCOM provided regarding how it calculated the all others rate was a single sentence in its report. MOFCOM provided no further explanation of its calculation of the all others dumping rate, and it did not disclose the information forming the basis for the calculation of this rate. The all others subsidy rate in the preliminary determination was 12 per cent.

4. On-Site Verification

15. Between 5 January 2010 and 13 January 2010, MOFCOM conducted an on-site verification of each of the two U.S. companies subject to individual investigation. The detailed sales data for GOES and customer lists for all products submitted by AK Steel and detailed GOES sales data submitted by ATI before the verification were usable for the determination of the subsidy rate because the data showed records for all sales, as well as the absence of sales to the government. MOFCOM could have used these data, in conjunction with the information supplied by the United States from its procurement database, to determine that GOES was not purchased by the U.S. government under any federal procurement programmes. Because the detailed sales data for GOES and customer lists for all products submitted by AK Steel provided a basis for MOFCOM to determine the level of sales to government entities, the U.S. companies requested that MOFCOM verify the customer lists submitted before the preliminary determination was issued. Despite this request, MOFCOM did not verify the customer lists in the CVD proceeding.

5. Disclosure Documents

(a) Factual Disclosure on Dumping Margin and Subsidy Rate

16. Prior to issuing the Final Determination for the anti-dumping and countervailing duty investigations, MOFCOM released its Final Disclosure, in which it revealed that it had nearly quadrupled the all others subsidy rate to 44.6 per cent. As with the Preliminary Determination, the Final Disclosure provided only one sentence referring to its CVD regulations to explain the source of the all others subsidy rate. MOFCOM did not disclose the facts that led it to conclude that the use of facts available was justified for all other U.S. companies. It also did not disclose the facts that led it to conclude that 44.6 per cent was a justifiable rate or the calculations performed to determine this rate. Also in the Final Disclosure, MOFCOM revealed that it was increasing the all others dumping rate to 64.8 per cent. Again, MOFCOM simply provided a vague reference to China's anti-dumping law, and beyond that offered not a single piece of information regarding how the rate was calculated.

(b) Injury Disclosure

17. On 5 March 2010, the Industry Injury Investigation Bureau of MOFCOM issued a document titled "Basic Facts Based on Which the Industry Injury Determination of the Anti-dumping Investigation into GOES Imports from the United States and Russia and the CVD Investigation into GOES Imports from the United States was Made" ("Injury Disclosure Document").

18. The Injury Disclosure Document provided some basic information about the volume of the imports under investigation, as well as trend information concerning the condition of the domestic industry. Nevertheless, with respect to an issue that was critical to the subsequent injury determination – pricing – MOFCOM disclosed strikingly few facts**.**

19. What MOFCOM characterized as "pricing" data in a section entitled "Price of the Subject Merchandise" were in fact average unit value data for transactions derived from Customs statistics. MOFCOM combined average unit value data for products imported from the United States and Russia, notwithstanding the fact that separate data for each country could be derived from the Customs statistics. MOFCOM also decided to use only one annual observation for calendar years 2006, 2007, and 2008. Consequently, in a three and one-quarter year period of investigation concerning products from two countries, MOFCOM reported – and apparently relied upon – only four observations of average unit values for the imports under investigation. In short, MOFCOM's disclosure included *no information* concerning actual prices charged for *any product* in any commercial transaction.

20. MOFCOM did not state how it generated any information on the pricing of the domestically produced product. The minimal information disclosed concerning pricing trends suggests that, as with the imports, MOFCOM relied on only four pricing observations for domestically produced products.

21. Another issue central to the final determination was price suppression and the Chinese producers' purported inability to recover increasing costs. While the Injury Disclosure Document provided some information concerning trends in sales revenue and profits before tax, it disclosed nothing concerning the level, trends, or composition of the domestic industry's costs.

22. On causation, MOFCOM disclosed that the Chinese industry's capacity increased by over 50 per cent in 2008, and was 80 per cent higher in the first quarter of 2009 than during the first quarter of 2008. The large capacity increases facilitated substantial increases in production. These increases in production outstripped even robust increases in demand – particularly so in the first quarter of 2009.

6. Final Determination

(a) Subsidy and Dumping Findings

23. On 10 April 2010, MOFCOM issued the final determination for the anti-dumping and countervailing duty investigations. MOFCOM applied a dumping margin of 7.8 per cent to AK Steel, and 19.9 per cent to ATI.

24. For the subsidy rate, MOFCOM continued to use what it termed facts available to calculate subsidy rates for the federal procurement statutes because the respondents did not provide 15 years of detailed sales data for non-subject merchandise. To calculate the amount of the subsidy purportedly benefitting GOES products, MOFCOM, relying on facts available, assumed that AK Steel and ATI sold only carbon steel, and sold *all* of their output to the government, despite the fact that the record demonstrated there were no sales of GOES to the government, AK Steel did not sell any product to any government entity during the POI, and only a limited amount of non-GOES AK Steel and ATI products could even as a theoretical matter have been purchased in connection with alleged government procurement. Without any analysis, MOFCOM determined that U.S. carbon steel prices were 25 per cent above prices for foreign products**.** MOFCOM calculated subsidy rates for the federal procurement statutes indicating that GOES from AK Steel benefitted from subsidies at the rate of 11.918 per cent and GOES from ATI benefitted at the rate of 11.65 per cent.

25. Regarding the procurement statutes, MOFCOM also concluded that the prices obtained through the competitive bidding process provided for under U.S. law do not reflect real market prices. In doing so, MOFCOM dismissed the position of the United States that procurement in the United States occurs under competitive bidding conditions and that foreign companies may compete

for bids. Repeating its position in the preliminary determination, MOFCOM simply stated that the prices generated by competitive bidding do not reflect market prices.

26. Ignoring U.S. comments explaining the flaws in the all others subsidy rate calculation, filed in response to the disclosure document, MOFCOM, in the final determination, imposed a final all others subsidy rate of 44.6 per cent. Again, at no time prior to the final determination did MOFCOM disclose to the United States or other interested parties the essential facts under consideration that formed the basis for the near quadrupling of the all others subsidy rate, other than stating that the rate was based on information from the petitioners pursuant to China's CVD regulations. MOFCOM's explanation did not change from the preliminary determination and disclosure document to the final determination.

27. In the final determination, MOFCOM calculated an all others dumping rate of 64.8 per cent, 332 per cent higher than that in its preliminary determination. It did so despite the fact that the dumping rates it calculated for the two respondents, AK Steel and ATI, were substantially lower that 64.8 per cent – that is, 7.8 per cent and 19.9 per cent, respectively. Again, MOFCOM's only explanation was that it relied upon its Anti-Dumping Regulation. The Final Determination contains no other explanation of how MOFCOM calculated the rate, the data it relied on, or why an increase from 25 per cent was warranted for other U.S. producers/exporters that it did not examine.

(b) Injury Findings

28. In its final determination, MOFCOM found that China' GOES industry sustained material injury and there was a causal link between the dumped imports of GOES from Russia and the dumped and subsidized imports of GOES from the United States and this injury. A critical aspect of the causation analysis concerned the purportedly significant price effects of the imports under investigation.

29. MOFCOM repeatedly stated that the importers had a "strategy" of charging "low prices." One critical finding at the beginning of the section is that "[t]he contracts and original records from the price formulation process provided by petitioners showed that the subject merchandise adopted a pricing strategy of selling at a price lower than Chinese like products in the Chinese domestic market. Because subject merchandise was kept at a low price, and the import volume of subject merchandise increased greatly since 2008, domestic producers had to lower their prices to keep market share." MOFCOM failed to specify the nature of these contracts or records, or summarize their content in the Final Determination. As previously discussed, the Injury Disclosure Document contained no information concerning actual prices charged for any product in any commercial transaction. It also provided no information about these contracts or records. Both the Russian and U.S. parties argued to MOFCOM that their prices were not in fact lower than the prices charged by the domestic producers. MOFCOM rejected these arguments at the end of its pricing discussion, in language almost identical to its "low price strategy" finding quoted above, providing no greater detail as to the nature or application of the policy.

30. While the Injury Disclosure Document provided no comparisons of prices of domestic and imported products, there was one such comparison in the Final Determination. MOFCOM revealed for the first time, in its response to the disclosure comments, that "the Investigating Authority did not conclude that the price of the imported subject merchandise was lower than the price of the domestic like product in Q1 of 2009." The Final Determination, however, contained no specific comparisons of prices of the imported and domestically produced product during the remaining period of investigation – calendar years 2006 through 2008.

31. As previously stated, notwithstanding the foregoing, MOFCOM found that the imports under investigation had price-depressing effects. In particular, it found that domestic producers had to

"lower their prices to keep market share" in response to the "pricing strategy" of the imports under investigation.

32. MOFCOM also found that the imports under investigation had price-suppressing effects. It found that, because of the imports under investigation, domestic producers were not able to recover rising costs in the first quarter of 2009. MOFCOM first found that, during 2008 and the first quarter of 2009, imports increased more quickly than domestic demand. MOFCOM then found that the increased market penetration of the imports under investigation caused declines in the domestic industry's capacity utilization and increases in its inventories in 2008 and the first quarter of 2009.

33. MOFCOM next repeated the price effects findings from the injury disclosure, and concluded that the subject imports, because of their purported underselling and purportedly significant price-depressing and -suppressing effects, "result[ed] in sharp decline[s] in the profitability of the domestic industry." MOFCOM cited as other adverse effects declines in sales revenues, profits, return on investments, and employment-related factors during the first quarter of 2009.

34. MOFCOM further purportedly examined whether other factors caused injury to the domestic industry. In every instance, it found that the other factors caused no injury. Thus it found that GOES imports from countries other than Russia and the United States were not a cause of injury. This discussion, which was the sole discussion in the Final Determination concerning imports from sources other than the United States and Russia, provided no empirical data concerning imports from nonsubject countries. Nor did MOFCOM include any information about imports from nonsubject countries in its Injury Disclosure Document.

35. Finally, MOFCOM responded to the U.S. comments that the Chinese industry's decisions to expand capacity and production were a likely alternative cause of injury. The United States argued before MOFCOM that the sharp increase in inventories caused by the domestic industry's overexpansion was an alternative cause of injury. MOFCOM rejected these arguments and concluded that the domestic industry's sharp increases in capacity, production, and inventories were not a cause of any injury to the domestic industry.

III. LEGAL ARGUMENT

A. THE INITIATION OF THE COUNTERVAILING DUTY INVESTIGATION FOR SEVERAL PROGRAMMES BREACHED ARTICLE 11 OF THE SCM AGREEMENT

36. MOFCOM's initiation of the countervailing duty investigation was inconsistent with Article 11 of the SCM Agreement. An application to initiate a CVD investigation must include sufficient evidence of financial contribution, benefit, and specificity to satisfy the requirements of Article 11.2. For several allegations contained in the petition, the programmes established under the laws and alleged to provide countervailable subsidies either were no longer in effect and could no longer provide benefits to the U.S. companies; or the petitioners did not offer evidence of specificity; or the petitioners did not offer evidence of a financial contribution. Therefore, the petition failed to meet the requirements of Article 11.2.

37. In addition, to satisfy the requirements of Article 11.3, an investigating authority must objectively assess the accuracy and adequacy of the evidence contained in the petition before initiating an investigation. MOFCOM, however, failed to examine the accuracy and adequacy of the evidence with respect to several alleged subsidies. Regarding several of the supposed subsidies at issue, an objective investigating authority would not have initiated an investigation based on the petition's unsupported allegations.

B. MOFCOM FAILED TO REQUIRE ADEQUATE NON-CONFIDENTIAL SUMMARIES, BREACHING ARTICLE 12.4.1 OF THE SCM AGREEMENT AND ARTICLE 6.5.1 OF THE AD AGREEMENT

38. China breached Article 12.4.1 of the SCM Agreement and Article 6.5.1 of the AD Agreement because it failed to require non-confidential summaries of allegedly confidential information. The only purported non-confidential summaries are contained in the petition; no summaries of confidential information are contained in the preliminary determination, disclosure documents, nor final determination. Further, the purported non-confidential summaries in the petition are not in fact summaries. Instead, the petition only provides requests for confidential treatment of data and information. It does not summarize the information in a manner permitting a reasonable understanding of the substance of the data and information treated as confidential.

C. CHINA BREACHED ARTICLE 12.7 OF THE SCM AGREEMENT BECAUSE ITS USE OF FACTS AVAILABLE WAS IMPROPER

39. China breached Article 12.7 of the SCM Agreement because its use of facts available was improper. MOFCOM ignored necessary information provided by the U.S. companies. The U.S. companies provided this necessary information within a reasonable period of time, and they did not impede the investigation. MOFCOM's use of facts available was unjustified and punitive.

D. MOFCOM FAILED TO MAKE AVAILABLE THE CALCULATIONS IT PERFORMED TO ARRIVE AT THE DUMPING MARGINS, INCONSISTENT WITH ARTICLE 12.2.2 OF THE AD AGREEMENT

40. China breached Article 12.2.2 of the AD Agreement because it failed to make available to AK Steel and ATI the calculations used to determine these companies' final dumping margins. The dumping calculations are "relevant information on the matters of fact" that led to the imposition of definitive measures. Accordingly, MOFCOM was required to make them available, but it did not do so.

E. MOFCOM'S FAILURE TO PROVIDE SUFFICIENT INFORMATION ON THE FINDINGS AND CONCLUSIONS OF LAW IT CONSIDERED MATERIAL CONSTITUTES A BREACH OF ARTICLE 22.3 OF THE SCM AGREEMENT

41. MOFCOM failed to adequately explain its findings and conclusions supporting its determinations that the competitive bidding process under the U.S. government procurement statutes at issue does not result in prices that reflect market conditions. These findings and conclusions were material to its finding of benefit in its subsidy investigation. MOFCOM failed to explain its novel benefit theory in the preliminary and final determinations. Therefore, China acted inconsistently with Article 22.3 of the SCM Agreement.

F. MOFCOM'S DETERMINATION OF THE "ALL OTHERS" CVD RATE WAS INCONSISTENT WITH ARTICLES 12.7, 12.8, 22.3, AND 22.5 OF THE SCM AGREEMENT

42. MOFCOM, without explanation, applied countervailing duties based on facts available to other U.S. exporters/producers of GOES that were not named in the petition and were never sent a questionnaire. MOFCOM never notified a single producer other than those identified in the petition of the existence of the investigation, the information that would be required of them, or the consequences of not fully complying with MOFCOM's requests. MOFCOM compounded the impact of its application of facts available by providing no detail in its Final Determination and final disclosure documents with regard to the findings that led to its application of facts available. As a

result of this lack of disclosure, the United States and other U.S. companies were deprived of any opportunity to defend their interests with respect to this issue. Thus, China acted inconsistently with Articles 12.7, 12.8, 22.3, and 22.5 of the SCM Agreement.

G. MOFCOM'S DETERMINATION OF THE ALL OTHERS RATE IN THE FINAL ANTI-DUMPING DUTY DETERMINATION IS INCONSISTENT WITH ARTICLE 6.8, 6.9, 12.2, AND 12.2.2 OF THE ANTI-DUMPING AGREEMENT

43. As with the application of countervailing duties to other U.S. exporters/producers of GOES that were not named in the petition and were never sent a questionnaire, MOFCOM appears to have applied a facts available dumping margin to other U.S. producers/exporters of GOES despite never notifying a single producer other than those identified in the petition of the existence of the investigation, the information that would be required of them, or the consequences of not fully complying with MOFCOM's requests. In so doing, MOFCOM did not disclose the essential facts and conclusions of law that led it to this result. MOFCOM provided no detail in its Final Determination and final disclosure documents with regard to the findings that led to its application of facts available. As a result of this lack of disclosure, the United States and other U.S. companies were deprived of any opportunity to defend their interests with respect to this issue. Consequently, China acted inconsistently with Articles 6.8, 6.9, 12.2, and 12.2.2 of the AD Agreement.

H. CHINA'S CONDUCT OF THE GOES INVESTIGATION BREACHED ARTICLE 1 OF THE AD AGREEMENT

44. Because China's conduct of the GOES investigation breached numerous other provisions of the AD Agreement, China also breached Article 1.

I. CHINA BREACHED ARTICLE VI:2 OF GATT 1994 BY LEVYING AN ANTI-DUMPING DUTY GREATER THAN THE MARGIN OF DUMPING

45. China impermissibly assigned an adverse facts available margin to other U.S. producers/exporters that China did not examine in this investigation. As a result of the adverse assumptions made in assigning that margin to those companies, the anti-dumping duty levied on their products was "greater in amount than the margin of dumping in respect of such products", which could permissibly have been calculated in accordance with the provisions of the AD Agreement. Because the duties China levied on these "all others" companies were, and continue to be, greater in amount than the appropriate margin of dumping, China violated Article VI:2 of GATT 1994.

J. THE PRICE EFFECTS ANALYSIS IN MOFCOM'S FINAL DETERMINATION WAS INCONSISTENT WITH CHINA'S WTO OBLIGATIONS

46. MOFCOM's price effects analysis in its injury determination was fundamentally flawed in many respects. MOFCOM failed to disclose essential facts supporting is price effects analysis. MOFCOM's price effects analysis was also not based on positive evidence. In conducting its price effects analysis, MOFCOM did not engage in an objective examination of the evidence, nor did MOFCOM offer an adequate explanation for its price effects findings. China therefore acted inconsistently with Articles 3.1, 3.2 , 6.9, and 12.2.2 of the AD Agreement, and Articles 12.8, 15.1, 15.2, and 22.5 of the SCM Agreement

K. THE CAUSATION ANALYSIS IN MOFCOM'S FINAL DETERMINATION IS INCONSISTENT WITH CHINA'S WTO OBLIGATIONS

47. MOFCOM's causation analysis in its injury determination was similarly deficient. MOFCOM failed to disclose facts supporting its causation analysis. The causation analysis was not supported by

positive evidence and was not based on an objective examination of the evidence. MOFCOM also failed to communicate an adequate explanation for its causation findings. Therefore, China acted inconsistently with Articles 3.1, 3.5, 6.9, and 12.2.2 of the AD Agreement, and Articles 12.8, 15.1, 15.5, and 22.5 of the SCM Agreement.

L. CHINA'S CONDUCT OF THE GOES INVESTIGATION BREACHED ARTICLE 10 OF THE SCM AGREEMENT

48. Because China's conduct of the GOES investigation breached numerous other provisions of the SCM Agreement, China also breached Article 10.

ANNEX A-2

EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION OF CHINA

A. THE PETITION AND INITIATION THEREOF WERE CONSISTENT WITH ARTICLES 11.2 AND 11.3 OF THE SCM AGREEMENT

1. In the underlying anti-subsidy proceeding, the applicants presented hundreds of pages of factual information relating to financial contribution, benefit, and specificity in support of their subsidy allegations. The information provided was that information reasonably available to the applicants. MOFCOM examined the allegations and accompanying factual information, and determined that although certain allegations did not warrant initiation of an investigation, there was a sufficient evidentiary basis to initiate on several other allegations. MOFCOM conducted an investigation of the allegations at issue. (Ultimately, none of the allegations at issue under this U.S. claim were determined to have provided countervailable benefits to the respondents.)

2. The U.S. claims merely reflect disapproval of the allegations found in the applications rather than a critique of the factual information supporting the allegations. Indeed, the United States is far too quick to assert without any evaluation that "the petition did not contain any evidence" of one or more elements of an actionable subsidy, when in fact such evidence existed, leaving in doubt whether the United States has advanced a *prima facie* case under Article 11

3. What the United States seeks is a different standard for applications than that found in Article 11 of the SCM Agreement, requiring a level of information, analysis, and disclosure simply not required by that provision. The consistent theme of prior panels in addressing this requirement is that applicants need only submit enough evidence to justify an investigation, and need not analyse that evidence or justify the ultimate conclusion. First, WTO dispute settlement panels have found that the initiation standard presents a relatively low threshold for applicants. Second, an application is sufficient if limited to providing relevant information; analysis is not a prerequisite. Third, an applicant is not required to provide within its application an exhaustive compendium of all relevant information reasonably available to it. The real question is whether the application contained sufficient information on the matters specified in Article 11, and by that standard whether initiation of the allegations at issue was proper. The evidence on the record of the proceeding, largely unaddressed by the United States in its claim, demonstrates that both the contents of the petition and initiation were proper.

4. China submits that the United States has failed to engage in a serious evaluation of the evidence that accompanied the application at issue. Because of that failure, the United States has failed to establish a *prima facie* case that the application was inconsistent with Article 11.2. Its entire case with respect to 11 separate allegations is confined to 11 perfunctory paragraphs that, to one extent or another, simply assert that "the petition did not contain any evidence" of one or more elements of an actionable subsidy. The United States made absolutely no reference to the information that accompanied the application with respect to many of the challenged allegations, when in fact each allegation was accompanied by specific documentary information beyond the assertions contained in the allegation itself. For the programmes where the United States actually mentioned accompanying evidence, it was only in passing with no serious critique of the information.

B. MOFCOM'S TREATMENT OF CONFIDENTIAL INFORMATION WAS FULLY CONSISTENT WITH THE REQUIREMENTS OF ARTICLE 6.5.1 OF THE AD AGREEMENT AND ARTICLE 12.4.1 OF THE SCM AGREEMENT

5. Article 6.5.1 and Article 12.4.1 do not require complete or perfect disclosure. They require only that a non-confidential summary – the public version of a document – be in "sufficient detail" to permit a "reasonable understanding" of the "substance" of the information. These provisions seek to strike a balance between the interests of the interested parties submitting confidential information and the interests of the other interested parties to be reasonably informed. Nonetheless, the text of the provisions recognizes that the balance must favour the submitter of confidential information, where summaries cannot adequately protect confidential information. The non-confidential summaries in the public version of the petition more than met this standard.

6. The U.S. argument focuses entirely on the statements made in part II of the petition, but completely ignores the non-confidential summaries provided in part I of the petition. Given the United States failure even to address the non-confidential summaries actually provided, China believes the United States has not made out a *prima facie* case of its claim. The fact that the Appendices do not repeat non-confidential summaries provided in the narrative of the public version of the petition does not create a violation of Article 6.5.1 or Article 12.4.1. One can have a "reasonable understanding" of the key issues and facts by reading the entire public version of the petition and there is no obligation on the authorities to require interested parties to repeat a non-confidential summary that has already been provided.

7. To the extent the Panel finds that adequate non-confidential summaries on any particular issues were not provided in the underlying proceeding, China believes that the central issue shifts to whether or not China dealt with the exceptional circumstances of this investigation properly in view of Article 6.5 and 6.5.1 and the so-called "due process" rights of the interested parties. The exceptional circumstance of having only two respondent companies in China permitted the authorities to invoke the "exceptional circumstance" provision of Articles 6.5.1 and 12.4.1 of the AD and SCM Agreements respectively in order to protect the confidentiality of the information submitted. Because the information was limited to two companies, the information provided was not susceptible to a more traditional confidential summary which aggregates the information from multiple companies, thereby protecting the confidentiality of individual company information.

C. MOFCOM'S APPLICATION OF FACTS AVAILABLE IN DETERMINING THE SUBSIDY MARGIN FOR THE GOVERNMENT PURCHASE OF GOODS PROGRAM WAS CONSISTENT WITH ARTICLE 12.7

8. In the underlying investigation MOFCOM made direct requests to the company respondents regarding information on all steel sales in the context of the government purchase of goods program. The respondents refused to respond to MOFCOM's requests in their initial questionnaire responses. After consulting and providing written guidance to both AK Steel and ATI on the matter, MOFCOM gave both companies ample opportunity to correct their responses. The companies again refused. In response, China declined to verify the deficient, untimely and unusable information provided, and instead applied "facts available" to both companies, finding that 100 per cent of sales took place under the programme. On the basis of these facts, the United States now argues that China improperly applied "facts available" in consideration of the government purchase of goods program. Looking to the language of Article 12.7 and guidance derived from parallel language under Article 6 of the AD Agreement, the United States claims that MOFCOM impermissibly ignored "necessary information" provided by the company respondents in the case.

9. China notes that the U.S. "facts available" claims appear rooted in a substantive disagreement over China's analysis of subsidy issues, but any substantive disagreement the United States has over

China's theory of subsidization and methodological choices with respect to the government purchase of goods program is not before this Panel. The Panel must evaluate the U.S. claim in light of China's approach to what it deemed to be necessary information, not in light of U.S. arguments about what should have been sufficient information. Properly framed, it is evident that MOFCOM's application of "facts available" was consistent with Article 12.7. The companies did not provide timely responses, did not cooperate to the best of their ability, and seriously impeded the investigation even when they knew as of the preliminary determination that MOFCOM was considering a 100 per cent utilization option.

10. MOFCOM knew the correct utilization of the programme was more than zero. MOFCOM also had a reasonable basis to believe the correct utilization was more than the 29 per cent alternative offered by AK Steel, since AK Steel had refused to provide requested information. Indeed, this alternative was filed on the same day – 30 December 2010 as the final AK Steel effort belatedly to respond to the MOFCOM request for information. Yet even at this late date, AK Steel still did not respond properly, and provided transaction data only for a subset of the customers that had been previously identified. Indeed, AK Steel did no more than submit data that it had readily available for months. So instead of making a good faith effort finally to respond to the request, AK Steel yet again decided it could pick and choose how and whether to respond. On the other hand, MOFCOM had no information with which it could determine some alternative more than the AK alternative but less than 100 per cent utilization, again in large part due to the refusal of ATI and AK Steel to provide complete information. MOFCOM's effort to elicit more complete cooperation had failed, and the facts to determine the actual level of utilization had still been withheld by the U.S. respondents. Thus, MOFCOM reasonably relied on the 100 per cent figure, consistent with Article 12.7 of the SCM Agreement.

11. Respondents who wilfully and strategically create a factual void during the course of an investigation should not be allowed to benefit from that non-cooperation under Article 12.7 of the SCM Agreement. To allow such an outcome would undermine the entire purpose of the investigation and allow respondents to manipulate the process by withholding unfavourable information in a calculated manner.

D. MOFCOM'S DISCLOSURE OF ITS DETERMINATION OF THE MARGINS OF DUMPING WAS CONSISTENT WITH THE REQUIREMENTS OF ARTICLE 12.2.2

12. There is no language in Article 12.2.2 that supports the U.S. contention that this provision requires authorities to provide respondents with the actual calculation of the margins of dumping. Article 12 is focused on providing an "explanation" of determinations; sufficient detail in this context would indicate that the disclosure be sufficient to constitute an adequate explanation of the authority's findings and conclusions, and what facts and law were relied upon in reaching such conclusions and findings. This is not a mandate to require full disclosure of all facts used to calculate the margins of dumping, but rather a more limited requirement to ensure an understanding of the methodology, facts used, and the results obtained with respect to the margins of dumping. All that is necessary is to provide interested parties to an investigation or review notice of determinations made by the authorities and an explanation of the determinations.

13. It is questionable whether the United States complaint regarding the disclosure of the actual numbers used and the actual calculations performed in the determination of the margins of dumping properly even lies under Article 12.2.2, which addresses final determinations, or Article 6.9 which addresses the disclosure of the essential facts forming the basis of the decision to apply definitive measures. Nevertheless, even if the United States were basing its complaint on Article 6.9, the language of the Article makes clear that its object and purposes is to provide the "essential facts" to enable interested parties "to defend their interests," not to provide the detailed facts demonstrating the

calculation of the margin of dumping. Moreover, even if Article 6.9 were properly before the Panel, the disclosure provided in Article 6.9 does not add to that required under Article 12.

14. Notwithstanding the absence of any requirement that the details of the calculation of the margins of dumping be disclosed, the disclosure by China in the instant investigation was sufficient to allow respondents to replicate the authority's calculation. China provides in Exhibits CHN-25 and CHN-26 tables listing each element of the calculation of normal value and export price or constructed export price used to calculate the margins of dumping for each of the two U.S. respondents, drawn from the source documents of the proceeding. Each respondent could go to the source information and reconstruct the exact calculation performed by MOFCOM to determine the margins of dumping. Thus, the respondents were in a position to check the accuracy of the MOFCOM calculation, and it is evident from comments filed by ATI during the proceeding that it clearly understood what information MOFCOM was using. Thus, the U.S. claim is without merit.

E. MOFCOM PROVIDED SUFFICIENT DETAIL ON ITS FINDINGS OF THE LACK OF A COMPETITIVE BIDDING PROCESS UNDER THE GOVERNMENT PURCHASE OF GOODS PROGRAM

15. Using record facts, MOFCOM's preliminary and final determinations plainly set forth why participation restrictions on foreign steel and price preferences afforded to U.S. steel resulted in prices that did not reflect competitive, market conditions under the government purchase of goods program.

16. Article 22.3 of the SCM Agreement establishes notification requirements at the preliminary and final stages of investigation with respect to those issues of fact and law considered material by the investigating authorities. Notifications, in "sufficient detail," should be provided in the preliminary and final determinations, or through a separate report. The object and purpose of the provision is to provide transparency and afford affected parties a reasonable understanding of the facts and analysis underlying an authority's determinations. Both the preliminary and final determinations issued by MOFCOM accomplished exactly this objective, contrary to U.S. claims.

17. In the preliminary determination, MOFCOM explained all the elements that led to its conclusion that bidding under the government purchases of goods program did not reflect market pricing. Contrary to U.S. claims, it also directly addressed arguments made by the United States that no benefits were conferred on any manufacturers of goods. Specifically, the preliminary determination noted: (1) bids by U.S. producers are afforded a 25 per cent price cushion over competing foreign prices, thus "competitive bidding" is really closed bidding among U.S. producers at artificial start prices; (2) to the extent foreign suppliers are exempted from the 25 per cent price preference for U.S. products under the Government Procurement Agreements, others remain subject to that restriction, with certain states prohibiting any foreign participation and expressly limiting competition to U.S.-made steel; and (3) because of these features, the price obtained through this so-called "competitive bidding does not reflect true market conditions."

18. In the final determination, MOFCOM's explanation expanded upon that offered in the preliminary determination. MOFCOM not only quantified the amount of foreign steel excluded from Buy American projects as part of U.S. consumption, but also quantified the price difference between North American prices and non-North American prices based on the submissions of AK Steel. As discussed in the final determination, what that factual information showed is that the prices of excluded products were lower than the North American price. Finally, MOFCOM presented evidence from verification noting the extremely limited use of foreign products within Buy American projects. Combined with what was already explained about price preferences and general exclusions, this information confirmed the lack of a competitive market, and a market that was otherwise weighted toward higher priced U.S. steel.

F. MOFCOM'S DETERMINATION OF THE "ALL OTHERS" CVD RATE WAS CONSISTENT WITH ARTICLES 12.7 AND 12.8 OF THE SCM AGREEMENT

19. In the underlying investigation, MOFCOM provided direct notice to the participating respondents, including the U.S. Government, AK Steel, and ATI. It also placed a copy of the received petition in its public reading room and published public notices of initiation. To MOFCOM's knowledge, notice was thereby given to each known interested party as defined by Article 12.9 of the SCM Agreement of the implications of initiation and the consequences for failing to cooperate with the investigation.

20. In terms of the facts selected by MOFCOM in calculating the "all others" CVD rate, as indicated in the final determination, MOFCOM relied upon information provided by the petitioner. Notice and thereby disclosure was given to all known producers/exporters. With respect to disclosure of the facts upon which the all others rate was based, the final determination disclosed that it was based upon information provided by the petitioners. Specifically, the final determination stated: "{f}or other U.S. companies who did not register nor submit the questionnaire responses, the Investigating Authority made a determination on ad valorem subsidy rate based on the information submitted by the petitioner pursuant to Article 21 of the Regulations on Countervailing Measures." There was little mystery to which information this statement referred, and the United States appears to have readily identified the source from the record based on that statement. The information provided the facts and calculations upon which the all others rate based.

G. MOFCOM'S DETERMINATION OF THE "ALL OTHERS" AD RATE

21. In the underlying GOES investigation, MOFCOM followed the general rule set forth in Article 6.10 of the AD Agreement which establishes that authorities "shall, as a rule, determine an individual margin of dumping for each known exporter or producer concerned of the product under investigation." Since MOFCOM conducted an individual examination of the margins of dumping of each known exporter/producer, the rule for determining the margin of dumping for non-individually examined exporters/producers in Article 9.4 of the AD Agreement does not apply in determining an "all others" rate. Neither Article 6.10 nor any other provision of the AD Agreement addresses the issue of the treatment of exporters/producers that are not "known" to the authority and cannot, therefore, be individually examined.

22. Pursuant to MOFCOM's notification to all producers/exporters consistent with Article 6.1 of the AD Agreement, China determined that the most relevant provision of the AD Agreement to address the issue of the antidumping rate for unknown and unresponsive exporters/producers was Article 6.8 of the AD Agreement which addresses the treatment of interested parties who do not provide the "necessary information" required by the authority. In applying Article 6.8, the authority based its margin of dumping on paragraph 7 of Annex II. This was done since an "all others" rate based on the rate applied to one or both of the cooperating respondents, would provide no incentive for unknown companies to make themselves known and participate in the investigation. Thus, the application of Article 6.8 and the last sentence of paragraph 7 of Annex II were intended to encourage realization of the objectives of Article 6.10, namely to enable China to follow the general rule of determining margins of dumping for each individual producer/exporter.

23. In the preliminary determination, the margins of dumping used for the "all others" rate was based on the margins alleged and contained in the petition. However, because the information on which the final determination of the "all others" rate was based was confidential information of one of the responding companies, the actual information used to determine this rate could not be disclosed without breaching the confidentiality of the information used. Thus, the explanation was necessarily general in nature. The failure to disclose the details of the calculation of the "all others" rate had no effect on the ability of parties to defend their interests. So long as the "all others" rate is based on

record evidence, it is not clear that in the situation where parties do not cooperate that the authority's discretion is limited.

H. MOFCOM'S INVESTIGATION DID NOT BREACH ARTICLE 1 OF THE AD AGREEMENT

24. In the sections above, China has addressed in full each of the United States' substantive claims concerning China's alleged breaches of the AD Agreement. To the extent China has addressed all of the substantive claims raised by the United States and acted consistently with its obligations under the AD Agreement, the United States' Article 1 claim lacks merit and should be set aside.

I. CHINA'S AD MEASURE DID NOT BREACH ARTICLE VI:2 OF GATT 1994

25. The United States claims that the circumstances surrounding China's assignment of the "all others" rate in the underlying proceeding breached Article VI:2 of GATT 1994. China has addressed the United States substantive arguments with respect to the "all others" AD margin. We refer the Panel to the discussion above in Section G.

J. MOFCOM PROPERLY ANALYSED THE ADVERSE PRICE EFFECTS FROM THE SUBJECT IMPORTS

26. At the outset, it is important to note the MOFCOM findings not being challenged by the United States. The United States has made no challenge to the MOFCOM findings of adverse volume effects. The United States has also made no challenge to the MOFCOM findings regarding cumulation, which means that subject imports from both the United States and Russia must be considered together and the behaviour of the U.S. producers themselves (individually or together) is not legally relevant to the analysis. Finally, the United States has made no challenge to the MOFCOM findings of material injury. The U.S. challenges are limited to the price effects, and the causal link.

27. The U.S. arguments focus heavily on price undercutting findings that MOFCOM did not make, and largely misstate and mischaracterize the price suppression and price depression analysis that MOFCOM did make. MOFCOM properly found that in the face of an increasing volume of subject imports that gained significant market share, domestic prices began to show the effects of price suppression and depression during 2008, and those effects continued and worsened in early 2009. The record provides strong positive evidence for the MOFCOM findings of price suppression and depression during 2008 and 2009, evidence that was not challenged at all during the administrative proceedings before MOFCOM and evidence that the United States has not effectively challenged in its submission to this Panel.

28. MOFCOM did not make specific price undercutting findings, nor was it under any legal obligation to do so, contrary to U.S. arguments. The texts of Article 3.2 and Article 15.2 -- through the key term "or" -- make clear that price undercutting is simply one alternative methodology that the authorities may consider as part of evaluating price effects. This interpretation is reinforced by the term "otherwise" that the United States left out of its quote from these texts – "whether the effect of such imports is otherwise to depress prices to a significant degree or prevent price increases." (emphasis added) Both the use of "or" and the use of "otherwise" confirm that price undercutting is optional, not mandatory. This interpretation has been adopted by other panels.

29. MOFCOM also disclosed all of the "essential facts" as required by Article 6.9 and Article 12.8. This disclosure occurred in two key documents. First, MOFCOM presented a Preliminary Determination on 10 December 2009, which included extensive discussion of injury issues in general, and pricing issues in particular. Second, MOFCOM also presented a Final Injury

Disclosures on 7 March 2010, which presented the essential facts and provided initial responses to those arguments that had been made so far during the administrative proceedings. These two documents contained all of the "essential facts" on which China ultimately relied in its Final Determination.

30. In making its disclosure argument, the United States has completely ignored the authority's obligation to protect the confidentiality of information. The United States cites to the procedural requirement to disclose, but conveniently overlooks the fact that this obligation occurs in the context of the parallel requirement to protect the confidentiality of proprietary information. This requirement can be seen in Article 6.5 and Article 12.4, which discuss the obligation to protect confidentiality. This requirement can also been seen in Article 12.2.2 and Article 22.5, which discuss the obligation of disclosure, but with "… due regard being paid to the requirements for protection of confidential information." On balance, the United States has not identified any specific piece of information that was both an "essential fact" and could be disclosed while maintaining confidentiality. Such a failure has often been the basis for dismissing such claims as not stating a *prima facie* case.

31. Beyond complaining about the disclosure of "essential facts," the United States also complains about the "reasons" provided by MOFCOM. Contrary to the U.S. argument, MOFCOM has provided the "relevant information" and "reasons" required by Article 12.2.2 and Article 22.5. The authority's obligation is not to address every detail of every argument raised by the parties, in the specific terms provided by those parties. MOFCOM developed its response that the growing volume of subject imports in 2008 and early 2009 caused price suppression and price depression in those years. That complete explanation of its "reasons" satisfies the obligations of Article 12.2.2 and Article 22.5.

32. Overall, China believes that its analysis of adverse price effects fully complied with the substantive and procedural requirements of the relevant Agreements. If the Panel were to disagree, China asks the Panel to confirm MOFCOM's overall finding of causation was still proper. Since MOFCOM based its analysis of causation on both volume effects and price effects, those price effects can support an overall finding of causation, even if they might not have been sufficient to justify finding a causal link on their own. U.S. arguments to the contrary are without merit, resting on an incorrect assumption that the WTO agreements "require an authority to undertake a price effects analysis." Article 3.1 and Article 15.1 require only two findings: an initial finding about volume/price effects, and then a finding about the "consequent impact" of those effects. An authority can thus "examine" both the volume and price effects, but ultimately decide to base its decision on whatever balance of volume effects and price effects appropriate in a specific case, and the "consequent impact" of those subject imports. The United States has not challenged the MOFCOM findings of volume effects, nor has the United States challenged the MOFCOM findings of material injury. If the Panel agrees that MOFCOM has properly established a causal link between that subject imports and the condition of the domestic industry, that should be sufficient even if the price effects analysis alone would not have supported a finding of causal link.

K. MOFCOM PROPERLY ANALYSED THE WAYS IN WHICH SUBJECT IMPORTS CAUSED THE MATERIAL INJURY SUFFERED BY THE DOMESTIC INDUSTRY

33. On causal link, the United States presents only a single paragraph discussing causal link more generally, and that paragraph simply refers back to the U.S. arguments about price effects. The United States seems to believe that the absence of price effects automatically established the lack of a WTO consistent causal link. Legally, the United States is wrong. Adverse price effects alone are not a "necessary element" of the causal link. The U.S. argument also conveniently ignores the extent to which MOFCOM based its analysis on <u>both</u> the volume effects and the price effects. MOFCOM never considered the price effects in isolation; they were part of any overall analysis that the increasing volumes of low priced subject imports were causing material injury to the Chinese

industry. The United States has thus failed to demonstrate any inconsistency between MOFCOM's analysis and the requirements of Article 3.1 and Article 15.1 to find a causal relationship between subject imports and the condition of the domestic industry.

34. With respect to non-attribution, the primary U.S. argument is a challenge based on a single "other cause" of injury -- the expansion of Chinese capacity -- that the United States believes was not adequately addressed, and somehow severed by itself the causal link that MOFCOM had found. In making its argument, China notes that the United States ignores the degree of discretion authorities have to address alternative causes. Article 3.5 and Article 15.5 do not specify any particular methodology, and thus leave authorities with discretion as to how best to ensure a genuine causal link, even given the effects of other causes. The United States also mischaracterizes the nature of the legal obligation. The issue is not whether increases in capacity "could not have contributed" to the injury. MOFCOM need not disprove any possible effect of any other known factor that might also be affecting the domestic industry. Rather, the issue is whether subject imports contributed sufficiently to the adverse condition of the domestic industry, and whether the effect of the other factor was so dramatic as to nullify that contribution by subject imports, and thus sever the causal link.

35. The burden is on the United States as the complaining party to establish a *prima facie* case that the effects of increased domestic capacity were so dramatic that they severed any possible causal link between the subject imports and the condition of the domestic industry. The United States has failed to meet that burden. It reduces to a single other factor and a series of failed efforts to attack the reasons given by MOFCOM for finding that capacity expansion did not sever the causal link. But the respondents below provided no evidence for the U.S. theory, and the logic presented ultimately failed. The record before MOFCOM demonstrated that:

- Production capacity increased, but never exceeded total Chinese consumption.

- Even though the domestic industry added capacity, it did not actually use all of that new capacity and instead capacity utilization rates fell.

- Subject imports increased sharply in 2008 (up 61 per cent) and early 2009 (up 24 per cent), were growing faster than the overall market, and were gaining market share.

- The large and increasing volume of subject imports suppressed domestic shipments, and this subject import volume (which also happened to be at low prices) prevented the domestic industry from taking advantage of its new capacity.

Based on these facts, MOFCOM properly dismissed the possibility that the expansion of domestic capacity severed the causal link that MOFCOM had found.

36. Finally with respect to the issue of non-subject imports, China disclosed the "essential facts" of the case. The Preliminary Determination identified "products imported from other countries" as an "other factor" being analysed, and noted that subject imports were capturing a larger share of the total imports. This provided both notice that China was addressing non-subject imports, and that subject imports were gaining share of total imports. Other parts of the notice also addressed non-subject imports.

37. Having made this basic point in the Preliminary Determination, the interested parties made no further arguments on this issue. They could have developed information publicly – as the United States concedes in fn. 295 of its submission – but did not do so. Having provided the "essential facts," and having received no arguments on this point, China did not need to develop this issue further in the absence of arguments from the parties.

38. Finally, the U.S. argument that MOFCOM did not provide any "factual substantiation" for its conclusions, is just wrong. The demonstration that non-subject imports gained only 0.09 percentage points of market share is factual substantiation. Moreover, MOFCOM provided more than adequate discussion of this issue in light of the failure by the parties to use the publicly available information to develop any arguments on this point.

L. CHINA'S OBLIGATIONS UNDER ARTICLE 10 OF THE SCM AGREEMENT

39. The United States claims that China breached its obligations under Article 10 of the SCM Agreement based on its substantive arguments under various other provisions of the Agreement and GATT 1994. To the extent China's has demonstrated that its actions are consistent with the provisions of Article VI of GATT 1994 and the terms of the SCM Agreement as raised by the United States, this U.S. Article 10 claim should be rejected.

ANNEX B

WRITTEN SUBMISSIONS, OR EXECUTIVE SUMMARIES THEREOF,
OF THE THIRD PARTIES

ANNEX B-1

EXECUTIVE SUMMARY OF THE THIRD PARTY
WRITTEN SUBMISSION OF ARGENTINA*

I. INTRODUCTION

1. In this third-party submission, Argentina is setting out its views on some of the issues that form part of this dispute, in accordance with the written submissions to this Panel by the United States and China.

II. UNDER ARTICLE 6.5 OF THE AGREEMENT ON IMPLEMENTATION OF ARTICLE VI OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE 1994 ("AD AGREEMENT") AND ARTICLE 12.4 OF THE AGREEMENT ON SUBSIDIES AND COUNTERVAILING MEASURES ("SCM AGREEMENT"), GOOD CAUSE MUST BE SHOWN FOR THE CONFIDENTIALITY OF INFORMATION AND A NON-CONFIDENTIAL SUMMARY MUST BE FURNISHED TO THE INTERESTED PARTIES

2. Articles 6.5 and 6.5.1 of the AD Agreement and Article 12.4.1 of the SCM Agreement require the submission of non-confidential summaries, so as to enable the interested parties or Members to gain "a reasonable understanding of the substance of the information submitted in confidence". The aim, ultimately, is to guarantee the right of defence to the interested parties, who otherwise would lack sufficient information to understand the grounds of the accusation that they face.

3. The WTO has had the opportunity to give its opinion on this subject in "*United States - Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*" (WT/DS268/RW). The Panel in that case held that "*[a]s we noted above, Article 6.5.1 protects the right of the interested parties generally to be reasonably informed about the substance of the confidential information that may be submitted by any other interested party. What matters for purposes of Article 6.5.1 is whether the interested parties themselves receive non-confidential summaries of the confidential information submitted to the investigating authorities*".[1]

4. Argentina therefore agrees with the view expressed by the United States in point B of its written submission to the effect that the Chinese Ministry of Commerce (MOFCOM), in accordance with the above-mentioned Articles 6.5.1 of the AD Agreement and 12.4.1 of the SCM Agreement, should have required the interested parties submitting confidential information in the investigation to furnish non-confidential summaries thereof, especially in cases where the submitting parties had shown no cause for the impossibility of summarization.

III. NON-ATTRIBUTION ANALYSIS WITH RESPECT TO OTHER FACTORS IN THE DETERMINATION OF INJURY

5. Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement show that, prior to its determination as to whether imports at dumped or subsidized prices are the cause of the difficulties experienced by the domestic industry, an investigating authority should carry out the so-called non-attribution analysis, whereby consideration has to be given to factors other than known factors

* This written statement was originally made in Spanish.

[1] *United States - Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina* (WT/DS/268/RW), paragraph 7.137.

and a determination made as to whether they contribute to the injury suffered by the domestic industry.

6. In this connection, Argentina is of the opinion that it is also clear from the above-mentioned rules that the Agreements under interpretation require no evidence that imports from other countries considered as "known factors" within the meaning of Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement are dumped or subsidized imports. In our view, therefore, even in the absence of dumping or subsidization or where the prices and/or quantity of those commercial operations are such as to cause injury to the domestic industry, it might be necessary for the investigating authority to examine whether, in the light of their volume and/or prices, imports from sources other than the one under investigation are substantial enough to break the causal link between the dumped imports and the injury determined. In that examination, it might also be necessary to consider qualitative issues relating to the forms of competition in each of the markets.

IV. CONCLUSION

7. In the light of the analysis contained in this submission, Argentina considers that:

- The "confidential" classification of information submitted by any party in the dumping or subsidy investigation must be justified by good cause; in that event, it is of the utmost importance that, except in duly attested exceptional circumstances, non-confidential summaries are to be furnished, so as to guarantee the right of defence to the interested parties.

- In the determination of injury, the investigating authority shall effect a non-attribution analysis relating to "other known factors" which may be a contributing cause of the difficulties faced by the domestic industry.

ANNEX B-2

EXECUTIVE SUMMARY OF THE THIRD PARTY
WRITTEN SUBMISSION OF THE
EUROPEAN UNION

I. INTRODUCTION

1. The European Union (EU) intervenes in this dispute because of its interest in the correct interpretation of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994"), the *Agreement on Subsidies and Countervailing Measures* ("*SCM*") and the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade* ("Anti-Dumping Agreement" or "ADA").

II. CONCERNING THE ALLEGATION THAT MOFCOM FAILED TO REQUIRE ADEQUATE NON-CONFIDENTIAL SUMMARIES CONTRARY TO ARTICLE 12.4.1 SCM AND ARTICLE 6.5.1 ADA

2. In its First Written Submission the U.S. submits that China breached Article 12.4.1 SCM and Article 6.5.1 ADA because it failed to require non-confidential summaries of allegedly confidential information.

3. Prior WTO panels clarified the importance and the outer boundaries of the obligation imposed by Article 6.5.1 ADA and its parallel provision in the SCM Article 12.4.1. The EU is of the view that not even the minimum transparency requirements of Article 6.5.1 ADA or Article 12.4.1 SCM can be considered to have been met in cases where non-confidential summaries were not provided to nor requested by the investigating authority and no statement of reasons stating the exceptional circumstances that render the confidential information unsusceptible to summarisation in non-confidential format has been provided to the investigating authorities.

III. CONCERNING THE ALLEGATION THAT MOFCOM FAILED TO MAKE AVAILABLE THE CALCULATIONS IT PERFOMED TO ARRIVE AT THE DUMPING MARGINS CONTRARY TO ARTICLE 12.2.2 ADA

4. In its First Written Submission the U.S. argues that China breached Article 12.2.2 ADA because it failed to make available to AK Steel and ATI the calculations and data used to determine these companies' final dumping margins. Whilst not taking a position on the facts of this case, the EU agrees with the U.S. that under Article 12.2.2 ADA, the investigating authority is required to include, or make available through a separate report, all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures in the public notice of conclusion of an investigation in the case of an affirmative determination providing for the imposition of a definitive duty.

5. The EU further notes that in order to provide interested parties with the opportunity to review the essential facts and provide meaningful comments, the ADA requires the investigating authority to disclose essential facts already under consideration before the final determination is made. According to the U.S., MOFCOM did not make the calculations, and the data underlying those calculations, available in its Final Disclosure. In general terms, even where calculations, and the data underlying those calculations, have already been made available at the stage of disclosure, any revision or modification of the calculations, and the data underlying those calculations, after the final disclosure would, in accordance with Article 12.2.2 ADA, have to be set out and explained in the public notice or through a separate report.

IV. CONCERNING THE ALLEGATION THAT MOFCOM APPEARS TO HAVE APPLIED A RATE THAT INCORPORATES PROGRAMS SPECIFICALLY FOUND NOT TO BE COUNTERVAILABLE

6. In its First Written Submission the U.S. alleges that China based the All Others' Rate on rates from the petition, which included rates for subsidies which were subsequently found to be non-countervailable.

7. The inclusion in the calculation of the All Others' Rate of programmes alleged in the petition, which were during the investigation found not to be countervailable by the investigating authority itself, would in the view of the EU amount to abusive use of facts available incompatible with Article 12.7 SCM interpreted with its relevant context.

V. CONCERNING THE ALLEGATION THAT CHINA ACTED INCONSISTENTLY WITH ARTICLE 12.8 OF THE SCM BY FAILING TO DISCLOSE THE ESSENTIAL FACTS UNDER CONSIDERATION REGARDING ITS CALCULATION OF THE "ALL OTHERS" SUBSIDY RATE

8. In its First Written Submission the U.S. alleges that China breached Article 12.8 SCM by failing to disclose the essential facts under consideration forming the basis of the All Others Subsidy Rate.

9. The EU agrees with the U.S. that: (i) facts that led the investigating authority to conclude that resorting to the use of the facts available was appropriate; (ii) facts that led the investigating authority to conclude that the subsidy rate as determined was an appropriate rate applicable to all other companies; (iii) facts underpinning the calculation of the subsidy rate as determined, and the details of the calculation itself; in general terms constitute essential facts forming the basis of the All Others Subsidy Rate within the meaning of Article 12.8 SCM and should as such be disclosed before a final determination is made.

VI. CONCERNING THE ALLEGATION THAT CHINA ACTED INCONSISTENTLY WITH ARTICLE 6.9 ADA BY FAILING TO DISCLOSE THE ESSENTIAL FACTS UNDER CONSIDERATION REGARDING ITS CALCULATION OF THE "ALL OTHERS" DUMPING RATE

10. The U.S. alleges that MOFCOM did not identify the essential facts that formed the basis for its imposition of a 64.8 per cent All Others Dumping Rate contrary to China's obligation under Article 6.9 ADA.

11. The EU agrees with the U.S. that: (i) facts that led the investigating authority to conclude that the All Others Dumping Rate as determined was an appropriate rate applicable to all other companies, especially considering that the dumping rates for the two companies identified in the notice of investigation were substantially lower than the determined all others dumping rate; (ii) particular "transaction information" from the two respondents that formed the basis for the All Others Dumping Rate as determined; (iii) facts underpinning the calculation of the All Others Dumping Rate, and the details of the calculation itself; in general terms constitute essential facts forming the basis of the All Others Dumping Rate within the meaning of Article 6.9 ADA and should as such be disclosed before a final determination is made.

VII. CONCERNING THE ALLEGATION THAT THE PRICE EFFECTS ANALYSIS IN MOFCOM'S FINAL DETERMINATION WAS INCONSISTENT WITH CHINA'S WTO OBLIGATIONS

12. The United States alleges[1] that MOFCOM did not (1) disclose several pieces of information critical to its price effects analysis, which is contrary to Article 6.9 ADA and Article 12.8 SCM; (2) in either the Final Determination or the injury disclosure document, provide any factual information or indeed reasoning to support its conclusion that import prices were lower than domestic producers' prices, thus infringing Article 12.2.2 ADA and Article 22.5 SCM; and (3) disclose evidence of significant price effects, which is in breach of Articles 3.1 and 3.2 ADA and Articles 15.1 and 15.2 SCM.

13. Concerning the alleged breach of Article 6.9 ADA and Article 12.8 SCM on the basis of the information available to the European Union it seems that disclosure[2] did not include any information about price levels for the domestically produced products. The information provided on page 8 of Exhibit US-27 indicates only the relative increase of the price of the products without indicating any price levels. Therefore, should the United States' allegations be confirmed, the European Union agrees with the United States' submission that MOFCOM's failure to disclose numerous facts central to its price effects analysis is inconsistent with Article 6.9 ADA and Article 12.8 SCM.

14. Concerning the alleged breach of Article 12.2.2 ADA and Article 22.5 SCM, if the United States' allegations are confirmed, the European Union agrees with the United States' submission that MOFCOM's failure to provide (1) a meaningful description of numerous facts critical to the price effects analysis; and (2) a substantiated response to the parties' arguments, breach Article 12.2.2 ADA and Article 22.5 SCM.

15. Concerning the alleged breach of Articles 3.1 and 3.2 ADA; and Articles 15.1 and 15.2 SCM were the Panel to establish that MOFCOM's response in the Final Measure to exporters' arguments submitted during the administrative procedure is insufficient and/or not based on sufficient evidence, the European Union agrees with the United States' submission that MOFCOM's failure to provide (1) a meaningful description of numerous facts critical to the price effects analysis; and (2) a substantiated response to the parties' arguments breach of Article 12.2.2 ADA and Article 22.5 SCM.

VIII. CONCERNING THE ALLEGATION THAT THE CAUSATION ANALYSIS IN MOFCOM'S FINAL DETERMINATION WAS INCONSISTENT WITH CHINA'S WTO OBLIGATIONS

16. Given the flawed price effects analysis MOFCOM could not possibly accomplish a correct causal link analysis. Indeed, unless imports have proven significant price effects, the investigating authorities cannot find such imports to be causing injury within the meaning of Article 3.1 ADA, first sentence; and Article 15.1 SCM.

17. Therefore, on the basis of the information presently before it, the European Union agrees with the United States' submission that MOFCOM has not complied with Article 6.9 ADA and Article 12.8 SCM in that it has provided no information whatsoever on imports from sources other than Russia and the United States.

[1] Ibid, paras. 186 et seq.
[2] See Exhibit US-27.

IX. CONCLUSIONS

18. The EU considers that this case raises important questions on the interpretation of Articles 15.1, 15.2, 12.4.1, 12.7 and 22.5 of the Agreement on Subsidies and Countervailing Measures and Articles 3.1, 3.2, 6.5.1, 6.8, 6.9 and 12.2.2 of the Anti-Dumping Agreement. While not taking a final position on the merits of the case, the EU requests this Panel to carefully review the scope of the claims in light of the observations made in this submission.

19. The EU reserves its right to make further comments at the third party session of the first substantive meeting with the Panel.

ANNEX B-3

THIRD PARTY WRITTEN SUBMISSION
OF HONDURAS[*]

I. INTRODUCTION

1. Honduras is participating in this dispute for reasons of systemic interest and because it considers that there is a need for proper interpretation of specific provisions of the WTO Agreements at issue.

2. In this third-party submission, therefore, Honduras is setting out its views on the legal interpretation of two of the issues that are the subject of this dispute, namely: (i) the requirements for initiation of an investigation on countervailing measures, pursuant to Articles 11.2 and 11.3 of the Agreement on Subsidies and Countervailing Measures (the "SCM Agreement"); and (ii) the requirements for the submission of confidential information, pursuant to Article 12.4.1 of the SCM Agreement and Article 6.5.1 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the "AD Agreement").

3. Honduras wishes to state that it reserves the right subsequently to submit its views on other issues or to elaborate on the comments concerning the two matters addressed in this submission, either at the oral statements stage or when the members of the Panel deem appropriate.

II. INITIATION OF INVESTIGATION BASED ON SUFFICIENT AND RELEVANT EVIDENCE UNDER ARTICLES 11.2 AND 11.3 OF THE SCM AGREEMENT

4. Article 11.2 of the SCM Agreement states that an application for initiation of an investigation in a proceeding on countervailing measures must contain:

> sufficient evidence of the existence of (a) a subsidy and, if possible, its amount; (b) injury within the meaning of Article VI of GATT 1994 as interpreted by this Agreement; and (c) a causal link between the subsidized imports and the alleged injury.

5. In addition, Article 11.2 of the SCM Agreement specifies that "simple assertion, unsubstantiated by relevant evidence", is not sufficient to meet the requirements of "sufficient evidence".

6. Furthermore, Article 11.3 of the SCM Agreement provides that:

> the authorities shall review the accuracy and adequacy of the evidence provided in the application to determine whether the evidence is sufficient to justify the initiation of an investigation.

7. The above-mentioned provisions lay down two obligations for the initiation of the investigation, both designed to obtain sufficient evidence. The first obligation pertains to the application and, in particular, the nature of the attached evidence. The second obligation falls on the investigating authority. The requirement that the evidence should be sufficient means, in part, that it should be relevant, adequate or appropriate - otherwise the investigating authority would have to

[*] This written statement was originally made in Spanish.

request the applicant to complete the application so that it complies with this provision. Without verifying such compliance, the investigating authority would not even be able to initiate the investigation procedure by reason of the *a fortiori* interpretation of Article 5.8 of the AD Agreement and Article 11.9 of the SCM Agreement.

8. The Panel in *US - Hot-Rolled Steel* stated that the expression "sufficient evidence" under Article 5.3 requires an examination as to "whether the evidence before the authority at the time it made its determination was such that an unbiased and objective investigating authority evaluating that evidence could properly have made the determination".[1] Therefore, the assessment criterion must pertain to the accuracy and relevance of the respective evidence in the light of the mandate to carry out an impartial and objective examination.

9. In the report of the Panel on *US - Softwood Lumber*, it was stated that the term "sufficient evidence" could not be taken to mean just "any evidence", since there has to be a factual basis to the decision of the investigating authority which is susceptible to review.[2]

10. It is clear from the foregoing that the evidence must contain a factual basis. In other words, the evidence submitted must be concrete evidence relating to the required elements of subsidization, injury and a causal link between subsidized imports and the alleged injury.

III. NON-CONFIDENTIAL SUMMARIES UNDER ARTICLE 12.4.1 OF THE SCM AGREEMENT AND ARTICLE 6.5.1 OF THE AD AGREEMENT

11. Article 12.4.1 of the SCM Agreement stipulates that the authorities shall require "interested parties providing confidential information to furnish non-confidential summaries thereof". It adds that:

> "[t]hese summaries shall be in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence. In exceptional circumstances, such Members or parties may indicate that such information is not susceptible of summary. In such exceptional circumstances, a statement of the reasons why summarization is not possible must be provided".

12. Article 6.5.1 of the AD Agreement sets out the same obligations with respect to the handling of non-confidential summaries in the context of anti-dumping investigation proceedings.

13. The above-mentioned provisions are unequivocal. In both cases they require that the investigating authorities should in turn require the interested parties to furnish non-confidential summaries when submitting information which they consider to be confidential. If a non-confidential summary of such information is not provided, it is not possible to gain an understanding of the substance of the information that has been removed or deleted from the document or documents containing confidential information. Failure to fulfil this obligation adversely affects compliance with the principle of defence and due process in an investigation procedure, and may affect the impartiality and neutrality of the investigating authority.

IV. CONCLUSION

14. In the light of the foregoing, we consider that the Panel should assess whether the investigating authority verified that sufficient evidence was provided on the elements required for the initiation of the investigation and whether the same authority satisfied itself that the evidence in

[1] Panel Report, *US - Hot-Rolled Steel*, paragraph 7.153.
[2] Panel Report, *US - Softwood Lumber*, paragraph 7.55.

question met the requirement of adequacy and accuracy as justification for the initiation of the investigation.

15. We likewise consider that the Panel should confirm the compulsory nature of the requirement that non-confidential summaries must be provided when an interested party submits confidential information, with a view to guaranteeing respect for due process and the impartiality and neutrality of the investigation.

ANNEX B-4

EXECUTIVE SUMMARY OF THE THIRD PARTY
WRITTEN SUBMISSION OF JAPAN

I. INTRODUCTION

1. In this third party submission, Japan would like to present its views on systemic aspects of the following issues: (a) disclosure of essential facts before the final determination under Article 6.9 of the *AD Agreement* and Article 12.8 of the *SCM Agreement*; (b) final determinations under Article 12.2.2 of the *AD Agreement* and Articles 22.3 and 22.5 of the *SCM Agreement*; and (c) the determination of the all others rates based on facts available under Article 6.8 of the *AD Agreement* and Article 12.7 of the *SCM Agreement*.

II. DISCUSSION

A. DISCLOSURE OF ESSENTIAL FACTS BEFORE THE FINAL DETERMINATION UNDER ARTICLE 6.9 OF THE *AD AGREEMENT* AND ARTICLE 12.8 OF THE *SCM AGREEMENT*

1. The Investigating Authority's Obligation to Disclose the Essential Facts before the Final Determination

2. The respective first sentences of Article 6.9 of the *AD Agreement* and Article 12.8 of the *SCM Agreement* provide that the authorities must disclose the "essential facts under consideration which form the basis for the decision whether to apply definitive measure." This obligation must be distinguished from providing interested parties the opportunity to see all information under Article 6.4 of the *AD Agreement* and Article 12.3 of the *SCM Agreement*. The authorities must identify the particular "essential facts" among all relevant information in the anti-dumping or countervailing investigation.

3. Japan recalls that essential facts "form the basis for the decision whether to apply definitive measure." In this respect, Japan agrees with the panel in *Mexico – Olive Oil*, which correctly described them to be "the specific facts that underlie the investigating authority's final findings and conclusions in respect of the three essential elements – subsidization, injury and causation".[1] The same rationale should apply to the essential facts for the decision whether to apply definitive anti-dumping measures because the provision of Article 6.9 of the *AD Agreement* is substantively identical to the provision of Article 12.8 of the *SCM Agreement*. Further, Article VI:1 of GATT 1994 provides that, in the case of an anti-dumping investigation, essential elements would be the existence of dumping, injury to the domestic industry, and causation.

2. Disclosure of Information on Price Effects in Connection with the Finding on Causation

4. The United States argues that MOFCOM disclosed "no data on levels of prices for the domestically produced product" and did not "disclose the results of any pricing comparisons between the domestically produced product and the imports"[2] and that non-disclosure of these facts is inconsistent with Article 6.9 of the *AD Agreement* and Article 12.8 of the *SCM Agreement*.

[1] Panel Report, *Mexico – Olive Oil*, para. 7.110. (WT/DS341/R)
[2] US FWS, para. 195.

5. Article 3.5 of the *AD Agreement* and Article 15.5 of the *SCM Agreement* provide that the causation must be demonstrated through the effects of dumping and subsidies as set forth in paragraphs 2 and 4 of these Articles. The factual finding by the investigating authorities of the price effects is "the specific facts that underlie the investigating authority's final findings conclusions in respect of … causation".[3]

6. In the final determination, MOFCOM appears to make certain price comparisons.[4] Such price comparisons appear to have resulted in the fact finding by the MOFCOM on the effects of the price of imports to the price of the domestically-produced product.

7. The authorities' choice of prices among raw price data, and its choice of the method to compare these prices would be a part of the process of the fact finding of the price effects. For exporters/producers and the exporting Member, the disclosure of such comparisons would be indispensable to argue effectively whether and how the authorities accurately and correctly found the effects of the price of imports to the price of the domestically-produced product. The results of pricing comparisons, therefore, are the type of "facts" that Article 6.9 of the *AD Agreement* and Article 12.8 of the *SCM Agreement* envisage to require disclosure to the interested parties. Japan notes that raw price data, however, is different from the price comparisons between the domestically-produced product and the imports. Such data would have to be made available under Article 6.4 of the *AD Agreement* and Article 12.3 of the *SCM Agreement.* Finally, it should be noted that certain price information might not be disclosed to interested parties because of its confidentiality.

3. Information Concerning Non-Subject Imports

8. The United States argues "MOFCOM disclosed no information concerning the volume or prices of imports from sources other than Russia and the United States"[5] in making the determination that there is no evidence suggesting that GOES imported from other countries or regions caused material injury to China's domestic industry[6] in both the preliminary determination and the final determination.

9. Article 3.5 of the *AD Agreement* and Article 15.5 of the *SCM Agreement* provide that authorities must examine any known factors and may not attribute the effect of the other factor to the dumped or subsidized imports. The non-attribution analysis is an essential part of the authority's final finding and conclusion on causation. As discussed above, however, raw data as such do not fall within the scope of the term "facts" that must be disclosed to interested parties under Article 6.9 of the *AD Agreement* and Article 12.8 of the *SCM Agreement*. The results of the analysis of raw data would be a part of the non-attribution finding that "the proportion of the volume of GOES imported from other countries and regions in total imports continued to drop". Such analytical information would be a "specific fact that underlie[s] MOFCOM's final finding of the causation."

[3] Panel Report, *Mexico – Olive Oil*, para. 7.110. (WT/DS341/R)

[4] *First Written Submission of the People's Republic of China* ("China FWS"), para. 282, citing Final Determination (English version) at 58; *See also* Preliminary Determination, (English version), (10 December 2009, at 56, Exhibit CHN-16). *See also* China FWS, para. 312.

[5] US FWS, para. 260.

[6] US FWS, para. 58. *See also* US FWS footnote 116 to para. 58 and footnote 294 to para. 260.

4. Information to Determine the Anti-Dumping Duty Rate Applicable to Unexamined Exporters

10. The United States argues that MOFCOM failed to disclose the information of the transactions that led MOFCOM to calculate an all others rate of 64.8 per cent rate in the anti-dumping duty investigation and the calculation of the all others rate.[7]

11. The Appellate Body has clarified that the existence of dumping must be determined on an exporter/producer-specific basis in accordance with the margin of dumping calculated on that basis.[8] The calculated individual margin is, therefore, one of the "facts" found by the authority to determine the existence of dumping, and accordingly, must be disclosed to all interested parties in accordance with Article 6.9 of the *AD* Agreement. Further Japan recalls the panel's finding that "the normal value and export price data ultimately used in the final determination are essential facts which form the basis for the decision whether to apply definitive measures."[9] Therefore it is clear that investigating authorities must disclose facts, including the normal value, the export price, and the calculation of dumping margins. A failure to disclose these facts would be inconsistent with Article 6.9 of the *AD* Agreement.

5. Information to Determine the Countervailing Duty Rate Applicable to Unexamined Exporters

12. The United States argues that MOFCOM failed to disclose the information that led MOFCOM to use the facts available to unexamined exporters in determining countervailing duty rate applicable to them, the information that led MOFCOM calculated 44.6 per cent of subsidy with respect to thereto, and calculation of the amount of subsidy applicable to these exporters or per-unit subsidy rate in the countervailing duty investigation.[10]

13. Article 19.4 of the *SCM Agreement* provides that the amount of subsidy must be calculated "in terms of subsidization per unit of the subsidized and exported product". The *SCM Agreement* requires "immediate termination in cases where the amount of a subsidy in *de minimis*".[11] As such, the amount of subsidy as indicated in the *ad valorem* rate constitutes a fact on which the authority makes the determination of the subsidization. Authorities therefore must disclose the government actions, which the authorities find as the subsidy, and also calculation of per-unit *ad valorem* subsidy rate. A failure to disclose these facts is inconsistent with Article 12.8 of the *SCM Agreement*.

B. FINAL DETERMINATIONS UNDER ARTICLE 12.2.2 OF THE *AD AGREEMENT A*ND ARTICLES 22.3 AND 22.5 OF THE *SCM AGREEMENT*

1. The Investigating Authority's Obligation to Provide a Sufficiently Detailed Explanation in Its Public Notice of the Final Determination

14. Article 12.2 of the *AD Agreement* and Articles 22.3 of the *SCM Agreement* require the issuance of a public notice or separate report of the final determination, setting forth "in ***sufficient***

[7] US FWS, para. 173.

[8] *See* Appellate Body Report, *US - Zeroing (Japan)*, para. 111. WT/DS322/AB/R ("the *Anti-Dumping Agreement* prescribes that dumping determinations be made in respect of each exporter or foreign producer examined. … Margins of dumping are established accordingly for each exporter or foreign producer on the basis of a comparison between normal value and export prices.").

[9] Panel Report, *Argentina - Poultry Anti-Dumping Duties*, para. 7.223 (emphasis in original).

[10] US FWS, para. 148.

[11] In case of developing countries, the *de minimis* level is 2 per cent. *See* Article 27.10(a) of the *SCM Agreement*.

detail the findings and conclusion reached on ***all issues*** of fact and law considered material by the investigating authorities."[12] Further, Article 12.2.2 of the *AD Agreement and A*rticle 22.5 of the *SCM Agreement* require that the public notice of such final determination must contain *"**all relevant information*** on the matters of fact and law and ***reasons***"[13] as well as "the reasons for the acceptance or rejection of relevant arguments" made by exporters or by interested Members. Therefore, in case of an affirmative determination, the authorities are required to provide explanation "in sufficient detail" and the reasons on all factual and legal issues related to the authorities' final determination or to arguments by interested parties and it must be published.

2. MOFCOM's Alleged Failure to Make Available the Calculations of the Dumping Margins and Data Used to Calculate the Margins

15. The United States alleges that MOFCOM's failure to make available the calculations and data it used to calculate the margins for two U.S. GOES producers was inconsistent with Article 12.2.2 of the *AD Agreement*.[14]

16. With respect to the determination of dumping, Article 12.2.2 requires that the public notice contain "all relevant information on the matters of fact"[15] The authorities, therefore, are obliged to provide a sufficiently detailed explanation on how they established the margin of dumping on an exporter/producer-specific basis, including the matters of facts. It must include the factual findings of the export price and the normal value, their comparison, and calculation of dumping and must be discernable in the public notice or separate report of the final determination. It should be noted that the actual data need not be stated in the public notice beca*use of the r*equirement for the protection of confidential information under Article 12.2.2 of the *AD Agreement.* Article 12.2.2 does not oblige the authorities to prepare a report of confidential version separately from the public notice.

3. MOFCOM's Alleged Failure to Provide Any Rationale on Its Rejection of a Price Derived from the Competitive Bidding Process

17. The United States *argues that "*Article 22.3 [of the *SCM Agreement*] requires MOFCOM to explain how the evidence supported its conclusion, and why MOFCOM chose to disregard arguments from the United States"[16] and that MOFCOM's explanation "does not qualify as adequate, and therefore China breached its obligation under Article 22.3."[17]

18. Article 12.2 of the *SCM Agreement* sets forth that any decision of the authorities must be "based on … the written record". Article 22.3 of the *SCM Agreement* then requires that the public notice or report of the preliminary or final determination "set forth … in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities."

19. According to the allegation by the United States, MOFCOM rejected the competitive bidding price in the U.S. government procurements as the market price. The adoption or rejection of the market price information in the country of purchase is an issue that must necessarily be resolved by the investigating authorities to reach the final determination. MOFCOM, thus, would be required to provide explanation in sufficient detail on how MOFCOM found that the competitive bidding price

[12] Emphasis added.
[13] Emphasis added.
[14] US FWS, para. 110.
[15] Article 12.2.1(iii) of the *AD Agreement* (incorporated by reference into Article 12.2.2).
[16] US FWS, para. 121.
[17] US FWS, para. 121.

was unable to accept as the market price and was higher than the market price based on the evidence on the record.

4. MOFCOM's Alleged Failure to Provide Factual Information of the Price Effects and of Imports from Sources Other than Russia and the United States and Alleged Insufficient Responses to Parties' Argument on the Price Effects

20. The United States argues that MOFCOM's non-attribution analysis in its final determination contained no empirical information concerning the volume and value of imports from sources other than Russia and the United States.[18] It further argues that the final determination "does not contain any facts that would support a finding that prices for the merchandise under investigation were at any time lower than prices for the domestically produced product."[19] Therefore China acted inconsistently with Article 12.2.2 of the *AD Agreement* and Article 22.5 of the *SCM Agreement*.[20]

21. Article 3.1 of the *AD Agreement* and Article 15.1 of the *SCM Agreement* require the authority to make determination "based on positive evidence". Articles 3.2 and 15.2 provide that the authority "***shall consider***" whether there has been a significant price-undercutting or otherwise a depression or suppression of the price of the domestically produced products. Articles 3.5 and 15.5 require that "the authorities ***shall examine*** all other factors … and the injuries caused by these other factors must not be attributed to the dumped [subsidized] imports." Article 12.2.2 of the *AD Agreement* and Article 22.5 of the *SCM Agreement* require that the notice contain information explaining "consideration relevant to the injury determination as set out in Article 3 of the *AD Agreement* or Article 15 of the *SCM Agreement*".[21]

22. The authorities must provide explanation in sufficient detail as to how the authorities considered positive evidence to make fact findings relevant to the injury determination as set forth in of Articles 3 and 15 because the analyses on both price effects and non-attribution are "consideration relevant to the injury determination"

C. THE DETERMINATION OF THE ALL OTHERS RATES BASED ON FACTS AVAILABLE

1. Consistency of the Determination of the All Others Rates Based on Facts Available with Article 6.8 of the *AD Agreement*

23. The United States alleges that "[b]y applying facts available to the unexamined firms when it never sent them copies of the anti-dumping questionnaire or took any other steps to ensure that they had received the notice that the AD Agreement requires, China breached Article 6.8 of the AD Agreement and paragraph 1 of Annex II."[22]

24. Article 6.1 of the *AD Agreement* provides that "[a]ll interested parties shall be given notice of the information which the authorities require". Paragraph 1 of Annex II further provides, "[a]s soon as possible after the initiation of the investigation, the investigating authorities should specify in detail the information required from any interested party". Article 6.8 of the *AD Agreement* then sets forth that facts available may be applied to an interested party which "refuses access to, or otherwise does to provide, necessary information … or significantly impedes the investigation". Paragraph 1 of

[18] US FWS, para. 262.
[19] US FWS, para. 201
[20] US FWS, paras. 204 and 265.
[21] Article 12.2.1(iv) of the *AD Agreement* and Article 22.4(iv) of the *SCM Agreement* (incorporated by reference into Article 12.2.2 and 22.5 respectively).
[22] US FWS, para. 166.

Annex II further provides that the authorities should inform the interested party that the authorities will apply facts available if the interested party does not supply the requested information. Therefore a dumping determination based on facts available with respect to exporters/producers that were not given any notice or unknown is inconsistent with Articles 6.1 and 6.8 and Paragraph 1 of Annex II of the *AD Agreement*.

2. Consistency of the Determination of the All Others Rates Based on Facts Available with Article 12.7 of the *SCM Agreement*

25. The United States argues that "China's application of facts available to calculate an adverse subsidy rate with respect to unexamined exporters/producers of GOES failed to satisfy the requirements of Article 12.7 of the SCM Agreement."[23]

26. The *SCM Agreement* envisages that certain exporters would be left unexamined during the original investigation, by providing in Article 19.3 that such exporters are "entitled to an expedited review in order that the investigating authorities promptly establish an individual countervailing duty rate for that exporter." The *SCM Agreement*, however, does not set forth any rules on whether or not to determine the existence of subsidization on an individual exporter basis. The authorities thus have the substantial discretion to make such determinations.

27. The authorities' discretion, however, is not unlimited. Article 12.1 of the *SCM Agreement* set forth the due process requirement that "all interested parties in a countervailing duty investigation shall be given notice of the information which the authorities require." This provision is substantially identical to Article 6.1 of the *AD Agreement.* Also as is the case of Article 6.8 of the *AD Agreement*, Article 12.7 permits authorities to rely on facts available only when an interested party does not provide "necessary" information.

28. The authorities must first notify an interested party of the information that they require, i.e. necessary information; the authorities may apply application of facts available with respect to "necessary" information, which the interested party did not provide; accordingly, the authorities may not apply facts available with respect to information that the authorities have not requested the interested party to submit. Therefore, a mere request in the public notice of the initiation to make themselves known to the authorities within 20 days from the date of initiation cannot be the basis to apply facts available to determine the amount of subsidy conferred upon such interested party.

III. CONCLUSION

29. As a third party, Japan does not comment on factual aspects on the issues above, and thus, does not take any specific position whether the measures at issue are inconsistent with the *AD Agreement* and the *SCM Agreement*. Japan respectfully requests the Panel to examine carefully the facts presented by the parties to this dispute in light of Japan's arguments above to ensure the fair and objective application of the provisions of the *AD Agreement* and the *SCM Agreement*.

[23] US FWS, para. 141.

ANNEX B-5

EXECUTIVE SUMMARY OF THE THIRD PARTY
WRITTEN SUBMISSION OF THE KINGDOM
OF SAUDI ARABIA

I. INTRODUCTION

1. Saudi Arabia's participation in this dispute relates to the interpretive issues discussed below, which are of strong systemic importance to all WTO Members. Saudi Arabia takes no position on the merits of the claims that are based on the particular facts of this case.

II. THE SCM AGREEMENT IMPOSES STRICT DISCIPLINES ON THE INITIATION OF A COUNTERVAILING DUTY INVESTIGATION

2. The negotiating history of the SCM Agreement demonstrates the intent of the drafters to strengthen the disciplines on initiation. Article 2.1 of the Tokyo Round Subsidies Code – the predecessor provision to Article 11.2 of the SCM Agreement – was incorporated essentially unchanged into the SCM Agreement, though with three important additions. First, the Uruguay Round negotiators added a new sentence to establish that "[s]imple assertion, unsubstantiated by relevant evidence, cannot be considered sufficient to meet the requirements of this paragraph". Second, they specified that the application must contain the detailed information set out in paragraphs (i) through (iv) of Article 11.2, provided such information is reasonably available to the applicant. Third, and most importantly, they added Article 11.3, imposing a new, affirmative obligation on the investigating authority to "review the accuracy and adequacy of the evidence provided in the application to determine whether the evidence is sufficient to justify the initiation of an investigation." The additions incorporated into the SCM Agreement demonstrate the intent of the drafters to "impose more disciplines on the application of countervailing measures".

3. There must be "sufficient evidence" before an investigating authority of subsidization, injury and causation to justify initiation. It is important to distinguish between the information requirements relevant to the *applicant* under Article 11.2 and the obligations of the *investigating authority* to review the accuracy and adequacy of that evidence under Article 11.3. The "reasonably available" language does not condone acceptance by the investigating authority of a complaint that is inaccurate or inadequate. Article 11.3 imposes a positive obligation on investigating authorities which goes beyond a determination that the requirements of Article 11.2 have been satisfied; authorities "must verify that the evidence presented constitutes 'reasonable indications'" of all subsidy and injury elements.[1]

III. AUTHORITIES MAY ONLY RESORT TO FACTS AVAILABLE IN LIMITED CIRCUMSTANCES AND CANNOT APPLY THEM IN A PUNITIVE MANNER

4. Under Article 12.7 of the SCM Agreement and Article 6.8 of the AD Agreement, an investigating authority may resort to facts available only in limited circumstances: when an interested party (i) refuses access to, or (ii) otherwise does not provide, necessary information[2] within a reasonable period, or (iii) significantly impedes the investigation. Information received from a respondent must be used if the respondent acted to the best of its ability, even if the information

[1] Panel Report, *Mexico – Steel Pipes and Tubes*, para. 7.22.
[2] *See* Panel Report, *US – Steel Plate*, para. 7.53; Panel Report, *EC – Salmon (Norway)*, para. 7.343.

provided is in a form different from that which was requested.[3] Paragraph 3 of Annex II "obliges an investigating authority to 'take[] into account' the information supplied by a respondent, even if *other* information requested has not been provided by the respondent and will need to be supplemented by facts available."[4] This is the case even if that information is submitted after a deadline, but within a reasonable period of time.[5]

5. Furthermore, the application of facts available must be non-punitive. The use of facts available "permits the use of facts on record *solely for the purpose of replacing information that may be missing*",[6] and authorities "should not arrive at a 'less favourable' outcome simply because an interested party fails to furnish requested information if, in fact, the interested party has 'cooperated'".[7] Thus, where an exporter fails to provide *some* information, or if the information provided does not fit perfectly the request to which it responds, authorities are not permitted to reject *all* information. Facts available may be employed only "to fill in gaps in the information [as] necessary to arrive at a [final] conclusion".[8]

IV. INVESTIGATING AUTHORITIES MUST DISCLOSE ESSENTIAL FACTS IN A MANNER WHICH ALLOWS PARTIES TO DEFEND THEIR INTERESTS

6. Under Article 12.8 of the SCM Agreement and Article 6.9 of the AD Agreement, an authority must (i) disclose all "essential facts" which form the basis for its determinations; and (ii) ensure that an interested party has adequate time to review those facts and correct them, where necessary, in a manner that permits interested parties to defend their interests. "Essential facts" encompasses "not only those [facts] that *support* the decision ultimately reached" but also the "body of facts" necessary to "the *process of analysis and decision-making* by the investigating authority" in reaching that ultimate decision.[9] This includes "new" essential facts which bring about a change in the authority's findings after the issuance of the preliminary determination. Where the factual basis of the definitive measure is "significantly different" from that of the provisional measure, the "essential facts" disclosure must include the specific facts that brought about this change.[10]

7. "Essential facts" must be explicitly identified and disclosed as such,[11] so that parties can then "comment on the completeness and correctness of the facts being considered by the investigating authority, provide additional information or correct perceived errors, and comment on or make arguments as to the proper interpretation of those facts."[12] Authorities must take into account the information or arguments an interested party submits.[13]

V. THE DETERMINATION OF INJURY REQUIRES A CAUSAL ANALYSIS BASED ON AN OBJECTIVE EXAMINATION OF POSITIVE EVIDENCE

8. Article 15 of the SCM Agreement and Article 3 of the Anti-Dumping Agreement impose an affirmative obligation on an authority to demonstrate that it has determined, through an "objective

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[3] Appellate Body Report, *Mexico – AD Measures on Rice*, para. 288; Panel Report, *US – Steel Plate*, para. 7.72.

[4] Appellate Body Report, *Mexico – AD Measures on Rice*, para. 287 (emphasis original).

[5] *See* Appellate Body Report, *US – Hot-Rolled Steel*, paras. 83-86.

[6] Appellate Body Report, *Mexico – AD Measures on Rice*, para. 293 (emphasis added).

[7] Appellate Body Report, *US – Hot-Rolled Steel*, para. 99-100.

[8] Appellate Body Report, *Mexico – AD Measures on Rice*, para. 291.

[9] Panel Report, *EC – Salmon (Norway)*, paras. 7.807, 7.796 (emphasis added).

[10] Panel Report, *Mexico – Olive Oil*, para. 7.110; Panel Report, *Guatemala – Cement II*, para. 8.228.

[11] Panel Report, *Guatemala – Cement II*, paras. 8.229-8.230.

[12] Panel Report, *EC – Salmon (Norway)*, para. 7.805. *See also* Panel Report, *Argentina – Ceramic Tiles*, para. 6.125.

[13] Panel Report, *EC – Salmon (Norway)*, para. 7.799.

examination" based on "positive evidence", (i) the subject imports' volume effects and price effects; (ii) injury to the domestic industry; and (iii) a causal link between the imports and that injury. The analytical and evidentiary standards of SCM Article 15.1 and AD Article 3.1 apply to all elements of an authority's injury determination.

9. The Appellate Body has found that the term "positive evidence" relates to "the *quality* of the evidence that authorities may rely upon in making a determination" and "focuses on the facts underpinning and justifying the injury determination".[14] Positive evidence must be distinguished from and preferred over unverified statements made by interested parties.[15]

10. Each element of the authority's injury analysis must involve an objective examination of the positive evidence collected. The Appellate Body has clarified that the word "objective" means that the examination "must conform to the dictates of the basic principles of good faith and fundamental fairness".[16] In keeping with this aim, the investigating authority is obligated to conduct its examination of the factors relating to injury in an unbiased, even-handed manner without favouring the interests of any interested party to make a finding of injury more likely.[17]

11. In accordance with SCM Article 15.5 and AD Article 3.5, an affirmative injury determination may only be made where the authority has *demonstrated* that the subsidized/dumped imports have caused injury to the domestic industry.[18] The Agreements impose a rigorous requirement to "demonstrate" causation. An investigating authority must ensure that injury caused by other "known factors" is not wrongly attributed to the subsidized/dumped imports in the causation analysis.[19] Only by separating and distinguishing the injurious effects can an authority make a reasoned judgment as to the degree of injury suffered which should be attributed (or not) to such other factors.

VI. SUFFICIENT DETAIL AND RELEVANT INFORMATION MUST BE PROVIDED IN THE PUBLIC NOTICE ON ALL MATERIAL ISSUES

12. Investigating authorities must provide "sufficient detail" on "material issues" in both preliminary and final determinations. An issue will be considered "material" where it has arisen in the course of the investigation and must necessarily be resolved in order for the investigating authority to be able to reach its determination.[20] The discipline imposed on an investigating authority to set forth its findings and conclusions in "sufficient detail" requires it to provide explanations for all material elements of the determination.[21]

13. Interested parties must be able to understand fully the reasons for the imposition of measures. As the Appellate Body has stressed, the investigating authority must provide 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", and this should be directly "discernible from the published determination itself."[22] The degree of detail required in the public

[14] Appellate Body Report, *US – Hot-Rolled Steel*, paras. 192-193 (emphasis added).
[15] Panel Report, *EC – Countervailing Measures on DRAM Chips*, para. 7.368.
[16] Appellate Body Report, *US – Hot-Rolled Steel*, para. 193.
[17] Appellate Body Report, *US – Hot-Rolled Steel*, paras. 193, 196; Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 180.
[18] *See* Appellate Body Report, *Japan – DRAMs (Korea)*, paras. 262-263, 268; Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 175.
[19] Appellate Body Report, *US – Hot-Rolled Steel*, paras. 226-228; Appellate Body Report, *EC – Tube or Pipe Fittings*, paras. 175, 188.
[20] Panel Report, *EC – Tube or Pipe Fittings*, para. 7.424.
[21] Panel Report, *Mexico – Corn Syrup*, para. 7.103.
[22] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 186; Panel Report, *EC – Tube or Pipe Fittings*, para. 7.435.

notice is therefore one that permits interested parties to discern directly either the significance or lack of significance of factors the investigating authority was obligated to address.[23]

14. "All relevant information" includes all information connected to the decision to impose duties. Article 22.5 of the SCM Agreement and Article 12.2.2 of the Anti-Dumping Agreement require the investigating authority to issue a public notice or report which contains (i) "all relevant information on the matters of fact and law", and (ii) the "reasons which have led to the imposition of final measures". The use of the words "have led to" means that authorities have a duty to identify in the notice "those matters on which a factual or legal determination must necessarily be made in connection with the decision" to impose measures.[24] The significance or lack of significance of factors the investigating authority was obligated to address must be directly discernable from the notice.[25] It would necessarily include information on the facts underlying the price effects analysis, upon which a legal determination of injury must necessarily be made in order to impose measures.

VII. CONCLUSION

15. Saudi Arabia respectfully urges the Panel to consider the Kingdom's positions on the interpretive issues set out above.

[23] Panel Report, *EC – Tube or Pipe Fittings*, paras. 7.432, 7.435.
[24] Panel Report, *EC – Tube or Pipe Fittings*, para. 7.424.
[25] Panel Report, *EC – Tube or Pipe Fittings*, paras. 7.432, 7.735.

ANNEX B-6

EXECUTIVE SUMMARY OF THE THIRD PARTY
WRITTEN SUBMISSION OF KOREA

I. INTRODUCTION

1. Korea appreciates this opportunity to present its views to the Panel. Korea fully shares the view that the issues presented in this dispute appear to have "wider, perhaps systemic, implications" for all the WTO Members since the claims presented in this dispute touch upon some of the core procedural elements of AD and CVD investigations of investigating authorities.

2. Korea is of the view that clarification of key factual situations would be critical for the Panel's proper analyses of the claims and the final disposition of the present dispute. In evaluating conflicting factual information, Korea respectfully requests the Panel to discharge its obligation under Article 11 of the DSU.

II. LEGAL ARGUMENTS

A. INITIATION OF A COUNTERVAILING DUTY INVESTIGATION SHOULD BE BASED ON ADEQUATE AND SUFFICIENT EVIDENCE

3. A CVD investigation entails mobilization of a great deal of resources on the part of a responding government and companies. A CVD investigation is also a serious undertaking laden with political sensitivities in that one Member investigates another Member's governmental programs on a bilateral basis. In Korea's view, these unique aspects of a CVD investigation explain the inclusion of bilateral consultations requirement in Article 13 of the SCM Agreement which do not appear in the AD Agreement.

4. In this spirit, the SCM Agreement clearly guards against initiation of a CVD investigation without adequate and sufficient evidence that cannot justify a lengthy investigation of another government. Although the information to be presented at the initiation stage is not the type of evidence that establishes the existence of subsidization or material injury, which can only be confirmed as a result of the full investigation[1], the investigating authority should nonetheless examine and confirm that at least a minimal amount of information reasonably indicating subsidization and injury has been submitted by a domestic applicant.

5. In fact, Article 11.2 of the SCM Agreement sets forth a detailed threshold for the initiation of a CVD investigation: in order for there to be initiation, "evidence that substantiates" the existence of a subsidy and injury that is reasonably available to the applicant must be presented in the application.

[1] *See* Panel Report, *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States*, WT/DS132/R, Adopted 24 February 2000, and Corr.1, DSR 2000:III, 1345, at paras. 7.74, 7.76; 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, 5 Adopted April 2001, DSR 2001:VII, 2741, at para. 7.77; Panel Report, *United States – Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/R, Adopted 31 August 2004, DSR 2004:V, 1875, at para. 7.56.

As the panel in U.S. - Byrd Amendment opined, this provision is to "ensure that investigations are not initiated on the basis of frivolous or unfounded suits."[2]

6. Article 11.3 of the SCM Agreement in turn requires the investigating authority to confirm the accuracy and adequacy of the evidence itself. Thus, an investigating authority assumes an affirmative obligation to examine all the relevant information and materials contained in the application and to confirm their veracity before making a decision to initiate a CVD investigation. It cannot passively accept the allegations in the petition as true or appearing to be true and initiate the investigation hoping to confirm the veracity down the road. Article 11.9 of the SCM Agreement clearly stipulates that the application should be rejected in such an instance.

7. In short, under the current SCM Agreement, initiation of a CVD investigation is not supposed to be an automatic rubber-stamp process once a petition is filed by a domestic industry. Rather, it is designed and envisioned to be a meaningful step where the investigating authorities carefully look into substantive information contained in the petition and determine whether the petition is really worth the time and resources to be inflicted from the lengthy investigations. Unless this filtering process operates in a way envisioned in Article 11 of the SCM Agreement, foreign exporters and governments would be in a severely dire situation regardless of the final outcome of a CVD investigation.[3]

B. THE "FACTS AVAILABLE" STANDARD HAS ITS OWN LEGAL PARAMETERS AND SHOULD NOT BE ABUSED TO PENALIZE FOREIGN RESPONDENTS SIMPLY BECAUSE A REQUEST FROM THE INVESTIGATING AUTHOROTY WAS NOT FULLY RESPECTED

8. The SCM Agreement does not provide an unlimited discretion to an investigating authority conducting a CVD investigation whenever it encounters a less than optimal information from a foreign respondent. Instead, these provisions unequivocally provide conditions that need to be satisfied before the investigating authority applies the facts available standard. Article 12.7 of the SCM Agreement, Article 6.8 of the AD Agreement, and Annex II of the AD Agreement provide detailed guidelines in this respect. Likewise, the Appellate Body in *Mexico-Beef and Rice* also stated that even if the request by an investigating authority for certain information is not completely adhered to by a foreign respondent (for instance, when the respondent submits only some information, not all the information requested), the investigating authority is nonetheless required to consider information actually provided by the respondent.[4]

9. In Korea's view, Article 12.7 of the SCM Agreement along with other provisions in Article 12 collectively stands for the proposition that fundamental due process rights must be ensured at all times

[2] Panel Report, *United States – Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217/R, WT/DS234/R, adopted 27 January 2003, as modified by the Appellate Body Report, WT/DS217/AB/R, WT/DS234, at para. 7.61

[3] For example, due to the so-called "chilling effect" flowing from an AD or CVD investigation, a foreign exporter defending an AD or CVD investigation "feels the direct hit" even in the initiation stage of the investigation, which is well before any preliminary or final AD/CVD determination. In other words, importers of the foreign exporters named in an AD or CVD petition usually consider reducing or avoiding transactions with the foreign exporters due to the "uncertainty" in the market – the importers are not sure about the ultimate AD or CVD margin as a result of a lengthy investigation, or the extra duty imposition's implication for and impact on the market. So, even if there is no actual duty imposition yet – whether preliminary or final – it may be the case that from the initiation itself, the market already feels the effect of an AD or CVD investigation. Therefore, initiation needs to be limited only to the good-faith allegations with sufficient information within the meaning of Article 5 of the AD Agreement or Article 11 of the SCM Agreement.

[4] 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, at para. 294.

in a CVD investigation.[5] The Panel should carefully review whether this due process right has been adequately respected. The Panel would have to look into the specific situation of the investigation at hand and then determine whether facts available would be warranted in the situation.

C. AN INVESTIGATING AUTHORIGY OF A MEMBER DOES NOT ENJOY UNBRIDLED DISCRETION REGARDING AN "ALL OTHERS RATE" IN ANTI-DUMPING AND COUNTERVAILING DUTY INVESTIGATIONS

10. One of the contentious claims in this dispute is about all others rates in AD and CVD investigations by MOFCOM. In the underlying AD and CVD investigations, the complainant claims, the all others rates were set at unreasonably high margins without sufficient explanations or rationale other than some cursory statements of policy reasons.[6] The respective all others rates indeed seem extraordinarily high when compared to the margins assigned to the respondent companies, AK and ATI.[7] Unreasonably high "all others rates" disassociated with calculated margins of the respondents participating in the investigations does raise a concern of possible inconsistency with the relevant provision of the SCM Agreement and the AD Agreement.

11. In Korea's view, to the extent the application of "all others rates" constitutes the virtual application of "facts available," as the United States argues, Article 12.7 of the SCM Agreement and 6.8 of the AD Agreement could be implicated in this context as well. If the facts available standard was imposed on non-participating exporters without satisfying the detailed requirements stipulated by Article 12.7 of the SCM Agreement and Article 6.8 of the AD Agreement, a violation similar to the one discussed in the previous section could be found.

III. CONCLUSION

12. Korea respectfully submits that in reaching its decision in this important dispute, the Panel should ensure that the relevant provisions of the GATT 1994, the AD Agreement and the SCM Agreement are construed in their proper context, which will give effect to the ordinary meaning of the terms consistently with the context, object and purpose of these legal instruments as a whole. Korea appreciates the opportunity to participate in this proceeding, and to present its views to the Panel.

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[5] See, e.g. Appellate Body Report, *United States - Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268/AB/R, 29 November 2004, at para. 241; *Guatemala – Cement II*, at para. 8.119; *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/R, adopted 9 January 2004, at para. 7.255.

[6] *See* U.S. First Written Submission, at paras. 134-136, 156, 173-175.

[7] *See id.* (With respect to the CVD investigation, the all others rate was set at 44.6 per cent compared to 11.918 per cent and 11.65 per cent assigned to the two participating respondents. In the AD investigation, the all others rate was set at 64.8 per cent compared to 7.8 per cent and 19.9 per cent assigned to the two participating respondents.).

ANNEX C

ORAL STATEMENTS OR EXECUTIVE SUMMARIES THEREOF OF THE PARTIES AT THE FIRST SUBSTANTIVE MEETING

ANNEX C-1

EXECUTIVE SUMMARY OF THE OPENING STATEMENT OF THE UNITED STATES AT THE FIRST MEETING OF THE PANEL

China's GOES investigation was conducted in a manner inconsistent with the AD and SCM Agreements. As a result, the ability of the United States and interested parties to understand the basis for China's determinations or to defend their interests was seriously impaired. Beyond the serious problems in how China conducted its investigation, the resulting determinations contain several fundamental flaws of reasoning that render them inconsistent with other obligations in the AD and SCM Agreements. This is particularly so with respect to China's injury determination, which is based on the most cursory of analysis and scant evidentiary support. In examining China's justifications for its measures in this case, it is useful to focus on what MOFCOM actually found as reflected in its determinations and disclosures, not on the *post-hoc* rationalizations contained in China's first written submission. As we discuss below, China's first written submission often ignores MOFCOM's actual findings or tries to rewrite them.

A. The Initiation of the Countervailing Duty Investigation for Several Programs Breached Article 11 of the SCM Agreement

Several of the petitioners' subsidy allegations did not offer sufficient, or in some cases any, evidence of the existence, amount, and nature of the subsidy, but rather consisted of simple assertion, unsubstantiated by relevant evidence. With respect to these programs, MOFCOM failed to sufficiently review the accuracy and adequacy of the evidence in the application to determine whether there was sufficient evidence for the initiation of an investigation, and thus acted inconsistently with Article 11.3 of the SCM Agreement. In response to the U.S. claims, China has offered pure speculation and citations to irrelevant evidence, and has claimed repeatedly that generalized allegations of the existence of subsidies for steel cured the defects in the various allegations.

MOFCOM did not meet its obligation under Article 11.3 to review the accuracy and adequacy of the evidence in the petitioners' application for sufficiency. For example, it is not sufficient, as China suggests, for the "broader context" provided in an application to support a specific subsidy allegation that is deficient with respect to one of the three subsidy elements. Rather, the Article 11 standard is met when there is accurate and adequate evidence as to *each* of the three subsidy elements sufficient to justify initiation. With respect to each of the subsidy programs described in the U.S. first written submission, the evidence was insufficient to initiate.

The obligations in Article 11 exist for a reason: so that investigations, involving a significant potential burden to both companies and WTO Members, will not be initiated unless certain evidentiary requirements are met.[1] An improperly initiated investigation can cause burden regardless of the ultimate finding. China cannot dodge the requirements of Article 11 by suggesting that initiating an investigation of flawed subsidy allegations is harmless because it did not result in the imposition of countervailing duties. China's arguments should not obscure the fact that MOFCOM acted inconsistently with these requirements in initiating investigations of several subsidy allegations in this case.

[1] *US – Carbon Steel (AB)*, para. 115.

B. China Failed to Require Adequate Non-confidential Summaries of Confidential Information

China failed to meet the requirements of Article 12.4.1 of the SCM Agreement and Article 6.5.1 of the AD Agreement, as its investigating authority did not require adequate non-confidential summaries of confidential information contained in the petition, and there is no explanation on the record from the domestic interested parties as to why the information was not susceptible to summarization.

China contends that the section of the petition entitled "non-confidential summaries," which was quoted in full by the United States and discussed in the U.S. first written submission, does *not* contain the "non-confidential summaries," and that in fact Part I of the petition contains a non-confidential summary of confidential information in the petition. Second, in the alternative, it asserts that "exceptional circumstances" were present that justified the absence of non-confidential summaries. With regard to China's first theory, in suggesting that the Panel rely on Part I in assessing whether China complied with its obligations, China ignores the clear structure of the petition. Even setting this fact aside, Part I of the petition does not contain adequate non-confidential summaries.

As an alternative, China asserts that "exceptional circumstances" exist such that summarization was not possible. Notably, neither the petition nor the documents prepared by MOFCOM during the course of the proceeding ever asserted that summarization was not possible or otherwise justified the absence of meaningful non-confidential summaries. China's argument in this regard is nothing more than a *post hoc* rationalization to justify its failure to comply with SCM Agreement Article 12.4.1 and AD Agreement Article 6.5.1. However, such a a *post hoc* rationalization cannot satisfy the requirement in Articles 12.4.1 and 6.5.1 that "a statement of the reasons why summarization is not possible must be provided."

C. China Breached Article 12.7 of the SCM Agreement Because Its Use of Facts Available Was Improper

MOFCOM's use of facts available was unjustified and punitive, and MOFCOM ignored necessary information provided by the U.S. companies. While China claims that the U.S. description of the facts is in error, a review of the evidence demonstrates the opposite: China's response relies on factual errors and mis-characterizations of the record.

While China repeatedly asserts that the respondents "refused" to respond to MOFCOM's questions and "seriously impeded" the investigation, a closer examination of the evidence demonstrates otherwise. First, in Part 3 of its initial questionnaire, MOFCOM asked for tables reflecting all government procurement "signed" within the POI and those "not performed within the POI." MOFCOM also asked for sales prices for the "involved" products in transactions with "private" purchasers. In Part 4, MOFCOM asked for tables showing the "[t]he quantity and {value} of each product sold to each client … ."

In response, ATI indicated that it made no direct sales to the government. AK Steel pointed out that it did not sign any government procurement within the POI, pointed MOFCOM to the sales data submitted in the parallel AD proceeding, and offered a customer list showing that the government did not purchase GOES. Because AK Steel did not participate in any procurement activity during the POI, there were no "involved" products and thus no sales to private purchasers of the same products to report. In response to Part 4, which only relates to the POI, and which does not contain a proviso of "not limited to the subject merchandise," AK Steel referred MOFCOM to the sales data for subject merchandise provided in the parallel AD proceeding.

While China now describes this as a "refusal" to cooperate, in fact, MOFCOM invited such a response in its own questionnaire. Specifically, in Section II Item 3 of the questionnaire, MOFCOM states: "if the question does not apply to you, please write down explicitly 'this question does not apply to my company' and state the reasons."

China further alleges that after issuing its deficiency letter, the companies still refused to respond "in an acceptable form," and continued to argue that MOFCOM's questions were irrelevant. Yet, AK Steel did respond. In the deficiency letter, MOFCOM gave the respondents the opportunity to show inapplicability: "If your company was of the view that, regarding the product concerned and your company's other products, there was no purchase from the government or public body, or there was no transaction bound by the Buy America Act, it was your company who shall bear the burden of proof." In response, AK Steel attached a customer list to its revised questionnaire response showing that the government did not purchase any AK Steel products during the POI – including products unrelated to subject merchandise. ATI provided a customer list for subject merchandise. In its deficiency letter response, AK Steel explained that it was impossible to know what its customers did with its products.

In its preliminary determination, MOFCOM rejected the customer list because the list does not contain transaction data. However, the preliminary determination, issued on December 10, 2009, is the first instance where MOFCOM indicated that it was requiring transaction data independent of whether government procurement was involved. In response to MOFCOM's approach in the preliminary determination, AK Steel submitted the sales data for subject merchandise as an exhibit to its comments on the preliminary determination.

The companies cooperated, responded to MOFCOM's questionnaires, and to the extent they did not provide information it was because MOFCOM's own questionnaires did not require it. When MOFCOM finally decided to require such information at the preliminary determination stage, it did not give the companies an opportunity to submit it. AK Steel provided the data after the preliminary determination, but MOFCOM chose not to verify it.

China nonetheless complains that the companies' failure to provide transaction data prior to the verification denied MOFCOM "the ability to plan efficiently" for verification. To the extent that MOFCOM may have suffered any prejudice, however, this was simply the result of its own decision to allow respondents to opt not to provide the data if not relevant.

Perhaps in recognition of the plainly burdensome nature of MOFCOM's request, China now appears to be attempting to distance itself from MOFCOM's request for 15 years of sales data for all products, asserting that MOFCOM did not apply facts available because of the failure to provide 15 years of sales data. But China's assertions are belied by the facts: when it applied facts available, MOFCOM simply explained that the U.S. companies had failed to provide the requested sales data.

MOFCOM could have verified that AK Steel or ATI did not sell to any government entity at verification. When the course MOFCOM was taking became clear in the preliminary determination, AK Steel re-submitted the sales data, which was already in MOFCOM's possession.

Finally, there are no facts available on the record to support MOFCOM's conclusion that the respondents sold all of their output to the government. As explained in our first written submission, the only facts available on the record suggest that, at most, AK Steel could have sold 29% of its output to the government, as part of infrastructure and manufacturing sales.

The respondents responded to MOFCOM's requests to the best of their ability. The information actually submitted was verifiable, timely submitted, and usable without undue difficulty. MOFCOM appears to have concluded that because a company does not provide some information, or if the

information provided does not perfectly fit the request to which it responds, MOFCOM can reject all information provided by the company.

D. China Acted Inconsistently With Article 12.2.2 of the AD Agreement by Failing to Make Available the Final Dumping Calculations

Article 12.2.2 requires an investigating authority to "make available" "*all relevant information* on the matters of fact" that led to the imposition of final measures. If information is relevant, it must be made available – as evidenced by the use of the term "all" (of course, with due regard for the protection of confidential information). Few things are more relevant to the imposition of final duties than the calculations themselves, which are the means by which an investigating authority arrives at the final finding of dumping. Without calculations that indicate dumping, there would be no affirmative finding. "Information" is "[c]ommunication of the knowledge of some fact or occurrence" or "[k]nowledge or facts communicated about a particular subject, event, etc." Dumping calculations certainly are "facts" that should be "communicated" about the imposition of final measures. In short, the language of Article 12.2.2 requires an investigating authority to release its final calculations to the affected interested parties.

China completely ignores the fact that, in addition to a "public notice," Article 12.2.2 also mentions a "separate report" as the vehicle for making available all relevant information on matters of fact and law. The "separate report" *need not* be public. These calculations can still be released to the relevant interested party. China should have fulfilled its obligation under Article 12.2.2 by releasing its calculations of AK Steel's dumping margin to AK Steel, and its calculations of ATI's dumping margin to ATI.

Release of the final dumping calculations to the interested parties is vital to those parties' ability to protect their interests. Parties should not be forced to guess at or approximate the methodology and data used by an investigating authority in its calculations, or piece the calculations together from different places in the record.

E. MOFCOM's Failure to Provide Sufficient Information on the Findings and Conclusions of Law It Considered Material Constitutes a Breach of Article 22.3 of the SCM Agreement

MOFCOM failed to explain its benefit determination because it did not provide in the preliminary determination any rationale that competitive bidding under U.S. procurement laws does not result in an acceptable market price. The final subsidy determination regarding U.S. procurement laws is inconsistent with Article 22.3 because it merely repeats the flawed discussion contained in the preliminary determination.

Under Article 14(d) of the SCM Agreement, the authorities are to use market prices in the country of purchase unless they establish that those prices are so distorted that the market price is unusable. Article 22.3 thus requires the investigating authority to provide explanation on how it found that market prices resulting from the competitive bidding process were distorted. Nothing in MOFCOM's determination however explains why the admittedly competitive bidding process distorted the market.

F. MOFCOM's Determination of the "All Others" AD and CVD Rates were Inconsistent with its Obligations under the SCM Agreement

The petition identified two U.S. exporters/producers of GOES: AK Steel and ATI. Notwithstanding the fact that neither the petitioner nor MOFCOM identified any other U.S. producers or exporters of GOES, China not only established an "all others" subsidy rate for the unidentified producers, but China established a rate more than two times higher than the highest rate for an investigated company

based on the purported lack of cooperation of the unknown, unidentified companies. The "all others" antidumping rate was more than three times higher than the highest rate calculated for an investigated company.

As the Appellate Body has made clear in *Mexico – Rice*, an exporter must be given the opportunity to provide information required by an investigating authority before the latter resorts to facts available that can be adverse to the exporter's interests. An exporter that is unknown to the investigating authority is not notified of the information required, and thus is denied an opportunity to provide it.

China's mere placement of a petition in a reading room and publication of a notice do not constitute a meaningful opportunity for a company to provide information. Accordingly, an unidentified exporter cannot be said to have failed to cooperate by not having located the petition and/or the notice of initiation in this case.

G. China Failed to Disclose the Essential Facts Regarding the Calculation of the "All Others" AD and CVD Rates

During the investigation, MOFCOM increased the all others subsidy rate from a preliminary rate of 12 percent to a final rate of 44.6 percent, justifying this increase by claiming it relied upon the "facts available." It did so without disclosing the essential facts forming the basis for its decision, contrary to Article 12.8 of the SCM Agreement.

MOFCOM increased the "all others" dumping rate from a preliminary rate of 25 percent to a final rate of 64.8 percent. MOFCOM's lone statement in the Final Disclosure regarding tis action was that the "all others" dumping rate was "based on transaction information of the respondents pursuant to Article 21 of the Antidumping Regulations." This disclosure is insufficient. Totally absent are any facts relating to the U.S. companies' refusing access to necessary information or significantly impeding the investigation, any facts relating to the actual calculation of the 64.8 percent rate or why that rate was appropriate given the much lower rates of the respondents, and any facts regarding the particular transaction information chosen.

China argues that it could not disclose the particular transaction information used without compromising the confidentiality of information supplied by the two respondent companies, but provides no explanation for why MOFCOM could not have publicly summarized the information used or at least identified the calculation methodology it employed. Disclosure of the essential facts is particularly important here, because it is difficult to understand how MOFCOM used the information of the two respondent companies and arrived at an all others dumping margin that is more than three times as high as the margin for one such company and eight times as high as the margin for the other company.

H. China's Injury Determination is Inconsistent with China's WTO Obligations

Cumulated imports from Russia and the United States increased throughout the POI. But during most of this period, the Chinese GOES industry was prospering. The Chinese industry's output, sales quantities, sales revenues, employment, wages, prices and pre-tax profits all increased during both 2007 and 2008.

It was only during the first quarter of 2009 that the Chinese industry began to experience some difficulties. In particular, the industry's profitability declined. The decline in profits, however, was not volume-related. The Chinese GOES industry showed double digit increases in sales quantities and revenues from the first quarter of 2008 to the first quarter of 2009. The market share of the Chinese industry actually increased during this period – by nearly the same amount as that of the

subject imports. Instead, the decline in profits occurred because the increased quantity of sales during the first quarter of 2009 was being sold at lower prices.

Consequently, MOFCOM's affirmative determination could not have been, and was not, based solely or even principally on volume considerations, as China's first written submission suggests. MOFCOM's conclusion that the imports had significant price effects was essential to its affirmative determination.

In examining MOFCOM's injury determination, it is useful to focus on what MOFCOM actually found, notwithstanding the fact that in its first written submission China variously ignores MOFCOM's findings or tries to rewrite them. To start, it is useful to explore why MOFCOM found price depression. It was not solely because imports were increasing. Instead, the final determination states that price depression occurred "[b]ecause the sales of the product concerned were kept at a low price." In an attempt to support this finding, MOFCOM cited the petitioners' assertion that "a pricing policy aiming at setting the price down to a level lower than the price of the domestic like product was adopted by the producers of the product concerned." Thus, whether or not MOFCOM expressly found significant underselling, underselling was critical to its price depression finding.

This finding is pervasively flawed. First, it relies on facts MOFCOM never disclosed. China now asserts that MOFCOM "was considering" an argument that price depression began in "late" 2008, although it made no express finding to this effect. The only 2008 pricing information provided in the final determination is that domestic prices increased by 14.53 percent in 2008 – hardly evidence of price depression.

Additionally, MOFCOM admitted that during 2009, the imports under investigation were actually priced *higher* than the domestically produced product. Thus there is no positive evidence supporting the price depression finding for 2009. Moreover, the fact that the imports oversold the domestically produced product in 2009 indicates that the unspecified, unexplained "pricing strategies" materials on which MOFCOM relied for its finding of low import prices could not constitute positive evidence of actual price levels.

It is true that MOFCOM did not rely solely on price depression. It also asserted declines in 2008 and the first quarter of 2009 in "profits per unit." Here again MOFCOM failed to disclose essential facts in violation of Articles 6.9 and 12.8. China claims that costs rose faster than revenues. But MOFCOM disclosed no information with respect to the industry's costs. MOFCOM additionally could have disclosed nonconfidential information about the types of costs that were rising, but instead disclosed nothing pertaining to the industry's cost levels.

MOFCOM also failed to address the pertinent substantive question under the Agreements: whether the dumped and subsidized imports served to prevent price increases, which otherwise would have occurred, to a significant degree. MOFCOM did not address this inquiry at all for the 2008 data. To fulfill its obligations under the Agreements, MOFCOM had to show that, because of the imports, prices for the domestic product would have increased even more in 2008 than they already did. Instead, MOFCOM assumed that, if imports were increasing, they must have caused the negative trends in per unit profits. An assumption is not positive evidence.

MOFCOM's findings of price suppression during the first quarter of 2009 must also fail. The price suppression findings for 2009 failed to reflect an objective examination, because MOFCOM evaluated the 2009 data in isolation from the earlier data. By contrast, an objective examination taking into account the entire POI would have revealed that there was not necessarily a correlation between rising import quantities and significant price suppression.

In its first written submission, China counters that the 2009 price suppression findings are justified because they reflect a continuation of 2008 trends. China's argument appears to follow from a passage in the final determination contending that "the price-cost differential declined continually." MOFCOM states that this was a result of the import underselling "strategy" that we have previously explained is contrary to the disclosed evidence. Thus, this finding is not supported by positive evidence. Moreover, because the 2008 price suppression findings are also unsupported by positive evidence, they cannot serve as the basis for the 2009 findings.

Because, as we explained, MOFCOM's price effects findings do not meet the requirements of the Agreements, the causal link required under Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement is absent.

Furthermore, the Agreements required MOFCOM not to attribute to dumped and subsidized imports injury caused by other known factors. There was at least one known factor other than imports under investigation that contributed to the domestic industry's decline in performance during the first quarter of 2009. This was the industry's huge increase in capacity. According to the preliminary determination, capacity was 80.13 percent higher in the first quarter of 2009 than in the first quarter of 2008. As a result, production skyrocketed during the first quarter of 2009, increasing far faster than demand. In fact, the increase in production was over 42 percentage points higher than the increase in demand. Inventories soared by 978.81 percent as a result. We explained in our first written submission why this inventory increase put pressure on the domestic industry's prices during the first quarter of 2009, why this contributed to the domestic industry's financial declines during that period, and why MOFCOM's analysis of the effects of the inventory increase falls short of the requirements of the Agreements.

China's response to this claim is defective legally. China argues that an authority need only show that the subject imports made a substantial contribution to the domestic industry's material injury and that the effect of other factors was not "so dramatic that they severed any possible causal link between the subject imports and the condition of the domestic industry." China further suggests that the party opposing the imposition of measures has the obligation to provide evidence demonstrating that the effects of other causes was "dramatic."

The text of the Agreements does not support China's arguments. Articles 3.5 of the AD Agreement and 15.5 of the SCM Agreement place on the authority the responsibility to examine all relevant evidence concerning causes of injury other than the subject imports. The only obligation the text places on the parties is to identify "known" causes of injury. It is undisputed that a U.S. exporter brought to MOFCOM's attention that overproduction and inventory overhang contributed to the difficulties of the Chinese GOES industry.

Similarly, neither Article 3.5 nor 15.5 states that an authority is relieved from the responsibility of conducting a non-attribution analysis if other known factors have effects, but such effects are not "dramatic." Nor does China point to any Appellate Body or panel report supporting this interpretation. By contrast, under the principles articulated in the Appellate Body report in *US – Hot-Rolled Steel*, once overproduction and the consequent inventory overhang was identified as a known cause of injury, MOFCOM had the obligation either to demonstrate that this factor was not contributing to the domestic industry's injury, or to conduct a non-attribution analysis. MOFCOM did not purport to conduct a non-attribution analysis.

Instead, MOFCOM took the position that production growing far more rapidly than demand had no appreciable effect on the domestic industry. This finding defies common sense, and our first written submission extensively discusses the lack of positive evidence supporting MOFCOM's analysis. For the most part, China has not responded to our arguments, nor has it meaningfully disputed that an inventory overhang caused by excessive growth in capacity and production would likely put

downward pressure on domestic prices. Instead, China asserts that the expanded capacity of the industry was less than domestic consumption. The accuracy of this assertion cannot be verified from any information MOFCOM disclosed. It is also unresponsive to the U.S. argument. Instead, it merely reflects an assumption that an industry that increases its capacity should be able to displace all imports in the market. The nature of this assumption is not intuitive, not explained by China, and not supported by any evidence disclosed. It cannot support MOFCOM's patently inadequate analysis of the increases in production and inventories.

China also argues in its first written submission that Chinese producers "did not produce more than the market could bear." Not even MOFCOM made such a finding, which is directly contradicted by the disclosed evidence. Far from showing restraint in production, Chinese producers used their additional capacity to increase production far beyond what the market demanded, resulting in the large inventory overhang. Again, China's argument does not justify MOFCOM's failure to perform a nonattribution analysis.

We also note that Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement specifically require authorities to examine the volume and price of imports that are not dumped or subsidized in their analysis of causal link. MOFCOM's superficial analysis of imports from sources other than Russia and the United States, which is devoid of any meaningful data, does not satisfy these requirements.

Consequently MOFCOM did not satisfy its obligations under the Agreements to establish a causal link between the subject imports and any injury sustained by the domestic industry.

In its consideration of imports from countries other than Russia and the United States, MOFCOM also breached its obligations to disclose essential facts. China attempts to defend MOFCOM's failure to provide facts or analysis by asserting that no interested party made an argument concerning nonsubject imports. China's argument overlooks that the purpose of the obligation is to permit parties to defend their interests. Parties cannot be expected to raise arguments about information an authority never disclosed. And MOFCOM entirely failed to disclose nonsubject import quantity and value information.

Finally, in our first written submission we pointed out several instances where MOFCOM's findings concerning price effects, causal link, and nonsubject imports failed to satisfy Article 12.2.2 of the AD Agreement and Article 22.5 of the SCM Agreement. Rather than attempt to defend MOFCOM's inadequate findings and conclusions, China asserts that authorities need only provide whatever information that they deem material. China provides no support for this assertion. It cannot be reconciled with the language of these provisions, which require disclosure of "all relevant information on the matters of fact and law which have led to the imposition of final measures." Premising disclosure not on an objective basis of relevance, but on the authority's own concept of what is "material," would reduce this provision to a nullity.

ANNEX C-2

EXECUTIVE SUMMARY OF THE OPENING STATEMENT OF CHINA
AT THE FIRST MEETING OF THE PANEL

1. The U.S. challenge in this case is limited in nature. There is no substantive challenge to China's findings with respect to the existence of dumping and subsidization. Rather, the U.S. challenge to the results of the antidumping and countervailing duty investigations is confined to a series of procedural complaints and complaints about the magnitude of the margins of dumping and subsidization based on facts available. The sole substantive complaint relates to China's determination of a single element of causation and is apparently grounded on a very limited analysis of the facts.

CVD Initiation

2. The record reflects that the information provided in the application was that information reasonably available to the applicants. BOFT examined the allegations and accompanying factual information, and determined that although certain allegations did not warrant initiation of an investigation, there was a sufficient evidentiary basis to initiate on several other allegations. This included the 11 challenged allegations.

3. The U.S. first submission failed to critique the factual information supporting the allegations. By failing to even address the evidence, China believes the United States has not established a *prima facie* case. What the United States really seeks is a different standard for applications than that found in Article 11 of the SCM Agreement. The United States wants a level of information, analysis, and disclosure simply not required by that provision. The consistent theme of prior panels in addressing Article 11 is that applicants need only submit enough evidence to justify an investigation, and need not analyze that evidence or justify the ultimate conclusion.

Treatment Of Confidential Information

4. The U.S. argument focuses entirely on the statements made in Part II of the application from the underlying record, but completely ignores the non-confidential summaries provided in Part I of the application. Given the failure of the United States even to address the specific non-confidential summaries provided, to discuss why each of the summaries is inadequate, or to demonstrate why such summaries did not provide respondents sufficient understanding of the confidential information to protect its interests, China does not believe that the United States has even established a *prima facie* case in support of its claim.

5. China also submits that the fact that the Appendices to the application do not repeat non-confidential summaries provided in the narrative of the public version of the application does not create a violation of Article 6.5.1 or Article 12.4.1. One can have a "reasonable understanding" of the key issues and facts by reading the entire public version of the petition and there is no obligation on the authorities to require interested parties to repeat a non-confidential summary that has already been provided.

6. To the extent the Panel finds that adequate non-confidential summaries on any particular issues were not provided in the underlying proceeding, China believes that the central issue shifts to whether or not China dealt with the exceptional circumstances of this investigation properly in view of Article 6.5 and 6.5.1 and the so-called "due process" rights of the interested parties. The exceptional circumstance of having only two respondent companies in China permitted the authorities

to invoke the "exceptional circumstance" provision of Articles 6.5.1 and 12.4.1 of the AD and SCM Agreements respectively in order to protect the confidentiality of the information submitted.

The Government Purchase of Goods Program

7. In the underlying investigation MOFCOM made direct requests to the company respondents regarding information on all steel sales in the context of the government purchase of goods program. The respondents refused to respond. After consulting and providing written guidance on the matter, MOFCOM gave both companies ample opportunity to correct their responses and provide the information necessary for MOFCOM to investigate the program. The companies again refused. In response, China declined to verify the deficient, untimely and unusable information provided, and instead applied "facts available" to both companies, finding that 100% of sales took place under the program.

8. The Panel must evaluate the U.S. Article 12.7 claim in light of China's approach to what it deemed to be necessary information, not in light of U.S. arguments about what should have been sufficient information under its own theory of subsidization. Properly framed, it is evident that MOFCOM's application of "facts available" was consistent with Article 12.7. The companies did not provide timely responses, did not cooperate to the best of their ability, and seriously impeded the investigation.

9. The United States has on this issue limited its arguments to AK Steel. All examples and arguments raised by the United States pertain only to AK Steel, and do not address ATI at all. The U.S. argument also concedes the point that China may infer some sales by AK Steel fell under the government purchase of goods program; the only issue is the extent to which sales by AK Steel fell under the program.

10. MOFCOM knew the correct utilization of the program was more than zero. MOFCOM also had a reasonable basis to believe the correct utilization was more than the 29% alternative offered by AK Steel, since AK Steel had refused to provide requested information. But MOFCOM also had no information with which it could determine some alternative that was more than the AK alternative but less than 100% utilization due to the refusal of ATI and AK Steel to provide complete information. Thus, MOFCOM reasonably relied on the 100% figure, consistent with Article 12.7 of the SCM Agreement. Finding MOFCOM obligated to utilize AK Steel's ratio would have been an invitation for respondents to create the same types of factual voids in order to obtain a favorable result.

MOFCOM's Disclosure of Its Determination of the Margins of Dumping

11. The United States is attempting to impose a requirement on Article 12.2.2 that authorities disclose the full calculations of all margins of dumping. But the U.S. claim does not refer to any WTO jurisprudence or reference any standard to be applied in interpreting the requirements of Article 12.2.2. The U.S. position is not supported by either the plain meaning of Article 12.2.2 of the AD Agreement or the facts.

12. Article 12 is focused on providing an "explanation" of determinations; sufficient detail in this context would indicate that the disclosure be sufficient to constitute an adequate explanation of the authority's findings and conclusions, and what facts and law were relied upon in reaching such conclusions and findings. All that is necessary is to provide interested parties to an investigation or review notice of determinations made by the authorities and an explanation of the determinations.

13. Notwithstanding the absence of any requirement that the details of the calculation of the margins of dumping be disclosed, as addressed in China's first submission the disclosure by China in the instant investigation was sufficient to allow respondents to replicate the

authority's calculation. Respondents were clearly in a position to check the accuracy of the MOFCOM calculation. Thus, the U.S. claim is simply without merit.

"Competitive" Bidding Process Under the Government Purchase of Goods Program

14. The U.S. Article 22.3 claim is focused on two issues: (1) MOFCOM's basic explanation; and (2) MOFCOM's reaction to U.S. arguments. China addressed both within its first written submission. Using record facts, MOFCOM's preliminary and final determinations plainly set forth why participation restrictions on foreign steel and price preferences afforded to U.S. steel resulted in prices that did not reflect competitive, market conditions under the government purchase of goods program. They also addressed U.S. arguments in the process. The U.S. claim is simply without merit.

"All Others" CVD Rate

15. In the underlying investigation MOFCOM provided direct notice to the participating respondents of its investigation, including the U.S. Government, AK Steel, and ATI. It also placed a copy of the received petition in its public reading room and published public notices of initiation. To MOFCOM's knowledge, notice was thereby given to each known interested party as defined by Article 12.9 of the SCM Agreement. In terms of the facts selected by MOFCOM in calculating the "all others" CVD rate, as indicated in the final determination, MOFCOM relied upon information provided by the petitioner. With respect to disclosure of the facts upon which the all others rate was based, the final determination disclosed that it was based upon information provided by the petitioners. The United States appears to have readily identified the source from the record based on that statement.

"All Others" AD Rate

16. On U.S. claims regarding the all others rate in the AD investigation, MOFCOM followed the general rule set forth in Article 6.10 of the AD Agreement. Neither Article 6.10 nor any other provision of the AD Agreement addresses the issue of the treatment of exporters/producers that are not "known" to the authority and cannot, therefore, be individually examined.

17. China also determined that the most relevant provision of the AD Agreement to address the issue of the antidumping rate for unknown and unresponsive exporters/producers was Article 6.8 of the AD Agreement which addresses the treatment of interested parties who do not provide the "necessary information" required by the authority. The application of Article 6.8 and the last sentence of paragraph 7 of Annex II were intended to encourage realization of the objectives of Article 6.10, namely to enable China to follow the general rule of determining margins of dumping for each individual producer/exporter.

18. Because the information on which the final determination of the "all others" rate was based was confidential information of one of the responding companies, the actual information used to determine this rate could not be disclosed without breaching the confidentiality of the information used. Thus, the explanation was necessarily general in nature. The failure to disclose the details of the calculation of the "all others" rate had no effect on the ability of parties to defend their interests. So long as the "all others" rate is based on record evidence, it is not clear that in the situation where parties do not cooperate that the authority's discretion is limited.

Injury Investigation

19. The United States has made no challenge to the MOFCOM findings of adverse volume effects. The United States has also made no challenge to the MOFCOM findings regarding

cumulation. Finally, the United States has made no challenge to the MOFCOM findings of material injury. The U.S. challenges are limited to the price effects, and the causal link.

20. On price effects, the U.S. arguments focus heavily on price undercutting findings that MOFCOM did not make, and largely misstate and mischaracterize the price suppression and price depression analysis that MOFCOM did make. The record provides strong positive evidence for the MOFCOM findings of price suppression and depression during 2008 and 2009, evidence that was not challenged at all during the administrative proceedings before MOFCOM and evidence that the United States has not effectively challenged.

21. MOFCOM did not make specific price undercutting findings, nor was it under any legal obligation to do so, contrary to U.S. arguments. The texts of Article 3.2 and Article 15.2 -- through the key term "or" -- make clear that price undercutting is simply one alternative methodology that the authorities may consider as part of evaluating price effects.

22. MOFCOM also disclosed all of the "essential facts" as required by Article 6.9 and Article 12.8. This disclosure occurred in two key documents. First, MOFCOM presented a Preliminary Determination on 10 December 2009, which included extensive discussion of injury issues in general, and pricing issues in particular. Second, MOFCOM also presented a Final Injury Disclosures on 7 March 2010, which presented the essential facts and provided initial responses to those arguments that had been made so far during the administrative proceedings. These two documents contained all of the "essential facts" on which China ultimately relied in its Final Determination.

23. MOFCOM also provided the "relevant information" and "reasons" required by Article 12.2.2 and Article 22.5. MOFCOM developed its response that the growing volume of subject imports in 2008 and early 2009 caused price suppression and price depression in those years. That complete explanation of its "reasons" satisfies the obligations of Article 12.2.2 and Article 22.5.

24. China further believes that its analysis of adverse price effects fully complied with the substantive and procedural requirements of the relevant Agreements. If the Panel were to disagree, China asks the Panel to confirm MOFCOM's overall finding of causation was still proper. Since MOFCOM based its analysis of causation on both volume effects and price effects, those price effects can support an overall finding of causation, even if they might not have been sufficient to justify finding a causal link on their own.

25. On causal link, the U.S. first submission presented only a single paragraph discussing causal link more generally, and that paragraph simply refers back to the U.S. arguments about price effects. But MOFCOM never considered the price effects in isolation; they were part of any overall analysis that the increasing volumes of low priced subject imports were causing material injury to the Chinese industry. The United States has thus failed to demonstrate any inconsistency between MOFCOM's analysis and the requirements of Article 3.1 and Article 15.1.

26. With respect to non-attribution, Article 3.5 and Article 15.5 do not specify any particular methodology, and thus leave authorities with discretion as to how best to ensure a genuine causal link, even given the effects of other causes. MOFCOM need not disprove any possible effect of any other known factor that might also be affecting the domestic industry. The burden is on the United States as the complaining party to establish a *prima facie* case that the effects of increased domestic capacity were so dramatic that they severed any possible causal link between the subject imports and the condition of the domestic industry. The United States has failed to meet that burden.

27. With respect to the issue of non-subject imports, China disclosed the "essential facts" of the case. The Preliminary Determination identified "products imported from other countries" as an "other factor" being analyzed, and noted that subject imports were capturing a larger share of the total

imports. Other parts of the notice also addressed non-subject imports. Having provided the "essential facts," and having received no arguments on this point, China did not need to develop this issue further in the absence of arguments.

28. Finally, the U.S. argument that MOFCOM did not provide any "factual substantiation" for its conclusions is wrong. The demonstration that non-subject imports gained only 0.09 percentage points of market share is factual substantiation. Moreover, MOFCOM provided more than adequate discussion of this issue in light of the failure by the parties to use the publicly available information to develop any arguments on this point.

U.S. Claims Under Article 1 of the AD Agreement, Article VI:2 of GATT 1994, and Article 10 of the SCM Agreement

29. U.S. claims under Article 1 of the AD Agreement, Article VI:2 of GATT 1994, and Article 10 of the SCM Agreement are subsidiary claims related to the substance of the claims previously addressed. To the extent the Panel finds the U.S. claims to lack merit with respect to these prior claims, so to should it dismiss this U.S. claims under Article 1 of the AD Agreement, Article VI:2 of GATT 1994, and Article 10 of the SCM Agreement.

ANNEX C-3

CLOSING STATEMENT OF THE UNITED STATES
AT THE FIRST MEETING OF THE PANEL

Mr. Chairman, Members of the Panel. The United States would like to begin by thanking you and the Secretariat for your efforts in the preparation for and conduct of this hearing.

We hope that the discussion held here yesterday and today has assisted the Panel in enhancing its understanding of the issues before it in this case.

If an observer had been listening solely to China's interventions yesterday, he or she might have come away with the impression that the practices of the U.S. Department of Commerce and International Trade Commission were the subject of this dispute. In that context, we would again note that China's description left out a number of important aspects of U.S. practice that are quite different from what MOFCOM did in this investigation.

To the extent that the Panel found the examination of such matters helpful to the task before it, we welcome further discussions along these lines. Nevertheless, we find it telling that China has chosen not to focus its attention on the actual Chinese measures at issue in this dispute, the actual record in the underlying investigation, and the application of WTO principles to that record.

China also at one point seemed to suggest that it is the responsibility of an interested party to piece together information that the investigating authority chose not to disclose or adequately summarize. First, this would be a highly speculative exercise. More fundamentally, the skill of a party in making educated guesses has no bearing on whether a breach of an investigating authority's WTO obligations exists.

We discussed a number of substantive issues on Thursday and will address them more fully in our future submissions. We also note that many of the third parties addressed the issues of initiation and the provision of non-confidential summaries, which we found helpful; particularly, the oral statements of Argentina, Honduras, and the European Union. We also found Japan's comments on the obligations of Article 12.2.2 of the AD agreement with regard to the dumping margin calculations particularly informative.

Before these hearings formally close, the United States would like to make a few brief comments relating to one of the substantive matters discussed yesterday. In particular, the United States would like to address the discussion before the Panel on Thursday concerning MOFCOM's finding of significant price effects, as this discussion revealed fundamental flaws in China's arguments.

First, China variously suggested that the factual support for the price effects findings may be found in the public documents prepared by MOFCOM or in other public documents submitted by the parties that MOFCOM neither referenced in its essential facts disclosure nor expressly or implicitly adopted in any determination. In some instances, both the Panel and the United States are left to guess where MOFCOM has stated its factual findings and what these findings are. Such lack of transparency cannot be reconciled with the requirements of Article 12.2.2 of the AD Agreement and Article 22.5 of the SCM Agreement. Moreover, China cannot simultaneously posit that it satisfied its obligations under Article 6.9 of the AD Agreement and Article 12.8 of the SCM Agreement through the preliminary determination and essential facts disclosure, but that the disclosures made in these documents were not intended to be complete.

Second, while China argues that a price undercutting analysis was unnecessary, it simultaneously repeated MOFCOM's findings of "low" import prices as grounds for finding significant price depression and price suppression. A predicate of a finding of "low" prices is that an authority has undertaken an analysis of comparative prices. But China has thus far failed even to explain how it undertook any such price comparison analysis, much less to respond to the United States' detailed arguments about how any such analysis did not reflect an objective examination and was unsupported by positive evidence. As Japan stated today, "[t]he mere statement ... that 'the sale of the product concerned was kept at a low price' – would not be sufficient to explain the relevant information."

The United States would like to conclude by again thanking the Panel and Secretariat for their efforts. We look forward to receiving your written questions and continuing this discussion in future submissions and at the December substantive hearing.

ANNEX C-4

CLOSING STATEMENT OF CHINA AT
THE FIRST MEETING OF THE PANEL

1. We would like initially to take the opportunity of this closing statement to again thank the panelists and the secretariat for their dedication to this proceeding. We have made every effort to make the first meeting with the Panel as productive as possible and we hope the panel shares our view that the meeting has been productive in better defining the issues and clarifying the positions of the parties on their positions. We look forward to working with the Panel and the secretariat as the panel proceeding moves forward.

2. We would like in this closing statement to briefly summarize China's position on the principal issues in this proceeding, beginning with the U.S. claims under Article 11.2 and 11.3 of the SCM Agreement and issues related to initiation. China believes some initial progress has been made. In particular, the United States confirms that the focus of any inquiry is on the evidence that accompanies an application, not the elegance of the allegation.

3. In parting, we would ask the Panel to consider two points. First, the initiation standard that appears to be offered by the United States is one of definitive evidence. For example, the United States wants definitive evidence of a financial contribution. According to the United States, anything less is mere speculation. But what purpose does an investigation serve if the initiation standard is based on definitive evidence? There is a well settled principle on this very point – the quantity and quality of the evidence required for initiation is less than that required for a preliminary or final determination. Second, it is the United States' burden to present both argument *and evidence* to the panel to make its *prima facie* case. The United States did not move beyond paragraph 78 of its First Written Submission, which is limited to assertions of "no evidence." China is left to defend on the basis of these simple assertions. We believe this situation should further reflect on the U.S. argument and whether it has met its burden as complainant in this case.

4. In terms of the adequacy of the non-confidential summaries provided in the petition and related to the determination of injury and causation. The fact that China in the context of this proceeding has been able to present to the Panel full argumentation and explanation of the basis of its determinations relying solely on the public information provided would seem to render this issue moot. To the extent that the United States provides specific examples of information which did not permit an adequate explanation of a particular aspect of the authority's determination, we would welcome the opportunity to respond by pointing them to the information on the public record which renders their concern moot. China provided such examples during the course of the Q&A yesterday to the extent that the United States provided specific examples and China is prepared to do this with respect to additional examples. China also reiterates that the adequacy of these summaries should be viewed in the context of the difficulty of protecting confidential information when only two petitioners are involved in an investigation. This problem is not unique to China.

5. In summary, the question before the panel is whether the non-confidential summaries provided by petitioners with respect to the determinations of injury and causation provide "sufficient detail" to allow a "reasonable understanding" of the substance of the information being provided in confidence and the reasoning of the authority in reaching its determination. China believes that the record in the underlying proceeding satisfies this standard.

6. In terms of the disclosures provided to the respondents on the method of calculation of the dumping margins, there are two very simple points to be made. First, while not disclosing the specific

numbers used in calculating the margins of dumping, the Chinese authority did disclose the source of the specific numbers used in calculating the margins of dumping and the methodology used. Although in China's view, nothing more is required because this meets the standards of both Article 12.2 and 6.5 of the Antidumping Agreement, the level of disclosure was such that the actual margins of dumping could be calculated by the respondents to ensure the accuracy of the calculations by the authority, the apparent overriding concern of the United States. This is evident from the detail of the disclosure itself.

7. We will not dwell on the issue of the all others rate, except to say that there is no provision governing the all others rate and that there are policy reasons supporting the use of facts available to encourage unknown exporters/producers to come forth and cooperate in an investigation in which the authority is investigating all exporters or producers individually.

8. On the application of facts available with respect to the Government Purchase of Goods Program, the issue remains whether the respondents cooperated to the best of their ability in providing necessary information. The United States wishes to distract by focusing on irrelevant issues and avoiding the question of whether AK Steel or ATI could have done more. Yesterday the United States appeared to advance a new theory not articulated in its first written submission – that AK Steel and ATI fully responded to the questions as posed by MOFCOM on this issue and were taken by complete and utter surprise in December 2009 when they first learned this was not MOFCOM's interpretation. The record simply does not support this new theory, as we will discuss in greater detail in subsequent submissions to the Panel. But suffice it to say that the U.S. theory has trouble at the start. It seems highly unlikely that answers to questions that were so clear to AK Steel in terms of the their narrow focus, at least according to the United States, were qualified in advance by healthy argument from AK Steel about why it believed it was impermissible for China to inquire on a broader scale. I could go on from here, but China will reserve further discussion to any written responses to questions and its second submission.

9. With regard to the claims involving injury, we would like to note a few key points. As we made clear in our first written statement and in our comments yesterday, we are happy to answer any Panel questions regarding proprietary information. We repeat that offer, with regard to both the U.S. claim regarding price effects that we discussed yesterday and the U.S. claim regarding causation that we assume will come up in the written questions.

10. Yesterday, the United States said in its oral statement that "it is useful to focus on what MOFCOM actually found." We agree. MOFCOM found that subject imports increased absolutely, captured more than 5 percentage points of market share in 2008, and continued to gain market share in early 2009. MOFCOM also found that the increasing volume of subject imports caused material injury. These findings of adverse volume effects have not been challenged by the United States. For all the back forth the parties have had and will continue to have about price effects, these volume effects alone establish a legally sufficient causal link to justify these measures. The United States claims the declining profitability in 2008 and 2009 was "not volume-related," but this is just not true. The domestic industry invested in a growing market, but found itself shipping less than it might otherwise have shipped and thus losing market share because of these surging volumes of unfairly traded imports. The price levels of the imports do not change the fact that increasing volumes of unfairly traded imports caused material injury.

Thank you.

ANNEX D

ORAL STATEMENTS OR EXECUTIVE SUMMARIES THEREOF OF THE THIRD PARTIES AT THE FIRST SUBSTANTIVE MEETING

ANNEX D-1

THIRD PARTY ORAL STATEMENT OF ARGENTINA*

I. INTRODUCTION

Mr Chairman, distinguished members of the Panel

1. The Republic of Argentina would like to thank the Panel for the opportunity to present its arguments and considerations relating to this case, in view of its "systemic" interest in ensuring the correct interpretation of the provisions at issue in this dispute.

2. As third party, Argentina maintains an interest in the correct interpretation of the agreements cited in these proceedings, and accordingly, in this submission, our government wishes to express its views on the interpretation of certain provisions of 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") inasmuch as this Panel's interpretations of those provisions will have systemic implications.

3. To make the best of the short time available, this submission will focus on certain matters relating to this case. The first concerns the interpretation of the confidentiality of the documents submitted in an investigation under the AD Agreement and the SCM Agreement, and the need for non-confidential summaries so as to ensure that the parties under investigation have the proper right of defence. The second relates to the determination of injury, in particular, in connection with the need to consider factors other than imports as causal agents of injury.

II. UNDER ARTICLE 6.5 OF THE AGREEMENT ON IMPLEMENTATION OF ARTICLE VI OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE 1994 ("AD AGREEMENT") AND ARTICLE 12.4 OF THE AGREEMENT ON SUBSIDIES AND COUNTERVAILING MEASURES ("SCM AGREEMENT"), GOOD CAUSE MUST BE SHOWN FOR THE CONFIDENTIALITY OF INFORMATION AND A NON-CONFIDENTIAL SUMMARY MUST BE FURNISHED TO THE INTERESTED PARTIES

4. We note that Articles 6.5 and 6.5.1 of the AD Agreement and 12.4.1 of the SCM Agreement require the submission of non-confidential summaries, so that interested parties or Members are able to gain "a reasonable understanding of the substance of the information submitted in confidence". The aim is to guarantee the right of defence to the interested parties, who otherwise would lack sufficient information to understand the grounds of the accusation that they face.

5. We recall that in *United States - Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina* (WT/DS268/RW), the Panel held that "*Article 6.5.1 protects the right of the interested parties generally to be reasonably informed about the substance of the confidential information that may be submitted by any other interested party. What matters for purposes of Article 6.5.1 is whether the interested parties themselves receive non-confidential summaries of the confidential information submitted to the investigating authorities*".[1]

* This oral statement was originally made in Spanish.

[1] *United States - Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina* (WT/DS268/RW), paragraph 7.137.

6. In other words, where the existence of a non-confidential summary is not accredited in the file, or where there is no explanation in the file that would justify the inability to summarize the confidential information, the right of the interested parties to be reasonably informed about the substance of the confidential information will not have been respected.

7. This is why Argentina agrees with the arguments set forth by the United States in point B of its written submission to the effect that in accordance with Article 6.5.1 of the AD Agreement and 12.4.1 of the SCM Agreement, the Chinese Ministry of Commerce (MOFCOM) should have required the interested parties submitting confidential information in the investigation to furnish non-confidential summaries thereof, especially in cases where the submitting parties had provided no reasons why summarization was not possible.

III. NON-ATTRIBUTION ANALYSIS WITH RESPECT TO OTHER FACTORS IN THE DETERMINATION OF INJURY

8. Argentina notes that according to Articles 3.5 of the AD Agreement and 15.5 of the SCM Agreement, prior to its determination as to whether imports at dumped or subsidized prices are the cause of the difficulties experienced by the domestic industry, an investigating authority should carry out the so-called *non-attribution analysis*, whereby consideration has to be given to factors other than known factors and a determination made as to whether they contribute to the injuries suffered by the domestic industry.

9. In this connection, we take the view that it is also clear from the above-mentioned rules that the Agreements under interpretation require no evidence that imports from other countries considered as one of the other "known factors" are dumped or subsidized imports.

10. In our view, even in the absence of dumping or subsidization, the prices and/or quantity of those commercial operations could be such as to cause injury to the domestic industry. In that case, the investigating authority would have to examine whether, in the light of their volume and/or prices, imports from sources other than the one under investigation are substantial enough to break the causal link between the dumped imports and the injury determined. In that examination, it might also be necessary to consider qualitative issues relating to the forms of competition in each of the markets.

IV. CONCLUSION

11. In the light of the analysis contained in this oral submission, Argentina considers that:

- The "confidential" classification of information submitted by any party in the dumping or subsidy investigation must be justified by good cause; in that event, it is of the utmost importance that, except in duly attested exceptional circumstances, sufficiently detailed non-confidential summaries are furnished, so as to guarantee the information necessary for the interested parties to be able to exercise their legitimate right of defence.

- In the determination of injury, the investigating authority shall effect a non-attribution analysis relating to "other known factors" which may be a contributing cause of the difficulties faced by the domestic industry. In particular, it shall analyse whether imports from origins other than those investigated are causing injury to the domestic industry.

12. We thank you for your attention and hope that the above comments prove to be useful in the Panel's deliberations and help arrive at an interpretation that is harmonious and in accordance with the aims and objectives of the AD Agreement and the SCM Agreement.

ANNEX D-2

EXECUTIVE SUMMARY OF THE THIRD PARTY ORAL
STATEMENT OF THE EUROPEAN UNION

I. TREATMENT OF CONFIDENTIAL INFORMATION UNDER ARTICLES 6.5.1 ADA AND 12.4.1 SCM

1. The European Union (EU) is of the view that the reading of Article 6.5 and 6.5.1 ADA (and the corresponding provisions in the SCM) advanced by China in Its First Written Submission cannot be reconciled with the text of the Agreement and is not supported by the jurisprudence of prior panels and the Appellate Body.

2. Article 6.5 ADA lays down the principle that, **upon good cause shown**, confidential information submitted by interested parties in the course of an anti-dumping investigation is to be kept confidential by the authorities. The requirement to show good cause falls on the **interested party submitting the information at issue, not the investigating authority**, and it applies both to information that is confidential "by nature" as to the information that is "provided on a confidential basis".

3. The Appellate Body in its recently confirmed that "[i]f information is treated as confidential by an authority without such a 'good cause' showing having been made, the authority would be acting inconsistently with its obligations under Article 6.5 to grant such treatment only 'upon good cause shown'" (Appellate Body Report in *EC – Fasteners*, para. 539). The Appellate Body also clarified that the type of evidence and the extent of substantiation an authority must require will depend on the nature of the information at issue and the particular "good cause" alleged.

4. Provided good cause has been shown, Article 6.5.1 ADA further **obliges the investigating authority to require** that parties submitting confidential information also furnish a **non-confidential summary** thereof. The summary must be **in sufficient detail** to permit the parties to the investigation a reasonable understanding of the substance of the information submitted in confidence and thereby allow them the opportunity to defend their interests.

5. The ADA and SCM allow the possibility for authorities to waive the obligation to provide a non-confidential summary of confidential information, but limit it to **"exceptional circumstances" where summarization is not possible**. In such exceptional circumstances **the party seeking confidential treatment** of the information submitted **is required to provide a "statement of reasons why summarization is not possible"**.

6. The EU also notes that prior panels - and recently the Appellate Body - left no doubt as to the fact that Article 6.5.1 ADA (as well as its parallel provision in the SCM) should be understood as imposing an **obligation on the investigating authority to scrutinise the statements** provided by parties seeking confidential treatment for information submitted. The aim is to determine whether exceptional circumstances have been established, and whether the reasons provided adequately explain why under the circumstances a summarization is not possible.

7. China refers to jurisprudence on Article 6.5 and 6.5.1 ADA in noting that these provisions aim to **strike a balance between the interests** of parties submitting information (i.e. confidentiality) and the interests of all other concerned parties (i.e. due process, transparency). In the view of the EU, this very balance would be completely upset if authorities were to be allowed to protect as

confidential virtually any piece of information based on a mere presumption that such protection is warranted.

8. The party submitting information is best placed to asses the effects that its disclosure could have. All an investigating authority could do, in the absence of a motivated request, is speculate as to the potential risks. It is therefore only logical and appropriate that the ADA put the burden of proof of good cause for confidential treatment and the obligation to demonstrate insusceptibility of summarization in non-confidential format on the party submitting the information. The authorities are charged with the obligation to demand and objectively scrutinise such requests. Anything else would create a risk that any "inconvenient facts" would become shielded from scrutiny and rebuttal by interested parties through an *ex officio* designation of confidentiality.

9. China furthermore argues that the very fact that there were only two producers amounts to "exceptional circumstances" within the meaning of Article 6.5.1 ADA. While it is undisputable that Article 6.5.1 provides for the possibility that there may be justified cases in which it is not possible to provide a non-confidential summary of confidential information, the EU is not persuaded by China's arguments that this is always the case where there are only two producers involved. The EU is of the view that in cases when there are only two producers it is still possible to prepare non-confidential summaries (e.g. in the form of indexes).

II. THE ALLEGATION THAT THE PRICE EFFECTS ANALYSIS IN MOFCOM'S FINAL DETERMINATION WAS INCONSISTENT WITH CHINA'S WTO OBLIGATIONS

10. The United States (US) alleges that MOFCOM's price effect analysis is inconsistent with Articles 3.1 and 3.2 ADA and with Articles 15.1 and 15.2 SCM. In particular the US alleges that MOFCOM made no finding at all regarding **price undercutting**, while references to "low price" policies and strategies are not based on positive evidence. According to the US, MOFCOM did not, either in the Injury Disclosure Document or in the Final Determination, rely on any information about actual pricing levels, neither in the price suppression nor in the price depression analysis. China argues, that it did not make specific findings about price undercutting, since on the basis of ADA it is not required to do so. China acknowledges that it based its overall finding about adverse price effects on the price suppression and price depression analysis and that these two "did not depend on precise pricing information".

11. The EU does not agree with China's position that price suppression and price depression analysis do not have to "depend on precise pricing information". In the EU's view, prices analysis necessarily requires information on prices, also concerning the analysis of price suppression and price depression. Otherwise the reliability of the findings cannot be guaranteed.

12. As elaborated in our Written Submission, an investigating authority is obliged under Article 3.1. ADA to base the injury examination on "**positive evidence**" and to conduct an "**objective examination**". The term "positive", indicates that the evidence must be of an affirmative, objective and verifiable character, and that it must be credible.

13. Price depression can be determined by considering the trend in prices of the domestic product over the period of investigation (POI). It could also be assessed by evaluating whether domestic price declines and prices of imports remain consistently below domestic prices over the POI. Failure to take into account concrete pricing data does not allow - in neither of the above methods - for an affirmative, objective and verifiable, and thus credible result of such an analysis.

14. Price suppression analysis, which relies on a counter-factual conclusion that, absent the dumped imports, prices of the domestic products would have increased, is even more difficult to

undertake in an objective manner. It requires a conclusion that domestic prices should have increased. Any such conclusion may rest on elements as e.g. increased costs, which would be normally passed on as price increases.

15. Therefore, any analysis which allows for the assessment of adverse price effects - be it in the form of price undercutting, price suppression or price depression - and of their significance must rest on precise pricing information to satisfy the requirements set out in Article 3.1 ADA.

16. The EU agrees that, in accordance with Article 3.2 ADA, a determination of injury does not require a finding of price undercutting, but may also be based on a finding of price depression and/or of price suppression. The EU also agrees that the ADA does not prescribe any precise methodology for assessing the level of price undercutting. But this does not mean, contrary to what appears to be China's position, that a comparison of the prices of domestic and imported products is never required by the ADA, so that the investigative authorities enjoy complete discretion to decide whether or not to make such a comparison. In particular, it may be noted that some form of comparison between the prices for domestic and imported products will usually be required in order to establish the requisite causal link between the imports and the injurious effects. For example, it is obvious that where the prices for the imported products have been much higher than the prices for the domestic products during the relevant period of reference, price depression or price suppression cannot, absent very exceptional circumstances, be attributed to the imported products. For this reason, a failure to make any kind of comparison between the prices for domestic and imported products may well constitute a breach of the obligation to make an "objective examination" within the meaning Article of 3.1 ADA.

III. ESTABLISHMENT OF THE REQUIRED CAUSAL LINK

17. In view of the Chinese arguments concerning the alleged failures in establishment of casual link, the EU would like to underline that both the significant adverse price effects and increasing volumes of low priced imports are necessary elements of the analysis of the casual link as provided for in Article 3.1 ADA and Article 15.1 SCM. Therefore, any inadequacies in the establishment of the adverse price effects will necessarily have repercussions on the finding concerning the casual link.

ANNEX D-3

THIRD PARTY ORAL STATEMENT OF HONDURAS[*]

Mr Chairman and distinguished members of the Panel,

1. Honduras would like to thank the Panel and the parties for this opportunity to present its views on some of the matters at issue in this dispute, and because we have a systemic interest in the matter, we would like to discuss the interpretation of some of the provisions of the WTO Agreements that are in dispute.

2. In this statement, and without prejudice to what was already stated in the third party submission to the Panel, Honduras will focus on certain matters relating to the standards of proof for the initiation of a countervailing measures investigation.

3. There does not appear to Honduras to be any divergence between China and the United States on the fact that Article 11.2 of the SCM Agreement requires that sufficient evidence be provided of the existence of the three elements of an actionable subsidy, namely financial contribution, benefit, and specificity of the subsidy.[1]

4. However, Honduras does see a divergence on whether sufficient evidence was provided regarding the elements of a subsidy in the context of various programmes that were under investigation during the domestic procedure. The United States claims that the application did not include that evidence[2], while China claims the contrary.[3]

5. In evaluating the arguments of the two parties, the Panel should bear in mind the following points:

6. Article 11.2 of the SCM Agreement requires the inclusion of sufficient "evidence" of the "existence" of a subsidy, among other elements. The term "evidence" is defined as an instrument intended to ascertain the truth or falsity of a matter, or an indication, sign or testimony that is given in relation to something.[4] In that respect, it must give *clear indications* of what it is seeking to establish. These clear indications must be *objectively* verifiable, and not simply left to a *subjective* appreciation. For Honduras, complying with Article 11.2 of the SCM Agreement requires more than simply asserting that there is "implicit" evidence. Evidence cannot consist of mere conjecture, speculation or abstract inferences without any positive and objective substantiation.

7. At the same time, Honduras notes that there is a certain divergence regarding compliance with the requirement to provide sufficient evidence of the benefit conferred by a subsidy when that subsidy ended prior to the beginning of the investigation period. In particular, there appears to be the suggestion that in the absence of any guidelines in the SCM Agreement as to the distribution of the benefit of a subsidy over time, an application for the initiation of an investigation would not necessarily have to contain evidence of the existence of the benefit during the period of investigation.[5]

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[*] This oral statement was originally made in Spanish.

[1] First Submission of the United States, paragraphs 72-74, and First Submission of China, paragraphs 14-18.

[2] For example, First Submission of the United States, paragraph 78.

[3] For example, First Submission of China, paragraphs 34-58.

[4] Real Academia Española, *Diccionario de la Lengua Española*, 22nd edition, 2011, p.1853.

[5] First Submission of China, paragraph 38.

8. In our view, Article 11.2 does not contain any repealing clause or provide for any exception with respect to the inclusion of *sufficient* evidence of the existence and the various elements of a subsidy. Consequently, we do not think that the lack of guidelines concerning the distribution of a subsidy over time should be considered as an exception to the *sufficiency* requirements laid down in Article 11.2.

9. Finally, Honduras notes that there is a divergence as to whether sufficient evidence was included, showing that a State entity provided a financial contribution.[6] It appears to Honduras that the sufficient evidence should be of the "existence" of a subsidy and its constituent elements. In its ordinary meaning, the term "existence" refers to a thing that is *real and genuine*.[7] Compliance with the Article 11.2 mandate requires the inclusion of evidence showing that the subsidy is real or genuine, in other words that it exists and has been granted. The mere creation of an entity whose apparent function is to conduct studies or analyses should not, in Honduras's view, be considered sufficient evidence of the *existence* of a subsidy, and in particular a financial contribution. Honduras is concerned at the idea that State information-gathering activities on behalf of a domestic industry should be considered to be an actionable subsidy.

Thank you.

[6] First Submission of the United States, paragraph 78, and First Submission of China, paragraph 43.
[7] Real Academia Española, *Diccionario de la Lengua Española*, 22nd edition, 2001, p. 1019.

ANNEX D-4

EXECUTIVE SUMMARY OF THE THIRD PARTY
ORAL STATEMENT OF INDIA

Mr. Chairman and distinguished members of the Panel. India thanks the Panel Members for the opportunity provided to it to submit its statement before this Panel.

Introduction

1.1. This dispute raises several procedural issues related to initiation of countervailing duty investigations, determination of subsidy rates, treatment of confidential information, injury determination etc. The issues raised are of systemic importance for all the WTO Members and therefore India attaches importance to the examination of these issues by the Panel. Most of the claims and counterclaims in this dispute are factual. With very limited factual information available, India would not wish to support the claims of any particular party and would rather urge the Panel to objectively look at the facts of this dispute and draw conclusions which would provide guidance to Members in implementation of the relevant provisions of ASCM and AD Agreement.

2. On whether China's initiation of an Anti-subsidy investigation was consistent with Articles 11.2 and 11.3 of the SCM Agreement

China asserts that the US has claimed that China's initiation was inconsistent with Articles 11.2 and 11.3 of ASCM :

(i) the application for investigation failed to contain information reasonably available to the applicant regarding the existence of a financial contribution, a benefit, and/or specificity with respect to certain of the investigated subsidy programs; and

(ii) by initiating an investigation of the same set of programs the investigating authority failed to objectively assess the adequacy and accuracy of the evidence contained in the application.

2.1. It is submitted that while examining the US claim under Article 11.2, it may be inherent to examine whether the specific programmes included in the allegation of subsidies fulfilled the criteria of definition of a 'subsidy' within the meaning of Article 1.1 of ASCM in order to prove that a subsidy existed.

2.2. It is submitted that whether or not the application contained the requirements as mandated under Art. 11.2, ASCM is a question of fact. India would urge the Panel to evaluate this question of fact keeping in view an objective interpretation of the requirements enunciated under Article 11.2, ASCM.

2.3. On the purported challenge of the US that by initiating an investigation of the same set of programs, India would wish to submit that this is a question of fact.

2.4. In the *Request for Consultations*, the US alleges that China's Countervailing and Antidumping measures on GOES from the US appear to be inconsistent, *inter alia*, with Article 10 and 19 of the ASCM because China improperly determined that government purchases under the US Buy American Laws

conferred a "benefit"[1]. At para 12[2], the US states that MOFCOM initiated an investigation with respect to the American Recovery and Reinvestment Act (ARRA), 2009. In the *Request for the Establishment of the Panel*[3], the US acknowledges that China has applied CVD as countervailing action on several alleged subsidy programs[4].The US states that the petitioner challenged the US State and Federal laws that they claimed provided countervailable subsidies to GOES producers[5]. The US does not categorically rebut the factum of the existence of the subsidy element in several and specific US programmes. The US in its First Written submissions[6] refers to the specific US measures/ sectors alleged to be providing subsidies to the US industry such as:

-*Buy America provisions.*

-*Medicare Prescription Drug, Improvement and Modernization Act of 2003, Economic Recovery Tax Act of 1981, Tax Reform Act of 1986, Steel Import Stabilization Act of 1984, State of Indiana Steel Industry Advisory Service, Grace periods for compliance with the Clean Air Act,*The American Clean Energy Security Act of 2009,*2003 Economic Stimulus Plan of Pennsylvannia.3,-Pennsylvania's Alternative Energy Funding Program.*

Sectors: *Electricity, Natural Gas, Coal*

2.5. It is submitted that an underlying issue in this dispute would be the existence of subsidies or otherwise in the US State and Federal Programmes and whether these subsidies could be subjected to countervailing duty action as per the ASCM.

2.6. At para 229[7], China submitted while addressing U.S. arguments in the underlying proceeding (that competitive bidding existed under Buy American provisions), the MOFCOM stated in full as follows:

> *The Investigating Authority found that, according to provisions in the Buy American Act and other regulations, although there is competitive bidding process, using steel and finished products produced in the U.S. is required unless there is a waiver. The Investigating Authority holds that this fact shows that the scope of products allowed for bidding under Buy American Act has actually been limited to some extent, and thus the bidding is not market competition in the usual sense…..when purchases of U.S. iron and steel products do not cost 25% more than foreign products, the foregoing so-called competitive bidding is only competition among U.S. products. …..…Therefore, the Investigating Authority considered that the competitive bidding restricted the scope of*

[1] WT/DS414/1
G/L/927
G/SCM/D85/1
G/ADP/D85/1
Dated 20 September, 2010; *Request for Consultations by the US.*
[2] *US First Written Submissions* (USFWS)dated June 8,2011.
[3] WT/DS414/2 dated 14 February,2011, *Request For The Establishment Of A Panel By the US.*
[4] At para 1.(a) and (b), *Ibid*.
[5] USFWS para 13.Details of the said laws are provided elsewhere in the USFWS and China's FWS.
[6] At page 25, para 78
[7] *Ibid.*

> *participating products, and thus could not reflect the full market competition. Even if there is competition, it is competition only among the U.S. domestic steel products (may include part of the foreign products at the federal level and in some regions). Hence the price obtained through competitive bidding does not reflect the true market conditions.*

2.7. Further, China states that the United States acknowledged in its questionnaire response in the underlying investigation The Buy American Act (the Act), 41 U.S.C. 10a-10d, is the major domestic preference statute governing procurement by the federal government and the program at issue is governed by "Buy American" provisions that prefer U.S. prices and U.S. goods, distorting the competitive playing field.

2.8. As a third party, India submits that questions of facts and evidence would be for the parties to prove or to rebut and the Panel should examine carefully the facts presented by the parties for fair and objective application of the provisions of the *AD Agreement* and the *SCM Agreement.*

3. On whether MOFCOM's treatment of confidential information was fully consistent with the requirements of article 6.5.1 of the AD Agreement and Article 12.4.1 of the SCM Agreement

3.1. United States has claimed that MOFCOM breached these disciplines as the non-confidential summaries provided to MOFCOM were inadequate and no reasons were provided for the inadequacy of the non-confidential summaries, China has rebutted this allegation. This is a question of fact to be established by evidence led by the two main Parties in this dispute.

3.2. As stated hereinbefore, India would urge the Panel to interpret the provisions of the WTO Agreements strictly in accordance with the language adopted in the said provisions. The Panel in *Mexico- Steel Pipes and Tubes* at para 7.380 held that it considered that the conditions set out in Article 6.5, chapeau, and 6.5.1 are of critical importance in preserving the balance between the interests of confidentiality and the ability of another interested party to defend its rights throughout an anti-dumping investigation.

3.3. India as a third party would like to assist the Panel in the determination of the issues raised in the present dispute for the Panel's balanced consideration.

3.4. China has contended that the US has claimed that the non-confidential summaries provided to MOFCOM were inadequate and that no reasons were provided for the inadequacy of the non confidential summaries. China believes that the US claim ignores important facts related to the confidential information: (1) the petitioning parties provided non-confidential summaries for the information for which confidential treatment was requested; and (2) most of the information for which confidential treatment was requested was information which fits within the "exceptional circumstances" waiver of confidential summaries provided in Article 6.5.1 and 12.4.4. Thus, China claims that the US does not challenge under Article 6.5 or Article 12.4 the right of this information to be classified as confidential rather it challenges only the sufficiency of the non confidential summaries under Art. 6.5.1 and Art. 12.4.1.

3.5. India submits that Art. 6.5.1, ADA lays down the standard of acceptability of a non confidential summary in as much as it states that "These [non confidential] summaries *shall be in sufficient detail to permit a reasonable understanding* of the substance of the information submitted in confidence."

3.6. At para 87, China states that in compliance with Art. 6.5.1, the information provided in non-confidential summaries was more than sufficient to allow responding parties to have a "reasonable understanding of the substance of the information". In *EC - Fasteners (Panel)* it was held that "the investigating authority must ensure that an appropriate non-confidential summary is provided, or in exceptional circumstances, if that is not possible, that an appropriate statement of reasons why summarization is not possible is given". China also takes the support of the exceptional circumstances provision under Article 6.5.1.

3.7 China's statement that in the case a party indicates that the confidential information is not susceptible to the aforementioned [non confidential] summary, then the provision does not provide a significant guidance on the level of analysis and explanation required (other than a statement of the reasons why summarization is not possible) appears to be, *prima facie*, supported by a bare reading of Art.6.5.1.

3.8. At para 134, China provides explanation that the confidential information at issue is primarily the confidential information on which the authority based its injury determinations. China claims that most of this information related to non-public information generally recognized and treated as business proprietary by companies throughout the world, namely information on individual company operations including sales revenue, sales volume etc. It is submitted that the Panel would evaluate the nature of the information submitted and the reasons for treating the information as confidential. In India's views, the practices of Investigating Authorities for treating certain information of the domestic industry as confidential may differ. The claims regarding certain information to be treated as confidential can also be evaluated with reference to the norms of public disclosure of financial statements of companies. The conclusions of the Panel on this matter would provide important guidance to Members.

4. On whether MOFCOM's application of Facts Available in determining the subsidy margin for the Government Purchase of Goods Program was consistent with Article 12.7

4.1. China has contended that due to the continuing failure of the companies to provide necessary information related to government purchase of goods programme, in its final determination MOFCOM continued to apply facts available in the manner imposed in the preliminary determination. It stated that what occurred was nothing short of a conscious decision to withhold information.

4.2. China relies on the observations of the Panel in *EC –DRAMs* to state that uncooperative behaviour may be taken into account by the authority when weighing the evidence and the facts before it and the fact that certain information was withheld from the authority may be the element that tilts the balance in a certain direction. Further, China also relies upon the interpretation given in *Egypt- Steel Rebar* to 'necessary information' under Art.6.8, ADA. India submits that this issue is a question of fact to be evaluated by the panel.

5. On whether MOFCOM's disclosure of its determination of the margins of dumping was consistent with its requirements of Art. 12.2.2

5.1. The US alleges that the failure of the MOFCOM to release the actual calculations while determining the margin of dumping violated Art. 12.2.2, ADA. China, in turn, states that the US does not refer to any WTO jurisprudence or reference any standard to be applied in interpreting Art. 12.2.2.

5.2. It is stated that the Panel would interpret Art. 12 as per the language used in the provision and would take into account that in the case of a determination, the authorities are required to provide explanations that are sufficiently detailed and shall refer to all matters of facts and law which have led to arguments being accepted or rejected.

5.3. Thus though the authorities have to provide a sufficiently detailed explanation on how they established the margin of dumping on an exporter/producer-specific basis, it may be considered that perhaps the actual data need not be stated in the public notice under the exception under Article 12.2.2 keeping in view the need for protection of confidential information under Article 12.2.2 of the AD Agreement.

6. On the determination of the All Others Rates based on Facts Available

6.1. The US alleged that MOFCOM's application of facts available to determine the anti-dumping duty rate and the countervailing duty rate for unexamined exporters/producers was inconsistent with Article 6.8 of the *AD Agreement* and Article 12.7 of the *SCM Agreement.*

6.2. The United States states that the unexamined firms were never sent copies of the antidumping questionnaire and that China breached Article 6.8 of the AD Agreement and paragraph 1 of Annex II by applying facts available to them. The said issue is a question of fact that the panel would examine.

6.3. Article 6.8 of the *AD Agreement* states that facts available may be applied to an interested party which refuses access to, or otherwise does not provide, necessary information or significantly impedes the investigation. Paragraph 1 of Annex II states that the authorities should inform the interested party that the authorities will apply facts available if the interested party does not supply the requested information. Interpreting the above, it appears that facts available may not be applied to an interested party who had not been asked to submit information in the first place.

6.4. Further, Art. 12.7, ASCM also states that in cases in which any interested Member or interested party refuses access to, or otherwise does not provide, necessary information or significantly impedes the investigation, the determinations, affirmative or negative, may be made on the basis of the facts available. Again, it would appear that a natural corollary of the said Article is that facts available may not be applied in the case that the interested party who has not been asked to submit information in the first place.

7. On MOFCOM's alleged failure to provide any rationale on its rejection of a price derived from the competitive bidding process

7.1. The US has alleged that MOFCOM rejected the competitive bidding price in the U.S. government procurements as the market price. It is a question of fact.

Conclusion

India thanks the panel for giving this opportunity to present its views as third party in this dispute. India would be happy to provide answers to any questions which the Panel may have.

Thank you.

ANNEX D-5

THIRD PARTY ORAL STATEMENT OF JAPAN

I. INTRODUCTION

1. Mr. Chairman, and the distinguished Members of the Panel, on behalf of the Government of Japan, I thank you for the opportunity you provide us to present our views with respect to this dispute, which involves important systemic issues on the disciplines of *AD Agreement* and the *SCM Agreement*. Because time is limited, Japan would like to focus only on three issues today.

II. DISCUSSION

A. Disclosure of Dumping Margin Calculation and Data Used

2. The first issue is the disclosure of the dumping margin calculation and the data used in the calculation. The United States claims that MOFCOM acted inconsistently with Article 12.2.2 of the *AD Agreement* because it failed to disclose or otherwise make available the calculation and data used during the investigation. According to the United States, MOFCOM's disclosure was limited to the weighted averages of export prices, normal values, and the product-specific margin of dumping and did not provide sufficient information for interested parties to understand how MOFCOM calculated the margin or which data MOFCOM used.

3. In general, the disclosure of the entire actual calculations for an exporter's dumping margin is critical for the exporter to present an effective defense because even a tiny mistake could result in a grave distortion of the margin calculation. For example, an authority might mistakenly treat the unit of measurement of data in pounds in the margin calculation, although the data actually were reported in kilograms. Such a mistake would be just a very small part of the entire calculation formulae but could result in the calculated margin being doubled. This type of mistake cannot be identified from the disclosure of the intermediate stage in the calculation process. As such, Japan considers that the authorities are required to disclose the entire dumping margin calculation under Article 12 of the *AD Agreement*; including the data of sales, expense and cost, which the authorities chose to use for the margin calculation, demonstrating every calculation step to reach the margin of dumping.

4. Article 12.2 of the *AD Agreement* sets forth the overarching rule applicable to a public notice or separate report of any preliminary and final determinations, providing that the notice or report must set forth "in ***sufficient detail*** the findings and conclusion reached on ***all issues of fact and law*** considered material by the investigating authorities."[1] The panel in *EC - Tube or Pipe Fittings* explained this provision, stating "a 'material' issue [is] 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."[2] It is not within the authorities' discretion to decide whether a specific issue may be classified as "material," thereby requiring inclusion in the public notice or a separate report.

5. Article 12.2.2 of the *AD Agreement* then sets forth special provisions applicable only to affirmative final determinations. This provision expands the depth and width of the content of a public notice or a separate report to include "all relevant information on the matters of fact … and reasons" of "the margins of dumping established and a full explanation of the reasons for the

[1] Emphasis added.
[2] Panel Report, *EC - Tube or Pipe Fittings*, para. 7.424.

methodology used in the establishment and comparison of the export price and the normal value under Article."[3] The content of a public notice or a separate report of the affirmative final determination must include not only "material" issues but also "all relevant information." With respect to the dumping margins, all individual decisions of the authorities, including its decision to choose the data, to assess the comparability of the export price with a specific normal value, and to set forth a specific calculation formula, are relevant information to the establishment of the margin of dumping, as discussed earlier. Therefore, the authorities must set forth such information in the document of the final determination.

B. Disclosure of Factual Findings Related to Injury Determinations

6. The second issue that Japan would like to address is the disclosure of factual findings related to injury determinations in the disclosure of essential facts before the final determination and the public notice or a separate report of the final determination. In particular, Japan focuses upon the disclosure of the price effects to the domestic like products, and injurious effects of factors other than dumped or subsidized imports to the domestic industry.

7. Article 6.9 of the *AD Agreement* and Article 12.8 of the *SCM Agreement* require the investigating authorities to disclose "the essential facts under consideration which form the basis for the decision whether to apply definitive measures" before the final determination. The panel in *EC – Salmon (Norway)* explained that such disclosure must "provide the interested parties with the necessary information to enable them to comment on the completeness and correctness of the facts being considered by the investigating authority".[4]

8. According to China, MOFCOM found "the sale of the product concerned was kept at a low price" in the final determination.[5] The MOFCOM's finding of "at a low price" would indicate that MOFCOM reached this fact finding based on certain data comparisons. In such case, as explained by the panel in *EC – Salmon (Norway)*, the authorities would have been obliged to disclose information on the comparison as a part of "essential facts" to enable interested parties to comment on the sufficiency of such facts finding before the final determination.

9. With respect to final determinations, Article 12.2.2 of the *AD Agreement* and Article 22.5 of the *SCM Agreement* require that the authorities set forth "all relevant information" on the matter of the facts, "which have led to the imposition of final measures", as discussed earlier. The information on the comparison would have led the authorities to make a finding of the fact of the price effects to the domestic like products, and then to the injury determination. Accordingly, such information must be set forth in the public notice or a separate report of the final determination. The mere statement of the fact found—that "the sale of the product concerned was kept at a low price"—would not be sufficient to explain the relevant information.

10. In addition, the United States argues that MOFCOM's disclosure and explanation on the volume and prices of imports from non-subject merchandise was insufficient. China states that MOFCOM analyzed those facts in the preliminary determination. China argues that the public notice of the preliminary determination was a part of the disclosure of the essential facts as required under Article 6.9 of the *AD Agreement* and Article 12.8 of the *SCM Agreement*.[6]

11. It should be noted, however, that the preliminary determination would not always be sufficient disclosure of the "essential facts" before the final determination. For example, when the

[3] Article 12.2.1(iii) of the *AD Agreement* (incorporated by reference into Article 12.2.2).
[4] Panel Report, *EC – Salmon (Norway)*, para. 7.805.
[5] China FWS, para. 282.
[6] *See* China FWS para. 373.

investigating authorities conduct on-the-spot investigations after the preliminary determination, the essential facts may be changed after on-the-spot investigations. In such case, the exporter should be informed of any changes in the "essential facts" found by the authorities from the time of the preliminary determination to allow them to present an effective defense.

C. The Determination of the All Others Rates Based on Facts Available

12. The last issue that Japan would like to address is the determination of the all others rates based on facts available. Article 6.1 and paragraph 1 of Annex II of the *AD Agreement* require that authorities give notice of information to an interested party from which the information is required, specifying the necessary information in detail.

13. The Appellate Body explained in *Mexico – Anti-Dumping Measures on Rice* that "an investigating authority that uses the facts available in the application for the initiation of the investigation against an exporter that was not given notice of the information the investigating authority requires, acts in a manner inconsistent with paragraph 1 of Annex II to the *AD Agreement* and, therefore, with Article 6.8 of that Agreement."[7] As explained by the Appellate Body, facts available cannot be applied to an interested party which had not been asked to submit information. Japan is of the view that investigating authorities are not allowed to treat the notice posted on the website as being properly given to exporters. Therefore, such notice is insufficient to satisfy the requirement under Article 6.8 of the *AD Agreement*.

14. In addition, the initiation notice of MOFCOM in this case did not request exporters and producers to submit the specific information but requested them only to register with MOFCOM. MOFCOM, nevertheless, declared that it made determination based on the facts available to the exporters that failed to register. Paragraph 1 of Annex II to the *AD Agreement* makes it clear that the authorities may apply facts available to an exporter only when the authorities gave a notice after the initiation to the exporter of the specific information which the authorities would like it to submit but it did not. In that sense, a mere request in the public notice of the initiation to make themselves known to the authorities within 20 days from the date of initiation cannot be the basis to apply facts available to determine dumping determination.

15. The all others rate, which China determined in the final determination of the antidumping investigation in question, *a*ppears to be based on the facts available, and to apply it to exporters and producers that MOFCOM did not ask to submit any information during the investigation. If it is the case, the application of such all others rate to such exporters and producers is also inconsistent with Articles 6.1 and 6.8 and paragraph 1 of Annex II of the *AD Agreement*.

16. Finally, Japan recalls that the Appellate Body found in *Mexico – Anti-Dumping Measures on Rice* that "it would be anomalous if Article 12.7 of the *SCM Agreement* were to permit the use of "facts available" in countervailing duty investigations in a manner markedly different from that in anti-dumping investigations".[8] Therefore, Japan considers that an investigating authority that uses the facts available in the application for the initiation of the investigation against an exporter that was not given notice of the information the investigating authority requires, acts in a manner inconsistent with Article 12.7 of the *SCM Agreement.*

[7] Appellate Body Report, *Mexico –Anti-Dumping Measures on Rice*, para. 259
[8] Appellate Body Report, *Mexico –Anti-Dumping Measures on Rice*, para. 295

III. CONCLUSION

17. In conclusion, Japan respectfully requests the Panel to review carefully the arguments presented by the parties in this dispute in light of the comments presented in Japan's submission and this oral statement. Japan would be pleased to respond any questions that the Panel may have.

ANNEX D-6

THIRD PARTY ORAL STATEMENT OF THE
KINGDOM OF SAUDI ARABIA

Mr. Chairman, Members of the Panel,

1. The Kingdom of Saudi Arabia affirms all of the positions set out in its Third Party submission, and we need not repeat them today. Instead, we will highlight two key issues of systemic importance. The first issue concerns the evidentiary standards that apply to the initiation of subsidy investigations. The second issue relates to the use of facts available.

I. INITIATION

2. I turn first to the issue of initiation.

3. Article 11 of the SCM Agreement imposes significant evidentiary disciplines on the initiation of subsidy investigations. In recognition of the obligation imposed on all Members not to initiate investigations based on unwarranted claims, Article 11 requires that the complaint contain *sufficient* evidence on each of the required elements of subsidization. Applications must contain a "degree of actual evidence"[1] as well as evidence of the relevant *type*.[2] The Kingdom explained in its submission that there must be sufficient evidence demonstrating the requisite elements of a countervailable subsidy.

4. This interpretation of "sufficient evidence" is consistent with the jurisprudence on initiation, which has established that authorities have an obligation to ensure that the evidence in an application constitutes a "reasonable indication" of the actual existence of subsidization and injury.[3] This is a positive obligation that must be faithfully discharged by the investigating authority.

5. The obligation on the investigating authority is set forth in Article 11.3, which requires the investigating authority to examine both the accuracy and adequacy of the evidence provided *in the application* itself. This imposes a binding obligation on Members not to initiate on the basis of deficient claims.

6. The time to verify the accuracy and adequacy of the complaint is prior to initiation. Verification after initiation falls far short of the duty entrusted to investigating authorities to identify and reject inadequate claims.

7. There are strong policy reasons for the initiation standard advocated here. The initiation of a subsidy investigation imposes a heavy burden on all parties, including the government of the exporting Member. Initiation has an immediate adverse effect on trade, and the chilling effect can remain even when initiation results in a negative finding. Investigations launched on the basis of insufficient evidence undermine the credibility of the entire investigatory process, as well as the justification for final measures.

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[1] Panel Report, *Mexico – Steel Pipes and Tubes*, para. 7.24.

[2] Panel Report, *Guatemala – Cement I*, para. 7.67; Panel Report, *Mexico – Steel Pipes and Tubes*, paras. 7.56, 7.59.

[3] Panel Report, *Guatemala – Cement I*, para. 7.49; Panel Report, *Mexico – Steel Pipes and Tubes*, para. 7.21; Appellate Body Report, *US – Carbon Steel*, para. 115.

8. The Kingdom urges the panel to take this opportunity to reinforce the agreed strong evidentiary standards under Article 11 to provide meaningful disciplines on the initiation of subsidy investigations.

II. FACTS AVAILABLE

9. I now turn to the issue of the use of facts available.

10. The Kingdom wishes to highlight that the SCM and Anti-Dumping Agreements limit both the opportunities to resort to facts available and the manner in which they are used. The use of facts available is disciplined in order to ensure that investigating authorities adopt the best information in their determinations. As the Appellate Body has stated, the use of facts available "permits the use of facts on record *solely for the purpose of replacing information that may be missing*".[4]

11. Accordingly, investigating authorities must accept information provided by the respondent where the respondent acted to the best of its ability. This is required under the Agreements even if other information requested has not been provided by the respondent,[5] and even if that information is submitted after a deadline, but within a reasonable period of time.[6] These standards are intended to ensure that determinations are based on objective evidence, and that "facts available" is not used in a punitive manner.

12. The Kingdom notes the European Union's acknowledgement that the right of an authority to use facts available depends on whether the authority *itself* has "acted in a reasonable, objective and impartial manner".[7] The Kingdom agrees with this statement and would add that at least three elements are relevant to the Panel's examination of the investigating authority's actions: the nature of the requests made by the authority, the efforts made by investigated parties to meet those requests, and the degree of any alleged impediment caused by the investigated party's failure to cooperate.[8]

13. The EU also emphasizes that resort to facts available is precluded in situations where the parties in question were not properly notified and the information not properly requested.[9] The Kingdom agrees and considers that the use of facts available is permissible only when the parties have been given proper notice both of the information required by the investigating authority, and of the possibility of the application of facts available in the case of non-cooperation with the authority.[10]

III. CONCLUSION

14. Mr. Chairman, the Kingdom urges the Panel, when considering the systemic issues raised in this dispute, to preserve the SCM Agreement's carefully negotiated balance of interests between exporting and importing Members. That balance can best be preserved through the strict enforcement of a rules-based system for trade remedies investigations.

15. This concludes the Kingdom's statement. I do thank you.

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[4] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 293 (emphasis added).
[5] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 287 (emphasis original).
[6] *See* Appellate Body Report, *US – Hot-Rolled Steel*, paras. 83-86.
[7] Third Party Submission of the European Union, para. 12, citing Panel Report, *Guatemala – Cement II*, para. 8.251.
[8] *See, for example,* Panel Report, *Guatemala – Cement II*, paras. 8.249-8.251.
[9] Third Party Submission of the European Union, para. 11.
[10] *See generally* Article 6.8 and Paragraph 1 of Annex II to the Anti-Dumping Agreement.

ANNEX D-7

THIRD PARTY ORAL STATEMENT OF KOREA

1. Korea appreciates this opportunity to present its views to the Panel as a third party.

2. The issues presented in this dispute appear to have systemic implications for the Members since the claims presented in this dispute touch upon some of the core procedural elements of AD and CVD investigations. However, with only a limited amount of factual information available, Korea does not attempt to support any particular party in this dispute. Instead, Korea offers its view concerning certain critical issues that may help the Panel reach a proper conclusion in the current proceeding.

I. INITIATION OF A COUNTERVAILING DUTY INVESTIGATION SHOULD BE BASED ON ADEQUATE AND SUFFICIENT EVIDENCE

3. A CVD investigation entails mobilization of a great deal of resources on the part of a responding government and companies. A CVD investigation is also a serious undertaking laden with political sensitivities in that one Member investigates another Member's governmental programs. In Korea's view, these unique aspects of a CVD investigation explain the inclusion of bilateral consultations requirement in Article 13 of the SCM Agreement which do not appear in the AD Agreement.

4. In this spirit, the SCM Agreement clearly guards against initiation of a CVD investigation without adequate and sufficient evidence that cannot justify a lengthy investigation of another government. Although the information to be presented at the initiation stage is not the type of evidence that establishes the existence of subsidization or material injury, the investigating authority should nonetheless examine and confirm that at least a minimal amount of information reasonably indicating subsidization and injury has been submitted by a domestic applicant.

5. In fact, Article 11.2 of the SCM Agreement sets forth a detailed threshold for the initiation of a CVD investigation: in order for there to be initiation, "evidence that substantiates" the existence of a subsidy and injury that is reasonably available to the applicant must be presented in the application. As the panel in *U.S.-Byrd Amendment* opined, this provision is to "ensure that investigations are not initiated on the basis of frivolous or unfounded suits."

6. Article 11.3 of the SCM Agreement in turn requires the investigating authority to confirm the accuracy and adequacy of the evidence itself. Thus, an investigating authority assumes an affirmative obligation to examine all the relevant information and materials contained in the application and to confirm their veracity before making a decision to initiate a CVD investigation. It cannot passively accept the allegations in the petition as true or appearing to be true and initiate the investigation hoping to confirm the veracity down the road. Article 11.9 of the SCM Agreement clearly stipulates that the application should be rejected in such an instance.

7. In short, under the current SCM Agreement, initiation of a CVD investigation is not supposed to be an automatic rubber-stamp process once a petition is filed by a domestic industry. Rather, it is designed and envisioned to be a meaningful step where the investigating authorities carefully look into substantive information contained in the petition and determine whether the petition is really worth the time and resources to be inflicted from the lengthy investigations. Unless this filtering

process operates in a way envisioned in Article 11 of the SCM Agreement, foreign exporters and governments would be in a severely dire situation regardless of the final outcome of a CVD investigation.

II. THE "FACTS AVAILABLE" STANDARD SHOULD NOT BE ABUSED TO PENALIZE FOREIGN RESPONDENTS SIMPLY BECAUSE A REQUEST FROM THE INVESTIGATING AUTHORITY WAS NOT FULLY RESPECTED

8. The SCM Agreement does not provide an unlimited discretion to an investigating authority conducting a CVD investigation whenever it encounters a less than optimal information from a foreign respondent. Instead, these provisions unequivocally provide conditions that need to be satisfied before the investigating authority applies the facts available standard.

9. Article 12.7 of the SCM Agreement, Article 6.8 of the AD Agreement, and Annex II of the AD Agreement provide detailed guidelines in this respect. Likewise, the Appellate Body in *Mexico-Beef and Rice* also stated that even if the request by an investigating authority for certain information is not completely adhered to by a foreign respondent, the investigating authority is nonetheless required to consider information actually provided by the respondent.

10. In Korea's view, Article 12.7 of the SCM Agreement along with other provisions in Article 12 collectively stands for the proposition that fundamental due process rights must be ensured at all times in a CVD investigation. The Panel should carefully review whether this due process right has been adequately respected. The Panel would have to look into the specific situation of the investigation at hand and then determine whether facts available would be warranted in the situation.

III. INVESTIGATING AUTHORITY DOES NOT ENJOY UNBRIDLED DISCRETION REGARDING AN "ALL OTHERS RATE" IN ANTI-DUMPING AND COUNTERVAILING DUTY INVESTIGATIONS

11. One of the contentious claims in this dispute is about all others rates in AD and CVD investigations by MOFCOM. In the underlying investigations, the complainant claims, the all others rates were set at unreasonably high margins without sufficient explanations or rationale other than some cursory statements of policy reasons. The respective all others rates indeed seem extraordinarily high when compared to the margins assigned to the respondent companies, AK and ATI. Unreasonably high "all others rates" disassociated with calculated margins of the respondents participating in the investigations does raise a concern of possible inconsistency with the relevant provision of the SCM Agreement and the AD Agreement.

12. In Korea's view, to the extent the application of "all others rates" constitutes the virtual application of "facts available," as the complainant argues, Article 12.7 of the SCM Agreement and 6.8 of the AD Agreement could be implicated in this context as well. If the facts available standard was imposed on non-participating exporters without satisfying the detailed requirements stipulated by Article 12.7 of the SCM Agreement and Article 6.8 of the AD Agreement, a violation similar to the one discussed previously could be found.

13. Korea appreciates this opportunity to participate in this proceeding, and to present its views to the Panel. /END/

ANNEX E

EXECUTIVE SUMMARIES OF THE SECOND WRITTEN SUBMISSIONS OF THE PARTIES

ANNEX E-1

EXECUTIVE SUMMARY OF THE SECOND WRITTEN SUBMISSION OF THE UNITED STATES

I. Introduction

1. China's responses to the U.S. claims fail to address the substance of the U.S. arguments. In examining China's justifications for its measures in this case, it is useful to focus on what MOFCOM actually found as reflected in its determinations and disclosures, not on the *post-hoc* rationalizations provided by China for purposes of this dispute. As we discuss below, China's first written submission often ignores MOFCOM's actual findings or tries to rewrite them. In some instances, China seeks to justify its measures by referring instead to alleged U.S. practice. In other instances, China has replied with broad assertions that the AD and SCM Agreements create no obligations with respect to the issues that the United States has raised, and that China is free to do whatever it chooses. China is incorrect. The AD and SCM Agreements do place relevant obligations on China, and China has failed to rebut the U.S. *prima facie* case that China has breached these obligations.

II. The Initiation of the Countervailing Duty Investigation for Several Programs Breached Article 11 of the SCM Agreement

A. China's interpretation of Article 11 of the SCM Agreement is erroneous

2. While there are parallels between SCM Agreement Article 11 and AD Agreement Article 5, it is important to note the textual differences between Article 5.2 of the AD Agreement and Article 11.2 of the SCM Agreement. Thus, China's reliance in its first written submission on panel reports interpreting the AD Agreement for its propositions that all that is needed is "the inclusion of raw information," and that information need not be linked with allegations, is misplaced in the context of the SCM Agreement. In contrast to the low standard advocated by China, the text of the SCM Agreement makes clear that what is required is *sufficient evidence.*

B. The Application Presented Insufficient or No Evidence Indicating a Countervailable Subsidy for Several Programs

3. As explained in the U.S. first written submission, the evidence provided in the application in support of applicants' claims with respect to several programs was nonexistent or otherwise not sufficient to support initiation. While China asserts that initiation of the countervailing duty investigation was consistent with Article 11 of the SCM Agreement, for each alleged subsidy, the petition contained serious gaps that would have prevented any reasonable investigating authority from concluding that the evidence provided was sufficient to support initiation.

C. No Unbiased or Objective Investigating Authority Would Have Initiated an Investigation under SCM Agreement Article 11.3 Based on the Conjecture Contained in the Application

4. Instead of carefully examining the application and accompanying evidence, MOFCOM merely accepted the applicants' allegations as is, or initiated an investigation based on sheer speculation regarding the "possibility" of a subsidy, apparently intending to bolster the otherwise deficient application after initiating its investigation.

5. Regarding the Medicare Prescription Drug, Improvement and Modernization Act of 2003, for instance, it is clear that MOFCOM made no attempt to analyze the information provided by applicants to determine whether there was a sufficient basis to support initiation. Regarding the Economic Recovery Tax Act of 1981, Tax Reform Act of 1986, and Clean Air Act allegations, instead of carefully reviewing the evidence provided by applicants to determine whether it was sufficient to support the claims made in the application, MOFCOM simply accepted applicants' assertions that a program that was terminated in the 1980s could continue to provide benefits during the POI. With respect to the Indiana Steel Industry Advisory Service, and Steel Import Stabilization Act of 1984, MOFCOM initiated an investigation on the basis of nothing more than pure speculation.

6. MOFCOM's decision to initiate an investigation into the electricity, coal, natural gas, the 2003 Economic Stimulus Plan of Pennsylvania, and Pennsylvania's Alternative Energy Funding programs serve as particularly egregious examples of MOFCOM's cavalier approach to initiation. Despite the clear deficiencies in the petition, and a submission by the United States highlighting the inadequacies of these allegations, MOFCOM initiated an investigation of these programs. In each of the instances, by initiating an investigation based on the "simple assertion, unsubstantiated by relevant evidence" contained in the application, China breached Article 11.3.

III. MOFCOM Failed to Require Adequate Non-Confidential Summaries, Breaching Article 12.4.1 of the SCM Agreement and Article 6.5.1 of the AD Agreement

A. China's submissions reflect a fundamental misunderstanding of Article 12.4.1 of the SCM Agreement and Article 6.5.1 of the AD Agreement

7. China appears to suggest in its submissions that it need only require "adequate" non-confidential summaries if an interested party objects to the manner in which confidential information is summarized. Yet, whether an interested party objects during the proceeding to the adequacy of a summary is irrelevant to the question of whether the summaries were in fact adequate. The obligation to require adequate non-confidential summaries applies regardless of whether an interested party objects to their adequacy during the proceeding. The obligations contained in SCM Article 12.4.1 and AD Agreement Article 6.5.1 rest with China, not interested parties.

8. China's response reflects the mistaken view that its obligation to ensure that the interested parties furnish adequate non-confidential summaries during the course of the investigation may be excused if it is able to point to some subsequent "non-confidential analysis" contained in its own determinations that provides some indication of the confidential information submitted by the interested party. To adequately defend their interests, parties must have access to adequate non-confidential summaries *during* the course of the investigation, not after the investigating authority has drawn conclusions based on the submitted information. *Ex post facto* "non-confidential analysis" is beside the point. Once the determination is made, the parties' ability to defend their interests has been compromised.

9. China's assertion that the agreements do not provide sufficiently detailed guidance on the requirement to furnish adequate non-confidential summaries is belied by the text of the provisions themselves, as well as how the provisions have been applied. In *Mexico – Olive Oil*, for instance, the panel emphasized that a public version of a document where confidential information has simply been redacted is unlikely to qualify as an adequate non-confidential summary. What is required by Article 12.4.1 are adequate non-confidential *summaries*.

10. Regarding China's claims of exceptional circumstances, as noted in our oral statement, neither the petition nor the documents prepared by MOFCOM during the course of the investigation ever asserted that summarization was not possible or otherwise justified the absence of meaningful

non-confidential summaries. China's *post-hoc* rationalizations that exceptional circumstances existed justifying the inadequate non-confidential summaries should therefore be rejected.

B. The Purported Non-confidential Summaries Contained in Part II of the Petition are Inadequate

11. The application itself demonstrates that the applicants intended the purported non-confidential summaries contained in Part II of the application to be linked with the information redacted. Yet the purported non-confidential summaries were inadequate. Setting aside the fact that Part II in fact contains the purported non-confidential summaries, for each category of confidential information, the application was inadequate as it contained no summary at all, or contained unlabelled trend lines, or year-over-year percentage changes without the necessary context of absolute values and without any justification from the applicants why there were exceptional circumstances that precluded more detailed summarization.

IV. China Breached Article 12.7 of the SCM Agreement Because Its Use of Facts Available Was Improper

A. China's Portrayal of the Facts Is Misleading and Contradicted by the Record

12. While China repeatedly asserts that the respondents "refused" to respond to MOFCOM's questions and "seriously impeded" the investigation, a closer examination of the evidence demonstrates otherwise. At no point did the U.S. companies refuse to cooperate with the investigation. The companies cooperated, responded to MOFCOM's questionnaires, and to the extent they did not provide information it was because MOFCOM's own questionnaires did not require it. When AK Steel provided the data after the preliminary determination (data that were already in the hands of the investigators), MOFCOM chose not to either verify it or use the information to develop a verification plan.

13. Similarly, China's assertion that MOFCOM did not request 15 years of sales data for federal-level procurement is misleading. In its original questionnaire, MOFCOM requested sales information for government procurement "not performed within the POI," or according to China's third re-translation of MOFCOM's questions on this topic, procurement "signed within the POI as well as those for which performance has started but remained unfulfilled by the end of the POI." On page 17 of the new subsidy allegation questionnaire response, MOFCOM asks for sales data for all products during the POI and the prior 14 years, for both state- and federal-level procurement laws: "Please provide, during the POI and the 14 years before the POI, the sales situation of all the products under the influence of Pennsylvania Steel Products Procurement Act *and purchasing American goods clause of other Acts* ." The only other procurement Acts alleged in the questionnaires issued at that time are federal procurement laws.

14. It is also important for the Panel to consider that China has acknowledged in paragraph 154 of its first written submission, and in paragraphs 68-72 of its answers to the Panel's questions, that 14/15 (93.3 percent) of the sales data MOFCOM requested for the alleged procurement program was not necessary. While MOFCOM's desire for the sensitive competitive information appeared to be unlimited, according to the explanation in paragraph 67 of China's Responses to the Panel's questions, its request was motivated by curiosity, rather than necessity.

15. In addition, there are no facts available on the record to support MOFCOM's conclusion that the respondents sold all of their output to the government. As explained in our first written submission, the only facts available on the record suggest that, at most, AK Steel could have sold 29 percent of its output to the government, as part of infrastructure and manufacturing sales. The 29

percent sales figure for infrastructure and manufacturing sales comes from AK Steel's audited financial statements and annual report.

16. Notwithstanding MOFCOM's apparent concern that this percentage may not have held true for the entire POI, which did not correspond to a calendar year, the annual report shows that 26 percent of the company's U.S. sales fell under the infrastructure and manufacturing segment in 2007. These figures demonstrate stability in the sales figures to this particular market segment over 24 months. It defies reason to suggest that the first two months of 2009 would be so drastically different from the preceding 24 months that MOFCOM would reject the figures entirely, and a review of AK Steel's later financial reporting would demonstrate that they were not. Regarding China's assertion that the proposal to use the 29 percent figure was untimely filed, AK Steel's annual report was actually contained in the Application. AK Steel proposed the use of the 29 percent figure from that report after seeing MOFCOM's unreasonable course in the preliminary determination.

17. Furthermore, MOFCOM could have verified that AK Steel or ATI did not sell to any government entity at verification. The 29 percent figure rejected by MOFCOM as the maximum possible percentage of AK Steel sales that could have been relevant to the alleged procurement programs, which focused on research and development funds and construction contracts for infrastructure, was provided in the Application before MOFCOM required AK Steel to translate into Chinese and re-submit the same document in the deficiency letter issued to AK Steel on August 26, 2009. Thus, this information was before MOFCOM well before verification began.

18. Notably, MOFCOM does not have standard timetables or schedules for events in antidumping and countervailing duty investigations. Any purported difficulty analyzing the GOES transactional data timely provided in comments on the Preliminary Determination is a product of MOFCOM's own scheduling, which was not based on any statutory or regulatory requirements but rather the agency's own assessment of when events should take place. It was unreasonable to schedule verification on a timeline that would allegedly make it difficult for MOFCOM to verify data that was timely submitted by AK Steel in response to the Preliminary Determination.

B. China's Claim that the U.S. Companies Seriously Impeded the Investigation Is Not Credible

19. Given the various additional means that MOFCOM had at its disposal to evaluate the U.S. companies' claims with respect to utilization of the government procurement programs and MOFCOM's failure to make use of any of them, China's claim of that the U.S. companies seriously impeded the investigation simply are not credible. Moreover, China's argument that MOFOCOM could review such summary data to uncover "anomalous transactions" makes no sense. As outlined above, MOFCOM's questionnaire did not request transaction-specific data in the absence of any procurement-related sales; it had only requested a "tabulation of all domestic sales by product … including quantity, value, and customer." Such data would not provide the information necessary to perform the analysis China purports it intended to perform.

V. MOFCOM Failed to Make Available the Calculations It Performed to Arrive at the Dumping Margins, Inconsistent with Article 12.2.2 of the AD Agreement

20. China does not deny that MOFCOM failed to provide to each U.S. company the actual, final dumping calculations that it performed for that company. Rather, it claims that there is no obligation to do so under Article 12.2.2, and that the U.S. exporters in this investigation were able to replicate MOFCOM's calculations. China's arguments are without merit.

21. Article 12.2.2 requires that if information on matters of fact that led to the imposition of final measures is relevant, then it must be made available, with due regard paid to the protection of confidential information. China argues that the language of Article 12.2.2 does not mandate the release of the final dumping calculations, but China's argument is contradicted by the text. Article 12.2.2 provides that the investigating authority's final determination must contain "or otherwise make available through a separate report, all relevant information on the matters of fact ... which have led to the imposition of final measures ...." As the United States has demonstrated, the calculations employed by an investigating authority to determine dumping margins, and the data underlying the authority's calculations, constitute "relevant information on the matters of fact ... which have led to the imposition of final measures" within the meaning of Article 12.2.2.

22. The theme running through China's arguments is that Article 12.2 pertains only to "public notice" and to "explanation," but China disregards the fact that Article 12.2.2 mentions the possibility of a "separate report" in addition to a "public notice," and the fact that Article 12.2.2 itself does not even use the word "explanation." China delves into the particular provisions of Article 12.2; if anything, however, these other provisions support the U.S. position, not China's. China's assertion that the two exporters were able to replicate the dumping calculations on their own is unavailing. Even if the exporters were in fact able to replicate the calculations, this would not relieve China of its obligation under Article 12.2.2 to make available the actual dumping calculations that its investigating authority performed.

VI. MOFCOM's Failure to Provide Sufficient Information on the Findings and Conclusions of Law It Considered Material Constitutes a Breach of Article 22.3 of the SCM Agreement

23. Under Article 14(d) of the SCM Agreement, the authorities are to use market prices in the country of purchase unless they establish that those prices are so distorted that the market price is unusable. MOFCOM's flawed logic appears to be based on the assumption that any government involvement in a market leads to a distorted market with prices that are unusable as a benchmark price. Prior reports of the Appellate Body interpreting Article 14(d) directly contradict MOFCOM in this regard. Regarding MOFCOM's benefit determination, Article 22.3 thus requires the investigating authority to provide explanation on how it found that market prices resulting from the competitive bidding process were distorted.

VII. MOFCOM's Determination of the "All Others" CVD Rate was Inconsistent with Articles 12.7 and 12.8

24. The fact that MOFCOM provided notice to the U.S. Government, AK Steel, and ATI is irrelevant to the question of the WTO-consistency of China's application of facts available to companies subject to the 44.6% "all others" subsidy rate. Likewise, placing a copy of the petition in a reading room and publishing notices of initiation is not sufficient to justify the application of facts available. China now acknowledges that "there are no other U.S. producers" of GOES. This begs the question of what basis China had to apply adverse facts available to nonexistent entities for failure to cooperate.

25. Without notice of the investigation and the information required of interested parties subject to the investigation, the unidentified, unknown (indeed non-existent) other U.S. producers/exporters cannot be said to have refused access to the required information, or otherwise failed to provide access to the information within a reasonable period as required under Article 12.7 when read in the context of Article 12.1 before resort to facts available. Neither can such producers/exporters be said to have significantly impeded an investigation of which they were unaware.

26. China acknowledges that many of the programs were "found by MOFCOM not to confer countervailable subsidies on the two known respondents." Nonetheless, China's "all others" calculation appears to include non-countervailable programs representing over one-half the 44.6 percent "all others" rate. China argues that it discharged its obligations under Article 12.8 to inform the interested parties "of the essential facts under consideration" which formed the basis of the "all others" calculation in time for the parties to defend themselves through a single sentence in final determination. However, absent from this sentence are any facts that led MOFCOM to conclude that resorting to facts available was appropriate or any facts that led MOFCOM to determine that a 44.6 percent CVD rate was appropriate to apply to the unknown, unidentified companies.

27. That the United States may have been able to divine some of the essential facts through guesswork from the information provided is of no consequence here. The burden is on China to disclose the essential facts, not on the United States to guess at them. Moreover, putting that aside, the facts that led China to determine that nonexistent companies that were not subject to the investigation nevertheless could be deemed non-cooperative for not having registered to participate in this investigation remains a mystery to the United States. China does not even attempt to demonstrate that MOFCOM disclosed the essential facts under consideration regarding its calculation of the "all others" subsidy rate.

VIII. MOFCOM Acted Inconsistently with Article 6.9 of the AD Agreement by Failing to Disclose the Essential Facts Under Consideration Regarding Its Calculation of the "All Others" Dumping Rate

28. As with the U.S. claim regarding the CVD "all others" rate, the issue before the Panel is whether a single sentence is sufficient disclosure under Article 6.9. It plainly is not. China's defense appears to be that MOFCOM could not disclose the essential facts under consideration because doing so would have revealed the business confidential information of the responding companies. However, China does not explain why MOFCOM failed to disclose the facts forming the basis for its decision to apply the facts available in the first place. These facts would not be confidential to the two responding companies, and would include the actions by all other U.S. companies that indicated to MOFCOM that these companies refused access to, or otherwise did not provide, necessary information within a reasonable period, or that they significantly impeded the investigation. Further, China provides no explanation for why MOFCOM could not have publicly summarized the information used or at least identified the calculation methodology it employed.

IX. The Price Effects Analysis in MOFCOM's Final Determination was Inconsistent with China's WTO Obligations

A. Price Effects and Underselling Findings were Critical to MOFCOM's Analysis

29. For the most part China has failed to respond to the arguments of the United States in its first written submission describing how MOFCOM's price effects analysis fails to satisfy WTO requirements. China variously ignores the U.S. arguments, mistakenly claims that they are irrelevant, or attempts to defend the MOFCOM analysis by recasting it.

30. China improperly mischaracterizes MOFCOM's price effects analysis (i) by suggesting, without citing anything from the final determination, that MOFCOM's price effects findings were unnecessary to support its injury determination and by arguing that MOFCOM did not need to make findings on underselling, and did not do so, and (ii) by arguing that it was not obliged to undertake *any* analysis comparing domestic prices with those of the subject imports.

31. The United States explained at length why the conclusions that MOFCOM reached concerning price comparisons were not supported by positive evidence, did not reflect an objective

examination, and consequently were inconsistent with Articles 3.1 and 3.2 of the AD Agreement and Articles 15.1 and 15.2 of the SCM Agreement. China does not challenge or even respond to this U.S. argument, other than mistakenly to contend that it is irrelevant because MOFCOM made no findings whatsoever on comparative prices. In so doing, China has essentially conceded that there is no positive evidence to support a finding that prices for the imports under investigation were lower than prices for the domestically produced product at any time during the period of investigation.

B. MOFCOM's Findings of Price Depression are Inconsistent with AD Agreement Articles 3.1 and 3.2 and SCM Agreement Articles 15.1 and 15.2

32. Contrary to China's current argument, MOFCOM did not rely exclusively on import volume to explain the domestic industry's price declines. Instead, it stated that the imports caused price depression because of their low prices, notwithstanding China's repeated statements that MOFCOM did not conduct a "price undercutting" analysis. We have previously demonstrated that there is no positive evidence supporting any finding that the imports were priced below the levels of the domestic product, and that any such findings could not have resulted from an objective examination. China has not attempted to rebut these claims.

33. China criticizes the United States for overlooking price depression that supposedly occurred in "late" 2008. MOFCOM, however, never made a finding that price depression occurred in 2008. Even accepting *arguendo* China's contention, any finding of price depression during "late" 2008 would not reflect an objective examination. China now argues that MOFCOM conducted a quarterly analysis for domestic price levels during 2008. MOFCOM's use of quarterly data for 2008 only for the purpose of examining domestic price levels "was selective and provided only a part the picture" of what might have caused any pricing declines in the fourth quarter. It was not consistent with of an objective examination of the data.

C. MOFCOM's Findings of Price Suppression Are Inconsistent With Articles 3.1 and 3.2 of the AD Agreement and Articles 15.1 and 15.2 of the SCM Agreement

34. China's arguments defending MOFCOM's findings of price suppression in 2008 fail to address the defects in the analysis MOFCOM conducted. Materials China introduced to the Panel in connection with the first written submission raise serious questions about whether MOFCOM's analysis of changes in the "price-cost differential" was objective.

35. MOFCOM's stated reason for finding that the increasing ratio of costs to sales revenues in the first quarter of 2009 was the effect of the subject imports was the purported "low price" strategy adopted by the importers under investigation. As we have explained, there is no positive evidence that the imports followed a "low price" policy and China does not even attempt to defend this finding.

D. MOFCOM's Failure to Disclose Facts Critical to Its Price Effects Analysis Breaches Article 6.9 of the AD Agreement and Article 15.8 of the SCM Agreement

36. China does not dispute that MOFCOM failed to disclose several pieces of information critical to its price effects analysis, as we demonstrated in our first written submission. China contends that the failure to disclose this information does not violate Article 6.9 of the AD Agreement and Article 15.8 of the SCM Agreement because the facts not disclosed either were not "essential" or were confidential. China's arguments are without merit.

E. MOFCOM's Measures Were Based on Cursory and Unsupported Findings Concerning Price Effects and are Inconsistent with Article 12.2.2 of the AD Agreement and Article 22.5 of the SCM Agreement

37. China's attempts to justify why the conclusory assertions in MOFCOM's Final Determination about the "strategies" purportedly used by importers to charge "low prices" for their products satisfy the provisions of Article 12.2.2 of the AD Agreement and Article 22.5 of the SCM Agreement are without merit. Indeed, China's inability to identify what findings MOFCOM made and where it made them underscore how its action are inconsistent with the Agreements.

X. The Causation Analysis in MOFCOM'S Final Determination is Inconsistent with China's WTO Obligations

A. MOFCOM's Examination of Causal Link is Inconsistent With Articles 3.1 and 3.5 of the AD Agreement and Articles 15.1 and 15.5 of the SCM Agreement

38. China's argument that the price effects analysis was unnecessary to MOFCOM's conclusion of causal link cannot withstand even casual scrutiny. As we explained, the price effects findings were an essential element of MOFCOM's causal link analysis. Because MOFCOM's analysis of price effects does not satisfy the requirements of the AD and SCM Agreements, China has failed to demonstrate that dumped or subsidized imports are causing injury, as required by Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement.

39. China raises similarly unpersuasive arguments concerning MOFCOM's examination of the Chinese industry's rapid expansion, the industry's increasing production at a rate far greater than the increase in domestic demand, and the consequent inventory overhang that placed downward pressure on prices. China's response to the U.S. argument that it violated Articles 3.1 and 3.5 of the AD Agreement and Articles 15.1 and 15.5 of the SCM Agreement by failing to perform a non-attribution analysis evinces a complete misunderstanding of these provisions.

B. MOFCOM's Failure to Disclose Information Concerning Non-Subject Imports is Inconsistent with Article 6.9 of the AD Agreement and Article 15.5 of the SCM Agreement

40. China does not seriously dispute that neither MOFCOM's Preliminary Determination nor its Essential Facts Disclosure contained any information about the volume and prices of imports of GOES from sources other than Russia and the United States. Nor does China seriously dispute that information concerning the volume and prices of imports from such sources is an essential element of the analysis of causation. Indeed, both Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement identify the volume and prices of imports that are fairly traded as elements that are relevant, and should be examined, in the causation analysis.

41. While China does argue that certain information about trends in market share for nonsubject imports can be inferred from MOFCOM's Preliminary Determination, this is neither responsive nor relevant to the U.S. claim. Information about market share trends is simply not the information about volume or prices that Articles 3.5 and 15.5 direct an authority to examine.

C. MOFCOM's Cursory and Fact-Free Analysis of Non-Subject Imports is Inconsistent with Article 12.2.2 of the AD Agreement and Article 22.5 of the SCM Agreement

42. China's sole response to the U.S. claim that MOFCOM's analysis of nonsubject imports was inconsistent with Article 12.2.2 of the AD Agreement and Article 22.5 of the SCM Agreement because it was devoid of information is the statement that nonsubject import market share increased only modestly in 2008. MOFCOM made no such finding. The finding MOFCOM did make, which is that nonsubject imports "continued to drop," does not appear to be consistent with China's current contention. The divergence between China's proffered justification for the finding that nonsubject imports were not a cause of injury to the domestic GOES industry and MOFCOM's stated justification indicates that the actual basis for the finding remains unclear. The Final Determination therefore does not contain "all relevant information on the matters of fact and law" which led MOFCOM to conclude that nonsubject imports were not causing injury to the Chinese GOES industry.

ANNEX E-2

EXECUTIVE SUMMARY OF THE SECOND
WRITTEN SUBMISSION OF CHINA

I. INTRODUCTION

1. This submission focuses on clarifying the issues, legal arguments, and facts before the Panel at this stage in the proceeding. In addition, the submission identifies omissions, mischaracterizations, and concessions by the United States in its various submissions of the facts and analysis in the underlying investigations. It remains China's position that the determinations of dumping, subsidization, and injury made by the authorities in the underlying investigation were consistent with the relevant obligations of the *SCM Agreement* and *AD Agreement*. The United States has not provided any support for the Panel to find these determinations to be inconsistent with China's obligations.

II. ARGUMENT

A. The United States Has Struggled To Reconcile Its Claims About Initiation Under Article 11 Of The *SCM Agreement* With The Applicable Standard, Its Burden Of Proof, And The Facts Of This Case

1. U.S. efforts to distinguish the standards under Article 5.2 of the *AD Agreement* from Article 11.2 of the *SCM Agreement* are unpersuasive

2. The United States seeks to discredit China's reliance on panel reports interpreting Article 5.2 of the *AD Agreement* in describing the applicable standard under Article 11.2 of the *SCM Agreement*. The U.S. position appears to be that the standard under Article 11.2 of the *SCM Agreement* is somehow more stringent than the standard under Article 5.2 of the *AD Agreement*. China disagrees with this interpretation and finds the textual distinctions upon which the U.S. posits this argument to amount to little practical difference between the two provisions. Indeed, if there is any difference, it is in the particularity of the evidence that must be presented under Article 5.2 of the *AD Agreement*, which provides a much more precise description of the type of evidence that is required to accompany an application.

3. China submits that reliance on panel interpretations of Article 5.2 of the *AD Agreement* in discussing the appropriate standard under Article 11.2 of the *SCM Agreement* is both valid and directly on point. Although the United States wishes to read more into Article 11.2 of the *SCM Agreement*, both the text and context of that provision confirm that the only requirement is that the application contain "sufficient evidence" as opposed to any analysis of that evidence. The application in the underlying proceeding met this standard.

2. The United States has largely failed to advance its initiation arguments beyond simple assertions of "no evidence"

4. It is the United States' burden to present its case. Applying well-accepted principles, the Appellate Body has confirmed that a complaining party must make out a *prima facie* case by presenting sufficient evidence to raise a presumption in favor of its claim. The case must be based on "evidence and legal argument" put forward by the complaining party in relation to each of the elements of the claim. It seems axiomatic that if a complaining party "may not simply submit

evidence and expect a panel to divine from it a claim of WTO-inconsistency," or "simply allege facts without relating them to its legal arguments," it should not be able to simply assert facts without relating them to the evidence presented. The United States, however, has largely failed to move beyond simple assertions of "no evidence" contained at paragraph 78 of its First Written Submission for each of the 11 challenged subsidy allegations. In most instances, it has not even addressed the evidence and documentation directly cited in the petition.

3. The initiation of investigations into the 11 challenged allegations was consistent with Articles 11.2 and 11.3 of the *SCM Agreement*

5. China reiterates that initiation of investigations into the 11 challenged allegations was consistent with Articles 11.2 and 11.3 of the *SCM Agreement*. For purposes of Article 11.2 they adequately met the obligations of that provision in terms of providing information reasonably available to the applicant that addressed the subject matter of Article 11.2(iii), and namely information related to financial contribution, benefit, and specificity. The evidence provided by the applicants further comports with the Article 11.3 standard. The objective at initiation is not to resolve all issues of fact and law. "An . . . investigation is a process where certainty on the existence of all the elements necessary in order to adopt a measure is reached gradually as the investigation moves forward." Consistent with that understanding "the quantity and quality of the information provided by the applicant need not be such as would be required in order to make a preliminary or final determination . . . ." China contends that the application met this standard, and that an unbiased and objective investigating authority would have found that the application contained sufficient information to justify initiation.

B. MOFCOM's Treatment of Confidential Information Was Fully Consistent With The Requirements of Article 6.5.1 Of The *AD Agreement* And Article 12.4.1 Of The *SCM Agreement*

1. The basis of the United States claims about the non-confidential summaries remains unclear

6. It remains unclear from the U.S. argument what provisions of Article 6.5 and 6.5.1 of the *AD Agreement* and 12.4 and 12.4.1 of the *SCM Agreement* China has supposedly violated. The United States appears to have changed its focus from the adequacy of the non-confidential information in allowing parties "a reasonable understanding" of the confidential information to whether or not there was "a link" between the non-confidential information and the redacted confidential information. In addition, the United States claims that even if the methodology used by petitioners to provide an adequate non-confidential summary were acceptable under the Agreements, "interested parties" should not be required "to piece together information" in order to understand the "substance of the confidential information." But the United States has not explained why the non-confidential information actually provided did not allow a reasonable understanding of the confidential information in the petition.

2. Articles 12.4.1 of the *SCM Agreement* and 6.5.1 of the *AD Agreement* are focused on whether the non-confidential summaries allow parties a reasonable understanding of the confidential information submitted and not on the form or placement of such summaries

7. Article 12.4 of the *SCM Agreement* and Article 6.5 of the *AD Agreement* set forth the standards to be applied when confidential information is submitted as evidence in an investigation. The Articles are concerned with ensuring that: (1) confidential information can be used in investigations without risk of disclosure adverse to the submitting party; (2) there is a legitimate reason for authorities to classify information as confidential; and (3) parties other than those

submitting the confidential information have a reasonable understanding of the confidential information submitted by virtue of a non-confidential summary. Contrary to U.S. suggestions, nowhere in Articles 12.4, 12.4.1, 6.5 or 6.5.1 do the *SCM* and *AD Agreements*, respectively, do those provisions address the issues of what constitutes an adequate non-confidential summary, whether and how such a non-confidential summary needs to be identified, or what form the non-confidential summary should take. The United States has failed to address China's arguments based on the facts of this investigation that the non-confidential information provided was sufficient to provide a reasonable understanding to other parties of the confidential information submitted.

3. The approach used in the proceedings at issue to present confidential information in a non-confidential format was adequate to permit a reasonable understanding of the confidential information

8. Although it does not appear that the United States is continuing to contest the adequacy of the non-confidential summaries, the United States now appears to be arguing that it cannot understand the non-confidential summaries because they are in the substantive portion of the text of the petition (Part I) rather than in the portion of the text which describes the categories of information for which confidential treatment is sought and which makes the request for confidential treatment. This issue is irrelevant to the sufficiency of the actual non-confidential summaries and the ability of a party to understand the factual support for the allegations in the petition. The fact that the non-confidential information is set forth in the very same portion of the petition which contains the corresponding confidential information would seem to undermine the U.S. claim. Moreover, neither of the relevant Articles from the *AD* and *SCM Agreements* addresses the principal issue raised by the United States, namely that the formula or form used to present the non-confidential summaries made it difficult to link the non-confidential information with the confidential information being summarized. In any case, this claim is without factual support. The approach taken by petitioners was really quite simple, straight forward, and clear. Indeed, it is difficult to see how much more obvious the link could be between the confidential and non-confidential information.

C. MOFCOM's Disclosure Of How It Calculated The Margins of Dumping Met The Standard Under Article 12.2 Of The *AD Agreement*

1. Article 12.2 does not require an authority to disclose the specific numbers used to calculate the margins of dumping

9. There is no requirement under Article 12.2 that an authority disclose the details of the calculations of the margins of dumping. Article 12.2.2 requires disclosure of "all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures." The United States has not provided the Panel any basis in the *AD Agreement* to conclude that China's disclosure of the methodology used to determine the margins of dumping and the specific sources of the information used in the actual calculations does not constitute disclosure of "all relevant information on the matters of fact and law." As such, given the absence of any legal or interpretive basis for the U.S. claim, China believes that the U.S. claim must fail. Given that the claim should have been properly brought under Article 6.9 and not Article 12.2, the U.S. claim must also fail.

2. MOFCOM's disclosure was sufficient to allow the U.S. respondents to both protect their interests and to replicate the authority's calculation

10. Since the U.S. claim is not supported by any requirement imposed by the relevant Articles of the *AD Agreement*, it relies on an argument that the disclosure was insufficient to allow the U.S. respondents to adequately protect their interests in the investigation. This claim is wrong as a matter of fact. In its disclosure, China provided the details of its calculation methodology and the source of

all of the data used in making the calculation of the margins of dumping. This disclosure enabled the respondents to comment on both the methodology used (e.g did the authority use the correct starting price) and the underlying data applied to the methodology. It also enabled respondents to challenge as being incorrect both the methodology used and the application of the methodology based on the source of the data used for the calculation of each element of the margins of dumping. The disclosure in fact allowed respondents to replicate and check the accuracy of the calculation.

D. MOFCOM Application Of Facts Available With Respect To The Government Purchase Of Goods Program Was Consistent With Article 12.7 Of The *SCM Agreement*

1. The company respondents failed to provide necessary information

11. In its initial questionnaire in the underyling proceeding MOFCOM requested that the company respondents provide transaction data for sales of all steel products over the period of investigation ("POI"). The United States cannot contest that ATI provided no transaction data at all, and AK Steel only belatedly provided POI data on GOES, a very small subset of all POI sales, 126 days beyond the final extended deadline for submission for that information and only three business days before verification. Instead, the United States continues to distract and insist that the scope of information deemed "necessary" by MOFCOM for purposes of the Government Purchase of Goods program included 15 years of information. But the United States has not articulated any purpose under Article 12.7 of the *SCM Agreement* for the fact it is trying to assert – that the application of facts available turned on the company respondents' failure to provide 15 years of data.

12. Although the United States argues about when MOFCOM made known its detailed considerations with respect to its subsidy analysis, the only obligation under the *SCM Agreement* relates to ensuring a clear articulation of the information required by the investigating authority to render its determination. In the underlying proceeding the company respondents knew exactly what MOFCOM was requesting from them. Even if one assumes that beyond an obligation to adequately explain what information is required, an investigating authority must articulate a more detailed explanation of the types of subsidies it is considering in conjunction with its requests, the United States has no argument. The record reflects that MOFCOM made this known as well.

13. The United States has advanced its Article 12.7 claim with respect to the application of facts available to the government purchase of goods program without any foundation for explaining why MOFCOM's choice to apply facts available was inappropriate. MOFCOM made clear in its investigation that it was considering indirect subsidies as contemplated by GATT Article VI.3 and therefore required information on intermediate sales to government contractors and information on sales of non-subject merchandise. The United States has neither brought a substantive claim under GATT Article VI.3, nor has it offered any contextual analysis of GATT Article VI.3 to help define its Article 12.7 claim. Under the circumstances, there is no basis for the Panel to even begin considering whether the requested information was "necessary" in the sense of Article 12.7.

2. The company respondents refused to cooperate to the best of their ability and thereby seriously impeded the investigation

14. Despite the respondents' clear understanding of what MOFCOM sought, they chose to largely ignore MOFCOM's requests for information. Neither respondent made any specific request for an extension of time in which to provide the requested information, indicated that they were preparing the information, or that compilation of the requested information was too difficult. The United States has done very little to address the implications of the underlying record. In summary, the company respondents failed each element of paragraph 3 of Annex II of the *AD Agreement*, which both parties agree is relevant here. They failed to provide information that was: (1) verifiable; (2) appropriately

submitted so that it can be used in the investigation without undue difficulties; (3) supplied in a timely fashion, and, where applicable; and (4) supplied in a medium or computer language requested by the authorities. Where a party fails to satisfy three, and sometimes four, of these elements, an authority is entitled to resort to facts available.

3. MOFCOM's choice of facts available was reasonable under the circumstances created by the respondents

(a) The company respondents were responsible for creating a factual void in the record

15. The company respondents' non-cooperation produced a critical factual void in the record, not by coincidence, but by the calculated choices of the company respondents. There is no other reasonable interpretation of the record evidence. ATI did nothing at all and AK Steel provided only a partial response extremely late in the investigation. In any case, the AK Steel response was still selective. Having provided a full customer list earlier, but with none of the additional quantity and value details that MOFCOM needed to prioritize and evaluate that information, this time AK Steel provided some detail for GOES (that could have been provided months earlier), but no detail at all for other steel sales. MOFCOM knew from the customer lists that AK Steel had many more customers for steel products other than GOES. MOFCOM also knew from the various responses that sales of GOES were a small portion of total AK Steel sales of steel products. Yet AK Steel still refused to provide any meaningful information about the sales other than GOES sales. The United States has not addressed these points to any significant degree in this proceeding. It has simply maintained that the respondents cooperated. Given the record, MOFCOM was entitled to a very different conclusion.

(b) MOFCOM was entitled to infer a less favorable fact than those positioned before MOFCOM through the company respondents' calculated non-co-operation

16. Article 12.7 is intended to ensure that the failure of an interested party to provide necessary information does not hinder an agency's investigation. It is designed to address circumstances in which respondents seek to "game" an investigation result by granting the authority the ability to incentivize cooperation through the application of certain facts, even if those facts are "less favorable" than other facts that might be available. Indeed, authorities may draw certain inferences – plainly adverse -- from that failure to cooperate, and the breadth of inferences available grows commensurate with the level of non-cooperation. Absent this discretion, the investigative process would grind to a halt. The United States has not contested this understanding of Article 12.7.

17. As explained in China's First Written Submission, MOFCOM had four alternatives before it: (1) find 0% utilization; (2) find 29% utilization based on the AK Steel 10-K report; (3) find some other degree of utilization; or (4) find 100% utilization, as it did in the preliminary determination. In the final analysis, MOFCOM had to choose among these alternatives and 100% utilization proved to the must reasonable under the circumstances of the respondents' non-cooperation.

18. China reiterates that respondents who willfully and strategically create a factual void in the record should not be allowed to benefit from that non-cooperation under Article 12.7 of the *SCM Agreement*. To allow such an outcome would undermine the entire purpose of the investigation and allow respondents to manipulate the process by withholding unfavorable information in a calculated manner. Indeed, such manipulation is seen on the face of the U.S. argument. The United States effectively argues that because AK Steel chose to provide insufficient and unusable sales data to MOFCOM with which to investigate the program at issue, Article 12.7 of the *SCM Agreement* requires MOFCOM to accept that no more than 29% of AK Steel's sales can be found to be related to the program at issue. In other words, MOFCOM should be forced to use this information because

sales data is unique and no secondary source exists. This could not have been the intent of the Members in drafting Article 12.7 or Annex II of the *AD Agreement*.

E. MOFCOM Properly Analyzed The Adverse Price Effects From The Subject Imports

19. The record from the underling proceeding shows that domestic prices were falling at the end of 2008 and early 2009. Domestic prices were not covering the increasing costs, and so profitability was falling in 2008 and early 2009. These facts are not in dispute, so the United States tries to shift the focus of its pricing arguments. But the U.S. emphasis is simply an effort to hide a fundamental weakness in its overall case: MOFCOM did rely heavily on adverse volume effects as part of its overall injury findings, and the United States has nothing really to say about these adverse volume effects and so has not challenged these findings. But it is against this context that MOFCOM also found the adverse price effects – both price suppression and price depression – that the United States has made the centerpiece of its claims.

1. MOFCOM properly found price depression and price suppression

20. The key facts are not really in dispute. Domestic prices began to decline in late 2008 and continued to decline sharply in early 2009. Similarly, average domestic prices over the full year 2008 did not increase enough to match the rising costs so profitability, and the falling domestic prices in early 2009, put even stronger downward pressure on domestic industry profitability. These facts support the MOFCOM findings of price depression and price suppression in 2008 and early 2009.

21. Since the United States cannot dispute these key facts, it has tried to shift the focus to price undercutting. Since the United States has no factual or legal basis to challenge MOFCOM's findings of price depression, the United States instead tries to graft price undercutting findings onto the price depression findings, and then attack the price undercutting findings. This U.S. argument is flawed on many levels, and should be rejected.

22. First, price depression can occur with or without price undercutting. The two concepts are factually and legally distinct. Price depression occurs whenever domestic industry prices are declining. Price depression does not depend on any comparison with subject import price levels; it focuses exclusively on the trend in domestic prices. It is this decline in domestic prices that Article 3.2 and Article 15.2 recognize as an adverse price effect. Second, price depression can result from the volume of subject imports. The United States implicitly admits as much, when it argues that the price depression "was not solely because imports were increasing."

23. The U.S. arguments also reflect a misunderstanding of price suppression analysis. Price depression focuses on domestic industry price trends alone. Price suppression goes one step further, and considers domestic prices trends relative to changing costs. Price suppression analysis recognizes that even when prices are going up, there can still be adverse price effects. If prices are going up because costs are also going up, but prices are being "suppressed" and not allowed to increase enough to cover rising costs, Article 5.2 and Article 15.2 recognize such price suppression as an adverse price effect. The United States now complains that MOFCOM did not disclose any information about the changing costs. But these complaints do not really address the issue of price suppression – the price-cost squeeze that MOFCOM documented for both 2008 and early 2009.

24. Perhaps recognizing the weakness of its arguments about both price depression and price suppression, the United States tries to slip into its arguments the notion of causation – that even if price depression and price suppression was occurring, these adverse price effects were not caused by subject imports. For purpose of the claims under Article 3.2 and Article 15.2, however, this approach is legally incorrect. These provisions require only the showing of the existence of the adverse price

effects – the declining prices (price depression), or the price-cost squeeze and declining profitability (price suppression) – and do not require any explanation as to the causes of these adverse price effects.

2. MOFCOM had no obligation to find price undercutting

25. The United States concedes that an authority can find adverse price effects without finding price undercutting. The concession is worded strangely – "we do not disagree" – but the concession has been made nonetheless. But the United States selectively quotes from *EC – Salmon* to suggest price undercutting analysis is "necessary." A full reading of the selected passage stands for something very different. In any event, the MOFCOM determination certainly discussed the issue of relative prices – as the United States repeatedly has pointed out – so there is no issue whether price undercutting was "considered" at some level. After considering all the facts, MOFCOM chose to base its determination on price depression and price suppression.

26. China also disagrees with the panel in *EC -- Salmon* that price undercutting must be considered. The text of both Article 3.2 and Article 15.2 use the key term "or." In other words, the authority "shall consider" either price undercutting or price depression or price suppression. Nothing in the text suggests that all three must each be considered. Given the interpretative significance of this key term "or," the United States is wrong to assert that analysis of price undercutting is "essential to a complete analysis of price effects." Such a view is at odds with the text and at odds with the absence of any requirement for the authorities to use any particular methodology. China recognizes that an authority could reasonably chose to consider price undercutting as part of its analysis; but the authority has the discretion under Article 3.2 and Article 15.2 to consider or not consider price undercutting.

3. Any concerns about price undercutting do not affect MOFCOM's conclusions about price depression or price suppression

27. As discussed above, price depression and price suppression analysis does not depend on the relative prices of domestic product and subject imports. Both price depression and price suppression can occur regardless of whether subject import prices are higher or lower than domestic prices. To this end, U.S. efforts in response to a question from the Panel to use its arguments about price undercutting to attack the MOFCOM findings on price depression and price suppression fail. The United States is confusing the mention of "low price" with specific findings of price undercutting.

28. The U.S. argument is really that MOFCOM did not exercise its discretion to conduct more detailed analysis than that required by Article 3.2 and Article 15.2. The United States appears frustrated that MOFCOM did not engage in analysis of "transaction prices." Although authorities could certainly choose to do so, they are not required to do so. MOFCOM did not pursue specific findings on price undercutting in this particular case because it did not believe such findings were the most appropriate analytic tool given the data available in this case. Moreover, MOFCOM also had to take into account the fact that it would be conducting analysis based on cumulated subject imports, so that any transaction specific data would be blurred and obscured with combined on a cumulated basis. For both of these reasons, MOFCOM focused the broader measure of average prices as reflected in average unit values.

29. Thus, given the data available in this case, MOFCOM properly exercised its discretion to make:

- Specific findings of price depression, based on the facts that domestic prices (as measured by average unit values) began to fall in Q4 2008 and fell more sharply in Q1 2009.

- Specific findings of price suppression, based on the facts that domestic prices did not increase enough in 2008 to cover rising costs, leading to a drop in per unit profits, and domestic prices fell in Q1 2009 exacerbating the drop in per unit profits.
- The general observation that subject import prices were "low" and were "lower than" domestic prices throughout the period.

30. All of these findings are fully supported by the evidence on the record before MOFCOM, and can be seen in both the MOFCOM determinations and in other public documents on the record of this investigation.

F. MOFCOM Properly Analyzed The Ways In Which Subject Imports Caused Material Injury To The Domestic Industry

1. Causal link

31. Essentially, the United States argues that because of its concerns about MOFCOM's lack of any specific findings on price undercutting – analysis that the United States has conceded is not required – then the price effects findings fail and thus the overall finding of a causal link also fails. This U.S. argument ignores the unchallenged findings about adverse volume effects – the significant increase in subject imports and their significant gain of market share. This U.S. argument also ignores the distinct findings on price depression (domestic prices declined) and price suppression (prices did not cover costs, so per unit profits also fell), both of which stand regardless of any price undercutting (the relative prices of subject imports and domestic products). It is hard to see how issues about an optional analysis of price undercutting trump these undisputed volume and price effects that establish a sufficient causal link.

32. Prior panels have deferred to the authorities when assessing claims that the authorities improperly found a causal link. Given the number of aspects of the causal link analysis that the United States has not challenged at all, it is hard to see how one could conclude that MOFCOM "could not" reach the conclusion of causal link that it found here. Increasing volumes of dumped and subsidized imports were taking significant market share away from the domestic industry, and this loss of volume was causing undisputed material injury to the domestic industry. Regardless of the arguments about certain aspects of price effects, the MOFCOM finding on causal link should stand.

2. Non-attribution

33. MOFCOM fully complied with the obligations in Article 3.5 and Article 15.5. First, MOFCOM did "examine" the change in domestic industry capacity. Any implication in the U.S. argument that China did not examine this factor is simply incorrect. Second, MOFCOM fully addressed this issue. It rejected respondents' arguments that the expansion of domestic industry capacity was causing the injury. Third, although MOFCOM could have stopped its analysis by simply noting the respondents' factual premise was incorrect, MOFCOM went further and ensured that it did not "attribute" any effects of the change in domestic industry capacity to subject imports. MOFCOM ensured non-attribution by comparing the relative trends to see whether there was any correlation in the trends that would suggest some adverse effects being improperly attributed. This analysis thus confirmed what MOFCOM had already found – that increased domestic capacity was not the problem, but rather subject imports were the problem.

34. In its arguments on this issue, the United States is confusing two distinct issues. The first issue is what arguments the respondents made to MOFCOM, and how MOFCOM responded to those arguments. But MOFCOM is properly within its discretion to evaluate the issue in light of the facts and arguments before the authorities. The second issue is what the United States must now present to establish a *prima facie* case for its claim. The U.S. argument on this issue is little more than to disagree with the various statements made by MOFCOM in its determination. But each of MOFCOM's findings was correct and supported by the record.

35. The U.S. claim on non-attribution also suffers from other factual and legal defects. The United States has improperly re-characterized the nature of the alternative cause at issue here. It has shifted its argument to "overproduction," and "production growing far more rapidly than demand," even though these arguments about excess production had never been presented to MOFCOM during the investigation. MOFCOM addressed the alternative cause that respondents had raised – excess capacity – and it is improper for the United State now to propose an alternative cause that had never been raised before the authorities.

36. The United States has also tried to dismiss China's argument about domestic capacity expanding less than the total domestic consumption, claiming this fact cannot be "verified from any information MOFCOM disclosed." Yet this statement is incorrect. MOFCOM made a specific finding that there was still a "gap" between domestic industry capacity and total domestic consumption.

37. Beyond these factual defects, the U.S. arguments also suffer from a fundamental legal defect – the United States has at most proposed an alternative explanation for one aspect of domestic industry performance. As other panels have found, such an alternative explanation is not enough, finding inadequate non-attribution arguments that do no more than posit an alternative explanation or a partial explanation for the condition of the domestic industry. This Panel should do the same, and reject the U.S. claim under Article 3.5 and Article 15.5.

III. CONCLUSION

38. For the reasons set forth in this submission, China requests the Panel to issue findings and recommendations consistent with the arguments presented in China's First Written Submission and those set forth above, and uphold the determinations and measures at issue.

ANNEX F

ORAL STATEMENTS OR EXECUTIVE SUMMARIES THEREOF, OF THE PARTIES AT THE SECOND SUBSTANTIVE MEETING

ANNEX F-1

EXECUTIVE SUMMARY OF THE OPENING STATEMENT OF CHINA
AT THE SECOND MEETING OF THE PANEL

I. MOFCOM's CVD Initiation Was Proper

1. The key issue is whether the application contained "sufficient evidence" under Article 11.2 and 11.3 of the SCM Agreement for purposes of initiation. In its first submission China addressed both the factual evidence contained in the application with respect to the various allegations and the relevant legal standard to confirm that initiation was proper. We demonstrated that there was sufficient evidence to commence an investigation. In many respects the United States is really delving into the ultimate merits of the allegations from the standpoint of a preliminary or final determination, not whether the allegation was supported by sufficient evidence for the limited purposes of initiation. China also disagrees with U.S. characterizations regarding what constitutes evidence of specificity, financial contribution, and benefit.

II. MOFCOM's Application Of Facts Available Under The Government Purchase of Goods Program Was Justified

2. Let me turn to U.S. claims regarding the application of facts available in the CVD investigation with respect to the government purchase of goods program. There are four fundamental issues to address. First, was MOFCOM's request for information clearly articulated? Second, what was the scope of "necessary information" for which MOFCOM had to fill gaps with facts available? Third, did the respondents seriously impede the investigation by failing to provide necessary information? Fourth, were the foundations of MOFCOM's choice of 100 percent utilization rate legitimate and contemplated under Article 12.7 of the SCM Agreement?

3. On the first point, China acknowledges that MOFCOM has an obligation to articulate clearly its requests for information. This point is reflected in Article 12.1 of the SCM Agreement, but more on point with respect to the U.S. claim under Article 12.7 of the SCM Agreement, this point is reflected in paragraph 1 of Annex II of the AD Agreement, which both parties agree is relevant here. In this regard, China explained in great detail in its responses to the Panel's questions not only the clarity with which MOFCOM requested information, but also the respondents' obvious understanding of MOFCOM's requests as early as their initial questionnaire responses. China reiterates that the administering authority has no obligation to articulate to the respondents any detailed theory of subsidization it may be considering during the course of the investigation. MOFCOM clearly articulated its request for information, which was its only obligation under Article 12.7.

4. Moving to the second fundamental issue– the scope of necessary information – the United States has not really advanced a coherent argument to challenge MOFCOM's decision. First, the United States protests a request for 15 years of transaction data, but gets the facts wrong about what was requested in the initial questionnaire that ultimately drove MOFCOM's facts available decision. Moreover, the United States has not articulated any purpose for the fact it is trying to assert – that the application of facts available turned on the respondents' failure to provide 15 years of data. China recalls that the legal claim is that China's application of facts available was inconsistent with Article 12.7 of the SCM Agreement. Even assuming that the application of facts available turned on the respondents' failure to provide 15 years of transaction data, which it did not, what is the legal significance the United States it attributing to its asserted fact? Ultimately, the record shows that the application of facts available did not turn on the respondents' failure to provide 15 years of transaction data in response to the supplemental questionnaire.

5. Moving to the third fundamental issue at play – whether the respondents seriously impeded the investigation – there is no question that this was the case. There was an undeniable, outright refusal to provide information to MOFCOM. By attempting to dictate the terms of MOFCOM's investigation and withholding information, the respondents denied MOFCOM any reasonable ability to verify utilization or calculate any corresponding benefit according to its investigation plan.

6. Ultimately, the United States is reduced to arguing that MOFCOM should have conducted its investigation in a different manner, effectively asserting that respondents have the power to dictate the terms of an investigation even to the extent of denying information when they have the capacity to supply it. Note, however, that the United States never really contends that the information MOFCOM sought was not relevant or in fact necessary. The United States simply contends, with no support, that there was an alternative, perhaps more direct, path. But China believes the most direct and comprehensive path was pursued and MOFCOM had discretion to determine that path. The Panel should also note that the United States has not articulated a single objection to MOFCOM's request for data on all sales that is grounded in some substantive provision of the SCM Agreement. Under the circumstances, absent some other procedural defect related to MOFCOM's efforts at articulating its request, providing enough time, or accommodating any other logistical problems experienced by the respondents that were associated with the request, the Panel must set aside the U.S. Article 12.7 claim.

7. This leads me to the final fundamental issue – whether MOFCOM's application of a 100 percent utilization rate as "facts available" was appropriate and permitted under Article 12.7 of the SCM Agreement. The United States has oversimplified the issue by first presenting the question in the context of a cooperating respondent by claiming MOFCOM was compelled to apply the 29 percent figure from AK Steel's annual report as the only facts available on the record. In *EC – DRAMs*, however, the panel in interpreting Article 12.7 concluded that authorities may draw certain inferences – plainly adverse -- from a failure to cooperate, and the breadth of inferences available grows commensurate with the level of non-cooperation. Part of the analysis is the fact that limited facts are available because the respondents refused to cooperate. Thus, the fact that a 29% figure for a particular grouping of sales appears in an annual report, with no factual basis for concluding it constituted the universe of sales under the program, is not grounds for compelling use of that figure where the respondents so completely refused to cooperate as in the case at issue.

III. MOFCOM's Explanation Of Its Benefit Determination Under the Government Purchase of Goods Program Was Proper

8. The United States continues to argue under Article 22.3 of the SCM Agreement that MOFCOM failed to adequately explain its benefit determination. In doing so, it focuses on isolated words out of context and then mischaracterizes the nature of MOFCOM's determination. First, the United States continues to point out that MOFCOM used the term "competitive bidding process" in its discussion of the Buy American Act to suggest that MOFCOM has somehow conceded the entire benefit issue by using this term. In fact, the obvious context that the United States ignores is that MOFCOM's discussion of the "competitive bidding process" under the program was to demonstrate that name was a misnomer and a fallacy.

9. Second, the United States in its second submission latches on to a new argument made by Korea to claim that MOFCOM's benefit determination did not comply with Article 22.3 of the SCM Agreement because MOFCOM failed to do a proper analysis of the market to establish that U.S. market prices were unusable as benefit benchmarks as required by Article 14(d) of the SCM Agreement. The Panel should view this argument with a great deal of circumspection and caution. Not only is the United States trying to impermissibly bootstrap a substantive claim through its procedural challenge under Article 22.3, it is doing it very late in this process. China addressed all of the U.S. Article 22.3 arguments after the U.S. first submission and it seems the United States believes

it needs to shift the focus. The second submission is the first time the United States broaches the Article 14 issue in any form. Nowhere is this issue raised in the U.S. request for consultations or its panel request.

IV. MOFCOM Properly Analyzed The Adverse Price Effects From The Subject Imports

10. Let me now turn to the injury issues. The factual record from the underling proceeding demonstrates three key trends. First, domestic prices were falling at the end of 2008 and early 2009. Second, domestic prices were not successfully covering the increasing costs, and so profitability was falling in 2008 and early 2009. Third, subject import prices remained relatively low throughout the period. These facts are not in dispute. It is against this factual context that MOFCOM found adverse price effects – more specifically, MOFCOM found both price suppression and price depression. Although the United States has made its attack against these MOFCOM's findings a centerpiece of its claims, the United States cannot avoid the fundamental problems with its attack.

11. The key facts regarding price depression are not really in dispute. Domestic prices began to decline in late 2008 and continued to decline sharply in early 2009, supporting MOFCOM's findings of price depression and price suppression in 2008 and early 2009. Since the United States cannot dispute these key facts, it has tried to shift the focus, but the U.S. argument is flawed on many levels, and should be rejected.

12. First, contrary to the U.S. argument, price depression can occur with or without price undercutting. The two concepts are factually and legally distinct. Second, price depression can result from the volume of subject imports. The text of Article 3.2 and Article 15.2 speak only of "the effect of the [dumped/subsidized] imports on prices," and does not limit itself to a focus on the prices of those dumped or subsidized imports. Third, perhaps recognizing the weakness of its arguments about price depression, the United States tries to slip into its arguments the notion of causation – that even if price depression was occurring, these adverse price effects were not caused by subject imports. For purpose of the claims under Article 3.2 and Article 15.2, however, this approach is legally incorrect.

13. The U.S. arguments also reflect a misunderstanding of price suppression analysis. Price depression focuses on domestic industry price trends alone. Price suppression goes one step further, and considers domestic prices trends relative to changing costs. Price suppression analysis recognizes that even when prices are going up, there can still be adverse price effects. If prices are going up because costs are also going up, but prices are being "suppressed" and not allowed to increase enough to cover rising costs, Article 5.2 and Article 15.2 recognize such price suppression as an adverse price effect.

14. Much of the U.S. argument seems to rest on its dissatisfaction with the manner in which MOFCOM wrote up its findings. MOFCOM noted price depression that began in late 2008, but MOFCOM did not discuss the quarterly data in its public discussion. MOFCOM noted price suppression during 2008, but discussed only per-unit costs. These U.S. arguments focusing on either 2008 or 2009 individually, however, largely ignore the evidence of adverse price effects over the combined period late 2008 to early 2009.

15. Given this well supported MOFCOM findings of price depression and price suppression, it is hardly surprising the United States focused its argument elsewhere, on price undercutting. As we noted in our Second Written Submission, the United States has conceded that an authority can find adverse price effects without finding price undercutting. Moreover, the United States does not even attempt to address in its Second Written Submission the extensive body of WTO panel precedent that has confirmed this legal interpretation. Given that MOFCOM had no legal obligation to find price undercutting, and given that MOFCOM in fact found price depression and price suppression, the U.S. arguments about the failure to disclose information about price undercutting largely miss the point.

16. As we have discussed, price depression and price suppression analysis does not depend on the relative prices of domestic products and subject imports. Both price depression and price suppression can occur regardless of whether subject import prices are higher or lower than domestic prices. The U.S. argument is really that MOFCOM did not exercise its discretion to conduct analysis not required by Article 3.2 and Article 15.2. MOFCOM did not make specific findings on price undercutting in this particular case because it did not believe such findings were the most appropriate analytic tool given the data available in this case, and given the need to consider the cumulative effect of imports from both the United States and Russia. For both of these reasons, MOFCOM focused the broader measure of average prices as reflected in average unit values.

V. MOFCOM Properly Analyzed The Ways In Which Subject Imports Caused Material Injury To The Domestic Industry

17. The U.S. Second Written Submission does not advance any new arguments on the causal link itself, as opposed to its arguments about non-attribution. Once again, the United States has essentially said that since the findings of adverse price effects were incorrect, the finding of a causal link is also incorrect.

18. The U.S. arguments really focus more on other causes, and whether MOFCOM met its obligations in Article 3.5 and Article 15.5 not to attribute the effects of other causes to subject imports. MOFCOM examined the change in domestic industry capacity, and concluded that the domestic industry capacity was not injuring the domestic industry. Any implication in the U.S. argument that China did not examine this factor is simply incorrect.

19. The United States also complains about the way that MOFCOM handled the issue of non-subject import, complaining there was insufficient disclosure and insufficient analysis. These arguments lack any merit. China would like to remind the Panel that these arguments are all completely new. Neither the comments by Allegheny Ludlum after the preliminary determination, nor the comments by the U.S. Government after the disclosure of basic facts said anything about non-subject imports. China finds it rather odd that the United States now presents an argument that was not raised at all by the foreign respondents during the investigation before MOFCOM. Notwithstanding this complete absence of any discussion of this issue by the foreign respondents, MOFCOM did in fact consider this issue.

VI. MOFCOM's Provision Of Non-Confidential Summaries Was Proper

20. Turning now to the issue of non-confidential summaries, the United States still has not met its burden to establish that non-confidential summaries provided in the application were inadequate. As China has previously noted, neither of the relevant articles from the AD and SCM Agreements specify a form or formula for providing non-confidential summaries. The Agreements are concerned only with whether or not the non-confidential summaries allow a reasonable understanding of the confidential information being summarized. In addition, neither of the relevant Articles addresses the principal issue now being raised by the United States, namely that the formula or form used to present the non-confidential summaries made it difficult to "link" the non-confidential information with the confidential information being summarized. Notwithstanding that this is not a requirement in the relevant provisions of either Agreement, this claim is also without factual support.

VII. The United States Has Not Established Any Legal Or Factual Basis For Its Complaint Regarding Disclosure of the Dumping Calculations

21. China must agree to disagree with the United States on MOFCOM's obligations with respect to disclosure of the calculations of the margins of dumping. As addressed extensively and with

specific reference to the texts of the relevant portion of Article 12.2, there is no requirement that an authority disclose the details of the calculations of the margins of dumping. Article 12.2.2 requires disclosure of "all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures." This does not encompass the actual calculations. There is no reference in Article 12.2.2 to the calculation of the margins of dumping. Rather, the only reference to the margins of dumping is in Article 12.2.1(iii) which requires that the margins of dumping established be disclosed in the relevant notice or separate report. The margins of dumping are the results of the comparison of export price or constructed export price with normal value as specified in Article 2.4.2 of the AD Agreement. That is, the margins of dumping are the results of particular calculations done by the authorities pursuant to the rules of Article 2 of the AD Agreement and based on the information provided by respondents. The margins of dumping are not the underlying calculations that lead to the margins. Thus, while Article 12.2.2, by virtue of the incorporation of Article 12.2.1(iii), requires authorities to provide notice of the results of its calculations in the form of notice as to the margins of dumping for each respondent, it does not impose any specific requirement regarding the calculation of those margins of dumping.

ANNEX F-2

EXECUTIVE SUMMARY OF THE OPENING STATEMENT OF THE UNITED STATES AT THE SECOND MEETING OF THE PANEL

1. The United States appreciates this opportunity to provide further views on the reasons why China's antidumping (AD) and countervailing duty (CVD) measures on U.S. grain oriented flat-rolled electrical steel (GOES) are inconsistent with WTO rules. Our previous submissions and statements have addressed most of the arguments that China has made in response to our claims. In this statement, we will concentrate on those points that China made for the first time – or chose to re-emphasize – in its second written submission.

A. The Initiation of the Countervailing Duty Investigation for Several Programs Breached Article 11 of the SCM Agreement

2. As the United States demonstrated in its previous submissions, China's decision to initiate a CVD investigation with respect to 11 programs was inconsistent with Article 11 of the SCM Agreement, because the application did not contain sufficient evidence to justify initiation of an investigation – and indeed, in many instances, contained no evidence at all for one or more elements of the subsidy claim. China's response is two fold: first, relying on panel reports addressing Article 5.2 of the AD Agreement (not Article 11 of the SCM Agreement), it asserts that it need not demonstrate that evidence was sufficient but rather merely that "raw information" was contained in the petition. Second, it attempts to rewrite the record in an effort to demonstrate that the evidence provided therein meets the standard China has invented.

3. Regarding China's first assertion, as noted in our previous submissions, China's reliance on panel reports interpreting the AD Agreement for its proposition that all that is needed is "raw information" is misplaced. First, the text of the two provisions is different. Whereas Article 5.2(iii) of the AD Agreement requires "information on prices …", Article 11.2(iii) of the SCM Agreement requires "evidence with regard to the existence, amount and nature of the subsidy in question." This difference matters, because the language reflects the fact that the type of evidence that would merit initiation of a CVD investigation – evidence with regard to financial contribution, benefit, and specificity – is distinct from that required to initiate an AD investigation – e.g., "information on prices." The panel reports cited by China are simply not informative of the meaning of the SCM Agreement obligation at issue.

4. China also argues that Article 5.2(iii) of the AD Agreement specifies a precise type of evidence, while suggesting that Article 11.2(iii) of the SCM Agreement does not specify a precise type of evidence. Contrary to what China suggests, Article 11.2 is precise in what it requires. It makes clear that an application must contain "sufficient ... evidence with regard to the existence, amount and nature of the subsidy in question." Thus, Article 11.2 requires "sufficient evidence" with regard to the existence of a financial contribution and benefit, the amount of the benefit, and whether the subsidy is specific.

5. China attempts to distract the panel from the clear language of the SCM Agreement because when applied to the facts it leads to only one conclusion: The evidence contained in the application was insufficient to initiate a CVD investigation for several programs under Article 11 of the SCM Agreement. While China points to various documents to assert otherwise, and in its second written submission even claims that these documents were the type of information described by the United States as sufficient evidence, the facts demonstrate that this is simply not the case.

B. China Failed to Require Adequate Non-confidential Summaries of Confidential Information

6. In its second written submission, China suggests that the United States has "changed its focus" from the adequacy of the non-confidential summaries to "whether or not there was 'a link' between the non-confidential information and the redacted confidential information." China misrepresents the U.S. position. The United States has consistently argued that the non-confidential summaries provided were labeled as such, but were entirely inadequate.

7. Our second written submission details various instances where China's theory of what constitutes an adequate non-confidential summary would require respondents to engage in a fishing expedition to surmise an understanding of the confidential information. For instance, China attempts to rely on percentage changes provided more than 50 pages later in the petition to argue that the redacted information was somehow discoverable from other parts of the petition. Forcing respondents to engage in this highly speculative exercise fails to satisfy the relevant provisions.

8. China also asserts that the AD and SCM Agreements do not provide enough guidance for determining how best to comply with Article 12.4.1 of the SCM Agreement and Article 6.5.1 of the AD Agreement, and that therefore it is free to decide for itself what constitutes an adequate summary. In asserting that there is no guidance for applying Articles 12.4.1 and 6.5.1, China ignores the fact that previous panels and the Appellate Body have found sufficient guidance in Article 12.4.1 of the SCM Agreement and Article 6.5.1 of the AD Agreement to resolve questions regarding what qualifies as an adequate non-confidential summary and when adequate non-confidential summaries are not required. Insofar as China continues to pursue its exceptional circumstances argument, the fact is the applicants provided no explanation as to why there were exceptional circumstances that precluded more detailed summarization. The Appellate Body has held that a statement of reasons why summarization is not possible must be provided in the record. Without a statement on the record of reasons why a more detailed summarization was not possible, China cannot excuse the deficient non-confidential summaries contained in the application. For the above reasons, China breached Article 12.4.1 of the SCM Agreement and Article 6.5.1 of the AD Agreement.

C. China's Resort to and Application of Facts Available is Inconsistent with Article 12.7 of the SCM Agreement

9. China continues to attempt to obscure the issues at hand in its second written submission. China asserts that the U.S. claim under Article 12.7 somehow fails because the United States has not brought a claim under GATT Article VI:3 or otherwise provided an Article VI:3 analysis of China's request for data. There is no GATT Article VI:3 claim within the terms of reference of this Panel. As the United States has made clear, it is challenging China's decision to resort to facts available and its selection of a 100% utilization rate. China's extensive comments regarding GATT Article VI:3 are not germane to that inquiry.

10. Although China claims that the "record speaks for itself", throughout the proceeding China has sought to back away from the very specific instructions contained in its own questionnaires – largely ignoring its own instructions regarding how to respond to irrelevant or inapplicable questions in general and specifically with respect to the government procurement program, denying the over-broad and burdensome nature of its request (while simultaneously conceding that 93% of their request was irrelevant), and re-translating the questions at issue twice in an apparent attempt to somehow prove the clarity of their request. China claims that the quantity and value data it sought in question 4 of its questionnaire was the only information that would have allowed it to test the U.S. companies' factual assertions and confirm the extent of utilization. This is a gross exaggeration. This information at best provided a roundabout way of confirming the extent of utilization. China itself notes that there

was a more direct means of identifying sales transactions that likely were ultimately destined for use in a government project. Specifically, China states that it was likely that the customers in an indirect transaction would request manufacturer's certificates certifying compliance with Buy American provisions. Yet China never asked for any such certificates.

11. Moreover, we note that China's purported need for the requested quantity and value data was to prepare for verification. That is, according to China, the information was to be mined in order to develop a verification strategy. Given this, there was nothing preventing China from using the databases filed in the AD proceedings to develop its verification strategy. Yet China chose not to do so.

12. Finally, we note that China also claims that its selection of a 100% utilization rate was reasonable and "best reflected the 'facts available' on the record", an assertion that strains credulity. First, China asserts that the United States conceded that the correct utilization rate was greater than zero. The United States is unaware of such a concession, and China's only support for such a concession appears to be its own assertions in a previous submission. How China arrived at 100% as a reasonable rate remains a mystery. The application itself, the source of the 29% alternative proposed by one of the U.S. companies, did not support anything close to a 100% utilization rate. All other evidence on the record indicates that even this 29% figure would be adverse. Selecting a 100% utilization rate in light of the customer lists, the petition, the sales databases, and other record evidence was inconsistent with Article 12.7 of the SCM Agreement.

D. China Acted Inconsistently With Its Obligations Under Article 12.2.2 of the AD Agreement

13. China baldly asserts that the United States has pointed to no text in Article 12.2.2 obligating an investigating authority to make available the specific dumping calculations. To the contrary, China simply has ignored the U.S. arguments on this point. China continues to argue that if any obligation to provide the final dumping calculations exists, it resides in Article 6.9 of the AD Agreement, not Article 12.2.2. Article 6.9, however, pertains to disclosure of the essential facts *before* a final determination. The U.S. claim, on the other hand, pertains to the actual *final* dumping calculations. The final dumping calculations performed by an investigating authority cannot be disclosed prior to the final determination.

14. Finally, China continues to claim that the respondents in the investigation were able to replicate and check the dumping calculations. The United States has already explained why China is wrong on this point, and China's claim is undermined by the express request of ATI during the investigation that MOFCOM release its calculations so that ATI would have "the opportunity to review those calculations for mathematical errors and to provide meaningful comments on the methodology MOFCOM used to calculate dumping margins ...." More fundamentally, the obligation of an investigating authority under Article 12.2.2 exists even if the respondent companies are able to replicate some (or even all) of the authority's calculations. Therefore, China acted inconsistently with Article 12.2.2 of the AD Agreement by failing to make available to the two respondent companies the final dumping calculations it performed.

E. The Injury Analysis in MOFCOM's Final Determination was Inconsistent with China's WTO Obligations

15. China's attempts to rewrite MOFCOM's injury determination are inconsistent with the nature of this dispute resolution process. The dispute resolution process concerns the findings the authority actually made, and during Panel proceedings Members may not offer new rationales or explanations to justify their findings. China's argument that the MOFCOM injury determination can be justified on the basis of volume effects alone cannot be reconciled with the determination itself. MOFCOM's

injury determination relied heavily on price effects findings. If the price effects findings are inconsistent with Articles 3.1 and 3.2 of the AD Agreement and Articles 15.1 and 15.2 of the SCM Agreement, MOFCOM's injury determination cannot stand.

16. Moreover, in an attempt to produce positive evidence to support its price effects findings, China's most recent submissions to the Panel rely heavily on findings nowhere made in the MOFCOM determination and evidence never disclosed to the parties. China's actions cannot be reconciled with the obligations of Articles 6.9 and 12.2.2 of the AD Agreement and Articles 12.8 and 22.5 of the SCM Agreement which require authorities to explain their findings and disclose pertinent non-confidential evidence to the parties. As we will explain, China repeatedly flouts this obligation.

17. A prime illustration of how China has tried to rewrite MOFCOM's price effects analysis appears in paragraph 93 of its second written submission. There China asserts that "[t]he subject imports were gaining market share, and the domestic industry reacted with lower prices to stop the further loss of market share. These lower prices then led to the price depression and price suppression that MOFCOM found." This assertion is incorrect in at least four respects.

18. First, it conforms to no finding that MOFCOM actually made. As we have stated repeatedly during these proceedings, MOFCOM's actual findings were that price depression and price suppression were caused by "low" prices of the imports under investigation. Thus MOFCOM's "low price" finding purported to explain price declines during the first quarter of 2009, notwithstanding MOFCOM's admission that the imports under investigation were priced higher than the domestically produced product. China has consistently declined to defend MOFCOM's "low price" findings, which we have contended are inconsistent with Articles 3.1 and 3.2 of the AD Agreement and Articles 15.1 and 15.2 of the SCM Agreement.

19. Moreover, according to the argument that China has made in paragraph 93, the critical point at which prices for the domestically produced product began to fall was the fourth quarter of 2008. In paragraph 121 of its answers to the first set of panel questions, China points to information it asserts is in the MOFCOM record supporting this proposition. However, MOFCOM's Final Determination supplied no data concerning quarterly pricing or price trends during 2008. It provided only annual average unit value data. The finding that MOFCOM actually made was that prices for domestically produced products followed the same trends as those of the imports under investigation. The only data the determination provided concerning the imports were annual average unit value data. MOFCOM's findings concerning domestic pricing patterns cannot be deemed to refer to quarterly data that nowhere appear in the decision.

20. Second, even if MOFCOM had made the finding that China now attributes to it, it is clear that quarterly pricing data for 2008 is a critical element of MOFCOM's analysis of price effects. But MOFCOM provided no quarterly pricing data in its Essential Facts Disclosure. Indeed, China did not provide the 2008 quarterly pricing data MOFCOM purportedly used until it submitted its answers to the first set of panel questions. This information, incidentally, indicates that the trend data can readily be disclosed in a non-confidential summary format. By not disclosing these essential facts to the parties during the MOFCOM investigation, China violated Article 6.9 of the AD Agreement and Article 12.8 of the SCM Agreement.

21. Third, even if MOFCOM can be deemed to have made a finding concerning quarterly price trends in 2008, it did not conduct the objective examination required by Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement. This is because pricing trends would be the only indicator on which MOFCOM would have performed a quarterly analysis for 2008. MOFCOM did not conduct a quarterly analysis of any other factor that would indicate whether price suppression or price depression was the effect of the imports under investigation, as required by Article 3.2 of the

AD Agreement and Article 15.2 of the SCM Agreement. It did not conduct a quarterly examination of import volumes, and it did not conduct a quarterly examination of import prices.

22. Fourth, China's attempted re-framing of MOFCOM's price effects finding is still not supported by positive evidence. According to China's re-framing in paragraph 93 of its second written submission, increasing subject import market penetration required domestic producers to cut their prices in an effort to regain market share. However, the only time during MOFCOM's period of investigation when the domestic industry lost market share was 2008. And during the bulk of 2008, the domestic industry was not cutting prices. Instead, the information China provided in paragraph 121 of its answers to the first set of panel questions – information, we reiterate, that MOFCOM never disclosed during its investigation – indicates that prices for domestically produced GOES increased throughout the first three quarters of 2008. Prices fell only in the fourth quarter, when the volume of the imports under investigation fell from prior quarterly peaks.

23. Furthermore, contrary to what China suggests in its second written submission, it is not correct that under Articles 3.2 and 15.2 the question is simply whether there is "price suppression" or "price depression" in the abstract. The language of those provisions is clear – the question concerns "the effect of" the imports. An examination of the "effect" of imports necessarily involves a causation analysis. The question is then whether imports have the effect of suppressing or depressing prices. Therefore, an investigating authority's failure to establish a causal link between the imports and the price effects is relevant evidence of a breach of Articles 3.2 and 15.2. The cases cited by China for its theory that these articles do not have any causation aspect do not in fact support China's theory. Rather, these cases involved the separate question of a non-attribution analysis. The causation analysis under Articles 3.2 and 15.2 is analytically distinct from a non-attribution analysis, and the EC – DRAMs panel report, cited by China, is fully consistent with the U.S. approach.

24. The only information in the record concerning quarterly import volumes, which is that in CHN-33 which we reformatted in US-41, indicates that the volume of imports under investigation increased most rapidly during the second and third quarters of 2008. These were the same quarters that, according to China, average unit values for domestically produced GOES peaked. By the fourth quarter of 2008, the quarterly volumes of imports under investigation had begun to decline. Thus, the record does not show that the Chinese industry was forced to cut prices to counter rising import volumes. When quarterly import volumes were reaching their peak, so were quarterly domestic average unit values.

25. Moreover, in attempting to attribute the falling average unit value levels during the fourth quarter of 2008 to the imports under investigation, MOFCOM overlooks other data in its record indicating why prices fell during this time. The ATI comments in CHN-31, whose discussion of pricing trends China has cited with approval, explain that raw materials prices for steel declined beginning in October 2008, and the prices for all types of steel – not merely GOES – declined. Indeed, the data in US-41 indicate that average unit values for both the imports under investigation and nonsubject imports declined in the fourth quarter of 2008. By focusing on per-unit profits, without any consideration of the cost components, MOFCOM had no basis to assess whether changes in per-unit profits were simply related to the start-up of Baosteel's new plant.

26. There are additional evidentiary and logical flaws in the price effects analysis that China has presented to the Panel. MOFCOM's price suppression analysis assumed that the GOES industry faced the same cost structure in 2007 and 2008. It did not, because of the entry of a new producer in 2008. As we explained in our second written submission, new steel production facilities frequently face high costs. MOFCOM's failure to examine whether the entry of a new producer in China skewed any comparison of 2007 and 2008 cost data demonstrates a lack of objective examination.

27. China's current arguments on pricing proceed as if there were a self-evident correlation during MOFCOM's period of investigation between the volume of the imports under investigation, the domestic industry's market share, and the domestic industry's price levels. This is not the case. While subject import volumes rose throughout the period of investigation, during some periods – such as 2007 and the first quarter of 2009 – the domestic industry's market share rose, and at other times, such as 2008, it fell. Similarly, as the quarterly data for 2008 indicate, during certain periods when the imports under investigation were increasing their presence in the market, prices for the domestically produced product rose.

28. There is a more fundamental flaw with MOFCOM's stated reason for finding price effects. There is no correlation between "low" prices for the imports under investigation and the domestic industry's market share. We explained in our first written submission why what MOFCOM presented as a comparative analysis of pricing was not an objective analysis because it did not measure prices at all. MOFCOM combined data for all grades of GOES into a single value measure, and combined all annual transactions into a single price point. We also explained why China violated the obligation to disclose essential facts by not disclosing the non-confidential data it had collected concerning price comparisons. China has now attempted to rectify this omission far too late through the chart it provided on the first page of its November 25 submission to the Panel. (We note, however, that this chart does not provide data for the first quarter of 2009.) Under China's calculations, the largest difference between the value of the imports under investigation and the value of the domestically produced product occurred in 2007 – a year that the Chinese industry raised prices, increased profits by over 50 percent, and gained market share. Consequently, the record for the entire period of investigation does not indicate that lower values of the imports under investigation from 2006 to 2008 required the domestic industry to adjust its pricing to preserve market share.

29. With respect to the issue of causal link, China has repeatedly mischaracterized the U.S. arguments and misrepresented the record. In paragraph 109 of its second written submission, China references the "number of aspects of the causal link analysis that the United States has not challenged at all." This statement does not reflect the U.S. position that MOFCOM's price effects findings were essential to its causation analysis.

30. Further in paragraph 109, China makes the statement that "increasing volumes of dumped and subsidized imports were taking significant market share away from the domestic industry, and this loss of volume was causing undisputed material injury to the domestic industry." This statement does not reflect any finding that MOFCOM actually made. It also does not accurately characterize the record. The only period in which the domestic industry lost market share was 2008. During that year, multiple important indicators of industry performance were positive and many rose by double digit percentages. These included output, sales prices, sales revenues, employment, and wages. The industry's pre-tax profit also rose in 2008. This hardly reflects "undisputed material injury."

31. By contrast, during the first quarter of 2009, numerous indicators of domestic industry performance, including operating income, fell. But this could not have been due to loss of volume to the subject imports. The domestic industry's sales quantities and market share were both higher during that period than they were during the first quarter of 2008. China's inability to show any correlation either between import volume and domestic industry market share, or between the domestic industry's market share and its performance, confirms why the price effects findings that we have challenged are essential to the causation analysis. The contrasts between 2008, when the domestic industry's market share declined and its performance was strong, and the first quarter of 2009 when market share increased and performance deteriorated, indicates that the record does not support the notion that maintaining market share was critical to the condition of the domestic industry.

32. China similarly confuses both the record and the U.S. argument with respect to the issue of non-attribution. Our argument is straightforward: there is no positive evidence supporting

MOFCOM's finding that the imports under investigation were the cause of the domestic industry's difficulties during the latter portion of the period of investigation. Specifically, any objective examination of the record would have indicated that the domestic industry's sharp increases in capacity after 2008 resulted in excessive production and inventory overhangs which in turn led to the domestic industry's price and profitability declines. In light of this, the third sentence of Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement required MOFCOM to engage in a non-attribution analysis to ensure it did not attribute to the imports under investigation any injury attributable to other causes. China's failure to conduct any such analysis consequently violated the agreements.

33. China has used a variety of strategies to avoid responding to our arguments. In its first written submission and at the first panel meeting, it contended that MOFCOM was not required to engage in a non-attribution analysis because the United States had not established that causes other than subject imports had "dramatic" effects. As we explained in our second written submission, nothing in the agreements provides that a non-attribution analysis is required only when factors other than subject imports are having "dramatic" effects. Moreover, the agreements place upon the authority, not the parties challenging imposition of duties, the responsibility to assess the effects of other known causes of injury.

34. In its second written submission, China changed its approach and argued that the overproduction and resulting inventory overhang was not a "known" cause of injury because the only arguments submitted to it concerned excess capacity. This argument is baseless. We observe initially that, in its comments on the preliminary determination that appear at CHN-31, ATI references "the supply-demand relation" several times as an alternate cause of injury. Thus, the asserted cause of injury was not merely a change in capacity, but a change in the amount supplied – in other words, excess production. The petitioners clearly understood this, because their response to the ATI comments in CHN-32 directly, albeit inaccurately, referenced the industry's production levels. Moreover, any possible ambiguity in ATI's comments was rectified by the comments of the U.S. Government. As MOFCOM acknowledged at page 72 of its Final Determination, the United States argued that "the more likely cause of any problems experienced by the Chinese producers is the enormous increase in inventories due to the domestic industry's incorrect assessment of demand." Thus, MOFCOM was well aware that excessive production and inventory overhangs were being asserted as an alternative cause of injury.

35. In its November 25 response to the Panel, China attempts to provide a factual basis for MOFCOM's findings. It has not succeeded. We observe initially that China disclosed critical nonconfidential trend data – most notably concerning capacity utilization levels and the level of the increase in capacity – for the first time in that response. While China apparently now believes that such data are necessary for an understanding of the MOFCOM determination, MOFCOM never disclosed these data to the parties. This provides yet another instance of China's violation of its obligations under Article 6.9 of the AD Agreement and Article 12.8 of the SCM Agreement.

36. China's response does not in fact provide positive evidence to support MOFCOM's findings concerning the effects of causes of injury other than the imports under investigation. While we hope to provide a complete written response, we can now summarize why. First, the information China has submitted confirms that the capacity increase was far greater than warranted by increases in domestic demand. China states that there was an average consumption growth of 20 percent per year. Capacity, however, more than doubled between 2006 and 2008.

37. Second, the capacity increase was large not only in relative terms, but also in absolute terms. This can be illustrated by the confidential data China provided comparing the percentage of Chinese demand the domestic industry could supply at the conclusion of the period of investigation with the percentage it could supply at the beginning of the period. Given the magnitude of this increase, the

only way in which the Chinese industry could have obtained full capacity utilization was by displacing the overwhelming majority of both subject and nonsubject imports from the market. China has not provided – and we cannot discern – any economic basis for the proposition that any capacity increase by a domestic industry is reasonable as long as total domestic industry capacity does not exceed national demand.

38. Third, it was not merely capacity, but also production that increased far more quickly than demand. China did not provide the specific confidential data that the Panel requested concerning demand, capacity, production, and inventories. Nevertheless, we have been able to estimate some data for demand, capacity, and production for 2008 by combining the limited confidential data China did provide with the nonsubject import data for 2008 in US-41. Based on our estimates, the record indicates that even if the volume of imports under investigation had not increased by a single ton in 2008, there still would have been substantial domestic industry overproduction – and consequently an inventory overhang – that year.

39. Moreover, China's November 25 submission conspicuously fails to provide any confidential data concerning the first quarter of 2009. Information in MOFCOM's Essential Facts Disclosure, however, indicates that compared to the first quarter of 2008, production increased by 55.23 percent while demand only increased by 12.46 percent. The Chinese industry's decision to increase production by far more than the increase in demand during the first quarter of 2009 cannot be attributed to the industry losing market share to low-priced imports under investigation, inasmuch as the domestic industry gained market share during this period and the imports under investigation were priced higher than the domestically produced product. The Chinese producers' flooding the market with excess production remains the only plausible explanation for the sharp decline.

40. Finally, China has not justified its failure either to discuss in its determination or disclose to the parties during the course of the MOFCOM investigation information about the volume and prices of nonsubject imports. We have explained in our written submissions how China's inactions in this regard violate Articles 6.9 and 12.2.2 of the AD Agreement and Articles 12.8 and 22.5 of the SCM Agreement. China asserts that MOFCOM did not need to provide any discussion of nonsubject imports because no party raised an argument concerning the issue. But parties could not defend their interests and assert arguments because MOFCOM did not disclose – and indeed, China has continued to fail to disclose – the public data on which it relied. The available data in the record that we have provided in US-41 demonstrate that there is no basis for China's suggestion that nonsubject imports were irrelevant to the injury analysis. Instead, during 2008 – the year China has characterized as critical to the MOFCOM pricing analysis – nonsubject imports had a greater volume and lower average unit values than the imports under investigation.

ANNEX F-3

CLOSING STATEMENT OF CHINA AT THE
SECOND MEETING OF THE PANEL

1. We thank the Panel once again for their dedication to this proceeding. In this closing statement China would like to make a few brief points. We expect to address any other issues through the Panel's written questions.

2. First, in our opening statement we highlighted China's concern regarding the U.S. attempt to raise substantive claims through its procedural challenges where those substantive claims are not part of the terms of reference of the Panel. This was in the context of Articles 22.3 and 14 of the SCM Agreement and U.S. arguments about pricing benchmarks. China appreciates the Panel's own attention to this matter through its questions on the first day with respect to Articles 6.9 and 12.2.2 of the Anti-Dumping Agreement and Articles 12.8, 22.3 and 22.5 of the SCM Agreement. We believe Members should be very concerned about attempts to use procedural provisions as a means for challenging the substantive aspects of a measure. We intend to address this more fully in our responses to the Panel's questions.

3. Second, on initiation, we believe the Panel has raised an interesting point about the textual distinction in Article 11.2(iii) with respect to specificity, where that provision uses the term "subsidy" by which one may refer to the definition of that term in Article 1.1, but then uses the term "nature" rather than any more specific association with the legal element of specificity. China believes this is an important point and helps inform the standard to be applied with respect to evidence of specificity found in an application under Article 11. China will address this issue in more detail in response to the Panel's written questions.

4. Let me now turn to what are the more significant issues in this case related to the application of facts available and injury. On facts available China believes the issue has been narrowed to a simple question. Did the respondents adequately respond to MOFCOM's questionnaire. The United States has taken off the table any issue related to the substantive relevance of the requests for information, the factual relevance, and any question related to burdens placed on the respondents. China has discussed the clarity of MOFCOM's requests as reinforced through its deficiency meetings and letter as well as the plain understanding of the respondents with respect to the nature and expectations of MOFCOM's inquiry. Any objective examination of the record leads to this conclusion.

5. On the question of how MOFCOM would or could have used the requested data if it had been provided, China believes the burden is really on the United States to definitively demonstrate that this data was irrelevant or not useful to the investigation. But, in a situation when the requested information was not even provided, China does not see how U.S. arguments can gain any traction here. China is forced to engage in hypothetical responses about how the information could or would be used in the investigation. All of its uses in this regard will never be known because the respondents deliberately withheld the information. The investigation may have headed down other paths had the respondents in fact done something when they were asked. The United States seems to divine what these paths should or could have been, or what might have been a "better approach." These are not valid arguments. First, the U.S. is not the investigating authority. Second, these are post hoc arguments offered in the face of the respondents refusal to provide the information – a refusal clearly based on their belief regarding the legal relevance of the information, which is an issue the United States does not challenge in this proceeding. Nonetheless, China has explained that, at a minimum, the prospect of assembling AUV time series by product and client would allow MOFCOM

to ask further questions about particular sales that exhibited characteristics indicating utilization – including higher than typical price and/or concentration of such prices around particular customers.

6. On the question of injury, simply stated the United States is pressing the Panel on a series of alternative explanations to explain why MOFCOM's explanation does not suffice. But China would remind the United States of the standard of review involved in this proceeding. The fact that the United States can imagine alternative explanations to the facts in no way renders MOFCOM's explanation WTO inconsistent. It is the Panel's obligation to determine if MOFCOM's explanation was reasonable, not whether there were other reasonable explanations or whether a given alternative explanation sounds better. Even if the United States has offered a reasonable alternative explanation – or even if the U.S. explanation is better – that is not enough. The U.S. alternative explanation must so much better as to render the MOFCOM explanation unreasonable. We submit that the U.S. arguments on price effects and causation in this case do not meet that standard. Even given the U.S. arguments, the MOFCOM explanation stands as a WTO consistent explanation of the factual record before MOFCOM.

7. This concludes China's closing statements. Thank you again for your time.

ANNEX F-4

CLOSING STATEMENT OF THE UNITED STATES AT THE
SECOND MEETING OF THE PANEL

1. Mr. Chairman, Members of the Panel. The United States would like to begin by thanking you and the Secretariat for your efforts in the preparation for and conduct of this hearing.

2. We hope that the discussion held here yesterday and today has assisted the Panel in enhancing its understanding of the issues before it in this case. We look forward to elaborating on our comments in further written submissions.

3. Before these hearings formally close, the United States would like to make a few brief comments.

4. First, while there was limited discussion of the U.S. disclosure claims at this meeting of the Panel, we wish to highlight MOFCOM's repeated failure to disclose essential non-confidential information to the parties during its investigation and to provide more than skeletal information in its Final Determination concerning the facts and reasoning central to its determination. This is evidenced by China's repeated submission to the Panel of new information and new justifications for MOFCOM's determination. What China has complained are the shifting U.S. arguments simply reflect our need to confront a moving target. Had MOFCOM disclosed its facts and underlying reasoning, as required by the Agreements, these proceedings could have been far more focused.

5. With respect to initiation, China in its opening statement referred to our claims regarding Article 11 of the SCM Agreement as "a distraction to other matters before the panel." Contrary to China's assertion, Article 11 of the SCM Agreement is not a distraction – it is an obligation that ensures that CVD investigations are not initiated based on frivolous claims. A party should not have to spend time and resources defending unsubstantiated allegations. MOFCOM did not meet the obligations of Article 11 in this instance.

6. With respect to Facts Available, we would like to emphasize that our position is that the U.S. Companies were cooperative and responded MOFCOM's questions on Government Procurement in accordance with the instructions in the questionnaire. Even if the panel does not ultimately share that assessment, the record does not reflect the sort of egregious non-cooperation that China attempts to paint here. Moreover, the information that China claims should have been provided was in a form that, as we explained, could not have done what China purports it would do. Thus, this information could hardly be critical to MOFOCOM's inquiry.

7. Given the companies engagement with MOFCOM on the question of utilization, the limited value of the alleged missing information, and the overwhelming facts showing that the utilization rate (direct or indirect) was zero, an adverse inference that 100% utilization on all sales of all products is not appropriate. At most, the record would support an adverse rate of 29%, which would represent an adverse inference of 100% utilization for the infrasturcture/construction sales, the only sector sales for which the applicant alleged a subsidy.

8. With respect to injury, we have had a great deal of discussion on price effects. We would like to highlight two principal points. First, the Agreements specifically require that any price depression and suppression be significant and be the effect of the subject imports. The Panel should not permit China to read this language out of the Agreements. Second, China's price depression and price

suppression analysis are ultimately dependent on MOFCOM's low price findings. These findings are not supported by positive evidence and do not reflect an objective examination.

9. Finally, we emphasize that even if subject import prices were low, they cannot explain domestic industry price declines in the first quarter of 2009 far greater than necessary to meet import competition, which led to the industry's decline in financial performance. These can be explained only by the massive inventory overhangs that developed due to overproduction. MOFCOM's conclusion that the overproduction and inventory overhang did not cause injury is not supported by positive evidence.

10. The United States would like to conclude by again thanking the Panel and Secretariat for their efforts. We look forward to receiving your written questions and continuing this discussion in future submissions.

ANNEX G

REQUEST FOR THE ESTABLISHMENT OF A PANEL

ANNEX G-1

REQUEST FOR THE ESTABLISHMENT OF A PANEL BY
THE UNITED STATES

WORLD TRADE ORGANIZATION

WT/DS414/2
14 February 2011

(11-0758)

Original: English

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

Request for the Establishment of a Panel by the United States

The following communication, dated 11 February 2011, from the delegation of the United States to the Chairman of the Dispute Settlement Body, is circulated pursuant to Article 6.2 of the DSU.

On September 15, 2010, the United States Government requested consultations with China pursuant to Article 4 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes (*"DSU"), Article XXII:1 of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994"), Article 17.3 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("AD Agreement"), and Article 30 of the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement").[1] The United States and China held such consultations on November 1, 2010. Unfortunately these consultations did not resolve the dispute.

The United States considers that certain measures of the Government of the People's Republic of China ("China") are inconsistent with China's commitments and obligations under the GATT 1994, the AD Agreement, and the SCM Agreement. The measures impose countervailing duties and anti-dumping duties on grain oriented flat-rolled electrical steel ("GOES") from the United States, and are set forth in Ministry of Commerce of the People's Republic of China ("MOFCOM") Notice No. 21 [2010], including its annexes.

These measures appear to be inconsistent with the following provisions of the AD Agreement, SCM Agreement, and GATT 1994:

[1] WT/DS414/1.

Initiation of the Investigation

1. Articles 11.2 and 11.3 of the SCM Agreement, because:

   (a) The application for a countervailing duty investigation failed to contain information reasonably available to the applicant regarding the existence of a financial contribution, a benefit, or specificity for several of the alleged subsidy programs; and

   (b) There was insufficient evidence in the application to justify the initiation of an investigation for several of the alleged subsidy programs.

Subsidy Rate Determinations

2. Article 12.7 of the SCM Agreement, because China improperly made its subsidy rate determinations based on the facts available. In particular, China was not entitled to reject necessary information submitted by respondent producers. The respondent producers submitted the necessary information in a reasonable period of time, and did not significantly impede the investigation. In addition, China applied facts available in a punitive manner, and disregarded its own findings in doing so.

3. Article 12.8 of the SCM Agreement, because China failed to disclose the essential facts underlying its final determination with regard to the subsidy rates, thus impairing the respondents' ability to defend their interests.

4. Article 22.3 of the SCM Agreement, because China failed to provide in sufficient detail the findings and conclusions it reached on all issues of fact and law it considered material in making its preliminary and final determinations, including with respect to its use of facts available.

All Others Subsidy Rate Determination

5. Article 12.7 of the SCM Agreement, because China improperly applied facts available in determining the duty rate applicable to exporters that were not known at the time of the investigation, including potential "new shippers" and exporters that were not given notice of the information required by the investigating authority. In addition, China applied facts available in a punitive manner, and disregarded its own findings in doing so.

6. Article 12.8 of the SCM Agreement, because China failed to disclose the essential facts underlying its determination regarding the all others subsidy rate, thus impairing the interested parties' ability to defend their interests.

7. Article 22.3 of the SCM Agreement, because China failed to provide in sufficient detail the findings and conclusions it reached on all issues of fact and law it considered material in makings its preliminary and final determinations. China also did not explain why the all others subsidy rate increased from the preliminary determination to the final determination.

Antidumping Margin Determinations

8. Articles 6.9 and 12.2.2 of the AD Agreement, because China failed to disclose the essential facts underlying its determination and make available all relevant information on the matters of fact and law and reasons which led to the imposition of the final measures, thus impairing the respondents' ability to defend their interests.

All Others Dumping Determination

9. Article 6.8 and paragraph 1 of Annex II of the AD Agreement, because China improperly applied facts available in determining the duty rate applicable to exporters that were not known at the time of the investigation, including potential "new shippers" and exporters that were not given notice of the information required by the investigating authority.

10. Article 6.9 of the AD Agreement, because China failed to disclose the "essential facts" underlying its determination regarding the all others dumping rate, thus impairing the respondents' ability to defend their interests.

11. Article 12.2 of the AD Agreement, because China failed to provide in sufficient detail the findings and conclusions it reached on all issues of fact and law it considered in making its preliminary or final determination regarding the all others dumping rate. China also did not explain why the all others dumping rate increased from the preliminary determination to the final determination.

12. Article 12.2.2 of the AD Agreement because China failed to make available all relevant information on the matters of fact and law and reasons which led to the imposition of the final measure.

Explanation of Final Countervailing Duty Determination

13. Article 22.5 of the SCM Agreement because China failed to make available all relevant information on the matters of fact and law and reasons which led to the imposition of the final measure.

Confidential Information

14. Articles 6.4 and 6.5.1 of the AD Agreement, and Articles 12.3 and 12.4.1 of the SCM Agreement, because China failed to provide, or require the applicant to provide, adequate non-confidential summaries of allegedly confidential information. China's treatment of confidential information did not allow the interested parties to obtain a reasonable understanding of the substance of the confidential information prior to the preliminary and final determinations, such that they could prepare presentations on the basis of this information. China did not give any indication that the information could not be summarized and did not provide the reasons why summarization was not practicable.

Injury Determination: Price Effects Analysis

15. Article VI of the GATT 1994 and Articles 3.1, 3.2 , 6.9, and 12.2.2 of the AD Agreement, and Articles 12.8, 15.1, 15.2, and 22.5 of the SCM Agreement, because in its analysis of the price effects of imports under investigation, China did not discharge its obligations to determine whether there had been significant price undercutting by the allegedly dumped imports, whether the effect of such imports was to depress prices to a significant degree, or prevent price increases which would otherwise have occurred to a significant degree. In particular:

(a) China never disclosed several pieces of information critical to its price effects analysis;

(b) China failed to provide in sufficient detail the findings and conclusions reached on all issues of fact and law it considered material and failed to provide the reasons for the

acceptance or rejection of the relevant argument or evidence by the exporters or importers; and

(c) China's findings that the dumped and subsidized imports had significant price effects failed to reflect an objective examination of the evidence in the record and/or are unsupported by positive evidence.

Injury Determination: Causation

16. Articles 3.1, 3.5, 6.9, and 12.2.2 of the AD Agreement, and Articles 12.8, 15.1, 15.5, and 22.5 of the SCM Agreement, in particular:

(a) China's causal link analysis relied on findings that did not reflect an objective examination of the record and/or are unsupported by positive evidence. China failed to examine all relevant evidence;

(b) China never disclosed several pieces of information critical to its causation analysis; and

(c) China failed to provide in sufficient detail the findings and conclusions reached on all issues of fact and law it considered material.

In view of the claims set forth above, the United States considers that China has also acted inconsistently with Article VI of the GATT 1994, Article 1 of the AD Agreement, and Article 10 of the SCM Agreement, which only permit anti-dumping or countervailing duty measures to be applied under the circumstances provided for in Article VI of the GATT 19994 and conducted in accordance with the AD Agreement and the SCM Agreement. These measures also appear to nullify or impair the benefits accruing to the United States directly or indirectly under the cited agreements.

Therefore, the United States respectfully requests, pursuant to Article 6 of the DSU, Article 17.4 of the AD Agreement, and Article 30 of the SCM Agreement, that the Dispute Settlement Body establish a panel to examine this matter, with the standard terms of reference as set out in Article 7.1 of the DSU.

ANNEX H

RELATIONSHIP BETWEEN DOMESTIC PRODUCTION AND SUBJECT IMPORTS

ANNEX H-1

RELATIONSHIP BETWEEN DOMESTIC PRODUCTION AND SUBJECT IMPORTS

[[BUSINESS CONFIDENTIAL INFORMATION]]

[[BCI

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WORLD TRADE ORGANIZATION

WT/DS414/R/Add.1
15 June 2012

(12-3104)

Original: English

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

Report of the Panel

Addendum

This *addendum* contains Annexes A to H to the Report of the Panel to be found in document WT/DS414/R.

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RELATIONSHIP BETWEEN DOMESTIC PRODUCTION AND SUBJECT IMPORTS

ANNEX A

EXECUTIVE SUMMARIES OF THE FIRST WRITTEN SUBMISSIONS OF THE PARTIES

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EXECUTIVE SUMMARY OF THE FIRST WRITTEN
SUBMISSION OF THE UNITED STATES

I. INTRODUCTION

1. In this dispute, the United States is challenging various aspects of the definitive anti-dumping and countervailing duty measures that the Government of the People's Republic of China ("China") has adopted with respect to imports of grain oriented flat-rolled electrical steel ("GOES") from the United States. Several aspects of these measures are inconsistent with China's obligations under the General Agreement on Tariffs and Trade 1994 ("GATT 1994"), the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("AD Agreement"), and the Agreement on Subsidies and Countervailing Measures ("SCM Agreement").

2. Transparency and due process commitments are important elements of the AD and SCM Agreements. From the very outset, China's conduct of the GOES investigation raised serious transparency and due process concerns. Following China's wide-ranging investigation, in which it requested detailed information on companies' entire production lines including products unrelated to GOES, data on sales stretching back fifteen years, and on laws and regulations that had no relation to the companies or product at issue, and after both the United States and U.S. companies provided over a dozen questionnaire responses, the serious due process and transparency problems evident from the beginning of the proceeding became even more apparent as China began issuing its determinations. These due process and transparency problems impaired the ability of the United States and interested parties to understand the basis for China's determinations or to defend their interests.

II. FACTUAL BACKGROUND

A. THE IMPOSITION OF DUTIES ON U.S. IMPORTS

1. The Petition

3. On 27 April 2009, two Chinese steel producers, Wuhan Iron and Steel (Group) Corporation and Baosteel Group Corporation, filed a petition with China's Ministry of Commerce ("MOFCOM") requesting relief under China's AD and CVD laws on behalf of China's domestic GOES industry. The petitioners alleged that U.S. producers of GOES, in particular AK Steel Corporation ("AK Steel") and ATI Allegheny Ludlum Corporation ("ATI"), had engaged in injurious dumping and benefitted from various countervailable subsidies.[1]

4. Regarding subsidies, the petitioners alleged that 27 federal and state laws provided countervailable subsidies to the U.S. companies. Among the laws challenged were several federal procurement statutes. Regarding the dumping allegations, petitioners estimated a dumping margin for GOES imports from the United States of 25 per cent. The petition alleged that imports of GOES from the United States and Russia caused and threatened injury to the Chinese industry. Citing China's AD regulations, the petitioners argued that a cumulative assessment of injury should be performed, which would collectively take into consideration GOES imports from the United States and Russia. The petition then alleged price undercutting, price depression, and price suppression caused by the imports.

[1] The petition also alleged that Russian producers of GOES engaged in injurious dumping.

5. To support virtually their allegations, the petitioners purportedly relied on a wide variety of data and information. Virtually none of this information was disclosed, however, because the petitioners sought and obtained from MOFCOM confidential treatment for nine broad categories of data and information that it claimed was confidential.

6. On 1 June 2009, MOFCOM initiated the anti-dumping, countervailing duty, and injury investigations. For the anti-dumping and countervailing duty proceedings, MOFCOM set a period of investigation from 1 March 2008 to 28 February 2009, and for injury, MOFCOM set the period of investigation from 1 January 2006 to 31 March 2009.

2. Subsidy Questionnaires and New Allegations

7. On 26 June 2009, MOFCOM issued initial subsidy questionnaires to AK Steel and ATI, as well as to the United States. MOFCOM asked the United States for purchase data relating to GOES during the period of investigation. The results of a search of the federal procurement database showed that GOES was not purchased by the U.S. government.

8. In the subsidy questionnaires issued to AK Steel and ATI, MOFCOM demanded volumes of information unrelated to the subject merchandise. For example, MOFCOM demanded that AK Steel provide detailed transaction data for billions of dollars in transactions involving non-subject merchandise – products that are neither inputs for GOES nor substitutable for GOES. Because of the volumes of information requested, neither AK Steel nor ATI could fulfil all of the requests made in the CVD proceeding. In addition, and in connection with demands for all sales data for all products, AK Steel referenced the fact that it had already submitted detailed sales data for GOES in the parallel anti-dumping proceeding, and asked MOFCOM to review that data for purposes of the CVD, since China's anti-dumping laws and regulations do not provide for separate investigative records.

9. The U.S. companies further demonstrated that they did not sell any GOES to any government entity. In addition to referring MOFCOM to detailed sales data for GOES, AK Steel provided MOFCOM customer lists for all products showing that no sales were made to the government. ATI provided customer lists for the subject merchandise.

10. On 20 July 2009, the petitioners filed new subsidy allegations regarding various federal and state laws. Despite serious deficiencies pertaining to these allegations, on 19 August 2009, MOFCOM initiated an investigation covering five programmes.

11. After filing its initial questionnaire response on 10 August 2009, in a span of just eight weeks, AK Steel received and responded to five lengthy supplemental questionnaires issued by MOFCOM in the CVD investigation. On 9 September 2009, AK Steel noted the considerable burden resulting from MOFCOM's investigation, and stressed its willingness to cooperate. AK Steel responded to all of MOFCOM's requests.

3. Preliminary Determination

12. On 20 December 2009, MOFCOM published the preliminary determination. Regarding the government procurement statutes, MOFCOM applied what it termed facts available and calculated a subsidy rate of 11.7 per cent for AK Steel and 12 per cent for ATI. MOFCOM asserted that it applied facts available to the U.S. companies because it determined that the U.S. companies did not cooperate in its investigation. MOFCOM specifically cited U.S. companies' failure to provide data on all sales of all steel products.

13. Regarding its benefit determination for the federal procurement statutes, MOFCOM concluded that competitive bidding under the procurement statutes does not result in a valid market

price. While conceding that competitive bidding exists, MOFCOM nonetheless concluded, without explaining it conclusion, that the qualification criteria for bid participants prevented the price from reflecting true market conditions.

14. MOFCOM calculated preliminary dumping margins of 10.7 per cent for AK Steel, 19.9 per cent for ATI, and 25 per cent for all others. The only explanation MOFCOM provided regarding how it calculated the all others rate was a single sentence in its report. MOFCOM provided no further explanation of its calculation of the all others dumping rate, and it did not disclose the information forming the basis for the calculation of this rate. The all others subsidy rate in the preliminary determination was 12 per cent.

4. On-Site Verification

15. Between 5 January 2010 and 13 January 2010, MOFCOM conducted an on-site verification of each of the two U.S. companies subject to individual investigation. The detailed sales data for GOES and customer lists for all products submitted by AK Steel and detailed GOES sales data submitted by ATI before the verification were usable for the determination of the subsidy rate because the data showed records for all sales, as well as the absence of sales to the government. MOFCOM could have used these data, in conjunction with the information supplied by the United States from its procurement database, to determine that GOES was not purchased by the U.S. government under any federal procurement programmes. Because the detailed sales data for GOES and customer lists for all products submitted by AK Steel provided a basis for MOFCOM to determine the level of sales to government entities, the U.S. companies requested that MOFCOM verify the customer lists submitted before the preliminary determination was issued. Despite this request, MOFCOM did not verify the customer lists in the CVD proceeding.

5. Disclosure Documents

(a) Factual Disclosure on Dumping Margin and Subsidy Rate

16. Prior to issuing the Final Determination for the anti-dumping and countervailing duty investigations, MOFCOM released its Final Disclosure, in which it revealed that it had nearly quadrupled the all others subsidy rate to 44.6 per cent. As with the Preliminary Determination, the Final Disclosure provided only one sentence referring to its CVD regulations to explain the source of the all others subsidy rate. MOFCOM did not disclose the facts that led it to conclude that the use of facts available was justified for all other U.S. companies. It also did not disclose the facts that led it to conclude that 44.6 per cent was a justifiable rate or the calculations performed to determine this rate. Also in the Final Disclosure, MOFCOM revealed that it was increasing the all others dumping rate to 64.8 per cent. Again, MOFCOM simply provided a vague reference to China's anti-dumping law, and beyond that offered not a single piece of information regarding how the rate was calculated.

(b) Injury Disclosure

17. On 5 March 2010, the Industry Injury Investigation Bureau of MOFCOM issued a document titled "Basic Facts Based on Which the Industry Injury Determination of the Anti-dumping Investigation into GOES Imports from the United States and Russia and the CVD Investigation into GOES Imports from the United States was Made" ("Injury Disclosure Document").

18. The Injury Disclosure Document provided some basic information about the volume of the imports under investigation, as well as trend information concerning the condition of the domestic industry. Nevertheless, with respect to an issue that was critical to the subsequent injury determination – pricing – MOFCOM disclosed strikingly few facts**.**

19. What MOFCOM characterized as "pricing" data in a section entitled "Price of the Subject Merchandise" were in fact average unit value data for transactions derived from Customs statistics. MOFCOM combined average unit value data for products imported from the United States and Russia, notwithstanding the fact that separate data for each country could be derived from the Customs statistics. MOFCOM also decided to use only one annual observation for calendar years 2006, 2007, and 2008. Consequently, in a three and one-quarter year period of investigation concerning products from two countries, MOFCOM reported – and apparently relied upon – only four observations of average unit values for the imports under investigation. In short, MOFCOM's disclosure included *no information* concerning actual prices charged for *any product* in any commercial transaction.

20. MOFCOM did not state how it generated any information on the pricing of the domestically produced product. The minimal information disclosed concerning pricing trends suggests that, as with the imports, MOFCOM relied on only four pricing observations for domestically produced products.

21. Another issue central to the final determination was price suppression and the Chinese producers' purported inability to recover increasing costs. While the Injury Disclosure Document provided some information concerning trends in sales revenue and profits before tax, it disclosed nothing concerning the level, trends, or composition of the domestic industry's costs.

22. On causation, MOFCOM disclosed that the Chinese industry's capacity increased by over 50 per cent in 2008, and was 80 per cent higher in the first quarter of 2009 than during the first quarter of 2008. The large capacity increases facilitated substantial increases in production. These increases in production outstripped even robust increases in demand – particularly so in the first quarter of 2009.

6. Final Determination

(a) Subsidy and Dumping Findings

23. On 10 April 2010, MOFCOM issued the final determination for the anti-dumping and countervailing duty investigations. MOFCOM applied a dumping margin of 7.8 per cent to AK Steel, and 19.9 per cent to ATI.

24. For the subsidy rate, MOFCOM continued to use what it termed facts available to calculate subsidy rates for the federal procurement statutes because the respondents did not provide 15 years of detailed sales data for non-subject merchandise. To calculate the amount of the subsidy purportedly benefitting GOES products, MOFCOM, relying on facts available, assumed that AK Steel and ATI sold only carbon steel, and sold *all* of their output to the government, despite the fact that the record demonstrated there were no sales of GOES to the government, AK Steel did not sell any product to any government entity during the POI, and only a limited amount of non-GOES AK Steel and ATI products could even as a theoretical matter have been purchased in connection with alleged government procurement. Without any analysis, MOFCOM determined that U.S. carbon steel prices were 25 per cent above prices for foreign products**.** MOFCOM calculated subsidy rates for the federal procurement statutes indicating that GOES from AK Steel benefitted from subsidies at the rate of 11.918 per cent and GOES from ATI benefitted at the rate of 11.65 per cent.

25. Regarding the procurement statutes, MOFCOM also concluded that the prices obtained through the competitive bidding process provided for under U.S. law do not reflect real market prices. In doing so, MOFCOM dismissed the position of the United States that procurement in the United States occurs under competitive bidding conditions and that foreign companies may compete

for bids. Repeating its position in the preliminary determination, MOFCOM simply stated that the prices generated by competitive bidding do not reflect market prices.

26. Ignoring U.S. comments explaining the flaws in the all others subsidy rate calculation, filed in response to the disclosure document, MOFCOM, in the final determination, imposed a final all others subsidy rate of 44.6 per cent. Again, at no time prior to the final determination did MOFCOM disclose to the United States or other interested parties the essential facts under consideration that formed the basis for the near quadrupling of the all others subsidy rate, other than stating that the rate was based on information from the petitioners pursuant to China's CVD regulations. MOFCOM's explanation did not change from the preliminary determination and disclosure document to the final determination.

27. In the final determination, MOFCOM calculated an all others dumping rate of 64.8 per cent, 332 per cent higher than that in its preliminary determination. It did so despite the fact that the dumping rates it calculated for the two respondents, AK Steel and ATI, were substantially lower that 64.8 per cent – that is, 7.8 per cent and 19.9 per cent, respectively. Again, MOFCOM's only explanation was that it relied upon its Anti-Dumping Regulation. The Final Determination contains no other explanation of how MOFCOM calculated the rate, the data it relied on, or why an increase from 25 per cent was warranted for other U.S. producers/exporters that it did not examine.

(b) Injury Findings

28. In its final determination, MOFCOM found that China' GOES industry sustained material injury and there was a causal link between the dumped imports of GOES from Russia and the dumped and subsidized imports of GOES from the United States and this injury. A critical aspect of the causation analysis concerned the purportedly significant price effects of the imports under investigation.

29. MOFCOM repeatedly stated that the importers had a "strategy" of charging "low prices." One critical finding at the beginning of the section is that "[t]he contracts and original records from the price formulation process provided by petitioners showed that the subject merchandise adopted a pricing strategy of selling at a price lower than Chinese like products in the Chinese domestic market. Because subject merchandise was kept at a low price, and the import volume of subject merchandise increased greatly since 2008, domestic producers had to lower their prices to keep market share." MOFCOM failed to specify the nature of these contracts or records, or summarize their content in the Final Determination. As previously discussed, the Injury Disclosure Document contained no information concerning actual prices charged for any product in any commercial transaction. It also provided no information about these contracts or records. Both the Russian and U.S. parties argued to MOFCOM that their prices were not in fact lower than the prices charged by the domestic producers. MOFCOM rejected these arguments at the end of its pricing discussion, in language almost identical to its "low price strategy" finding quoted above, providing no greater detail as to the nature or application of the policy.

30. While the Injury Disclosure Document provided no comparisons of prices of domestic and imported products, there was one such comparison in the Final Determination. MOFCOM revealed for the first time, in its response to the disclosure comments, that "the Investigating Authority did not conclude that the price of the imported subject merchandise was lower than the price of the domestic like product in Q1 of 2009." The Final Determination, however, contained no specific comparisons of prices of the imported and domestically produced product during the remaining period of investigation – calendar years 2006 through 2008.

31. As previously stated, notwithstanding the foregoing, MOFCOM found that the imports under investigation had price-depressing effects. In particular, it found that domestic producers had to

"lower their prices to keep market share" in response to the "pricing strategy" of the imports under investigation.

32. MOFCOM also found that the imports under investigation had price-suppressing effects. It found that, because of the imports under investigation, domestic producers were not able to recover rising costs in the first quarter of 2009. MOFCOM first found that, during 2008 and the first quarter of 2009, imports increased more quickly than domestic demand. MOFCOM then found that the increased market penetration of the imports under investigation caused declines in the domestic industry's capacity utilization and increases in its inventories in 2008 and the first quarter of 2009.

33. MOFCOM next repeated the price effects findings from the injury disclosure, and concluded that the subject imports, because of their purported underselling and purportedly significant price-depressing and -suppressing effects, "result[ed] in sharp decline[s] in the profitability of the domestic industry." MOFCOM cited as other adverse effects declines in sales revenues, profits, return on investments, and employment-related factors during the first quarter of 2009.

34. MOFCOM further purportedly examined whether other factors caused injury to the domestic industry. In every instance, it found that the other factors caused no injury. Thus it found that GOES imports from countries other than Russia and the United States were not a cause of injury. This discussion, which was the sole discussion in the Final Determination concerning imports from sources other than the United States and Russia, provided no empirical data concerning imports from nonsubject countries. Nor did MOFCOM include any information about imports from nonsubject countries in its Injury Disclosure Document.

35. Finally, MOFCOM responded to the U.S. comments that the Chinese industry's decisions to expand capacity and production were a likely alternative cause of injury. The United States argued before MOFCOM that the sharp increase in inventories caused by the domestic industry's overexpansion was an alternative cause of injury. MOFCOM rejected these arguments and concluded that the domestic industry's sharp increases in capacity, production, and inventories were not a cause of any injury to the domestic industry.

III. LEGAL ARGUMENT

A. THE INITIATION OF THE COUNTERVAILING DUTY INVESTIGATION FOR SEVERAL PROGRAMMES BREACHED ARTICLE 11 OF THE SCM AGREEMENT

36. MOFCOM's initiation of the countervailing duty investigation was inconsistent with Article 11 of the SCM Agreement. An application to initiate a CVD investigation must include sufficient evidence of financial contribution, benefit, and specificity to satisfy the requirements of Article 11.2. For several allegations contained in the petition, the programmes established under the laws and alleged to provide countervailable subsidies either were no longer in effect and could no longer provide benefits to the U.S. companies; or the petitioners did not offer evidence of specificity; or the petitioners did not offer evidence of a financial contribution. Therefore, the petition failed to meet the requirements of Article 11.2.

37. In addition, to satisfy the requirements of Article 11.3, an investigating authority must objectively assess the accuracy and adequacy of the evidence contained in the petition before initiating an investigation. MOFCOM, however, failed to examine the accuracy and adequacy of the evidence with respect to several alleged subsidies. Regarding several of the supposed subsidies at issue, an objective investigating authority would not have initiated an investigation based on the petition's unsupported allegations.

B. MOFCOM FAILED TO REQUIRE ADEQUATE NON-CONFIDENTIAL SUMMARIES, BREACHING ARTICLE 12.4.1 OF THE SCM AGREEMENT AND ARTICLE 6.5.1 OF THE AD AGREEMENT

38. China breached Article 12.4.1 of the SCM Agreement and Article 6.5.1 of the AD Agreement because it failed to require non-confidential summaries of allegedly confidential information. The only purported non-confidential summaries are contained in the petition; no summaries of confidential information are contained in the preliminary determination, disclosure documents, nor final determination. Further, the purported non-confidential summaries in the petition are not in fact summaries. Instead, the petition only provides requests for confidential treatment of data and information. It does not summarize the information in a manner permitting a reasonable understanding of the substance of the data and information treated as confidential.

C. CHINA BREACHED ARTICLE 12.7 OF THE SCM AGREEMENT BECAUSE ITS USE OF FACTS AVAILABLE WAS IMPROPER

39. China breached Article 12.7 of the SCM Agreement because its use of facts available was improper. MOFCOM ignored necessary information provided by the U.S. companies. The U.S. companies provided this necessary information within a reasonable period of time, and they did not impede the investigation. MOFCOM's use of facts available was unjustified and punitive.

D. MOFCOM FAILED TO MAKE AVAILABLE THE CALCULATIONS IT PERFORMED TO ARRIVE AT THE DUMPING MARGINS, INCONSISTENT WITH ARTICLE 12.2.2 OF THE AD AGREEMENT

40. China breached Article 12.2.2 of the AD Agreement because it failed to make available to AK Steel and ATI the calculations used to determine these companies' final dumping margins. The dumping calculations are "relevant information on the matters of fact" that led to the imposition of definitive measures. Accordingly, MOFCOM was required to make them available, but it did not do so.

E. MOFCOM'S FAILURE TO PROVIDE SUFFICIENT INFORMATION ON THE FINDINGS AND CONCLUSIONS OF LAW IT CONSIDERED MATERIAL CONSTITUTES A BREACH OF ARTICLE 22.3 OF THE SCM AGREEMENT

41. MOFCOM failed to adequately explain its findings and conclusions supporting its determinations that the competitive bidding process under the U.S. government procurement statutes at issue does not result in prices that reflect market conditions. These findings and conclusions were material to its finding of benefit in its subsidy investigation. MOFCOM failed to explain its novel benefit theory in the preliminary and final determinations. Therefore, China acted inconsistently with Article 22.3 of the SCM Agreement.

F. MOFCOM'S DETERMINATION OF THE "ALL OTHERS" CVD RATE WAS INCONSISTENT WITH ARTICLES 12.7, 12.8, 22.3, AND 22.5 OF THE SCM AGREEMENT

42. MOFCOM, without explanation, applied countervailing duties based on facts available to other U.S. exporters/producers of GOES that were not named in the petition and were never sent a questionnaire. MOFCOM never notified a single producer other than those identified in the petition of the existence of the investigation, the information that would be required of them, or the consequences of not fully complying with MOFCOM's requests. MOFCOM compounded the impact of its application of facts available by providing no detail in its Final Determination and final disclosure documents with regard to the findings that led to its application of facts available. As a

result of this lack of disclosure, the United States and other U.S. companies were deprived of any opportunity to defend their interests with respect to this issue. Thus, China acted inconsistently with Articles 12.7, 12.8, 22.3, and 22.5 of the SCM Agreement.

G. MOFCOM'S DETERMINATION OF THE ALL OTHERS RATE IN THE FINAL ANTI-DUMPING DUTY DETERMINATION IS INCONSISTENT WITH ARTICLE 6.8, 6.9, 12.2, AND 12.2.2 OF THE ANTI-DUMPING AGREEMENT

43. As with the application of countervailing duties to other U.S. exporters/producers of GOES that were not named in the petition and were never sent a questionnaire, MOFCOM appears to have applied a facts available dumping margin to other U.S. producers/exporters of GOES despite never notifying a single producer other than those identified in the petition of the existence of the investigation, the information that would be required of them, or the consequences of not fully complying with MOFCOM's requests. In so doing, MOFCOM did not disclose the essential facts and conclusions of law that led it to this result. MOFCOM provided no detail in its Final Determination and final disclosure documents with regard to the findings that led to its application of facts available. As a result of this lack of disclosure, the United States and other U.S. companies were deprived of any opportunity to defend their interests with respect to this issue. Consequently, China acted inconsistently with Articles 6.8, 6.9, 12.2, and 12.2.2 of the AD Agreement.

H. CHINA'S CONDUCT OF THE GOES INVESTIGATION BREACHED ARTICLE 1 OF THE AD AGREEMENT

44. Because China's conduct of the GOES investigation breached numerous other provisions of the AD Agreement, China also breached Article 1.

I. CHINA BREACHED ARTICLE VI:2 OF GATT 1994 BY LEVYING AN ANTI-DUMPING DUTY GREATER THAN THE MARGIN OF DUMPING

45. China impermissibly assigned an adverse facts available margin to other U.S. producers/exporters that China did not examine in this investigation. As a result of the adverse assumptions made in assigning that margin to those companies, the anti-dumping duty levied on their products was "greater in amount than the margin of dumping in respect of such products", which could permissibly have been calculated in accordance with the provisions of the AD Agreement. Because the duties China levied on these "all others" companies were, and continue to be, greater in amount than the appropriate margin of dumping, China violated Article VI:2 of GATT 1994.

J. THE PRICE EFFECTS ANALYSIS IN MOFCOM'S FINAL DETERMINATION WAS INCONSISTENT WITH CHINA'S WTO OBLIGATIONS

46. MOFCOM's price effects analysis in its injury determination was fundamentally flawed in many respects. MOFCOM failed to disclose essential facts supporting is price effects analysis. MOFCOM's price effects analysis was also not based on positive evidence. In conducting its price effects analysis, MOFCOM did not engage in an objective examination of the evidence, nor did MOFCOM offer an adequate explanation for its price effects findings. China therefore acted inconsistently with Articles 3.1, 3.2 , 6.9, and 12.2.2 of the AD Agreement, and Articles 12.8, 15.1, 15.2, and 22.5 of the SCM Agreement

K. THE CAUSATION ANALYSIS IN MOFCOM'S FINAL DETERMINATION IS INCONSISTENT WITH CHINA'S WTO OBLIGATIONS

47. MOFCOM's causation analysis in its injury determination was similarly deficient. MOFCOM failed to disclose facts supporting its causation analysis. The causation analysis was not supported by

positive evidence and was not based on an objective examination of the evidence. MOFCOM also failed to communicate an adequate explanation for its causation findings. Therefore, China acted inconsistently with Articles 3.1, 3.5, 6.9, and 12.2.2 of the AD Agreement, and Articles 12.8, 15.1, 15.5, and 22.5 of the SCM Agreement.

L. CHINA'S CONDUCT OF THE GOES INVESTIGATION BREACHED ARTICLE 10 OF THE SCM AGREEMENT

48. Because China's conduct of the GOES investigation breached numerous other provisions of the SCM Agreement, China also breached Article 10.

ANNEX A-2

EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION OF CHINA

A. THE PETITION AND INITIATION THEREOF WERE CONSISTENT WITH ARTICLES 11.2 AND 11.3 OF THE SCM AGREEMENT

1. In the underlying anti-subsidy proceeding, the applicants presented hundreds of pages of factual information relating to financial contribution, benefit, and specificity in support of their subsidy allegations. The information provided was that information reasonably available to the applicants. MOFCOM examined the allegations and accompanying factual information, and determined that although certain allegations did not warrant initiation of an investigation, there was a sufficient evidentiary basis to initiate on several other allegations. MOFCOM conducted an investigation of the allegations at issue. (Ultimately, none of the allegations at issue under this U.S. claim were determined to have provided countervailable benefits to the respondents.)

2. The U.S. claims merely reflect disapproval of the allegations found in the applications rather than a critique of the factual information supporting the allegations. Indeed, the United States is far too quick to assert without any evaluation that "the petition did not contain any evidence" of one or more elements of an actionable subsidy, when in fact such evidence existed, leaving in doubt whether the United States has advanced a *prima facie* case under Article 11

3. What the United States seeks is a different standard for applications than that found in Article 11 of the SCM Agreement, requiring a level of information, analysis, and disclosure simply not required by that provision. The consistent theme of prior panels in addressing this requirement is that applicants need only submit enough evidence to justify an investigation, and need not analyse that evidence or justify the ultimate conclusion. First, WTO dispute settlement panels have found that the initiation standard presents a relatively low threshold for applicants. Second, an application is sufficient if limited to providing relevant information; analysis is not a prerequisite. Third, an applicant is not required to provide within its application an exhaustive compendium of all relevant information reasonably available to it. The real question is whether the application contained sufficient information on the matters specified in Article 11, and by that standard whether initiation of the allegations at issue was proper. The evidence on the record of the proceeding, largely unaddressed by the United States in its claim, demonstrates that both the contents of the petition and initiation were proper.

4. China submits that the United States has failed to engage in a serious evaluation of the evidence that accompanied the application at issue. Because of that failure, the United States has failed to establish a *prima facie* case that the application was inconsistent with Article 11.2. Its entire case with respect to 11 separate allegations is confined to 11 perfunctory paragraphs that, to one extent or another, simply assert that "the petition did not contain any evidence" of one or more elements of an actionable subsidy. The United States made absolutely no reference to the information that accompanied the application with respect to many of the challenged allegations, when in fact each allegation was accompanied by specific documentary information beyond the assertions contained in the allegation itself. For the programmes where the United States actually mentioned accompanying evidence, it was only in passing with no serious critique of the information.

B. MOFCOM'S TREATMENT OF CONFIDENTIAL INFORMATION WAS FULLY CONSISTENT WITH THE REQUIREMENTS OF ARTICLE 6.5.1 OF THE AD AGREEMENT AND ARTICLE 12.4.1 OF THE SCM AGREEMENT

5. Article 6.5.1 and Article 12.4.1 do not require complete or perfect disclosure. They require only that a non-confidential summary – the public version of a document – be in "sufficient detail" to permit a "reasonable understanding" of the "substance" of the information. These provisions seek to strike a balance between the interests of the interested parties submitting confidential information and the interests of the other interested parties to be reasonably informed. Nonetheless, the text of the provisions recognizes that the balance must favour the submitter of confidential information, where summaries cannot adequately protect confidential information. The non-confidential summaries in the public version of the petition more than met this standard.

6. The U.S. argument focuses entirely on the statements made in part II of the petition, but completely ignores the non-confidential summaries provided in part I of the petition. Given the United States failure even to address the non-confidential summaries actually provided, China believes the United States has not made out a *prima facie* case of its claim. The fact that the Appendices do not repeat non-confidential summaries provided in the narrative of the public version of the petition does not create a violation of Article 6.5.1 or Article 12.4.1. One can have a "reasonable understanding" of the key issues and facts by reading the entire public version of the petition and there is no obligation on the authorities to require interested parties to repeat a non-confidential summary that has already been provided.

7. To the extent the Panel finds that adequate non-confidential summaries on any particular issues were not provided in the underlying proceeding, China believes that the central issue shifts to whether or not China dealt with the exceptional circumstances of this investigation properly in view of Article 6.5 and 6.5.1 and the so-called "due process" rights of the interested parties. The exceptional circumstance of having only two respondent companies in China permitted the authorities to invoke the "exceptional circumstance" provision of Articles 6.5.1 and 12.4.1 of the AD and SCM Agreements respectively in order to protect the confidentiality of the information submitted. Because the information was limited to two companies, the information provided was not susceptible to a more traditional confidential summary which aggregates the information from multiple companies, thereby protecting the confidentiality of individual company information.

C. MOFCOM'S APPLICATION OF FACTS AVAILABLE IN DETERMINING THE SUBSIDY MARGIN FOR THE GOVERNMENT PURCHASE OF GOODS PROGRAM WAS CONSISTENT WITH ARTICLE 12.7

8. In the underlying investigation MOFCOM made direct requests to the company respondents regarding information on all steel sales in the context of the government purchase of goods program. The respondents refused to respond to MOFCOM's requests in their initial questionnaire responses. After consulting and providing written guidance to both AK Steel and ATI on the matter, MOFCOM gave both companies ample opportunity to correct their responses. The companies again refused. In response, China declined to verify the deficient, untimely and unusable information provided, and instead applied "facts available" to both companies, finding that 100 per cent of sales took place under the programme. On the basis of these facts, the United States now argues that China improperly applied "facts available" in consideration of the government purchase of goods program. Looking to the language of Article 12.7 and guidance derived from parallel language under Article 6 of the AD Agreement, the United States claims that MOFCOM impermissibly ignored "necessary information" provided by the company respondents in the case.

9. China notes that the U.S. "facts available" claims appear rooted in a substantive disagreement over China's analysis of subsidy issues, but any substantive disagreement the United States has over

China's theory of subsidization and methodological choices with respect to the government purchase of goods program is not before this Panel. The Panel must evaluate the U.S. claim in light of China's approach to what it deemed to be necessary information, not in light of U.S. arguments about what should have been sufficient information. Properly framed, it is evident that MOFCOM's application of "facts available" was consistent with Article 12.7. The companies did not provide timely responses, did not cooperate to the best of their ability, and seriously impeded the investigation even when they knew as of the preliminary determination that MOFCOM was considering a 100 per cent utilization option.

10. MOFCOM knew the correct utilization of the programme was more than zero. MOFCOM also had a reasonable basis to believe the correct utilization was more than the 29 per cent alternative offered by AK Steel, since AK Steel had refused to provide requested information. Indeed, this alternative was filed on the same day – 30 December 2010 as the final AK Steel effort belatedly to respond to the MOFCOM request for information. Yet even at this late date, AK Steel still did not respond properly, and provided transaction data only for a subset of the customers that had been previously identified. Indeed, AK Steel did no more than submit data that it had readily available for months. So instead of making a good faith effort finally to respond to the request, AK Steel yet again decided it could pick and choose how and whether to respond. On the other hand, MOFCOM had no information with which it could determine some alternative more than the AK alternative but less than 100 per cent utilization, again in large part due to the refusal of ATI and AK Steel to provide complete information. MOFCOM's effort to elicit more complete cooperation had failed, and the facts to determine the actual level of utilization had still been withheld by the U.S. respondents. Thus, MOFCOM reasonably relied on the 100 per cent figure, consistent with Article 12.7 of the SCM Agreement.

11. Respondents who wilfully and strategically create a factual void during the course of an investigation should not be allowed to benefit from that non-cooperation under Article 12.7 of the SCM Agreement. To allow such an outcome would undermine the entire purpose of the investigation and allow respondents to manipulate the process by withholding unfavourable information in a calculated manner.

D. MOFCOM'S DISCLOSURE OF ITS DETERMINATION OF THE MARGINS OF DUMPING WAS CONSISTENT WITH THE REQUIREMENTS OF ARTICLE 12.2.2

12. There is no language in Article 12.2.2 that supports the U.S. contention that this provision requires authorities to provide respondents with the actual calculation of the margins of dumping. Article 12 is focused on providing an "explanation" of determinations; sufficient detail in this context would indicate that the disclosure be sufficient to constitute an adequate explanation of the authority's findings and conclusions, and what facts and law were relied upon in reaching such conclusions and findings. This is not a mandate to require full disclosure of all facts used to calculate the margins of dumping, but rather a more limited requirement to ensure an understanding of the methodology, facts used, and the results obtained with respect to the margins of dumping. All that is necessary is to provide interested parties to an investigation or review notice of determinations made by the authorities and an explanation of the determinations.

13. It is questionable whether the United States complaint regarding the disclosure of the actual numbers used and the actual calculations performed in the determination of the margins of dumping properly even lies under Article 12.2.2, which addresses final determinations, or Article 6.9 which addresses the disclosure of the essential facts forming the basis of the decision to apply definitive measures. Nevertheless, even if the United States were basing its complaint on Article 6.9, the language of the Article makes clear that its object and purposes is to provide the "essential facts" to enable interested parties "to defend their interests," not to provide the detailed facts demonstrating the

calculation of the margin of dumping. Moreover, even if Article 6.9 were properly before the Panel, the disclosure provided in Article 6.9 does not add to that required under Article 12.

14. Notwithstanding the absence of any requirement that the details of the calculation of the margins of dumping be disclosed, the disclosure by China in the instant investigation was sufficient to allow respondents to replicate the authority's calculation. China provides in Exhibits CHN-25 and CHN-26 tables listing each element of the calculation of normal value and export price or constructed export price used to calculate the margins of dumping for each of the two U.S. respondents, drawn from the source documents of the proceeding. Each respondent could go to the source information and reconstruct the exact calculation performed by MOFCOM to determine the margins of dumping. Thus, the respondents were in a position to check the accuracy of the MOFCOM calculation, and it is evident from comments filed by ATI during the proceeding that it clearly understood what information MOFCOM was using. Thus, the U.S. claim is without merit.

E. MOFCOM PROVIDED SUFFICIENT DETAIL ON ITS FINDINGS OF THE LACK OF A COMPETITIVE BIDDING PROCESS UNDER THE GOVERNMENT PURCHASE OF GOODS PROGRAM

15. Using record facts, MOFCOM's preliminary and final determinations plainly set forth why participation restrictions on foreign steel and price preferences afforded to U.S. steel resulted in prices that did not reflect competitive, market conditions under the government purchase of goods program.

16. Article 22.3 of the SCM Agreement establishes notification requirements at the preliminary and final stages of investigation with respect to those issues of fact and law considered material by the investigating authorities. Notifications, in "sufficient detail," should be provided in the preliminary and final determinations, or through a separate report. The object and purpose of the provision is to provide transparency and afford affected parties a reasonable understanding of the facts and analysis underlying an authority's determinations. Both the preliminary and final determinations issued by MOFCOM accomplished exactly this objective, contrary to U.S. claims.

17. In the preliminary determination, MOFCOM explained all the elements that led to its conclusion that bidding under the government purchases of goods program did not reflect market pricing. Contrary to U.S. claims, it also directly addressed arguments made by the United States that no benefits were conferred on any manufacturers of goods. Specifically, the preliminary determination noted: (1) bids by U.S. producers are afforded a 25 per cent price cushion over competing foreign prices, thus "competitive bidding" is really closed bidding among U.S. producers at artificial start prices; (2) to the extent foreign suppliers are exempted from the 25 per cent price preference for U.S. products under the Government Procurement Agreements, others remain subject to that restriction, with certain states prohibiting any foreign participation and expressly limiting competition to U.S.-made steel; and (3) because of these features, the price obtained through this so-called "competitive bidding does not reflect true market conditions."

18. In the final determination, MOFCOM's explanation expanded upon that offered in the preliminary determination. MOFCOM not only quantified the amount of foreign steel excluded from Buy American projects as part of U.S. consumption, but also quantified the price difference between North American prices and non-North American prices based on the submissions of AK Steel. As discussed in the final determination, what that factual information showed is that the prices of excluded products were lower than the North American price. Finally, MOFCOM presented evidence from verification noting the extremely limited use of foreign products within Buy American projects. Combined with what was already explained about price preferences and general exclusions, this information confirmed the lack of a competitive market, and a market that was otherwise weighted toward higher priced U.S. steel.

F. MOFCOM'S DETERMINATION OF THE "ALL OTHERS" CVD RATE WAS CONSISTENT WITH ARTICLES 12.7 AND 12.8 OF THE SCM AGREEMENT

19. In the underlying investigation, MOFCOM provided direct notice to the participating respondents, including the U.S. Government, AK Steel, and ATI. It also placed a copy of the received petition in its public reading room and published public notices of initiation. To MOFCOM's knowledge, notice was thereby given to each known interested party as defined by Article 12.9 of the SCM Agreement of the implications of initiation and the consequences for failing to cooperate with the investigation.

20. In terms of the facts selected by MOFCOM in calculating the "all others" CVD rate, as indicated in the final determination, MOFCOM relied upon information provided by the petitioner. Notice and thereby disclosure was given to all known producers/exporters. With respect to disclosure of the facts upon which the all others rate was based, the final determination disclosed that it was based upon information provided by the petitioners. Specifically, the final determination stated: "{f}or other U.S. companies who did not register nor submit the questionnaire responses, the Investigating Authority made a determination on ad valorem subsidy rate based on the information submitted by the petitioner pursuant to Article 21 of the Regulations on Countervailing Measures." There was little mystery to which information this statement referred, and the United States appears to have readily identified the source from the record based on that statement. The information provided the facts and calculations upon which the all others rate based.

G. MOFCOM'S DETERMINATION OF THE "ALL OTHERS" AD RATE

21. In the underlying GOES investigation, MOFCOM followed the general rule set forth in Article 6.10 of the AD Agreement which establishes that authorities "shall, as a rule, determine an individual margin of dumping for each known exporter or producer concerned of the product under investigation." Since MOFCOM conducted an individual examination of the margins of dumping of each known exporter/producer, the rule for determining the margin of dumping for non-individually examined exporters/producers in Article 9.4 of the AD Agreement does not apply in determining an "all others" rate. Neither Article 6.10 nor any other provision of the AD Agreement addresses the issue of the treatment of exporters/producers that are not "known" to the authority and cannot, therefore, be individually examined.

22. Pursuant to MOFCOM's notification to all producers/exporters consistent with Article 6.1 of the AD Agreement, China determined that the most relevant provision of the AD Agreement to address the issue of the antidumping rate for unknown and unresponsive exporters/producers was Article 6.8 of the AD Agreement which addresses the treatment of interested parties who do not provide the "necessary information" required by the authority. In applying Article 6.8, the authority based its margin of dumping on paragraph 7 of Annex II. This was done since an "all others" rate based on the rate applied to one or both of the cooperating respondents, would provide no incentive for unknown companies to make themselves known and participate in the investigation. Thus, the application of Article 6.8 and the last sentence of paragraph 7 of Annex II were intended to encourage realization of the objectives of Article 6.10, namely to enable China to follow the general rule of determining margins of dumping for each individual producer/exporter.

23. In the preliminary determination, the margins of dumping used for the "all others" rate was based on the margins alleged and contained in the petition. However, because the information on which the final determination of the "all others" rate was based was confidential information of one of the responding companies, the actual information used to determine this rate could not be disclosed without breaching the confidentiality of the information used. Thus, the explanation was necessarily general in nature. The failure to disclose the details of the calculation of the "all others" rate had no effect on the ability of parties to defend their interests. So long as the "all others" rate is based on

record evidence, it is not clear that in the situation where parties do not cooperate that the authority's discretion is limited.

H. MOFCOM'S INVESTIGATION DID NOT BREACH ARTICLE 1 OF THE AD AGREEMENT

24. In the sections above, China has addressed in full each of the United States' substantive claims concerning China's alleged breaches of the AD Agreement. To the extent China has addressed all of the substantive claims raised by the United States and acted consistently with its obligations under the AD Agreement, the United States' Article 1 claim lacks merit and should be set aside.

I. CHINA'S AD MEASURE DID NOT BREACH ARTICLE VI:2 OF GATT 1994

25. The United States claims that the circumstances surrounding China's assignment of the "all others" rate in the underlying proceeding breached Article VI:2 of GATT 1994. China has addressed the United States substantive arguments with respect to the "all others" AD margin. We refer the Panel to the discussion above in Section G.

J. MOFCOM PROPERLY ANALYSED THE ADVERSE PRICE EFFECTS FROM THE SUBJECT IMPORTS

26. At the outset, it is important to note the MOFCOM findings not being challenged by the United States. The United States has made no challenge to the MOFCOM findings of adverse volume effects. The United States has also made no challenge to the MOFCOM findings regarding cumulation, which means that subject imports from both the United States and Russia must be considered together and the behaviour of the U.S. producers themselves (individually or together) is not legally relevant to the analysis. Finally, the United States has made no challenge to the MOFCOM findings of material injury. The U.S. challenges are limited to the price effects, and the causal link.

27. The U.S. arguments focus heavily on price undercutting findings that MOFCOM did not make, and largely misstate and mischaracterize the price suppression and price depression analysis that MOFCOM did make. MOFCOM properly found that in the face of an increasing volume of subject imports that gained significant market share, domestic prices began to show the effects of price suppression and depression during 2008, and those effects continued and worsened in early 2009. The record provides strong positive evidence for the MOFCOM findings of price suppression and depression during 2008 and 2009, evidence that was not challenged at all during the administrative proceedings before MOFCOM and evidence that the United States has not effectively challenged in its submission to this Panel.

28. MOFCOM did not make specific price undercutting findings, nor was it under any legal obligation to do so, contrary to U.S. arguments. The texts of Article 3.2 and Article 15.2 -- through the key term "or" -- make clear that price undercutting is simply one alternative methodology that the authorities may consider as part of evaluating price effects. This interpretation is reinforced by the term "otherwise" that the United States left out of its quote from these texts – "whether the effect of such imports is otherwise to depress prices to a significant degree or prevent price increases." (emphasis added) Both the use of "or" and the use of "otherwise" confirm that price undercutting is optional, not mandatory. This interpretation has been adopted by other panels.

29. MOFCOM also disclosed all of the "essential facts" as required by Article 6.9 and Article 12.8. This disclosure occurred in two key documents. First, MOFCOM presented a Preliminary Determination on 10 December 2009, which included extensive discussion of injury issues in general, and pricing issues in particular. Second, MOFCOM also presented a Final Injury

Disclosures on 7 March 2010, which presented the essential facts and provided initial responses to those arguments that had been made so far during the administrative proceedings. These two documents contained all of the "essential facts" on which China ultimately relied in its Final Determination.

30. In making its disclosure argument, the United States has completely ignored the authority's obligation to protect the confidentiality of information. The United States cites to the procedural requirement to disclose, but conveniently overlooks the fact that this obligation occurs in the context of the parallel requirement to protect the confidentiality of proprietary information. This requirement can be seen in Article 6.5 and Article 12.4, which discuss the obligation to protect confidentiality. This requirement can also been seen in Article 12.2.2 and Article 22.5, which discuss the obligation of disclosure, but with "… due regard being paid to the requirements for protection of confidential information." On balance, the United States has not identified any specific piece of information that was both an "essential fact" and could be disclosed while maintaining confidentiality. Such a failure has often been the basis for dismissing such claims as not stating a *prima facie* case.

31. Beyond complaining about the disclosure of "essential facts," the United States also complains about the "reasons" provided by MOFCOM. Contrary to the U.S. argument, MOFCOM has provided the "relevant information" and "reasons" required by Article 12.2.2 and Article 22.5. The authority's obligation is not to address every detail of every argument raised by the parties, in the specific terms provided by those parties. MOFCOM developed its response that the growing volume of subject imports in 2008 and early 2009 caused price suppression and price depression in those years. That complete explanation of its "reasons" satisfies the obligations of Article 12.2.2 and Article 22.5.

32. Overall, China believes that its analysis of adverse price effects fully complied with the substantive and procedural requirements of the relevant Agreements. If the Panel were to disagree, China asks the Panel to confirm MOFCOM's overall finding of causation was still proper. Since MOFCOM based its analysis of causation on both volume effects and price effects, those price effects can support an overall finding of causation, even if they might not have been sufficient to justify finding a causal link on their own. U.S. arguments to the contrary are without merit, resting on an incorrect assumption that the WTO agreements "require an authority to undertake a price effects analysis." Article 3.1 and Article 15.1 require only two findings: an initial finding about volume/price effects, and then a finding about the "consequent impact" of those effects. An authority can thus "examine" both the volume and price effects, but ultimately decide to base its decision on whatever balance of volume effects and price effects appropriate in a specific case, and the "consequent impact" of those subject imports. The United States has not challenged the MOFCOM findings of volume effects, nor has the United States challenged the MOFCOM findings of material injury. If the Panel agrees that MOFCOM has properly established a causal link between that subject imports and the condition of the domestic industry, that should be sufficient even if the price effects analysis alone would not have supported a finding of causal link.

K. MOFCOM PROPERLY ANALYSED THE WAYS IN WHICH SUBJECT IMPORTS CAUSED THE MATERIAL INJURY SUFFERED BY THE DOMESTIC INDUSTRY

33. On causal link, the United States presents only a single paragraph discussing causal link more generally, and that paragraph simply refers back to the U.S. arguments about price effects. The United States seems to believe that the absence of price effects automatically established the lack of a WTO consistent causal link. Legally, the United States is wrong. Adverse price effects alone are not a "necessary element" of the causal link. The U.S. argument also conveniently ignores the extent to which MOFCOM based its analysis on <u>both</u> the volume effects and the price effects. MOFCOM never considered the price effects in isolation; they were part of any overall analysis that the increasing volumes of low priced subject imports were causing material injury to the Chinese

industry. The United States has thus failed to demonstrate any inconsistency between MOFCOM's analysis and the requirements of Article 3.1 and Article 15.1 to find a causal relationship between subject imports and the condition of the domestic industry.

34. With respect to non-attribution, the primary U.S. argument is a challenge based on a single "other cause" of injury -- the expansion of Chinese capacity -- that the United States believes was not adequately addressed, and somehow severed by itself the causal link that MOFCOM had found. In making its argument, China notes that the United States ignores the degree of discretion authorities have to address alternative causes. Article 3.5 and Article 15.5 do not specify any particular methodology, and thus leave authorities with discretion as to how best to ensure a genuine causal link, even given the effects of other causes. The United States also mischaracterizes the nature of the legal obligation. The issue is not whether increases in capacity "could not have contributed" to the injury. MOFCOM need not disprove any possible effect of any other known factor that might also be affecting the domestic industry. Rather, the issue is whether subject imports contributed sufficiently to the adverse condition of the domestic industry, and whether the effect of the other factor was so dramatic as to nullify that contribution by subject imports, and thus sever the causal link.

35. The burden is on the United States as the complaining party to establish a *prima facie* case that the effects of increased domestic capacity were so dramatic that they severed any possible causal link between the subject imports and the condition of the domestic industry. The United States has failed to meet that burden. It reduces to a single other factor and a series of failed efforts to attack the reasons given by MOFCOM for finding that capacity expansion did not sever the causal link. But the respondents below provided no evidence for the U.S. theory, and the logic presented ultimately failed. The record before MOFCOM demonstrated that:

- Production capacity increased, but never exceeded total Chinese consumption.

- Even though the domestic industry added capacity, it did not actually use all of that new capacity and instead capacity utilization rates fell.

- Subject imports increased sharply in 2008 (up 61 per cent) and early 2009 (up 24 per cent), were growing faster than the overall market, and were gaining market share.

- The large and increasing volume of subject imports suppressed domestic shipments, and this subject import volume (which also happened to be at low prices) prevented the domestic industry from taking advantage of its new capacity.

Based on these facts, MOFCOM properly dismissed the possibility that the expansion of domestic capacity severed the causal link that MOFCOM had found.

36. Finally with respect to the issue of non-subject imports, China disclosed the "essential facts" of the case. The Preliminary Determination identified "products imported from other countries" as an "other factor" being analysed, and noted that subject imports were capturing a larger share of the total imports. This provided both notice that China was addressing non-subject imports, and that subject imports were gaining share of total imports. Other parts of the notice also addressed non-subject imports.

37. Having made this basic point in the Preliminary Determination, the interested parties made no further arguments on this issue. They could have developed information publicly – as the United States concedes in fn. 295 of its submission – but did not do so. Having provided the "essential facts," and having received no arguments on this point, China did not need to develop this issue further in the absence of arguments from the parties.

38. Finally, the U.S. argument that MOFCOM did not provide any "factual substantiation" for its conclusions, is just wrong. The demonstration that non-subject imports gained only 0.09 percentage points of market share is factual substantiation. Moreover, MOFCOM provided more than adequate discussion of this issue in light of the failure by the parties to use the publicly available information to develop any arguments on this point.

L. CHINA'S OBLIGATIONS UNDER ARTICLE 10 OF THE SCM AGREEMENT

39. The United States claims that China breached its obligations under Article 10 of the SCM Agreement based on its substantive arguments under various other provisions of the Agreement and GATT 1994. To the extent China's has demonstrated that its actions are consistent with the provisions of Article VI of GATT 1994 and the terms of the SCM Agreement as raised by the United States, this U.S. Article 10 claim should be rejected.

ANNEX B

WRITTEN SUBMISSIONS, OR EXECUTIVE SUMMARIES THEREOF,
OF THE THIRD PARTIES

ANNEX B-1

EXECUTIVE SUMMARY OF THE THIRD PARTY
WRITTEN SUBMISSION OF ARGENTINA*

I. INTRODUCTION

1. In this third-party submission, Argentina is setting out its views on some of the issues that form part of this dispute, in accordance with the written submissions to this Panel by the United States and China.

II. UNDER ARTICLE 6.5 OF THE AGREEMENT ON IMPLEMENTATION OF ARTICLE VI OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE 1994 ("AD AGREEMENT") AND ARTICLE 12.4 OF THE AGREEMENT ON SUBSIDIES AND COUNTERVAILING MEASURES ("SCM AGREEMENT"), GOOD CAUSE MUST BE SHOWN FOR THE CONFIDENTIALITY OF INFORMATION AND A NON-CONFIDENTIAL SUMMARY MUST BE FURNISHED TO THE INTERESTED PARTIES

2. Articles 6.5 and 6.5.1 of the AD Agreement and Article 12.4.1 of the SCM Agreement require the submission of non-confidential summaries, so as to enable the interested parties or Members to gain "a reasonable understanding of the substance of the information submitted in confidence". The aim, ultimately, is to guarantee the right of defence to the interested parties, who otherwise would lack sufficient information to understand the grounds of the accusation that they face.

3. The WTO has had the opportunity to give its opinion on this subject in "*United States - Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*" (WT/DS268/RW). The Panel in that case held that "*[a]s we noted above, Article 6.5.1 protects the right of the interested parties generally to be reasonably informed about the substance of the confidential information that may be submitted by any other interested party. What matters for purposes of Article 6.5.1 is whether the interested parties themselves receive non-confidential summaries of the confidential information submitted to the investigating authorities*".[1]

4. Argentina therefore agrees with the view expressed by the United States in point B of its written submission to the effect that the Chinese Ministry of Commerce (MOFCOM), in accordance with the above-mentioned Articles 6.5.1 of the AD Agreement and 12.4.1 of the SCM Agreement, should have required the interested parties submitting confidential information in the investigation to furnish non-confidential summaries thereof, especially in cases where the submitting parties had shown no cause for the impossibility of summarization.

III. NON-ATTRIBUTION ANALYSIS WITH RESPECT TO OTHER FACTORS IN THE DETERMINATION OF INJURY

5. Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement show that, prior to its determination as to whether imports at dumped or subsidized prices are the cause of the difficulties experienced by the domestic industry, an investigating authority should carry out the so-called non-attribution analysis, whereby consideration has to be given to factors other than known factors

* This written statement was originally made in Spanish.

[1] *United States - Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina* (WT/DS/268/RW), paragraph 7.137.

and a determination made as to whether they contribute to the injury suffered by the domestic industry.

6. In this connection, Argentina is of the opinion that it is also clear from the above-mentioned rules that the Agreements under interpretation require no evidence that imports from other countries considered as "known factors" within the meaning of Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement are dumped or subsidized imports. In our view, therefore, even in the absence of dumping or subsidization or where the prices and/or quantity of those commercial operations are such as to cause injury to the domestic industry, it might be necessary for the investigating authority to examine whether, in the light of their volume and/or prices, imports from sources other than the one under investigation are substantial enough to break the causal link between the dumped imports and the injury determined. In that examination, it might also be necessary to consider qualitative issues relating to the forms of competition in each of the markets.

IV. CONCLUSION

7. In the light of the analysis contained in this submission, Argentina considers that:

- The "confidential" classification of information submitted by any party in the dumping or subsidy investigation must be justified by good cause; in that event, it is of the utmost importance that, except in duly attested exceptional circumstances, non-confidential summaries are to be furnished, so as to guarantee the right of defence to the interested parties.

- In the determination of injury, the investigating authority shall effect a non-attribution analysis relating to "other known factors" which may be a contributing cause of the difficulties faced by the domestic industry.

ANNEX B-2

EXECUTIVE SUMMARY OF THE THIRD PARTY
WRITTEN SUBMISSION OF THE
EUROPEAN UNION

I. INTRODUCTION

1. The European Union (EU) intervenes in this dispute because of its interest in the correct interpretation of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994"), the *Agreement on Subsidies and Countervailing Measures* ("*SCM*") and the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade* ("Anti-Dumping Agreement" or "ADA").

II. CONCERNING THE ALLEGATION THAT MOFCOM FAILED TO REQUIRE ADEQUATE NON-CONFIDENTIAL SUMMARIES CONTRARY TO ARTICLE 12.4.1 SCM AND ARTICLE 6.5.1 ADA

2. In its First Written Submission the U.S. submits that China breached Article 12.4.1 SCM and Article 6.5.1 ADA because it failed to require non-confidential summaries of allegedly confidential information.

3. Prior WTO panels clarified the importance and the outer boundaries of the obligation imposed by Article 6.5.1 ADA and its parallel provision in the SCM Article 12.4.1. The EU is of the view that not even the minimum transparency requirements of Article 6.5.1 ADA or Article 12.4.1 SCM can be considered to have been met in cases where non-confidential summaries were not provided to nor requested by the investigating authority and no statement of reasons stating the exceptional circumstances that render the confidential information unsusceptible to summarisation in non-confidential format has been provided to the investigating authorities.

III. CONCERNING THE ALLEGATION THAT MOFCOM FAILED TO MAKE AVAILABLE THE CALCULATIONS IT PERFOMED TO ARRIVE AT THE DUMPING MARGINS CONTRARY TO ARTICLE 12.2.2 ADA

4. In its First Written Submission the U.S. argues that China breached Article 12.2.2 ADA because it failed to make available to AK Steel and ATI the calculations and data used to determine these companies' final dumping margins. Whilst not taking a position on the facts of this case, the EU agrees with the U.S. that under Article 12.2.2 ADA, the investigating authority is required to include, or make available through a separate report, all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures in the public notice of conclusion of an investigation in the case of an affirmative determination providing for the imposition of a definitive duty.

5. The EU further notes that in order to provide interested parties with the opportunity to review the essential facts and provide meaningful comments, the ADA requires the investigating authority to disclose essential facts already under consideration before the final determination is made. According to the U.S., MOFCOM did not make the calculations, and the data underlying those calculations, available in its Final Disclosure. In general terms, even where calculations, and the data underlying those calculations, have already been made available at the stage of disclosure, any revision or modification of the calculations, and the data underlying those calculations, after the final disclosure would, in accordance with Article 12.2.2 ADA, have to be set out and explained in the public notice or through a separate report.

IV. CONCERNING THE ALLEGATION THAT MOFCOM APPEARS TO HAVE APPLIED A RATE THAT INCORPORATES PROGRAMS SPECIFICALLY FOUND NOT TO BE COUNTERVAILABLE

6. In its First Written Submission the U.S. alleges that China based the All Others' Rate on rates from the petition, which included rates for subsidies which were subsequently found to be non-countervailable.

7. The inclusion in the calculation of the All Others' Rate of programmes alleged in the petition, which were during the investigation found not to be countervailable by the investigating authority itself, would in the view of the EU amount to abusive use of facts available incompatible with Article 12.7 SCM interpreted with its relevant context.

V. CONCERNING THE ALLEGATION THAT CHINA ACTED INCONSISTENTLY WITH ARTICLE 12.8 OF THE SCM BY FAILING TO DISCLOSE THE ESSENTIAL FACTS UNDER CONSIDERATION REGARDING ITS CALCULATION OF THE "ALL OTHERS" SUBSIDY RATE

8. In its First Written Submission the U.S. alleges that China breached Article 12.8 SCM by failing to disclose the essential facts under consideration forming the basis of the All Others Subsidy Rate.

9. The EU agrees with the U.S. that: (i) facts that led the investigating authority to conclude that resorting to the use of the facts available was appropriate; (ii) facts that led the investigating authority to conclude that the subsidy rate as determined was an appropriate rate applicable to all other companies; (iii) facts underpinning the calculation of the subsidy rate as determined, and the details of the calculation itself; in general terms constitute essential facts forming the basis of the All Others Subsidy Rate within the meaning of Article 12.8 SCM and should as such be disclosed before a final determination is made.

VI. CONCERNING THE ALLEGATION THAT CHINA ACTED INCONSISTENTLY WITH ARTICLE 6.9 ADA BY FAILING TO DISCLOSE THE ESSENTIAL FACTS UNDER CONSIDERATION REGARDING ITS CALCULATION OF THE "ALL OTHERS" DUMPING RATE

10. The U.S. alleges that MOFCOM did not identify the essential facts that formed the basis for its imposition of a 64.8 per cent All Others Dumping Rate contrary to China's obligation under Article 6.9 ADA.

11. The EU agrees with the U.S. that: (i) facts that led the investigating authority to conclude that the All Others Dumping Rate as determined was an appropriate rate applicable to all other companies, especially considering that the dumping rates for the two companies identified in the notice of investigation were substantially lower than the determined all others dumping rate; (ii) particular "transaction information" from the two respondents that formed the basis for the All Others Dumping Rate as determined; (iii) facts underpinning the calculation of the All Others Dumping Rate, and the details of the calculation itself; in general terms constitute essential facts forming the basis of the All Others Dumping Rate within the meaning of Article 6.9 ADA and should as such be disclosed before a final determination is made.

VII. CONCERNING THE ALLEGATION THAT THE PRICE EFFECTS ANALYSIS IN MOFCOM'S FINAL DETERMINATION WAS INCONSISTENT WITH CHINA'S WTO OBLIGATIONS

12. The United States alleges[1] that MOFCOM did not (1) disclose several pieces of information critical to its price effects analysis, which is contrary to Article 6.9 ADA and Article 12.8 SCM; (2) in either the Final Determination or the injury disclosure document, provide any factual information or indeed reasoning to support its conclusion that import prices were lower than domestic producers' prices, thus infringing Article 12.2.2 ADA and Article 22.5 SCM; and (3) disclose evidence of significant price effects, which is in breach of Articles 3.1 and 3.2 ADA and Articles 15.1 and 15.2 SCM.

13. Concerning the alleged breach of Article 6.9 ADA and Article 12.8 SCM on the basis of the information available to the European Union it seems that disclosure[2] did not include any information about price levels for the domestically produced products. The information provided on page 8 of Exhibit US-27 indicates only the relative increase of the price of the products without indicating any price levels. Therefore, should the United States' allegations be confirmed, the European Union agrees with the United States' submission that MOFCOM's failure to disclose numerous facts central to its price effects analysis is inconsistent with Article 6.9 ADA and Article 12.8 SCM.

14. Concerning the alleged breach of Article 12.2.2 ADA and Article 22.5 SCM, if the United States' allegations are confirmed, the European Union agrees with the United States' submission that MOFCOM's failure to provide (1) a meaningful description of numerous facts critical to the price effects analysis; and (2) a substantiated response to the parties' arguments, breach Article 12.2.2 ADA and Article 22.5 SCM.

15. Concerning the alleged breach of Articles 3.1 and 3.2 ADA; and Articles 15.1 and 15.2 SCM were the Panel to establish that MOFCOM's response in the Final Measure to exporters' arguments submitted during the administrative procedure is insufficient and/or not based on sufficient evidence, the European Union agrees with the United States' submission that MOFCOM's failure to provide (1) a meaningful description of numerous facts critical to the price effects analysis; and (2) a substantiated response to the parties' arguments breach of Article 12.2.2 ADA and Article 22.5 SCM.

VIII. CONCERNING THE ALLEGATION THAT THE CAUSATION ANALYSIS IN MOFCOM'S FINAL DETERMINATION WAS INCONSISTENT WITH CHINA'S WTO OBLIGATIONS

16. Given the flawed price effects analysis MOFCOM could not possibly accomplish a correct causal link analysis. Indeed, unless imports have proven significant price effects, the investigating authorities cannot find such imports to be causing injury within the meaning of Article 3.1 ADA, first sentence; and Article 15.1 SCM.

17. Therefore, on the basis of the information presently before it, the European Union agrees with the United States' submission that MOFCOM has not complied with Article 6.9 ADA and Article 12.8 SCM in that it has provided no information whatsoever on imports from sources other than Russia and the United States.

[1] Ibid, paras. 186 et seq.
[2] See Exhibit US-27.

IX. CONCLUSIONS

18. The EU considers that this case raises important questions on the interpretation of Articles 15.1, 15.2, 12.4.1, 12.7 and 22.5 of the Agreement on Subsidies and Countervailing Measures and Articles 3.1, 3.2, 6.5.1, 6.8, 6.9 and 12.2.2 of the Anti-Dumping Agreement. While not taking a final position on the merits of the case, the EU requests this Panel to carefully review the scope of the claims in light of the observations made in this submission.

19. The EU reserves its right to make further comments at the third party session of the first substantive meeting with the Panel.

ANNEX B-3

THIRD PARTY WRITTEN SUBMISSION
OF HONDURAS[*]

I. INTRODUCTION

1. Honduras is participating in this dispute for reasons of systemic interest and because it considers that there is a need for proper interpretation of specific provisions of the WTO Agreements at issue.

2. In this third-party submission, therefore, Honduras is setting out its views on the legal interpretation of two of the issues that are the subject of this dispute, namely: (i) the requirements for initiation of an investigation on countervailing measures, pursuant to Articles 11.2 and 11.3 of the Agreement on Subsidies and Countervailing Measures (the "SCM Agreement"); and (ii) the requirements for the submission of confidential information, pursuant to Article 12.4.1 of the SCM Agreement and Article 6.5.1 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the "AD Agreement").

3. Honduras wishes to state that it reserves the right subsequently to submit its views on other issues or to elaborate on the comments concerning the two matters addressed in this submission, either at the oral statements stage or when the members of the Panel deem appropriate.

II. INITIATION OF INVESTIGATION BASED ON SUFFICIENT AND RELEVANT EVIDENCE UNDER ARTICLES 11.2 AND 11.3 OF THE SCM AGREEMENT

4. Article 11.2 of the SCM Agreement states that an application for initiation of an investigation in a proceeding on countervailing measures must contain:

> sufficient evidence of the existence of (a) a subsidy and, if possible, its amount; (b) injury within the meaning of Article VI of GATT 1994 as interpreted by this Agreement; and (c) a causal link between the subsidized imports and the alleged injury.

5. In addition, Article 11.2 of the SCM Agreement specifies that "simple assertion, unsubstantiated by relevant evidence", is not sufficient to meet the requirements of "sufficient evidence".

6. Furthermore, Article 11.3 of the SCM Agreement provides that:

> the authorities shall review the accuracy and adequacy of the evidence provided in the application to determine whether the evidence is sufficient to justify the initiation of an investigation.

7. The above-mentioned provisions lay down two obligations for the initiation of the investigation, both designed to obtain sufficient evidence. The first obligation pertains to the application and, in particular, the nature of the attached evidence. The second obligation falls on the investigating authority. The requirement that the evidence should be sufficient means, in part, that it should be relevant, adequate or appropriate - otherwise the investigating authority would have to

[*] This written statement was originally made in Spanish.

request the applicant to complete the application so that it complies with this provision. Without verifying such compliance, the investigating authority would not even be able to initiate the investigation procedure by reason of the *a fortiori* interpretation of Article 5.8 of the AD Agreement and Article 11.9 of the SCM Agreement.

8. The Panel in *US - Hot-Rolled Steel* stated that the expression "sufficient evidence" under Article 5.3 requires an examination as to "whether the evidence before the authority at the time it made its determination was such that an unbiased and objective investigating authority evaluating that evidence could properly have made the determination".[1] Therefore, the assessment criterion must pertain to the accuracy and relevance of the respective evidence in the light of the mandate to carry out an impartial and objective examination.

9. In the report of the Panel on *US - Softwood Lumber*, it was stated that the term "sufficient evidence" could not be taken to mean just "any evidence", since there has to be a factual basis to the decision of the investigating authority which is susceptible to review.[2]

10. It is clear from the foregoing that the evidence must contain a factual basis. In other words, the evidence submitted must be concrete evidence relating to the required elements of subsidization, injury and a causal link between subsidized imports and the alleged injury.

III. NON-CONFIDENTIAL SUMMARIES UNDER ARTICLE 12.4.1 OF THE SCM AGREEMENT AND ARTICLE 6.5.1 OF THE AD AGREEMENT

11. Article 12.4.1 of the SCM Agreement stipulates that the authorities shall require "interested parties providing confidential information to furnish non-confidential summaries thereof". It adds that:

> "[t]hese summaries shall be in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence. In exceptional circumstances, such Members or parties may indicate that such information is not susceptible of summary. In such exceptional circumstances, a statement of the reasons why summarization is not possible must be provided".

12. Article 6.5.1 of the AD Agreement sets out the same obligations with respect to the handling of non-confidential summaries in the context of anti-dumping investigation proceedings.

13. The above-mentioned provisions are unequivocal. In both cases they require that the investigating authorities should in turn require the interested parties to furnish non-confidential summaries when submitting information which they consider to be confidential. If a non-confidential summary of such information is not provided, it is not possible to gain an understanding of the substance of the information that has been removed or deleted from the document or documents containing confidential information. Failure to fulfil this obligation adversely affects compliance with the principle of defence and due process in an investigation procedure, and may affect the impartiality and neutrality of the investigating authority.

IV. CONCLUSION

14. In the light of the foregoing, we consider that the Panel should assess whether the investigating authority verified that sufficient evidence was provided on the elements required for the initiation of the investigation and whether the same authority satisfied itself that the evidence in

[1] Panel Report, *US - Hot-Rolled Steel*, paragraph 7.153.
[2] Panel Report, *US - Softwood Lumber*, paragraph 7.55.

question met the requirement of adequacy and accuracy as justification for the initiation of the investigation.

15. We likewise consider that the Panel should confirm the compulsory nature of the requirement that non-confidential summaries must be provided when an interested party submits confidential information, with a view to guaranteeing respect for due process and the impartiality and neutrality of the investigation.

ANNEX B-4

EXECUTIVE SUMMARY OF THE THIRD PARTY
WRITTEN SUBMISSION OF JAPAN

I. INTRODUCTION

1. In this third party submission, Japan would like to present its views on systemic aspects of the following issues: (a) disclosure of essential facts before the final determination under Article 6.9 of the *AD Agreement* and Article 12.8 of the *SCM Agreement*; (b) final determinations under Article 12.2.2 of the *AD Agreement* and Articles 22.3 and 22.5 of the *SCM Agreement*; and (c) the determination of the all others rates based on facts available under Article 6.8 of the *AD Agreement* and Article 12.7 of the *SCM Agreement*.

II. DISCUSSION

A. DISCLOSURE OF ESSENTIAL FACTS BEFORE THE FINAL DETERMINATION UNDER ARTICLE 6.9 OF THE *AD AGREEMENT* AND ARTICLE 12.8 OF THE *SCM AGREEMENT*

1. The Investigating Authority's Obligation to Disclose the Essential Facts before the Final Determination

2. The respective first sentences of Article 6.9 of the *AD Agreement* and Article 12.8 of the *SCM Agreement* provide that the authorities must disclose the "essential facts under consideration which form the basis for the decision whether to apply definitive measure." This obligation must be distinguished from providing interested parties the opportunity to see all information under Article 6.4 of the *AD Agreement* and Article 12.3 of the *SCM Agreement*. The authorities must identify the particular "essential facts" among all relevant information in the anti-dumping or countervailing investigation.

3. Japan recalls that essential facts "form the basis for the decision whether to apply definitive measure." In this respect, Japan agrees with the panel in *Mexico – Olive Oil*, which correctly described them to be "the specific facts that underlie the investigating authority's final findings and conclusions in respect of the three essential elements – subsidization, injury and causation".[1] The same rationale should apply to the essential facts for the decision whether to apply definitive anti-dumping measures because the provision of Article 6.9 of the *AD Agreement* is substantively identical to the provision of Article 12.8 of the *SCM Agreement*. Further, Article VI:1 of GATT 1994 provides that, in the case of an anti-dumping investigation, essential elements would be the existence of dumping, injury to the domestic industry, and causation.

2. Disclosure of Information on Price Effects in Connection with the Finding on Causation

4. The United States argues that MOFCOM disclosed "no data on levels of prices for the domestically produced product" and did not "disclose the results of any pricing comparisons between the domestically produced product and the imports"[2] and that non-disclosure of these facts is inconsistent with Article 6.9 of the *AD Agreement* and Article 12.8 of the *SCM Agreement*.

[1] Panel Report, *Mexico – Olive Oil*, para. 7.110. (WT/DS341/R)
[2] US FWS, para. 195.

5. Article 3.5 of the *AD Agreement* and Article 15.5 of the *SCM Agreement* provide that the causation must be demonstrated through the effects of dumping and subsidies as set forth in paragraphs 2 and 4 of these Articles. The factual finding by the investigating authorities of the price effects is "the specific facts that underlie the investigating authority's final findings conclusions in respect of … causation".[3]

6. In the final determination, MOFCOM appears to make certain price comparisons.[4] Such price comparisons appear to have resulted in the fact finding by the MOFCOM on the effects of the price of imports to the price of the domestically-produced product.

7. The authorities' choice of prices among raw price data, and its choice of the method to compare these prices would be a part of the process of the fact finding of the price effects. For exporters/producers and the exporting Member, the disclosure of such comparisons would be indispensable to argue effectively whether and how the authorities accurately and correctly found the effects of the price of imports to the price of the domestically-produced product. The results of pricing comparisons, therefore, are the type of "facts" that Article 6.9 of the *AD Agreement* and Article 12.8 of the *SCM Agreement* envisage to require disclosure to the interested parties. Japan notes that raw price data, however, is different from the price comparisons between the domestically-produced product and the imports. Such data would have to be made available under Article 6.4 of the *AD Agreement* and Article 12.3 of the *SCM Agreement.* Finally, it should be noted that certain price information might not be disclosed to interested parties because of its confidentiality.

3. Information Concerning Non-Subject Imports

8. The United States argues "MOFCOM disclosed no information concerning the volume or prices of imports from sources other than Russia and the United States"[5] in making the determination that there is no evidence suggesting that GOES imported from other countries or regions caused material injury to China's domestic industry[6] in both the preliminary determination and the final determination.

9. Article 3.5 of the *AD Agreement* and Article 15.5 of the *SCM Agreement* provide that authorities must examine any known factors and may not attribute the effect of the other factor to the dumped or subsidized imports. The non-attribution analysis is an essential part of the authority's final finding and conclusion on causation. As discussed above, however, raw data as such do not fall within the scope of the term "facts" that must be disclosed to interested parties under Article 6.9 of the *AD Agreement* and Article 12.8 of the *SCM Agreement*. The results of the analysis of raw data would be a part of the non-attribution finding that "the proportion of the volume of GOES imported from other countries and regions in total imports continued to drop". Such analytical information would be a "specific fact that underlie[s] MOFCOM's final finding of the causation."

[3] Panel Report, *Mexico – Olive Oil*, para. 7.110. (WT/DS341/R)

[4] *First Written Submission of the People's Republic of China* ("China FWS"), para. 282, citing Final Determination (English version) at 58; *See also* Preliminary Determination, (English version), (10 December 2009, at 56, Exhibit CHN-16). *See also* China FWS, para. 312.

[5] US FWS, para. 260.

[6] US FWS, para. 58. *See also* US FWS footnote 116 to para. 58 and footnote 294 to para. 260.

4. Information to Determine the Anti-Dumping Duty Rate Applicable to Unexamined Exporters

10. The United States argues that MOFCOM failed to disclose the information of the transactions that led MOFCOM to calculate an all others rate of 64.8 per cent rate in the anti-dumping duty investigation and the calculation of the all others rate.[7]

11. The Appellate Body has clarified that the existence of dumping must be determined on an exporter/producer-specific basis in accordance with the margin of dumping calculated on that basis.[8] The calculated individual margin is, therefore, one of the "facts" found by the authority to determine the existence of dumping, and accordingly, must be disclosed to all interested parties in accordance with Article 6.9 of the *AD* Agreement. Further Japan recalls the panel's finding that "the normal value and export price data ultimately used in the final determination are essential facts which form the basis for the decision whether to apply definitive measures."[9] Therefore it is clear that investigating authorities must disclose facts, including the normal value, the export price, and the calculation of dumping margins. A failure to disclose these facts would be inconsistent with Article 6.9 of the *AD* Agreement.

5. Information to Determine the Countervailing Duty Rate Applicable to Unexamined Exporters

12. The United States argues that MOFCOM failed to disclose the information that led MOFCOM to use the facts available to unexamined exporters in determining countervailing duty rate applicable to them, the information that led MOFCOM calculated 44.6 per cent of subsidy with respect to thereto, and calculation of the amount of subsidy applicable to these exporters or per-unit subsidy rate in the countervailing duty investigation.[10]

13. Article 19.4 of the *SCM Agreement* provides that the amount of subsidy must be calculated "in terms of subsidization per unit of the subsidized and exported product". The *SCM Agreement* requires "immediate termination in cases where the amount of a subsidy in *de minimis*".[11] As such, the amount of subsidy as indicated in the *ad valorem* rate constitutes a fact on which the authority makes the determination of the subsidization. Authorities therefore must disclose the government actions, which the authorities find as the subsidy, and also calculation of per-unit *ad valorem* subsidy rate. A failure to disclose these facts is inconsistent with Article 12.8 of the *SCM Agreement*.

B. FINAL DETERMINATIONS UNDER ARTICLE 12.2.2 OF THE *AD AGREEMENT A*ND ARTICLES 22.3 AND 22.5 OF THE *SCM AGREEMENT*

1. The Investigating Authority's Obligation to Provide a Sufficiently Detailed Explanation in Its Public Notice of the Final Determination

14. Article 12.2 of the *AD Agreement* and Articles 22.3 of the *SCM Agreement* require the issuance of a public notice or separate report of the final determination, setting forth "in ***sufficient***

[7] US FWS, para. 173.

[8] *See* Appellate Body Report, *US - Zeroing (Japan)*, para. 111. WT/DS322/AB/R ("the *Anti-Dumping Agreement* prescribes that dumping determinations be made in respect of each exporter or foreign producer examined. … Margins of dumping are established accordingly for each exporter or foreign producer on the basis of a comparison between normal value and export prices.").

[9] Panel Report, *Argentina - Poultry Anti-Dumping Duties*, para. 7.223 (emphasis in original).

[10] US FWS, para. 148.

[11] In case of developing countries, the *de minimis* level is 2 per cent. *See* Article 27.10(a) of the *SCM Agreement*.

detail the findings and conclusion reached on ***all issues*** of fact and law considered material by the investigating authorities."[12] Further, Article 12.2.2 of the *AD Agreement and A*rticle 22.5 of the *SCM Agreement* require that the public notice of such final determination must contain *"**all relevant information*** on the matters of fact and law and ***reasons***"[13] as well as "the reasons for the acceptance or rejection of relevant arguments" made by exporters or by interested Members. Therefore, in case of an affirmative determination, the authorities are required to provide explanation "in sufficient detail" and the reasons on all factual and legal issues related to the authorities' final determination or to arguments by interested parties and it must be published.

2. MOFCOM's Alleged Failure to Make Available the Calculations of the Dumping Margins and Data Used to Calculate the Margins

15. The United States alleges that MOFCOM's failure to make available the calculations and data it used to calculate the margins for two U.S. GOES producers was inconsistent with Article 12.2.2 of the *AD Agreement*.[14]

16. With respect to the determination of dumping, Article 12.2.2 requires that the public notice contain "all relevant information on the matters of fact"[15] The authorities, therefore, are obliged to provide a sufficiently detailed explanation on how they established the margin of dumping on an exporter/producer-specific basis, including the matters of facts. It must include the factual findings of the export price and the normal value, their comparison, and calculation of dumping and must be discernable in the public notice or separate report of the final determination. It should be noted that the actual data need not be stated in the public notice beca*use of the r*equirement for the protection of confidential information under Article 12.2.2 of the *AD Agreement.* Article 12.2.2 does not oblige the authorities to prepare a report of confidential version separately from the public notice.

3. MOFCOM's Alleged Failure to Provide Any Rationale on Its Rejection of a Price Derived from the Competitive Bidding Process

17. The United States *argues that "*Article 22.3 [of the *SCM Agreement*] requires MOFCOM to explain how the evidence supported its conclusion, and why MOFCOM chose to disregard arguments from the United States"[16] and that MOFCOM's explanation "does not qualify as adequate, and therefore China breached its obligation under Article 22.3."[17]

18. Article 12.2 of the *SCM Agreement* sets forth that any decision of the authorities must be "based on … the written record". Article 22.3 of the *SCM Agreement* then requires that the public notice or report of the preliminary or final determination "set forth … in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities."

19. According to the allegation by the United States, MOFCOM rejected the competitive bidding price in the U.S. government procurements as the market price. The adoption or rejection of the market price information in the country of purchase is an issue that must necessarily be resolved by the investigating authorities to reach the final determination. MOFCOM, thus, would be required to provide explanation in sufficient detail on how MOFCOM found that the competitive bidding price

[12] Emphasis added.
[13] Emphasis added.
[14] US FWS, para. 110.
[15] Article 12.2.1(iii) of the *AD Agreement* (incorporated by reference into Article 12.2.2).
[16] US FWS, para. 121.
[17] US FWS, para. 121.

was unable to accept as the market price and was higher than the market price based on the evidence on the record.

4. MOFCOM's Alleged Failure to Provide Factual Information of the Price Effects and of Imports from Sources Other than Russia and the United States and Alleged Insufficient Responses to Parties' Argument on the Price Effects

20. The United States argues that MOFCOM's non-attribution analysis in its final determination contained no empirical information concerning the volume and value of imports from sources other than Russia and the United States.[18] It further argues that the final determination "does not contain any facts that would support a finding that prices for the merchandise under investigation were at any time lower than prices for the domestically produced product."[19] Therefore China acted inconsistently with Article 12.2.2 of the *AD Agreement* and Article 22.5 of the *SCM Agreement*.[20]

21. Article 3.1 of the *AD Agreement* and Article 15.1 of the *SCM Agreement* require the authority to make determination "based on positive evidence". Articles 3.2 and 15.2 provide that the authority "***shall consider***" whether there has been a significant price-undercutting or otherwise a depression or suppression of the price of the domestically produced products. Articles 3.5 and 15.5 require that "the authorities ***shall examine*** all other factors … and the injuries caused by these other factors must not be attributed to the dumped [subsidized] imports." Article 12.2.2 of the *AD Agreement* and Article 22.5 of the *SCM Agreement* require that the notice contain information explaining "consideration relevant to the injury determination as set out in Article 3 of the *AD Agreement* or Article 15 of the *SCM Agreement*".[21]

22. The authorities must provide explanation in sufficient detail as to how the authorities considered positive evidence to make fact findings relevant to the injury determination as set forth in of Articles 3 and 15 because the analyses on both price effects and non-attribution are "consideration relevant to the injury determination"

C. THE DETERMINATION OF THE ALL OTHERS RATES BASED ON FACTS AVAILABLE

1. Consistency of the Determination of the All Others Rates Based on Facts Available with Article 6.8 of the *AD Agreement*

23. The United States alleges that "[b]y applying facts available to the unexamined firms when it never sent them copies of the anti-dumping questionnaire or took any other steps to ensure that they had received the notice that the AD Agreement requires, China breached Article 6.8 of the AD Agreement and paragraph 1 of Annex II."[22]

24. Article 6.1 of the *AD Agreement* provides that "[a]ll interested parties shall be given notice of the information which the authorities require". Paragraph 1 of Annex II further provides, "[a]s soon as possible after the initiation of the investigation, the investigating authorities should specify in detail the information required from any interested party". Article 6.8 of the *AD Agreement* then sets forth that facts available may be applied to an interested party which "refuses access to, or otherwise does to provide, necessary information … or significantly impedes the investigation". Paragraph 1 of

[18] US FWS, para. 262.
[19] US FWS, para. 201
[20] US FWS, paras. 204 and 265.
[21] Article 12.2.1(iv) of the *AD Agreement* and Article 22.4(iv) of the *SCM Agreement* (incorporated by reference into Article 12.2.2 and 22.5 respectively).
[22] US FWS, para. 166.

Annex II further provides that the authorities should inform the interested party that the authorities will apply facts available if the interested party does not supply the requested information. Therefore a dumping determination based on facts available with respect to exporters/producers that were not given any notice or unknown is inconsistent with Articles 6.1 and 6.8 and Paragraph 1 of Annex II of the *AD Agreement*.

2. Consistency of the Determination of the All Others Rates Based on Facts Available with Article 12.7 of the *SCM Agreement*

25. The United States argues that "China's application of facts available to calculate an adverse subsidy rate with respect to unexamined exporters/producers of GOES failed to satisfy the requirements of Article 12.7 of the SCM Agreement."[23]

26. The *SCM Agreement* envisages that certain exporters would be left unexamined during the original investigation, by providing in Article 19.3 that such exporters are "entitled to an expedited review in order that the investigating authorities promptly establish an individual countervailing duty rate for that exporter." The *SCM Agreement*, however, does not set forth any rules on whether or not to determine the existence of subsidization on an individual exporter basis. The authorities thus have the substantial discretion to make such determinations.

27. The authorities' discretion, however, is not unlimited. Article 12.1 of the *SCM Agreement* set forth the due process requirement that "all interested parties in a countervailing duty investigation shall be given notice of the information which the authorities require." This provision is substantially identical to Article 6.1 of the *AD Agreement.* Also as is the case of Article 6.8 of the *AD Agreement*, Article 12.7 permits authorities to rely on facts available only when an interested party does not provide "necessary" information.

28. The authorities must first notify an interested party of the information that they require, i.e. necessary information; the authorities may apply application of facts available with respect to "necessary" information, which the interested party did not provide; accordingly, the authorities may not apply facts available with respect to information that the authorities have not requested the interested party to submit. Therefore, a mere request in the public notice of the initiation to make themselves known to the authorities within 20 days from the date of initiation cannot be the basis to apply facts available to determine the amount of subsidy conferred upon such interested party.

III. CONCLUSION

29. As a third party, Japan does not comment on factual aspects on the issues above, and thus, does not take any specific position whether the measures at issue are inconsistent with the *AD Agreement* and the *SCM Agreement*. Japan respectfully requests the Panel to examine carefully the facts presented by the parties to this dispute in light of Japan's arguments above to ensure the fair and objective application of the provisions of the *AD Agreement* and the *SCM Agreement*.

[23] US FWS, para. 141.

ANNEX B-5

EXECUTIVE SUMMARY OF THE THIRD PARTY
WRITTEN SUBMISSION OF THE KINGDOM
OF SAUDI ARABIA

I. INTRODUCTION

1. Saudi Arabia's participation in this dispute relates to the interpretive issues discussed below, which are of strong systemic importance to all WTO Members. Saudi Arabia takes no position on the merits of the claims that are based on the particular facts of this case.

II. THE SCM AGREEMENT IMPOSES STRICT DISCIPLINES ON THE INITIATION OF A COUNTERVAILING DUTY INVESTIGATION

2. The negotiating history of the SCM Agreement demonstrates the intent of the drafters to strengthen the disciplines on initiation. Article 2.1 of the Tokyo Round Subsidies Code – the predecessor provision to Article 11.2 of the SCM Agreement – was incorporated essentially unchanged into the SCM Agreement, though with three important additions. First, the Uruguay Round negotiators added a new sentence to establish that "[s]imple assertion, unsubstantiated by relevant evidence, cannot be considered sufficient to meet the requirements of this paragraph". Second, they specified that the application must contain the detailed information set out in paragraphs (i) through (iv) of Article 11.2, provided such information is reasonably available to the applicant. Third, and most importantly, they added Article 11.3, imposing a new, affirmative obligation on the investigating authority to "review the accuracy and adequacy of the evidence provided in the application to determine whether the evidence is sufficient to justify the initiation of an investigation." The additions incorporated into the SCM Agreement demonstrate the intent of the drafters to "impose more disciplines on the application of countervailing measures".

3. There must be "sufficient evidence" before an investigating authority of subsidization, injury and causation to justify initiation. It is important to distinguish between the information requirements relevant to the *applicant* under Article 11.2 and the obligations of the *investigating authority* to review the accuracy and adequacy of that evidence under Article 11.3. The "reasonably available" language does not condone acceptance by the investigating authority of a complaint that is inaccurate or inadequate. Article 11.3 imposes a positive obligation on investigating authorities which goes beyond a determination that the requirements of Article 11.2 have been satisfied; authorities "must verify that the evidence presented constitutes 'reasonable indications'" of all subsidy and injury elements.[1]

III. AUTHORITIES MAY ONLY RESORT TO FACTS AVAILABLE IN LIMITED CIRCUMSTANCES AND CANNOT APPLY THEM IN A PUNITIVE MANNER

4. Under Article 12.7 of the SCM Agreement and Article 6.8 of the AD Agreement, an investigating authority may resort to facts available only in limited circumstances: when an interested party (i) refuses access to, or (ii) otherwise does not provide, necessary information[2] within a reasonable period, or (iii) significantly impedes the investigation. Information received from a respondent must be used if the respondent acted to the best of its ability, even if the information

[1] Panel Report, *Mexico – Steel Pipes and Tubes*, para. 7.22.
[2] *See* Panel Report, *US – Steel Plate*, para. 7.53; Panel Report, *EC – Salmon (Norway)*, para. 7.343.

provided is in a form different from that which was requested.[3] Paragraph 3 of Annex II "obliges an investigating authority to 'take[] into account' the information supplied by a respondent, even if *other* information requested has not been provided by the respondent and will need to be supplemented by facts available."[4] This is the case even if that information is submitted after a deadline, but within a reasonable period of time.[5]

5. Furthermore, the application of facts available must be non-punitive. The use of facts available "permits the use of facts on record *solely for the purpose of replacing information that may be missing*",[6] and authorities "should not arrive at a 'less favourable' outcome simply because an interested party fails to furnish requested information if, in fact, the interested party has 'cooperated'".[7] Thus, where an exporter fails to provide *some* information, or if the information provided does not fit perfectly the request to which it responds, authorities are not permitted to reject *all* information. Facts available may be employed only "to fill in gaps in the information [as] necessary to arrive at a [final] conclusion".[8]

IV. INVESTIGATING AUTHORITIES MUST DISCLOSE ESSENTIAL FACTS IN A MANNER WHICH ALLOWS PARTIES TO DEFEND THEIR INTERESTS

6. Under Article 12.8 of the SCM Agreement and Article 6.9 of the AD Agreement, an authority must (i) disclose all "essential facts" which form the basis for its determinations; and (ii) ensure that an interested party has adequate time to review those facts and correct them, where necessary, in a manner that permits interested parties to defend their interests. "Essential facts" encompasses "not only those [facts] that *support* the decision ultimately reached" but also the "body of facts" necessary to "the *process of analysis and decision-making* by the investigating authority" in reaching that ultimate decision.[9] This includes "new" essential facts which bring about a change in the authority's findings after the issuance of the preliminary determination. Where the factual basis of the definitive measure is "significantly different" from that of the provisional measure, the "essential facts" disclosure must include the specific facts that brought about this change.[10]

7. "Essential facts" must be explicitly identified and disclosed as such,[11] so that parties can then "comment on the completeness and correctness of the facts being considered by the investigating authority, provide additional information or correct perceived errors, and comment on or make arguments as to the proper interpretation of those facts."[12] Authorities must take into account the information or arguments an interested party submits.[13]

V. THE DETERMINATION OF INJURY REQUIRES A CAUSAL ANALYSIS BASED ON AN OBJECTIVE EXAMINATION OF POSITIVE EVIDENCE

8. Article 15 of the SCM Agreement and Article 3 of the Anti-Dumping Agreement impose an affirmative obligation on an authority to demonstrate that it has determined, through an "objective

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[3] Appellate Body Report, *Mexico – AD Measures on Rice*, para. 288; Panel Report, *US – Steel Plate*, para. 7.72.

[4] Appellate Body Report, *Mexico – AD Measures on Rice*, para. 287 (emphasis original).

[5] *See* Appellate Body Report, *US – Hot-Rolled Steel*, paras. 83-86.

[6] Appellate Body Report, *Mexico – AD Measures on Rice*, para. 293 (emphasis added).

[7] Appellate Body Report, *US – Hot-Rolled Steel*, para. 99-100.

[8] Appellate Body Report, *Mexico – AD Measures on Rice*, para. 291.

[9] Panel Report, *EC – Salmon (Norway)*, paras. 7.807, 7.796 (emphasis added).

[10] Panel Report, *Mexico – Olive Oil*, para. 7.110; Panel Report, *Guatemala – Cement II*, para. 8.228.

[11] Panel Report, *Guatemala – Cement II*, paras. 8.229-8.230.

[12] Panel Report, *EC – Salmon (Norway)*, para. 7.805. *See also* Panel Report, *Argentina – Ceramic Tiles*, para. 6.125.

[13] Panel Report, *EC – Salmon (Norway)*, para. 7.799.

examination" based on "positive evidence", (i) the subject imports' volume effects and price effects; (ii) injury to the domestic industry; and (iii) a causal link between the imports and that injury. The analytical and evidentiary standards of SCM Article 15.1 and AD Article 3.1 apply to all elements of an authority's injury determination.

9. The Appellate Body has found that the term "positive evidence" relates to "the *quality* of the evidence that authorities may rely upon in making a determination" and "focuses on the facts underpinning and justifying the injury determination".[14] Positive evidence must be distinguished from and preferred over unverified statements made by interested parties.[15]

10. Each element of the authority's injury analysis must involve an objective examination of the positive evidence collected. The Appellate Body has clarified that the word "objective" means that the examination "must conform to the dictates of the basic principles of good faith and fundamental fairness".[16] In keeping with this aim, the investigating authority is obligated to conduct its examination of the factors relating to injury in an unbiased, even-handed manner without favouring the interests of any interested party to make a finding of injury more likely.[17]

11. In accordance with SCM Article 15.5 and AD Article 3.5, an affirmative injury determination may only be made where the authority has *demonstrated* that the subsidized/dumped imports have caused injury to the domestic industry.[18] The Agreements impose a rigorous requirement to "demonstrate" causation. An investigating authority must ensure that injury caused by other "known factors" is not wrongly attributed to the subsidized/dumped imports in the causation analysis.[19] Only by separating and distinguishing the injurious effects can an authority make a reasoned judgment as to the degree of injury suffered which should be attributed (or not) to such other factors.

VI. SUFFICIENT DETAIL AND RELEVANT INFORMATION MUST BE PROVIDED IN THE PUBLIC NOTICE ON ALL MATERIAL ISSUES

12. Investigating authorities must provide "sufficient detail" on "material issues" in both preliminary and final determinations. An issue will be considered "material" where it has arisen in the course of the investigation and must necessarily be resolved in order for the investigating authority to be able to reach its determination.[20] The discipline imposed on an investigating authority to set forth its findings and conclusions in "sufficient detail" requires it to provide explanations for all material elements of the determination.[21]

13. Interested parties must be able to understand fully the reasons for the imposition of measures. As the Appellate Body has stressed, the investigating authority must provide 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", and this should be directly "discernible from the published determination itself."[22] The degree of detail required in the public

[14] Appellate Body Report, *US – Hot-Rolled Steel*, paras. 192-193 (emphasis added).
[15] Panel Report, *EC – Countervailing Measures on DRAM Chips*, para. 7.368.
[16] Appellate Body Report, *US – Hot-Rolled Steel*, para. 193.
[17] Appellate Body Report, *US – Hot-Rolled Steel*, paras. 193, 196; Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 180.
[18] *See* Appellate Body Report, *Japan – DRAMs (Korea)*, paras. 262-263, 268; Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 175.
[19] Appellate Body Report, *US – Hot-Rolled Steel*, paras. 226-228; Appellate Body Report, *EC – Tube or Pipe Fittings*, paras. 175, 188.
[20] Panel Report, *EC – Tube or Pipe Fittings*, para. 7.424.
[21] Panel Report, *Mexico – Corn Syrup*, para. 7.103.
[22] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 186; Panel Report, *EC – Tube or Pipe Fittings*, para. 7.435.

notice is therefore one that permits interested parties to discern directly either the significance or lack of significance of factors the investigating authority was obligated to address.[23]

14. "All relevant information" includes all information connected to the decision to impose duties. Article 22.5 of the SCM Agreement and Article 12.2.2 of the Anti-Dumping Agreement require the investigating authority to issue a public notice or report which contains (i) "all relevant information on the matters of fact and law", and (ii) the "reasons which have led to the imposition of final measures". The use of the words "have led to" means that authorities have a duty to identify in the notice "those matters on which a factual or legal determination must necessarily be made in connection with the decision" to impose measures.[24] The significance or lack of significance of factors the investigating authority was obligated to address must be directly discernable from the notice.[25] It would necessarily include information on the facts underlying the price effects analysis, upon which a legal determination of injury must necessarily be made in order to impose measures.

VII. CONCLUSION

15. Saudi Arabia respectfully urges the Panel to consider the Kingdom's positions on the interpretive issues set out above.

[23] Panel Report, *EC – Tube or Pipe Fittings*, paras. 7.432, 7.435.
[24] Panel Report, *EC – Tube or Pipe Fittings*, para. 7.424.
[25] Panel Report, *EC – Tube or Pipe Fittings*, paras. 7.432, 7.735.

ANNEX B-6

EXECUTIVE SUMMARY OF THE THIRD PARTY
WRITTEN SUBMISSION OF KOREA

I. INTRODUCTION

1. Korea appreciates this opportunity to present its views to the Panel. Korea fully shares the view that the issues presented in this dispute appear to have "wider, perhaps systemic, implications" for all the WTO Members since the claims presented in this dispute touch upon some of the core procedural elements of AD and CVD investigations of investigating authorities.

2. Korea is of the view that clarification of key factual situations would be critical for the Panel's proper analyses of the claims and the final disposition of the present dispute. In evaluating conflicting factual information, Korea respectfully requests the Panel to discharge its obligation under Article 11 of the DSU.

II. LEGAL ARGUMENTS

A. INITIATION OF A COUNTERVAILING DUTY INVESTIGATION SHOULD BE BASED ON ADEQUATE AND SUFFICIENT EVIDENCE

3. A CVD investigation entails mobilization of a great deal of resources on the part of a responding government and companies. A CVD investigation is also a serious undertaking laden with political sensitivities in that one Member investigates another Member's governmental programs on a bilateral basis. In Korea's view, these unique aspects of a CVD investigation explain the inclusion of bilateral consultations requirement in Article 13 of the SCM Agreement which do not appear in the AD Agreement.

4. In this spirit, the SCM Agreement clearly guards against initiation of a CVD investigation without adequate and sufficient evidence that cannot justify a lengthy investigation of another government. Although the information to be presented at the initiation stage is not the type of evidence that establishes the existence of subsidization or material injury, which can only be confirmed as a result of the full investigation[1], the investigating authority should nonetheless examine and confirm that at least a minimal amount of information reasonably indicating subsidization and injury has been submitted by a domestic applicant.

5. In fact, Article 11.2 of the SCM Agreement sets forth a detailed threshold for the initiation of a CVD investigation: in order for there to be initiation, "evidence that substantiates" the existence of a subsidy and injury that is reasonably available to the applicant must be presented in the application.

[1] *See* Panel Report, *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States*, WT/DS132/R, Adopted 24 February 2000, and Corr.1, DSR 2000:III, 1345, at paras. 7.74, 7.76; 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, 5 Adopted April 2001, DSR 2001:VII, 2741, at para. 7.77; Panel Report, *United States – Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/R, Adopted 31 August 2004, DSR 2004:V, 1875, at para. 7.56.

As the panel in U.S. - Byrd Amendment opined, this provision is to "ensure that investigations are not initiated on the basis of frivolous or unfounded suits."[2]

6. Article 11.3 of the SCM Agreement in turn requires the investigating authority to confirm the accuracy and adequacy of the evidence itself. Thus, an investigating authority assumes an affirmative obligation to examine all the relevant information and materials contained in the application and to confirm their veracity before making a decision to initiate a CVD investigation. It cannot passively accept the allegations in the petition as true or appearing to be true and initiate the investigation hoping to confirm the veracity down the road. Article 11.9 of the SCM Agreement clearly stipulates that the application should be rejected in such an instance.

7. In short, under the current SCM Agreement, initiation of a CVD investigation is not supposed to be an automatic rubber-stamp process once a petition is filed by a domestic industry. Rather, it is designed and envisioned to be a meaningful step where the investigating authorities carefully look into substantive information contained in the petition and determine whether the petition is really worth the time and resources to be inflicted from the lengthy investigations. Unless this filtering process operates in a way envisioned in Article 11 of the SCM Agreement, foreign exporters and governments would be in a severely dire situation regardless of the final outcome of a CVD investigation.[3]

B. THE "FACTS AVAILABLE" STANDARD HAS ITS OWN LEGAL PARAMETERS AND SHOULD NOT BE ABUSED TO PENALIZE FOREIGN RESPONDENTS SIMPLY BECAUSE A REQUEST FROM THE INVESTIGATING AUTHOROTY WAS NOT FULLY RESPECTED

8. The SCM Agreement does not provide an unlimited discretion to an investigating authority conducting a CVD investigation whenever it encounters a less than optimal information from a foreign respondent. Instead, these provisions unequivocally provide conditions that need to be satisfied before the investigating authority applies the facts available standard. Article 12.7 of the SCM Agreement, Article 6.8 of the AD Agreement, and Annex II of the AD Agreement provide detailed guidelines in this respect. Likewise, the Appellate Body in *Mexico-Beef and Rice* also stated that even if the request by an investigating authority for certain information is not completely adhered to by a foreign respondent (for instance, when the respondent submits only some information, not all the information requested), the investigating authority is nonetheless required to consider information actually provided by the respondent.[4]

9. In Korea's view, Article 12.7 of the SCM Agreement along with other provisions in Article 12 collectively stands for the proposition that fundamental due process rights must be ensured at all times

[2] Panel Report, *United States – Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217/R, WT/DS234/R, adopted 27 January 2003, as modified by the Appellate Body Report, WT/DS217/AB/R, WT/DS234, at para. 7.61

[3] For example, due to the so-called "chilling effect" flowing from an AD or CVD investigation, a foreign exporter defending an AD or CVD investigation "feels the direct hit" even in the initiation stage of the investigation, which is well before any preliminary or final AD/CVD determination. In other words, importers of the foreign exporters named in an AD or CVD petition usually consider reducing or avoiding transactions with the foreign exporters due to the "uncertainty" in the market – the importers are not sure about the ultimate AD or CVD margin as a result of a lengthy investigation, or the extra duty imposition's implication for and impact on the market. So, even if there is no actual duty imposition yet – whether preliminary or final – it may be the case that from the initiation itself, the market already feels the effect of an AD or CVD investigation. Therefore, initiation needs to be limited only to the good-faith allegations with sufficient information within the meaning of Article 5 of the AD Agreement or Article 11 of the SCM Agreement.

[4] 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, at para. 294.

in a CVD investigation.[5] The Panel should carefully review whether this due process right has been adequately respected. The Panel would have to look into the specific situation of the investigation at hand and then determine whether facts available would be warranted in the situation.

C. AN INVESTIGATING AUTHORIGY OF A MEMBER DOES NOT ENJOY UNBRIDLED DISCRETION REGARDING AN "ALL OTHERS RATE" IN ANTI-DUMPING AND COUNTERVAILING DUTY INVESTIGATIONS

10. One of the contentious claims in this dispute is about all others rates in AD and CVD investigations by MOFCOM. In the underlying AD and CVD investigations, the complainant claims, the all others rates were set at unreasonably high margins without sufficient explanations or rationale other than some cursory statements of policy reasons.[6] The respective all others rates indeed seem extraordinarily high when compared to the margins assigned to the respondent companies, AK and ATI.[7] Unreasonably high "all others rates" disassociated with calculated margins of the respondents participating in the investigations does raise a concern of possible inconsistency with the relevant provision of the SCM Agreement and the AD Agreement.

11. In Korea's view, to the extent the application of "all others rates" constitutes the virtual application of "facts available," as the United States argues, Article 12.7 of the SCM Agreement and 6.8 of the AD Agreement could be implicated in this context as well. If the facts available standard was imposed on non-participating exporters without satisfying the detailed requirements stipulated by Article 12.7 of the SCM Agreement and Article 6.8 of the AD Agreement, a violation similar to the one discussed in the previous section could be found.

III. CONCLUSION

12. Korea respectfully submits that in reaching its decision in this important dispute, the Panel should ensure that the relevant provisions of the GATT 1994, the AD Agreement and the SCM Agreement are construed in their proper context, which will give effect to the ordinary meaning of the terms consistently with the context, object and purpose of these legal instruments as a whole. Korea appreciates the opportunity to participate in this proceeding, and to present its views to the Panel.

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[5] See, e.g. Appellate Body Report, *United States - Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268/AB/R, 29 November 2004, at para. 241; *Guatemala – Cement II*, at para. 8.119; *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/R, adopted 9 January 2004, at para. 7.255.

[6] *See* U.S. First Written Submission, at paras. 134-136, 156, 173-175.

[7] *See id.* (With respect to the CVD investigation, the all others rate was set at 44.6 per cent compared to 11.918 per cent and 11.65 per cent assigned to the two participating respondents. In the AD investigation, the all others rate was set at 64.8 per cent compared to 7.8 per cent and 19.9 per cent assigned to the two participating respondents.).

ANNEX C

ORAL STATEMENTS OR EXECUTIVE SUMMARIES THEREOF OF THE PARTIES AT THE FIRST SUBSTANTIVE MEETING

ANNEX C-1

EXECUTIVE SUMMARY OF THE OPENING STATEMENT OF THE UNITED STATES AT THE FIRST MEETING OF THE PANEL

China's GOES investigation was conducted in a manner inconsistent with the AD and SCM Agreements. As a result, the ability of the United States and interested parties to understand the basis for China's determinations or to defend their interests was seriously impaired. Beyond the serious problems in how China conducted its investigation, the resulting determinations contain several fundamental flaws of reasoning that render them inconsistent with other obligations in the AD and SCM Agreements. This is particularly so with respect to China's injury determination, which is based on the most cursory of analysis and scant evidentiary support. In examining China's justifications for its measures in this case, it is useful to focus on what MOFCOM actually found as reflected in its determinations and disclosures, not on the *post-hoc* rationalizations contained in China's first written submission. As we discuss below, China's first written submission often ignores MOFCOM's actual findings or tries to rewrite them.

A. The Initiation of the Countervailing Duty Investigation for Several Programs Breached Article 11 of the SCM Agreement

Several of the petitioners' subsidy allegations did not offer sufficient, or in some cases any, evidence of the existence, amount, and nature of the subsidy, but rather consisted of simple assertion, unsubstantiated by relevant evidence. With respect to these programs, MOFCOM failed to sufficiently review the accuracy and adequacy of the evidence in the application to determine whether there was sufficient evidence for the initiation of an investigation, and thus acted inconsistently with Article 11.3 of the SCM Agreement. In response to the U.S. claims, China has offered pure speculation and citations to irrelevant evidence, and has claimed repeatedly that generalized allegations of the existence of subsidies for steel cured the defects in the various allegations.

MOFCOM did not meet its obligation under Article 11.3 to review the accuracy and adequacy of the evidence in the petitioners' application for sufficiency. For example, it is not sufficient, as China suggests, for the "broader context" provided in an application to support a specific subsidy allegation that is deficient with respect to one of the three subsidy elements. Rather, the Article 11 standard is met when there is accurate and adequate evidence as to *each* of the three subsidy elements sufficient to justify initiation. With respect to each of the subsidy programs described in the U.S. first written submission, the evidence was insufficient to initiate.

The obligations in Article 11 exist for a reason: so that investigations, involving a significant potential burden to both companies and WTO Members, will not be initiated unless certain evidentiary requirements are met.[1] An improperly initiated investigation can cause burden regardless of the ultimate finding. China cannot dodge the requirements of Article 11 by suggesting that initiating an investigation of flawed subsidy allegations is harmless because it did not result in the imposition of countervailing duties. China's arguments should not obscure the fact that MOFCOM acted inconsistently with these requirements in initiating investigations of several subsidy allegations in this case.

[1] *US – Carbon Steel (AB)*, para. 115.

B. China Failed to Require Adequate Non-confidential Summaries of Confidential Information

China failed to meet the requirements of Article 12.4.1 of the SCM Agreement and Article 6.5.1 of the AD Agreement, as its investigating authority did not require adequate non-confidential summaries of confidential information contained in the petition, and there is no explanation on the record from the domestic interested parties as to why the information was not susceptible to summarization.

China contends that the section of the petition entitled "non-confidential summaries," which was quoted in full by the United States and discussed in the U.S. first written submission, does *not* contain the "non-confidential summaries," and that in fact Part I of the petition contains a non-confidential summary of confidential information in the petition. Second, in the alternative, it asserts that "exceptional circumstances" were present that justified the absence of non-confidential summaries. With regard to China's first theory, in suggesting that the Panel rely on Part I in assessing whether China complied with its obligations, China ignores the clear structure of the petition. Even setting this fact aside, Part I of the petition does not contain adequate non-confidential summaries.

As an alternative, China asserts that "exceptional circumstances" exist such that summarization was not possible. Notably, neither the petition nor the documents prepared by MOFCOM during the course of the proceeding ever asserted that summarization was not possible or otherwise justified the absence of meaningful non-confidential summaries. China's argument in this regard is nothing more than a *post hoc* rationalization to justify its failure to comply with SCM Agreement Article 12.4.1 and AD Agreement Article 6.5.1. However, such a a *post hoc* rationalization cannot satisfy the requirement in Articles 12.4.1 and 6.5.1 that "a statement of the reasons why summarization is not possible must be provided."

C. China Breached Article 12.7 of the SCM Agreement Because Its Use of Facts Available Was Improper

MOFCOM's use of facts available was unjustified and punitive, and MOFCOM ignored necessary information provided by the U.S. companies. While China claims that the U.S. description of the facts is in error, a review of the evidence demonstrates the opposite: China's response relies on factual errors and mis-characterizations of the record.

While China repeatedly asserts that the respondents "refused" to respond to MOFCOM's questions and "seriously impeded" the investigation, a closer examination of the evidence demonstrates otherwise. First, in Part 3 of its initial questionnaire, MOFCOM asked for tables reflecting all government procurement "signed" within the POI and those "not performed within the POI." MOFCOM also asked for sales prices for the "involved" products in transactions with "private" purchasers. In Part 4, MOFCOM asked for tables showing the "[t]he quantity and {value} of each product sold to each client … ."

In response, ATI indicated that it made no direct sales to the government. AK Steel pointed out that it did not sign any government procurement within the POI, pointed MOFCOM to the sales data submitted in the parallel AD proceeding, and offered a customer list showing that the government did not purchase GOES. Because AK Steel did not participate in any procurement activity during the POI, there were no "involved" products and thus no sales to private purchasers of the same products to report. In response to Part 4, which only relates to the POI, and which does not contain a proviso of "not limited to the subject merchandise," AK Steel referred MOFCOM to the sales data for subject merchandise provided in the parallel AD proceeding.

While China now describes this as a "refusal" to cooperate, in fact, MOFCOM invited such a response in its own questionnaire. Specifically, in Section II Item 3 of the questionnaire, MOFCOM states: "if the question does not apply to you, please write down explicitly 'this question does not apply to my company' and state the reasons."

China further alleges that after issuing its deficiency letter, the companies still refused to respond "in an acceptable form," and continued to argue that MOFCOM's questions were irrelevant. Yet, AK Steel did respond. In the deficiency letter, MOFCOM gave the respondents the opportunity to show inapplicability: "If your company was of the view that, regarding the product concerned and your company's other products, there was no purchase from the government or public body, or there was no transaction bound by the Buy America Act, it was your company who shall bear the burden of proof." In response, AK Steel attached a customer list to its revised questionnaire response showing that the government did not purchase any AK Steel products during the POI – including products unrelated to subject merchandise. ATI provided a customer list for subject merchandise. In its deficiency letter response, AK Steel explained that it was impossible to know what its customers did with its products.

In its preliminary determination, MOFCOM rejected the customer list because the list does not contain transaction data. However, the preliminary determination, issued on December 10, 2009, is the first instance where MOFCOM indicated that it was requiring transaction data independent of whether government procurement was involved. In response to MOFCOM's approach in the preliminary determination, AK Steel submitted the sales data for subject merchandise as an exhibit to its comments on the preliminary determination.

The companies cooperated, responded to MOFCOM's questionnaires, and to the extent they did not provide information it was because MOFCOM's own questionnaires did not require it. When MOFCOM finally decided to require such information at the preliminary determination stage, it did not give the companies an opportunity to submit it. AK Steel provided the data after the preliminary determination, but MOFCOM chose not to verify it.

China nonetheless complains that the companies' failure to provide transaction data prior to the verification denied MOFCOM "the ability to plan efficiently" for verification. To the extent that MOFCOM may have suffered any prejudice, however, this was simply the result of its own decision to allow respondents to opt not to provide the data if not relevant.

Perhaps in recognition of the plainly burdensome nature of MOFCOM's request, China now appears to be attempting to distance itself from MOFCOM's request for 15 years of sales data for all products, asserting that MOFCOM did not apply facts available because of the failure to provide 15 years of sales data. But China's assertions are belied by the facts: when it applied facts available, MOFCOM simply explained that the U.S. companies had failed to provide the requested sales data.

MOFCOM could have verified that AK Steel or ATI did not sell to any government entity at verification. When the course MOFCOM was taking became clear in the preliminary determination, AK Steel re-submitted the sales data, which was already in MOFCOM's possession.

Finally, there are no facts available on the record to support MOFCOM's conclusion that the respondents sold all of their output to the government. As explained in our first written submission, the only facts available on the record suggest that, at most, AK Steel could have sold 29% of its output to the government, as part of infrastructure and manufacturing sales.

The respondents responded to MOFCOM's requests to the best of their ability. The information actually submitted was verifiable, timely submitted, and usable without undue difficulty. MOFCOM appears to have concluded that because a company does not provide some information, or if the

information provided does not perfectly fit the request to which it responds, MOFCOM can reject all information provided by the company.

D. China Acted Inconsistently With Article 12.2.2 of the AD Agreement by Failing to Make Available the Final Dumping Calculations

Article 12.2.2 requires an investigating authority to "make available" "*all relevant information* on the matters of fact" that led to the imposition of final measures. If information is relevant, it must be made available – as evidenced by the use of the term "all" (of course, with due regard for the protection of confidential information). Few things are more relevant to the imposition of final duties than the calculations themselves, which are the means by which an investigating authority arrives at the final finding of dumping. Without calculations that indicate dumping, there would be no affirmative finding. "Information" is "[c]ommunication of the knowledge of some fact or occurrence" or "[k]nowledge or facts communicated about a particular subject, event, etc." Dumping calculations certainly are "facts" that should be "communicated" about the imposition of final measures. In short, the language of Article 12.2.2 requires an investigating authority to release its final calculations to the affected interested parties.

China completely ignores the fact that, in addition to a "public notice," Article 12.2.2 also mentions a "separate report" as the vehicle for making available all relevant information on matters of fact and law. The "separate report" *need not* be public. These calculations can still be released to the relevant interested party. China should have fulfilled its obligation under Article 12.2.2 by releasing its calculations of AK Steel's dumping margin to AK Steel, and its calculations of ATI's dumping margin to ATI.

Release of the final dumping calculations to the interested parties is vital to those parties' ability to protect their interests. Parties should not be forced to guess at or approximate the methodology and data used by an investigating authority in its calculations, or piece the calculations together from different places in the record.

E. MOFCOM's Failure to Provide Sufficient Information on the Findings and Conclusions of Law It Considered Material Constitutes a Breach of Article 22.3 of the SCM Agreement

MOFCOM failed to explain its benefit determination because it did not provide in the preliminary determination any rationale that competitive bidding under U.S. procurement laws does not result in an acceptable market price. The final subsidy determination regarding U.S. procurement laws is inconsistent with Article 22.3 because it merely repeats the flawed discussion contained in the preliminary determination.

Under Article 14(d) of the SCM Agreement, the authorities are to use market prices in the country of purchase unless they establish that those prices are so distorted that the market price is unusable. Article 22.3 thus requires the investigating authority to provide explanation on how it found that market prices resulting from the competitive bidding process were distorted. Nothing in MOFCOM's determination however explains why the admittedly competitive bidding process distorted the market.

F. MOFCOM's Determination of the "All Others" AD and CVD Rates were Inconsistent with its Obligations under the SCM Agreement

The petition identified two U.S. exporters/producers of GOES: AK Steel and ATI. Notwithstanding the fact that neither the petitioner nor MOFCOM identified any other U.S. producers or exporters of GOES, China not only established an "all others" subsidy rate for the unidentified producers, but China established a rate more than two times higher than the highest rate for an investigated company

based on the purported lack of cooperation of the unknown, unidentified companies. The "all others" antidumping rate was more than three times higher than the highest rate calculated for an investigated company.

As the Appellate Body has made clear in *Mexico – Rice*, an exporter must be given the opportunity to provide information required by an investigating authority before the latter resorts to facts available that can be adverse to the exporter's interests. An exporter that is unknown to the investigating authority is not notified of the information required, and thus is denied an opportunity to provide it.

China's mere placement of a petition in a reading room and publication of a notice do not constitute a meaningful opportunity for a company to provide information. Accordingly, an unidentified exporter cannot be said to have failed to cooperate by not having located the petition and/or the notice of initiation in this case.

G. China Failed to Disclose the Essential Facts Regarding the Calculation of the "All Others" AD and CVD Rates

During the investigation, MOFCOM increased the all others subsidy rate from a preliminary rate of 12 percent to a final rate of 44.6 percent, justifying this increase by claiming it relied upon the "facts available." It did so without disclosing the essential facts forming the basis for its decision, contrary to Article 12.8 of the SCM Agreement.

MOFCOM increased the "all others" dumping rate from a preliminary rate of 25 percent to a final rate of 64.8 percent. MOFCOM's lone statement in the Final Disclosure regarding tis action was that the "all others" dumping rate was "based on transaction information of the respondents pursuant to Article 21 of the Antidumping Regulations." This disclosure is insufficient. Totally absent are any facts relating to the U.S. companies' refusing access to necessary information or significantly impeding the investigation, any facts relating to the actual calculation of the 64.8 percent rate or why that rate was appropriate given the much lower rates of the respondents, and any facts regarding the particular transaction information chosen.

China argues that it could not disclose the particular transaction information used without compromising the confidentiality of information supplied by the two respondent companies, but provides no explanation for why MOFCOM could not have publicly summarized the information used or at least identified the calculation methodology it employed. Disclosure of the essential facts is particularly important here, because it is difficult to understand how MOFCOM used the information of the two respondent companies and arrived at an all others dumping margin that is more than three times as high as the margin for one such company and eight times as high as the margin for the other company.

H. China's Injury Determination is Inconsistent with China's WTO Obligations

Cumulated imports from Russia and the United States increased throughout the POI. But during most of this period, the Chinese GOES industry was prospering. The Chinese industry's output, sales quantities, sales revenues, employment, wages, prices and pre-tax profits all increased during both 2007 and 2008.

It was only during the first quarter of 2009 that the Chinese industry began to experience some difficulties. In particular, the industry's profitability declined. The decline in profits, however, was not volume-related. The Chinese GOES industry showed double digit increases in sales quantities and revenues from the first quarter of 2008 to the first quarter of 2009. The market share of the Chinese industry actually increased during this period – by nearly the same amount as that of the

subject imports. Instead, the decline in profits occurred because the increased quantity of sales during the first quarter of 2009 was being sold at lower prices.

Consequently, MOFCOM's affirmative determination could not have been, and was not, based solely or even principally on volume considerations, as China's first written submission suggests. MOFCOM's conclusion that the imports had significant price effects was essential to its affirmative determination.

In examining MOFCOM's injury determination, it is useful to focus on what MOFCOM actually found, notwithstanding the fact that in its first written submission China variously ignores MOFCOM's findings or tries to rewrite them. To start, it is useful to explore why MOFCOM found price depression. It was not solely because imports were increasing. Instead, the final determination states that price depression occurred "[b]ecause the sales of the product concerned were kept at a low price." In an attempt to support this finding, MOFCOM cited the petitioners' assertion that "a pricing policy aiming at setting the price down to a level lower than the price of the domestic like product was adopted by the producers of the product concerned." Thus, whether or not MOFCOM expressly found significant underselling, underselling was critical to its price depression finding.

This finding is pervasively flawed. First, it relies on facts MOFCOM never disclosed. China now asserts that MOFCOM "was considering" an argument that price depression began in "late" 2008, although it made no express finding to this effect. The only 2008 pricing information provided in the final determination is that domestic prices increased by 14.53 percent in 2008 – hardly evidence of price depression.

Additionally, MOFCOM admitted that during 2009, the imports under investigation were actually priced *higher* than the domestically produced product. Thus there is no positive evidence supporting the price depression finding for 2009. Moreover, the fact that the imports oversold the domestically produced product in 2009 indicates that the unspecified, unexplained "pricing strategies" materials on which MOFCOM relied for its finding of low import prices could not constitute positive evidence of actual price levels.

It is true that MOFCOM did not rely solely on price depression. It also asserted declines in 2008 and the first quarter of 2009 in "profits per unit." Here again MOFCOM failed to disclose essential facts in violation of Articles 6.9 and 12.8. China claims that costs rose faster than revenues. But MOFCOM disclosed no information with respect to the industry's costs. MOFCOM additionally could have disclosed nonconfidential information about the types of costs that were rising, but instead disclosed nothing pertaining to the industry's cost levels.

MOFCOM also failed to address the pertinent substantive question under the Agreements: whether the dumped and subsidized imports served to prevent price increases, which otherwise would have occurred, to a significant degree. MOFCOM did not address this inquiry at all for the 2008 data. To fulfill its obligations under the Agreements, MOFCOM had to show that, because of the imports, prices for the domestic product would have increased even more in 2008 than they already did. Instead, MOFCOM assumed that, if imports were increasing, they must have caused the negative trends in per unit profits. An assumption is not positive evidence.

MOFCOM's findings of price suppression during the first quarter of 2009 must also fail. The price suppression findings for 2009 failed to reflect an objective examination, because MOFCOM evaluated the 2009 data in isolation from the earlier data. By contrast, an objective examination taking into account the entire POI would have revealed that there was not necessarily a correlation between rising import quantities and significant price suppression.

In its first written submission, China counters that the 2009 price suppression findings are justified because they reflect a continuation of 2008 trends. China's argument appears to follow from a passage in the final determination contending that "the price-cost differential declined continually." MOFCOM states that this was a result of the import underselling "strategy" that we have previously explained is contrary to the disclosed evidence. Thus, this finding is not supported by positive evidence. Moreover, because the 2008 price suppression findings are also unsupported by positive evidence, they cannot serve as the basis for the 2009 findings.

Because, as we explained, MOFCOM's price effects findings do not meet the requirements of the Agreements, the causal link required under Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement is absent.

Furthermore, the Agreements required MOFCOM not to attribute to dumped and subsidized imports injury caused by other known factors. There was at least one known factor other than imports under investigation that contributed to the domestic industry's decline in performance during the first quarter of 2009. This was the industry's huge increase in capacity. According to the preliminary determination, capacity was 80.13 percent higher in the first quarter of 2009 than in the first quarter of 2008. As a result, production skyrocketed during the first quarter of 2009, increasing far faster than demand. In fact, the increase in production was over 42 percentage points higher than the increase in demand. Inventories soared by 978.81 percent as a result. We explained in our first written submission why this inventory increase put pressure on the domestic industry's prices during the first quarter of 2009, why this contributed to the domestic industry's financial declines during that period, and why MOFCOM's analysis of the effects of the inventory increase falls short of the requirements of the Agreements.

China's response to this claim is defective legally. China argues that an authority need only show that the subject imports made a substantial contribution to the domestic industry's material injury and that the effect of other factors was not "so dramatic that they severed any possible causal link between the subject imports and the condition of the domestic industry." China further suggests that the party opposing the imposition of measures has the obligation to provide evidence demonstrating that the effects of other causes was "dramatic."

The text of the Agreements does not support China's arguments. Articles 3.5 of the AD Agreement and 15.5 of the SCM Agreement place on the authority the responsibility to examine all relevant evidence concerning causes of injury other than the subject imports. The only obligation the text places on the parties is to identify "known" causes of injury. It is undisputed that a U.S. exporter brought to MOFCOM's attention that overproduction and inventory overhang contributed to the difficulties of the Chinese GOES industry.

Similarly, neither Article 3.5 nor 15.5 states that an authority is relieved from the responsibility of conducting a non-attribution analysis if other known factors have effects, but such effects are not "dramatic." Nor does China point to any Appellate Body or panel report supporting this interpretation. By contrast, under the principles articulated in the Appellate Body report in *US – Hot-Rolled Steel*, once overproduction and the consequent inventory overhang was identified as a known cause of injury, MOFCOM had the obligation either to demonstrate that this factor was not contributing to the domestic industry's injury, or to conduct a non-attribution analysis. MOFCOM did not purport to conduct a non-attribution analysis.

Instead, MOFCOM took the position that production growing far more rapidly than demand had no appreciable effect on the domestic industry. This finding defies common sense, and our first written submission extensively discusses the lack of positive evidence supporting MOFCOM's analysis. For the most part, China has not responded to our arguments, nor has it meaningfully disputed that an inventory overhang caused by excessive growth in capacity and production would likely put

downward pressure on domestic prices. Instead, China asserts that the expanded capacity of the industry was less than domestic consumption. The accuracy of this assertion cannot be verified from any information MOFCOM disclosed. It is also unresponsive to the U.S. argument. Instead, it merely reflects an assumption that an industry that increases its capacity should be able to displace all imports in the market. The nature of this assumption is not intuitive, not explained by China, and not supported by any evidence disclosed. It cannot support MOFCOM's patently inadequate analysis of the increases in production and inventories.

China also argues in its first written submission that Chinese producers "did not produce more than the market could bear." Not even MOFCOM made such a finding, which is directly contradicted by the disclosed evidence. Far from showing restraint in production, Chinese producers used their additional capacity to increase production far beyond what the market demanded, resulting in the large inventory overhang. Again, China's argument does not justify MOFCOM's failure to perform a nonattribution analysis.

We also note that Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement specifically require authorities to examine the volume and price of imports that are not dumped or subsidized in their analysis of causal link. MOFCOM's superficial analysis of imports from sources other than Russia and the United States, which is devoid of any meaningful data, does not satisfy these requirements.

Consequently MOFCOM did not satisfy its obligations under the Agreements to establish a causal link between the subject imports and any injury sustained by the domestic industry.

In its consideration of imports from countries other than Russia and the United States, MOFCOM also breached its obligations to disclose essential facts. China attempts to defend MOFCOM's failure to provide facts or analysis by asserting that no interested party made an argument concerning nonsubject imports. China's argument overlooks that the purpose of the obligation is to permit parties to defend their interests. Parties cannot be expected to raise arguments about information an authority never disclosed. And MOFCOM entirely failed to disclose nonsubject import quantity and value information.

Finally, in our first written submission we pointed out several instances where MOFCOM's findings concerning price effects, causal link, and nonsubject imports failed to satisfy Article 12.2.2 of the AD Agreement and Article 22.5 of the SCM Agreement. Rather than attempt to defend MOFCOM's inadequate findings and conclusions, China asserts that authorities need only provide whatever information that they deem material. China provides no support for this assertion. It cannot be reconciled with the language of these provisions, which require disclosure of "all relevant information on the matters of fact and law which have led to the imposition of final measures." Premising disclosure not on an objective basis of relevance, but on the authority's own concept of what is "material," would reduce this provision to a nullity.

ANNEX C-2

EXECUTIVE SUMMARY OF THE OPENING STATEMENT OF CHINA
AT THE FIRST MEETING OF THE PANEL

1. The U.S. challenge in this case is limited in nature. There is no substantive challenge to China's findings with respect to the existence of dumping and subsidization. Rather, the U.S. challenge to the results of the antidumping and countervailing duty investigations is confined to a series of procedural complaints and complaints about the magnitude of the margins of dumping and subsidization based on facts available. The sole substantive complaint relates to China's determination of a single element of causation and is apparently grounded on a very limited analysis of the facts.

CVD Initiation

2. The record reflects that the information provided in the application was that information reasonably available to the applicants. BOFT examined the allegations and accompanying factual information, and determined that although certain allegations did not warrant initiation of an investigation, there was a sufficient evidentiary basis to initiate on several other allegations. This included the 11 challenged allegations.

3. The U.S. first submission failed to critique the factual information supporting the allegations. By failing to even address the evidence, China believes the United States has not established a *prima facie* case. What the United States really seeks is a different standard for applications than that found in Article 11 of the SCM Agreement. The United States wants a level of information, analysis, and disclosure simply not required by that provision. The consistent theme of prior panels in addressing Article 11 is that applicants need only submit enough evidence to justify an investigation, and need not analyze that evidence or justify the ultimate conclusion.

Treatment Of Confidential Information

4. The U.S. argument focuses entirely on the statements made in Part II of the application from the underlying record, but completely ignores the non-confidential summaries provided in Part I of the application. Given the failure of the United States even to address the specific non-confidential summaries provided, to discuss why each of the summaries is inadequate, or to demonstrate why such summaries did not provide respondents sufficient understanding of the confidential information to protect its interests, China does not believe that the United States has even established a *prima facie* case in support of its claim.

5. China also submits that the fact that the Appendices to the application do not repeat non-confidential summaries provided in the narrative of the public version of the application does not create a violation of Article 6.5.1 or Article 12.4.1. One can have a "reasonable understanding" of the key issues and facts by reading the entire public version of the petition and there is no obligation on the authorities to require interested parties to repeat a non-confidential summary that has already been provided.

6. To the extent the Panel finds that adequate non-confidential summaries on any particular issues were not provided in the underlying proceeding, China believes that the central issue shifts to whether or not China dealt with the exceptional circumstances of this investigation properly in view of Article 6.5 and 6.5.1 and the so-called "due process" rights of the interested parties. The exceptional circumstance of having only two respondent companies in China permitted the authorities

to invoke the "exceptional circumstance" provision of Articles 6.5.1 and 12.4.1 of the AD and SCM Agreements respectively in order to protect the confidentiality of the information submitted.

The Government Purchase of Goods Program

7. In the underlying investigation MOFCOM made direct requests to the company respondents regarding information on all steel sales in the context of the government purchase of goods program. The respondents refused to respond. After consulting and providing written guidance on the matter, MOFCOM gave both companies ample opportunity to correct their responses and provide the information necessary for MOFCOM to investigate the program. The companies again refused. In response, China declined to verify the deficient, untimely and unusable information provided, and instead applied "facts available" to both companies, finding that 100% of sales took place under the program.

8. The Panel must evaluate the U.S. Article 12.7 claim in light of China's approach to what it deemed to be necessary information, not in light of U.S. arguments about what should have been sufficient information under its own theory of subsidization. Properly framed, it is evident that MOFCOM's application of "facts available" was consistent with Article 12.7. The companies did not provide timely responses, did not cooperate to the best of their ability, and seriously impeded the investigation.

9. The United States has on this issue limited its arguments to AK Steel. All examples and arguments raised by the United States pertain only to AK Steel, and do not address ATI at all. The U.S. argument also concedes the point that China may infer some sales by AK Steel fell under the government purchase of goods program; the only issue is the extent to which sales by AK Steel fell under the program.

10. MOFCOM knew the correct utilization of the program was more than zero. MOFCOM also had a reasonable basis to believe the correct utilization was more than the 29% alternative offered by AK Steel, since AK Steel had refused to provide requested information. But MOFCOM also had no information with which it could determine some alternative that was more than the AK alternative but less than 100% utilization due to the refusal of ATI and AK Steel to provide complete information. Thus, MOFCOM reasonably relied on the 100% figure, consistent with Article 12.7 of the SCM Agreement. Finding MOFCOM obligated to utilize AK Steel's ratio would have been an invitation for respondents to create the same types of factual voids in order to obtain a favorable result.

MOFCOM's Disclosure of Its Determination of the Margins of Dumping

11. The United States is attempting to impose a requirement on Article 12.2.2 that authorities disclose the full calculations of all margins of dumping. But the U.S. claim does not refer to any WTO jurisprudence or reference any standard to be applied in interpreting the requirements of Article 12.2.2. The U.S. position is not supported by either the plain meaning of Article 12.2.2 of the AD Agreement or the facts.

12. Article 12 is focused on providing an "explanation" of determinations; sufficient detail in this context would indicate that the disclosure be sufficient to constitute an adequate explanation of the authority's findings and conclusions, and what facts and law were relied upon in reaching such conclusions and findings. All that is necessary is to provide interested parties to an investigation or review notice of determinations made by the authorities and an explanation of the determinations.

13. Notwithstanding the absence of any requirement that the details of the calculation of the margins of dumping be disclosed, as addressed in China's first submission the disclosure by China in the instant investigation was sufficient to allow respondents to replicate the

authority's calculation. Respondents were clearly in a position to check the accuracy of the MOFCOM calculation. Thus, the U.S. claim is simply without merit.

"Competitive" Bidding Process Under the Government Purchase of Goods Program

14. The U.S. Article 22.3 claim is focused on two issues: (1) MOFCOM's basic explanation; and (2) MOFCOM's reaction to U.S. arguments. China addressed both within its first written submission. Using record facts, MOFCOM's preliminary and final determinations plainly set forth why participation restrictions on foreign steel and price preferences afforded to U.S. steel resulted in prices that did not reflect competitive, market conditions under the government purchase of goods program. They also addressed U.S. arguments in the process. The U.S. claim is simply without merit.

"All Others" CVD Rate

15. In the underlying investigation MOFCOM provided direct notice to the participating respondents of its investigation, including the U.S. Government, AK Steel, and ATI. It also placed a copy of the received petition in its public reading room and published public notices of initiation. To MOFCOM's knowledge, notice was thereby given to each known interested party as defined by Article 12.9 of the SCM Agreement. In terms of the facts selected by MOFCOM in calculating the "all others" CVD rate, as indicated in the final determination, MOFCOM relied upon information provided by the petitioner. With respect to disclosure of the facts upon which the all others rate was based, the final determination disclosed that it was based upon information provided by the petitioners. The United States appears to have readily identified the source from the record based on that statement.

"All Others" AD Rate

16. On U.S. claims regarding the all others rate in the AD investigation, MOFCOM followed the general rule set forth in Article 6.10 of the AD Agreement. Neither Article 6.10 nor any other provision of the AD Agreement addresses the issue of the treatment of exporters/producers that are not "known" to the authority and cannot, therefore, be individually examined.

17. China also determined that the most relevant provision of the AD Agreement to address the issue of the antidumping rate for unknown and unresponsive exporters/producers was Article 6.8 of the AD Agreement which addresses the treatment of interested parties who do not provide the "necessary information" required by the authority. The application of Article 6.8 and the last sentence of paragraph 7 of Annex II were intended to encourage realization of the objectives of Article 6.10, namely to enable China to follow the general rule of determining margins of dumping for each individual producer/exporter.

18. Because the information on which the final determination of the "all others" rate was based was confidential information of one of the responding companies, the actual information used to determine this rate could not be disclosed without breaching the confidentiality of the information used. Thus, the explanation was necessarily general in nature. The failure to disclose the details of the calculation of the "all others" rate had no effect on the ability of parties to defend their interests. So long as the "all others" rate is based on record evidence, it is not clear that in the situation where parties do not cooperate that the authority's discretion is limited.

Injury Investigation

19. The United States has made no challenge to the MOFCOM findings of adverse volume effects. The United States has also made no challenge to the MOFCOM findings regarding

cumulation. Finally, the United States has made no challenge to the MOFCOM findings of material injury. The U.S. challenges are limited to the price effects, and the causal link.

20. On price effects, the U.S. arguments focus heavily on price undercutting findings that MOFCOM did not make, and largely misstate and mischaracterize the price suppression and price depression analysis that MOFCOM did make. The record provides strong positive evidence for the MOFCOM findings of price suppression and depression during 2008 and 2009, evidence that was not challenged at all during the administrative proceedings before MOFCOM and evidence that the United States has not effectively challenged.

21. MOFCOM did not make specific price undercutting findings, nor was it under any legal obligation to do so, contrary to U.S. arguments. The texts of Article 3.2 and Article 15.2 -- through the key term "or" -- make clear that price undercutting is simply one alternative methodology that the authorities may consider as part of evaluating price effects.

22. MOFCOM also disclosed all of the "essential facts" as required by Article 6.9 and Article 12.8. This disclosure occurred in two key documents. First, MOFCOM presented a Preliminary Determination on 10 December 2009, which included extensive discussion of injury issues in general, and pricing issues in particular. Second, MOFCOM also presented a Final Injury Disclosures on 7 March 2010, which presented the essential facts and provided initial responses to those arguments that had been made so far during the administrative proceedings. These two documents contained all of the "essential facts" on which China ultimately relied in its Final Determination.

23. MOFCOM also provided the "relevant information" and "reasons" required by Article 12.2.2 and Article 22.5. MOFCOM developed its response that the growing volume of subject imports in 2008 and early 2009 caused price suppression and price depression in those years. That complete explanation of its "reasons" satisfies the obligations of Article 12.2.2 and Article 22.5.

24. China further believes that its analysis of adverse price effects fully complied with the substantive and procedural requirements of the relevant Agreements. If the Panel were to disagree, China asks the Panel to confirm MOFCOM's overall finding of causation was still proper. Since MOFCOM based its analysis of causation on both volume effects and price effects, those price effects can support an overall finding of causation, even if they might not have been sufficient to justify finding a causal link on their own.

25. On causal link, the U.S. first submission presented only a single paragraph discussing causal link more generally, and that paragraph simply refers back to the U.S. arguments about price effects. But MOFCOM never considered the price effects in isolation; they were part of any overall analysis that the increasing volumes of low priced subject imports were causing material injury to the Chinese industry. The United States has thus failed to demonstrate any inconsistency between MOFCOM's analysis and the requirements of Article 3.1 and Article 15.1.

26. With respect to non-attribution, Article 3.5 and Article 15.5 do not specify any particular methodology, and thus leave authorities with discretion as to how best to ensure a genuine causal link, even given the effects of other causes. MOFCOM need not disprove any possible effect of any other known factor that might also be affecting the domestic industry. The burden is on the United States as the complaining party to establish a *prima facie* case that the effects of increased domestic capacity were so dramatic that they severed any possible causal link between the subject imports and the condition of the domestic industry. The United States has failed to meet that burden.

27. With respect to the issue of non-subject imports, China disclosed the "essential facts" of the case. The Preliminary Determination identified "products imported from other countries" as an "other factor" being analyzed, and noted that subject imports were capturing a larger share of the total

imports. Other parts of the notice also addressed non-subject imports. Having provided the "essential facts," and having received no arguments on this point, China did not need to develop this issue further in the absence of arguments.

28. Finally, the U.S. argument that MOFCOM did not provide any "factual substantiation" for its conclusions is wrong. The demonstration that non-subject imports gained only 0.09 percentage points of market share is factual substantiation. Moreover, MOFCOM provided more than adequate discussion of this issue in light of the failure by the parties to use the publicly available information to develop any arguments on this point.

U.S. Claims Under Article 1 of the AD Agreement, Article VI:2 of GATT 1994, and Article 10 of the SCM Agreement

29. U.S. claims under Article 1 of the AD Agreement, Article VI:2 of GATT 1994, and Article 10 of the SCM Agreement are subsidiary claims related to the substance of the claims previously addressed. To the extent the Panel finds the U.S. claims to lack merit with respect to these prior claims, so to should it dismiss this U.S. claims under Article 1 of the AD Agreement, Article VI:2 of GATT 1994, and Article 10 of the SCM Agreement.

ANNEX C-3

CLOSING STATEMENT OF THE UNITED STATES
AT THE FIRST MEETING OF THE PANEL

Mr. Chairman, Members of the Panel. The United States would like to begin by thanking you and the Secretariat for your efforts in the preparation for and conduct of this hearing.

We hope that the discussion held here yesterday and today has assisted the Panel in enhancing its understanding of the issues before it in this case.

If an observer had been listening solely to China's interventions yesterday, he or she might have come away with the impression that the practices of the U.S. Department of Commerce and International Trade Commission were the subject of this dispute. In that context, we would again note that China's description left out a number of important aspects of U.S. practice that are quite different from what MOFCOM did in this investigation.

To the extent that the Panel found the examination of such matters helpful to the task before it, we welcome further discussions along these lines. Nevertheless, we find it telling that China has chosen not to focus its attention on the actual Chinese measures at issue in this dispute, the actual record in the underlying investigation, and the application of WTO principles to that record.

China also at one point seemed to suggest that it is the responsibility of an interested party to piece together information that the investigating authority chose not to disclose or adequately summarize. First, this would be a highly speculative exercise. More fundamentally, the skill of a party in making educated guesses has no bearing on whether a breach of an investigating authority's WTO obligations exists.

We discussed a number of substantive issues on Thursday and will address them more fully in our future submissions. We also note that many of the third parties addressed the issues of initiation and the provision of non-confidential summaries, which we found helpful; particularly, the oral statements of Argentina, Honduras, and the European Union. We also found Japan's comments on the obligations of Article 12.2.2 of the AD agreement with regard to the dumping margin calculations particularly informative.

Before these hearings formally close, the United States would like to make a few brief comments relating to one of the substantive matters discussed yesterday. In particular, the United States would like to address the discussion before the Panel on Thursday concerning MOFCOM's finding of significant price effects, as this discussion revealed fundamental flaws in China's arguments.

First, China variously suggested that the factual support for the price effects findings may be found in the public documents prepared by MOFCOM or in other public documents submitted by the parties that MOFCOM neither referenced in its essential facts disclosure nor expressly or implicitly adopted in any determination. In some instances, both the Panel and the United States are left to guess where MOFCOM has stated its factual findings and what these findings are. Such lack of transparency cannot be reconciled with the requirements of Article 12.2.2 of the AD Agreement and Article 22.5 of the SCM Agreement. Moreover, China cannot simultaneously posit that it satisfied its obligations under Article 6.9 of the AD Agreement and Article 12.8 of the SCM Agreement through the preliminary determination and essential facts disclosure, but that the disclosures made in these documents were not intended to be complete.

Second, while China argues that a price undercutting analysis was unnecessary, it simultaneously repeated MOFCOM's findings of "low" import prices as grounds for finding significant price depression and price suppression. A predicate of a finding of "low" prices is that an authority has undertaken an analysis of comparative prices. But China has thus far failed even to explain how it undertook any such price comparison analysis, much less to respond to the United States' detailed arguments about how any such analysis did not reflect an objective examination and was unsupported by positive evidence. As Japan stated today, "[t]he mere statement ... that 'the sale of the product concerned was kept at a low price' – would not be sufficient to explain the relevant information."

The United States would like to conclude by again thanking the Panel and Secretariat for their efforts. We look forward to receiving your written questions and continuing this discussion in future submissions and at the December substantive hearing.

ANNEX C-4

CLOSING STATEMENT OF CHINA AT
THE FIRST MEETING OF THE PANEL

1. We would like initially to take the opportunity of this closing statement to again thank the panelists and the secretariat for their dedication to this proceeding. We have made every effort to make the first meeting with the Panel as productive as possible and we hope the panel shares our view that the meeting has been productive in better defining the issues and clarifying the positions of the parties on their positions. We look forward to working with the Panel and the secretariat as the panel proceeding moves forward.

2. We would like in this closing statement to briefly summarize China's position on the principal issues in this proceeding, beginning with the U.S. claims under Article 11.2 and 11.3 of the SCM Agreement and issues related to initiation. China believes some initial progress has been made. In particular, the United States confirms that the focus of any inquiry is on the evidence that accompanies an application, not the elegance of the allegation.

3. In parting, we would ask the Panel to consider two points. First, the initiation standard that appears to be offered by the United States is one of definitive evidence. For example, the United States wants definitive evidence of a financial contribution. According to the United States, anything less is mere speculation. But what purpose does an investigation serve if the initiation standard is based on definitive evidence? There is a well settled principle on this very point – the quantity and quality of the evidence required for initiation is less than that required for a preliminary or final determination. Second, it is the United States' burden to present both argument *and evidence* to the panel to make its *prima facie* case. The United States did not move beyond paragraph 78 of its First Written Submission, which is limited to assertions of "no evidence." China is left to defend on the basis of these simple assertions. We believe this situation should further reflect on the U.S. argument and whether it has met its burden as complainant in this case.

4. In terms of the adequacy of the non-confidential summaries provided in the petition and related to the determination of injury and causation. The fact that China in the context of this proceeding has been able to present to the Panel full argumentation and explanation of the basis of its determinations relying solely on the public information provided would seem to render this issue moot. To the extent that the United States provides specific examples of information which did not permit an adequate explanation of a particular aspect of the authority's determination, we would welcome the opportunity to respond by pointing them to the information on the public record which renders their concern moot. China provided such examples during the course of the Q&A yesterday to the extent that the United States provided specific examples and China is prepared to do this with respect to additional examples. China also reiterates that the adequacy of these summaries should be viewed in the context of the difficulty of protecting confidential information when only two petitioners are involved in an investigation. This problem is not unique to China.

5. In summary, the question before the panel is whether the non-confidential summaries provided by petitioners with respect to the determinations of injury and causation provide "sufficient detail" to allow a "reasonable understanding" of the substance of the information being provided in confidence and the reasoning of the authority in reaching its determination. China believes that the record in the underlying proceeding satisfies this standard.

6. In terms of the disclosures provided to the respondents on the method of calculation of the dumping margins, there are two very simple points to be made. First, while not disclosing the specific

numbers used in calculating the margins of dumping, the Chinese authority did disclose the source of the specific numbers used in calculating the margins of dumping and the methodology used. Although in China's view, nothing more is required because this meets the standards of both Article 12.2 and 6.5 of the Antidumping Agreement, the level of disclosure was such that the actual margins of dumping could be calculated by the respondents to ensure the accuracy of the calculations by the authority, the apparent overriding concern of the United States. This is evident from the detail of the disclosure itself.

7. We will not dwell on the issue of the all others rate, except to say that there is no provision governing the all others rate and that there are policy reasons supporting the use of facts available to encourage unknown exporters/producers to come forth and cooperate in an investigation in which the authority is investigating all exporters or producers individually.

8. On the application of facts available with respect to the Government Purchase of Goods Program, the issue remains whether the respondents cooperated to the best of their ability in providing necessary information. The United States wishes to distract by focusing on irrelevant issues and avoiding the question of whether AK Steel or ATI could have done more. Yesterday the United States appeared to advance a new theory not articulated in its first written submission – that AK Steel and ATI fully responded to the questions as posed by MOFCOM on this issue and were taken by complete and utter surprise in December 2009 when they first learned this was not MOFCOM's interpretation. The record simply does not support this new theory, as we will discuss in greater detail in subsequent submissions to the Panel. But suffice it to say that the U.S. theory has trouble at the start. It seems highly unlikely that answers to questions that were so clear to AK Steel in terms of the their narrow focus, at least according to the United States, were qualified in advance by healthy argument from AK Steel about why it believed it was impermissible for China to inquire on a broader scale. I could go on from here, but China will reserve further discussion to any written responses to questions and its second submission.

9. With regard to the claims involving injury, we would like to note a few key points. As we made clear in our first written statement and in our comments yesterday, we are happy to answer any Panel questions regarding proprietary information. We repeat that offer, with regard to both the U.S. claim regarding price effects that we discussed yesterday and the U.S. claim regarding causation that we assume will come up in the written questions.

10. Yesterday, the United States said in its oral statement that "it is useful to focus on what MOFCOM actually found." We agree. MOFCOM found that subject imports increased absolutely, captured more than 5 percentage points of market share in 2008, and continued to gain market share in early 2009. MOFCOM also found that the increasing volume of subject imports caused material injury. These findings of adverse volume effects have not been challenged by the United States. For all the back forth the parties have had and will continue to have about price effects, these volume effects alone establish a legally sufficient causal link to justify these measures. The United States claims the declining profitability in 2008 and 2009 was "not volume-related," but this is just not true. The domestic industry invested in a growing market, but found itself shipping less than it might otherwise have shipped and thus losing market share because of these surging volumes of unfairly traded imports. The price levels of the imports do not change the fact that increasing volumes of unfairly traded imports caused material injury.

Thank you.

ANNEX D

ORAL STATEMENTS OR EXECUTIVE SUMMARIES THEREOF OF THE THIRD PARTIES AT THE FIRST SUBSTANTIVE MEETING

ANNEX D-1

THIRD PARTY ORAL STATEMENT OF ARGENTINA*

I. INTRODUCTION

Mr Chairman, distinguished members of the Panel

1. The Republic of Argentina would like to thank the Panel for the opportunity to present its arguments and considerations relating to this case, in view of its "systemic" interest in ensuring the correct interpretation of the provisions at issue in this dispute.

2. As third party, Argentina maintains an interest in the correct interpretation of the agreements cited in these proceedings, and accordingly, in this submission, our government wishes to express its views on the interpretation of certain provisions of 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") inasmuch as this Panel's interpretations of those provisions will have systemic implications.

3. To make the best of the short time available, this submission will focus on certain matters relating to this case. The first concerns the interpretation of the confidentiality of the documents submitted in an investigation under the AD Agreement and the SCM Agreement, and the need for non-confidential summaries so as to ensure that the parties under investigation have the proper right of defence. The second relates to the determination of injury, in particular, in connection with the need to consider factors other than imports as causal agents of injury.

II. UNDER ARTICLE 6.5 OF THE AGREEMENT ON IMPLEMENTATION OF ARTICLE VI OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE 1994 ("AD AGREEMENT") AND ARTICLE 12.4 OF THE AGREEMENT ON SUBSIDIES AND COUNTERVAILING MEASURES ("SCM AGREEMENT"), GOOD CAUSE MUST BE SHOWN FOR THE CONFIDENTIALITY OF INFORMATION AND A NON-CONFIDENTIAL SUMMARY MUST BE FURNISHED TO THE INTERESTED PARTIES

4. We note that Articles 6.5 and 6.5.1 of the AD Agreement and 12.4.1 of the SCM Agreement require the submission of non-confidential summaries, so that interested parties or Members are able to gain "a reasonable understanding of the substance of the information submitted in confidence". The aim is to guarantee the right of defence to the interested parties, who otherwise would lack sufficient information to understand the grounds of the accusation that they face.

5. We recall that in *United States - Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina* (WT/DS268/RW), the Panel held that "*Article 6.5.1 protects the right of the interested parties generally to be reasonably informed about the substance of the confidential information that may be submitted by any other interested party. What matters for purposes of Article 6.5.1 is whether the interested parties themselves receive non-confidential summaries of the confidential information submitted to the investigating authorities*".[1]

* This oral statement was originally made in Spanish.

[1] *United States - Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina* (WT/DS268/RW), paragraph 7.137.

6. In other words, where the existence of a non-confidential summary is not accredited in the file, or where there is no explanation in the file that would justify the inability to summarize the confidential information, the right of the interested parties to be reasonably informed about the substance of the confidential information will not have been respected.

7. This is why Argentina agrees with the arguments set forth by the United States in point B of its written submission to the effect that in accordance with Article 6.5.1 of the AD Agreement and 12.4.1 of the SCM Agreement, the Chinese Ministry of Commerce (MOFCOM) should have required the interested parties submitting confidential information in the investigation to furnish non-confidential summaries thereof, especially in cases where the submitting parties had provided no reasons why summarization was not possible.

III. NON-ATTRIBUTION ANALYSIS WITH RESPECT TO OTHER FACTORS IN THE DETERMINATION OF INJURY

8. Argentina notes that according to Articles 3.5 of the AD Agreement and 15.5 of the SCM Agreement, prior to its determination as to whether imports at dumped or subsidized prices are the cause of the difficulties experienced by the domestic industry, an investigating authority should carry out the so-called *non-attribution analysis*, whereby consideration has to be given to factors other than known factors and a determination made as to whether they contribute to the injuries suffered by the domestic industry.

9. In this connection, we take the view that it is also clear from the above-mentioned rules that the Agreements under interpretation require no evidence that imports from other countries considered as one of the other "known factors" are dumped or subsidized imports.

10. In our view, even in the absence of dumping or subsidization, the prices and/or quantity of those commercial operations could be such as to cause injury to the domestic industry. In that case, the investigating authority would have to examine whether, in the light of their volume and/or prices, imports from sources other than the one under investigation are substantial enough to break the causal link between the dumped imports and the injury determined. In that examination, it might also be necessary to consider qualitative issues relating to the forms of competition in each of the markets.

IV. CONCLUSION

11. In the light of the analysis contained in this oral submission, Argentina considers that:

- The "confidential" classification of information submitted by any party in the dumping or subsidy investigation must be justified by good cause; in that event, it is of the utmost importance that, except in duly attested exceptional circumstances, sufficiently detailed non-confidential summaries are furnished, so as to guarantee the information necessary for the interested parties to be able to exercise their legitimate right of defence.

- In the determination of injury, the investigating authority shall effect a non-attribution analysis relating to "other known factors" which may be a contributing cause of the difficulties faced by the domestic industry. In particular, it shall analyse whether imports from origins other than those investigated are causing injury to the domestic industry.

12. We thank you for your attention and hope that the above comments prove to be useful in the Panel's deliberations and help arrive at an interpretation that is harmonious and in accordance with the aims and objectives of the AD Agreement and the SCM Agreement.

ANNEX D-2

EXECUTIVE SUMMARY OF THE THIRD PARTY ORAL
STATEMENT OF THE EUROPEAN UNION

I. TREATMENT OF CONFIDENTIAL INFORMATION UNDER ARTICLES 6.5.1 ADA AND 12.4.1 SCM

1. The European Union (EU) is of the view that the reading of Article 6.5 and 6.5.1 ADA (and the corresponding provisions in the SCM) advanced by China in Its First Written Submission cannot be reconciled with the text of the Agreement and is not supported by the jurisprudence of prior panels and the Appellate Body.

2. Article 6.5 ADA lays down the principle that, **upon good cause shown**, confidential information submitted by interested parties in the course of an anti-dumping investigation is to be kept confidential by the authorities. The requirement to show good cause falls on the **interested party submitting the information at issue, not the investigating authority**, and it applies both to information that is confidential "by nature" as to the information that is "provided on a confidential basis".

3. The Appellate Body in its recently confirmed that "[i]f information is treated as confidential by an authority without such a 'good cause' showing having been made, the authority would be acting inconsistently with its obligations under Article 6.5 to grant such treatment only 'upon good cause shown'" (Appellate Body Report in *EC – Fasteners*, para. 539). The Appellate Body also clarified that the type of evidence and the extent of substantiation an authority must require will depend on the nature of the information at issue and the particular "good cause" alleged.

4. Provided good cause has been shown, Article 6.5.1 ADA further **obliges the investigating authority to require** that parties submitting confidential information also furnish a **non-confidential summary** thereof. The summary must be **in sufficient detail** to permit the parties to the investigation a reasonable understanding of the substance of the information submitted in confidence and thereby allow them the opportunity to defend their interests.

5. The ADA and SCM allow the possibility for authorities to waive the obligation to provide a non-confidential summary of confidential information, but limit it to **"exceptional circumstances" where summarization is not possible**. In such exceptional circumstances **the party seeking confidential treatment** of the information submitted **is required to provide a "statement of reasons why summarization is not possible"**.

6. The EU also notes that prior panels - and recently the Appellate Body - left no doubt as to the fact that Article 6.5.1 ADA (as well as its parallel provision in the SCM) should be understood as imposing an **obligation on the investigating authority to scrutinise the statements** provided by parties seeking confidential treatment for information submitted. The aim is to determine whether exceptional circumstances have been established, and whether the reasons provided adequately explain why under the circumstances a summarization is not possible.

7. China refers to jurisprudence on Article 6.5 and 6.5.1 ADA in noting that these provisions aim to **strike a balance between the interests** of parties submitting information (i.e. confidentiality) and the interests of all other concerned parties (i.e. due process, transparency). In the view of the EU, this very balance would be completely upset if authorities were to be allowed to protect as

confidential virtually any piece of information based on a mere presumption that such protection is warranted.

8. The party submitting information is best placed to asses the effects that its disclosure could have. All an investigating authority could do, in the absence of a motivated request, is speculate as to the potential risks. It is therefore only logical and appropriate that the ADA put the burden of proof of good cause for confidential treatment and the obligation to demonstrate insusceptibility of summarization in non-confidential format on the party submitting the information. The authorities are charged with the obligation to demand and objectively scrutinise such requests. Anything else would create a risk that any "inconvenient facts" would become shielded from scrutiny and rebuttal by interested parties through an *ex officio* designation of confidentiality.

9. China furthermore argues that the very fact that there were only two producers amounts to "exceptional circumstances" within the meaning of Article 6.5.1 ADA. While it is undisputable that Article 6.5.1 provides for the possibility that there may be justified cases in which it is not possible to provide a non-confidential summary of confidential information, the EU is not persuaded by China's arguments that this is always the case where there are only two producers involved. The EU is of the view that in cases when there are only two producers it is still possible to prepare non-confidential summaries (e.g. in the form of indexes).

II. THE ALLEGATION THAT THE PRICE EFFECTS ANALYSIS IN MOFCOM'S FINAL DETERMINATION WAS INCONSISTENT WITH CHINA'S WTO OBLIGATIONS

10. The United States (US) alleges that MOFCOM's price effect analysis is inconsistent with Articles 3.1 and 3.2 ADA and with Articles 15.1 and 15.2 SCM. In particular the US alleges that MOFCOM made no finding at all regarding **price undercutting**, while references to "low price" policies and strategies are not based on positive evidence. According to the US, MOFCOM did not, either in the Injury Disclosure Document or in the Final Determination, rely on any information about actual pricing levels, neither in the price suppression nor in the price depression analysis. China argues, that it did not make specific findings about price undercutting, since on the basis of ADA it is not required to do so. China acknowledges that it based its overall finding about adverse price effects on the price suppression and price depression analysis and that these two "did not depend on precise pricing information".

11. The EU does not agree with China's position that price suppression and price depression analysis do not have to "depend on precise pricing information". In the EU's view, prices analysis necessarily requires information on prices, also concerning the analysis of price suppression and price depression. Otherwise the reliability of the findings cannot be guaranteed.

12. As elaborated in our Written Submission, an investigating authority is obliged under Article 3.1. ADA to base the injury examination on "**positive evidence**" and to conduct an "**objective examination**". The term "positive", indicates that the evidence must be of an affirmative, objective and verifiable character, and that it must be credible.

13. Price depression can be determined by considering the trend in prices of the domestic product over the period of investigation (POI). It could also be assessed by evaluating whether domestic price declines and prices of imports remain consistently below domestic prices over the POI. Failure to take into account concrete pricing data does not allow - in neither of the above methods - for an affirmative, objective and verifiable, and thus credible result of such an analysis.

14. Price suppression analysis, which relies on a counter-factual conclusion that, absent the dumped imports, prices of the domestic products would have increased, is even more difficult to

undertake in an objective manner. It requires a conclusion that domestic prices should have increased. Any such conclusion may rest on elements as e.g. increased costs, which would be normally passed on as price increases.

15. Therefore, any analysis which allows for the assessment of adverse price effects - be it in the form of price undercutting, price suppression or price depression - and of their significance must rest on precise pricing information to satisfy the requirements set out in Article 3.1 ADA.

16. The EU agrees that, in accordance with Article 3.2 ADA, a determination of injury does not require a finding of price undercutting, but may also be based on a finding of price depression and/or of price suppression. The EU also agrees that the ADA does not prescribe any precise methodology for assessing the level of price undercutting. But this does not mean, contrary to what appears to be China's position, that a comparison of the prices of domestic and imported products is never required by the ADA, so that the investigative authorities enjoy complete discretion to decide whether or not to make such a comparison. In particular, it may be noted that some form of comparison between the prices for domestic and imported products will usually be required in order to establish the requisite causal link between the imports and the injurious effects. For example, it is obvious that where the prices for the imported products have been much higher than the prices for the domestic products during the relevant period of reference, price depression or price suppression cannot, absent very exceptional circumstances, be attributed to the imported products. For this reason, a failure to make any kind of comparison between the prices for domestic and imported products may well constitute a breach of the obligation to make an "objective examination" within the meaning Article of 3.1 ADA.

III. ESTABLISHMENT OF THE REQUIRED CAUSAL LINK

17. In view of the Chinese arguments concerning the alleged failures in establishment of casual link, the EU would like to underline that both the significant adverse price effects and increasing volumes of low priced imports are necessary elements of the analysis of the casual link as provided for in Article 3.1 ADA and Article 15.1 SCM. Therefore, any inadequacies in the establishment of the adverse price effects will necessarily have repercussions on the finding concerning the casual link.

ANNEX D-3

THIRD PARTY ORAL STATEMENT OF HONDURAS[*]

Mr Chairman and distinguished members of the Panel,

1. Honduras would like to thank the Panel and the parties for this opportunity to present its views on some of the matters at issue in this dispute, and because we have a systemic interest in the matter, we would like to discuss the interpretation of some of the provisions of the WTO Agreements that are in dispute.

2. In this statement, and without prejudice to what was already stated in the third party submission to the Panel, Honduras will focus on certain matters relating to the standards of proof for the initiation of a countervailing measures investigation.

3. There does not appear to Honduras to be any divergence between China and the United States on the fact that Article 11.2 of the SCM Agreement requires that sufficient evidence be provided of the existence of the three elements of an actionable subsidy, namely financial contribution, benefit, and specificity of the subsidy.[1]

4. However, Honduras does see a divergence on whether sufficient evidence was provided regarding the elements of a subsidy in the context of various programmes that were under investigation during the domestic procedure. The United States claims that the application did not include that evidence[2], while China claims the contrary.[3]

5. In evaluating the arguments of the two parties, the Panel should bear in mind the following points:

6. Article 11.2 of the SCM Agreement requires the inclusion of sufficient "evidence" of the "existence" of a subsidy, among other elements. The term "evidence" is defined as an instrument intended to ascertain the truth or falsity of a matter, or an indication, sign or testimony that is given in relation to something.[4] In that respect, it must give *clear indications* of what it is seeking to establish. These clear indications must be *objectively* verifiable, and not simply left to a *subjective* appreciation. For Honduras, complying with Article 11.2 of the SCM Agreement requires more than simply asserting that there is "implicit" evidence. Evidence cannot consist of mere conjecture, speculation or abstract inferences without any positive and objective substantiation.

7. At the same time, Honduras notes that there is a certain divergence regarding compliance with the requirement to provide sufficient evidence of the benefit conferred by a subsidy when that subsidy ended prior to the beginning of the investigation period. In particular, there appears to be the suggestion that in the absence of any guidelines in the SCM Agreement as to the distribution of the benefit of a subsidy over time, an application for the initiation of an investigation would not necessarily have to contain evidence of the existence of the benefit during the period of investigation.[5]

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[*] This oral statement was originally made in Spanish.

[1] First Submission of the United States, paragraphs 72-74, and First Submission of China, paragraphs 14-18.

[2] For example, First Submission of the United States, paragraph 78.

[3] For example, First Submission of China, paragraphs 34-58.

[4] Real Academia Española, *Diccionario de la Lengua Española*, 22nd edition, 2011, p.1853.

[5] First Submission of China, paragraph 38.

8. In our view, Article 11.2 does not contain any repealing clause or provide for any exception with respect to the inclusion of *sufficient* evidence of the existence and the various elements of a subsidy. Consequently, we do not think that the lack of guidelines concerning the distribution of a subsidy over time should be considered as an exception to the *sufficiency* requirements laid down in Article 11.2.

9. Finally, Honduras notes that there is a divergence as to whether sufficient evidence was included, showing that a State entity provided a financial contribution.[6] It appears to Honduras that the sufficient evidence should be of the "existence" of a subsidy and its constituent elements. In its ordinary meaning, the term "existence" refers to a thing that is *real and genuine*.[7] Compliance with the Article 11.2 mandate requires the inclusion of evidence showing that the subsidy is real or genuine, in other words that it exists and has been granted. The mere creation of an entity whose apparent function is to conduct studies or analyses should not, in Honduras's view, be considered sufficient evidence of the *existence* of a subsidy, and in particular a financial contribution. Honduras is concerned at the idea that State information-gathering activities on behalf of a domestic industry should be considered to be an actionable subsidy.

Thank you.

[6] First Submission of the United States, paragraph 78, and First Submission of China, paragraph 43.
[7] Real Academia Española, *Diccionario de la Lengua Española*, 22nd edition, 2001, p. 1019.

ANNEX D-4

EXECUTIVE SUMMARY OF THE THIRD PARTY
ORAL STATEMENT OF INDIA

Mr. Chairman and distinguished members of the Panel. India thanks the Panel Members for the opportunity provided to it to submit its statement before this Panel.

Introduction

1.1. This dispute raises several procedural issues related to initiation of countervailing duty investigations, determination of subsidy rates, treatment of confidential information, injury determination etc. The issues raised are of systemic importance for all the WTO Members and therefore India attaches importance to the examination of these issues by the Panel. Most of the claims and counterclaims in this dispute are factual. With very limited factual information available, India would not wish to support the claims of any particular party and would rather urge the Panel to objectively look at the facts of this dispute and draw conclusions which would provide guidance to Members in implementation of the relevant provisions of ASCM and AD Agreement.

2. On whether China's initiation of an Anti-subsidy investigation was consistent with Articles 11.2 and 11.3 of the SCM Agreement

China asserts that the US has claimed that China's initiation was inconsistent with Articles 11.2 and 11.3 of ASCM :

(i) the application for investigation failed to contain information reasonably available to the applicant regarding the existence of a financial contribution, a benefit, and/or specificity with respect to certain of the investigated subsidy programs; and

(ii) by initiating an investigation of the same set of programs the investigating authority failed to objectively assess the adequacy and accuracy of the evidence contained in the application.

2.1. It is submitted that while examining the US claim under Article 11.2, it may be inherent to examine whether the specific programmes included in the allegation of subsidies fulfilled the criteria of definition of a 'subsidy' within the meaning of Article 1.1 of ASCM in order to prove that a subsidy existed.

2.2. It is submitted that whether or not the application contained the requirements as mandated under Art. 11.2, ASCM is a question of fact. India would urge the Panel to evaluate this question of fact keeping in view an objective interpretation of the requirements enunciated under Article 11.2, ASCM.

2.3. On the purported challenge of the US that by initiating an investigation of the same set of programs, India would wish to submit that this is a question of fact.

2.4. In the *Request for Consultations*, the US alleges that China's Countervailing and Antidumping measures on GOES from the US appear to be inconsistent, *inter alia*, with Article 10 and 19 of the ASCM because China improperly determined that government purchases under the US Buy American Laws

conferred a "benefit"[1]. At para 12[2], the US states that MOFCOM initiated an investigation with respect to the American Recovery and Reinvestment Act (ARRA), 2009. In the *Request for the Establishment of the Panel*[3], the US acknowledges that China has applied CVD as countervailing action on several alleged subsidy programs[4].The US states that the petitioner challenged the US State and Federal laws that they claimed provided countervailable subsidies to GOES producers[5]. The US does not categorically rebut the factum of the existence of the subsidy element in several and specific US programmes. The US in its First Written submissions[6] refers to the specific US measures/ sectors alleged to be providing subsidies to the US industry such as:

-*Buy America provisions.*

-*Medicare Prescription Drug, Improvement and Modernization Act of 2003, Economic Recovery Tax Act of 1981, Tax Reform Act of 1986, Steel Import Stabilization Act of 1984, State of Indiana Steel Industry Advisory Service, Grace periods for compliance with the Clean Air Act,*The American Clean Energy Security Act of 2009,*2003 Economic Stimulus Plan of Pennsylvannia.3,-Pennsylvania's Alternative Energy Funding Program.*

Sectors: *Electricity, Natural Gas, Coal*

2.5. It is submitted that an underlying issue in this dispute would be the existence of subsidies or otherwise in the US State and Federal Programmes and whether these subsidies could be subjected to countervailing duty action as per the ASCM.

2.6. At para 229[7], China submitted while addressing U.S. arguments in the underlying proceeding (that competitive bidding existed under Buy American provisions), the MOFCOM stated in full as follows:

> *The Investigating Authority found that, according to provisions in the Buy American Act and other regulations, although there is competitive bidding process, using steel and finished products produced in the U.S. is required unless there is a waiver. The Investigating Authority holds that this fact shows that the scope of products allowed for bidding under Buy American Act has actually been limited to some extent, and thus the bidding is not market competition in the usual sense…..when purchases of U.S. iron and steel products do not cost 25% more than foreign products, the foregoing so-called competitive bidding is only competition among U.S. products. …..…Therefore, the Investigating Authority considered that the competitive bidding restricted the scope of*

[1] WT/DS414/1
G/L/927
G/SCM/D85/1
G/ADP/D85/1
Dated 20 September, 2010; *Request for Consultations by the US.*
[2] *US First Written Submissions* (USFWS)dated June 8,2011.
[3] WT/DS414/2 dated 14 February,2011, *Request For The Establishment Of A Panel By the US.*
[4] At para 1.(a) and (b), *Ibid*.
[5] USFWS para 13.Details of the said laws are provided elsewhere in the USFWS and China's FWS.
[6] At page 25, para 78
[7] *Ibid.*

> *participating products, and thus could not reflect the full market competition. Even if there is competition, it is competition only among the U.S. domestic steel products (may include part of the foreign products at the federal level and in some regions). Hence the price obtained through competitive bidding does not reflect the true market conditions.*

2.7. Further, China states that the United States acknowledged in its questionnaire response in the underlying investigation The Buy American Act (the Act), 41 U.S.C. 10a-10d, is the major domestic preference statute governing procurement by the federal government and the program at issue is governed by "Buy American" provisions that prefer U.S. prices and U.S. goods, distorting the competitive playing field.

2.8. As a third party, India submits that questions of facts and evidence would be for the parties to prove or to rebut and the Panel should examine carefully the facts presented by the parties for fair and objective application of the provisions of the *AD Agreement* and the *SCM Agreement.*

3. On whether MOFCOM's treatment of confidential information was fully consistent with the requirements of article 6.5.1 of the AD Agreement and Article 12.4.1 of the SCM Agreement

3.1. United States has claimed that MOFCOM breached these disciplines as the non-confidential summaries provided to MOFCOM were inadequate and no reasons were provided for the inadequacy of the non-confidential summaries, China has rebutted this allegation. This is a question of fact to be established by evidence led by the two main Parties in this dispute.

3.2. As stated hereinbefore, India would urge the Panel to interpret the provisions of the WTO Agreements strictly in accordance with the language adopted in the said provisions. The Panel in *Mexico- Steel Pipes and Tubes* at para 7.380 held that it considered that the conditions set out in Article 6.5, chapeau, and 6.5.1 are of critical importance in preserving the balance between the interests of confidentiality and the ability of another interested party to defend its rights throughout an anti-dumping investigation.

3.3. India as a third party would like to assist the Panel in the determination of the issues raised in the present dispute for the Panel's balanced consideration.

3.4. China has contended that the US has claimed that the non-confidential summaries provided to MOFCOM were inadequate and that no reasons were provided for the inadequacy of the non confidential summaries. China believes that the US claim ignores important facts related to the confidential information: (1) the petitioning parties provided non-confidential summaries for the information for which confidential treatment was requested; and (2) most of the information for which confidential treatment was requested was information which fits within the "exceptional circumstances" waiver of confidential summaries provided in Article 6.5.1 and 12.4.4. Thus, China claims that the US does not challenge under Article 6.5 or Article 12.4 the right of this information to be classified as confidential rather it challenges only the sufficiency of the non confidential summaries under Art. 6.5.1 and Art. 12.4.1.

3.5. India submits that Art. 6.5.1, ADA lays down the standard of acceptability of a non confidential summary in as much as it states that "These [non confidential] summaries *shall be in sufficient detail to permit a reasonable understanding* of the substance of the information submitted in confidence."

3.6. At para 87, China states that in compliance with Art. 6.5.1, the information provided in non-confidential summaries was more than sufficient to allow responding parties to have a "reasonable understanding of the substance of the information". In *EC - Fasteners (Panel)* it was held that "the investigating authority must ensure that an appropriate non-confidential summary is provided, or in exceptional circumstances, if that is not possible, that an appropriate statement of reasons why summarization is not possible is given". China also takes the support of the exceptional circumstances provision under Article 6.5.1.

3.7 China's statement that in the case a party indicates that the confidential information is not susceptible to the aforementioned [non confidential] summary, then the provision does not provide a significant guidance on the level of analysis and explanation required (other than a statement of the reasons why summarization is not possible) appears to be, *prima facie*, supported by a bare reading of Art.6.5.1.

3.8. At para 134, China provides explanation that the confidential information at issue is primarily the confidential information on which the authority based its injury determinations. China claims that most of this information related to non-public information generally recognized and treated as business proprietary by companies throughout the world, namely information on individual company operations including sales revenue, sales volume etc. It is submitted that the Panel would evaluate the nature of the information submitted and the reasons for treating the information as confidential. In India's views, the practices of Investigating Authorities for treating certain information of the domestic industry as confidential may differ. The claims regarding certain information to be treated as confidential can also be evaluated with reference to the norms of public disclosure of financial statements of companies. The conclusions of the Panel on this matter would provide important guidance to Members.

4. On whether MOFCOM's application of Facts Available in determining the subsidy margin for the Government Purchase of Goods Program was consistent with Article 12.7

4.1. China has contended that due to the continuing failure of the companies to provide necessary information related to government purchase of goods programme, in its final determination MOFCOM continued to apply facts available in the manner imposed in the preliminary determination. It stated that what occurred was nothing short of a conscious decision to withhold information.

4.2. China relies on the observations of the Panel in *EC –DRAMs* to state that uncooperative behaviour may be taken into account by the authority when weighing the evidence and the facts before it and the fact that certain information was withheld from the authority may be the element that tilts the balance in a certain direction. Further, China also relies upon the interpretation given in *Egypt- Steel Rebar* to 'necessary information' under Art.6.8, ADA. India submits that this issue is a question of fact to be evaluated by the panel.

5. On whether MOFCOM's disclosure of its determination of the margins of dumping was consistent with its requirements of Art. 12.2.2

5.1. The US alleges that the failure of the MOFCOM to release the actual calculations while determining the margin of dumping violated Art. 12.2.2, ADA. China, in turn, states that the US does not refer to any WTO jurisprudence or reference any standard to be applied in interpreting Art. 12.2.2.

5.2. It is stated that the Panel would interpret Art. 12 as per the language used in the provision and would take into account that in the case of a determination, the authorities are required to provide explanations that are sufficiently detailed and shall refer to all matters of facts and law which have led to arguments being accepted or rejected.

5.3. Thus though the authorities have to provide a sufficiently detailed explanation on how they established the margin of dumping on an exporter/producer-specific basis, it may be considered that perhaps the actual data need not be stated in the public notice under the exception under Article 12.2.2 keeping in view the need for protection of confidential information under Article 12.2.2 of the AD Agreement.

6. On the determination of the All Others Rates based on Facts Available

6.1. The US alleged that MOFCOM's application of facts available to determine the anti-dumping duty rate and the countervailing duty rate for unexamined exporters/producers was inconsistent with Article 6.8 of the *AD Agreement* and Article 12.7 of the *SCM Agreement.*

6.2. The United States states that the unexamined firms were never sent copies of the antidumping questionnaire and that China breached Article 6.8 of the AD Agreement and paragraph 1 of Annex II by applying facts available to them. The said issue is a question of fact that the panel would examine.

6.3. Article 6.8 of the *AD Agreement* states that facts available may be applied to an interested party which refuses access to, or otherwise does not provide, necessary information or significantly impedes the investigation. Paragraph 1 of Annex II states that the authorities should inform the interested party that the authorities will apply facts available if the interested party does not supply the requested information. Interpreting the above, it appears that facts available may not be applied to an interested party who had not been asked to submit information in the first place.

6.4. Further, Art. 12.7, ASCM also states that in cases in which any interested Member or interested party refuses access to, or otherwise does not provide, necessary information or significantly impedes the investigation, the determinations, affirmative or negative, may be made on the basis of the facts available. Again, it would appear that a natural corollary of the said Article is that facts available may not be applied in the case that the interested party who has not been asked to submit information in the first place.

7. On MOFCOM's alleged failure to provide any rationale on its rejection of a price derived from the competitive bidding process

7.1. The US has alleged that MOFCOM rejected the competitive bidding price in the U.S. government procurements as the market price. It is a question of fact.

Conclusion

India thanks the panel for giving this opportunity to present its views as third party in this dispute. India would be happy to provide answers to any questions which the Panel may have.

Thank you.

ANNEX D-5

THIRD PARTY ORAL STATEMENT OF JAPAN

I. INTRODUCTION

1. Mr. Chairman, and the distinguished Members of the Panel, on behalf of the Government of Japan, I thank you for the opportunity you provide us to present our views with respect to this dispute, which involves important systemic issues on the disciplines of *AD Agreement* and the *SCM Agreement*. Because time is limited, Japan would like to focus only on three issues today.

II. DISCUSSION

A. Disclosure of Dumping Margin Calculation and Data Used

2. The first issue is the disclosure of the dumping margin calculation and the data used in the calculation. The United States claims that MOFCOM acted inconsistently with Article 12.2.2 of the *AD Agreement* because it failed to disclose or otherwise make available the calculation and data used during the investigation. According to the United States, MOFCOM's disclosure was limited to the weighted averages of export prices, normal values, and the product-specific margin of dumping and did not provide sufficient information for interested parties to understand how MOFCOM calculated the margin or which data MOFCOM used.

3. In general, the disclosure of the entire actual calculations for an exporter's dumping margin is critical for the exporter to present an effective defense because even a tiny mistake could result in a grave distortion of the margin calculation. For example, an authority might mistakenly treat the unit of measurement of data in pounds in the margin calculation, although the data actually were reported in kilograms. Such a mistake would be just a very small part of the entire calculation formulae but could result in the calculated margin being doubled. This type of mistake cannot be identified from the disclosure of the intermediate stage in the calculation process. As such, Japan considers that the authorities are required to disclose the entire dumping margin calculation under Article 12 of the *AD Agreement*; including the data of sales, expense and cost, which the authorities chose to use for the margin calculation, demonstrating every calculation step to reach the margin of dumping.

4. Article 12.2 of the *AD Agreement* sets forth the overarching rule applicable to a public notice or separate report of any preliminary and final determinations, providing that the notice or report must set forth "in ***sufficient detail*** the findings and conclusion reached on ***all issues of fact and law*** considered material by the investigating authorities."[1] The panel in *EC - Tube or Pipe Fittings* explained this provision, stating "a 'material' issue [is] 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."[2] It is not within the authorities' discretion to decide whether a specific issue may be classified as "material," thereby requiring inclusion in the public notice or a separate report.

5. Article 12.2.2 of the *AD Agreement* then sets forth special provisions applicable only to affirmative final determinations. This provision expands the depth and width of the content of a public notice or a separate report to include "all relevant information on the matters of fact … and reasons" of "the margins of dumping established and a full explanation of the reasons for the

[1] Emphasis added.
[2] Panel Report, *EC - Tube or Pipe Fittings*, para. 7.424.

methodology used in the establishment and comparison of the export price and the normal value under Article."[3] The content of a public notice or a separate report of the affirmative final determination must include not only "material" issues but also "all relevant information." With respect to the dumping margins, all individual decisions of the authorities, including its decision to choose the data, to assess the comparability of the export price with a specific normal value, and to set forth a specific calculation formula, are relevant information to the establishment of the margin of dumping, as discussed earlier. Therefore, the authorities must set forth such information in the document of the final determination.

B. Disclosure of Factual Findings Related to Injury Determinations

6. The second issue that Japan would like to address is the disclosure of factual findings related to injury determinations in the disclosure of essential facts before the final determination and the public notice or a separate report of the final determination. In particular, Japan focuses upon the disclosure of the price effects to the domestic like products, and injurious effects of factors other than dumped or subsidized imports to the domestic industry.

7. Article 6.9 of the *AD Agreement* and Article 12.8 of the *SCM Agreement* require the investigating authorities to disclose "the essential facts under consideration which form the basis for the decision whether to apply definitive measures" before the final determination. The panel in *EC – Salmon (Norway)* explained that such disclosure must "provide the interested parties with the necessary information to enable them to comment on the completeness and correctness of the facts being considered by the investigating authority".[4]

8. According to China, MOFCOM found "the sale of the product concerned was kept at a low price" in the final determination.[5] The MOFCOM's finding of "at a low price" would indicate that MOFCOM reached this fact finding based on certain data comparisons. In such case, as explained by the panel in *EC – Salmon (Norway)*, the authorities would have been obliged to disclose information on the comparison as a part of "essential facts" to enable interested parties to comment on the sufficiency of such facts finding before the final determination.

9. With respect to final determinations, Article 12.2.2 of the *AD Agreement* and Article 22.5 of the *SCM Agreement* require that the authorities set forth "all relevant information" on the matter of the facts, "which have led to the imposition of final measures", as discussed earlier. The information on the comparison would have led the authorities to make a finding of the fact of the price effects to the domestic like products, and then to the injury determination. Accordingly, such information must be set forth in the public notice or a separate report of the final determination. The mere statement of the fact found—that "the sale of the product concerned was kept at a low price"—would not be sufficient to explain the relevant information.

10. In addition, the United States argues that MOFCOM's disclosure and explanation on the volume and prices of imports from non-subject merchandise was insufficient. China states that MOFCOM analyzed those facts in the preliminary determination. China argues that the public notice of the preliminary determination was a part of the disclosure of the essential facts as required under Article 6.9 of the *AD Agreement* and Article 12.8 of the *SCM Agreement*.[6]

11. It should be noted, however, that the preliminary determination would not always be sufficient disclosure of the "essential facts" before the final determination. For example, when the

[3] Article 12.2.1(iii) of the *AD Agreement* (incorporated by reference into Article 12.2.2).
[4] Panel Report, *EC – Salmon (Norway)*, para. 7.805.
[5] China FWS, para. 282.
[6] *See* China FWS para. 373.

investigating authorities conduct on-the-spot investigations after the preliminary determination, the essential facts may be changed after on-the-spot investigations. In such case, the exporter should be informed of any changes in the "essential facts" found by the authorities from the time of the preliminary determination to allow them to present an effective defense.

C. The Determination of the All Others Rates Based on Facts Available

12. The last issue that Japan would like to address is the determination of the all others rates based on facts available. Article 6.1 and paragraph 1 of Annex II of the *AD Agreement* require that authorities give notice of information to an interested party from which the information is required, specifying the necessary information in detail.

13. The Appellate Body explained in *Mexico – Anti-Dumping Measures on Rice* that "an investigating authority that uses the facts available in the application for the initiation of the investigation against an exporter that was not given notice of the information the investigating authority requires, acts in a manner inconsistent with paragraph 1 of Annex II to the *AD Agreement* and, therefore, with Article 6.8 of that Agreement."[7] As explained by the Appellate Body, facts available cannot be applied to an interested party which had not been asked to submit information. Japan is of the view that investigating authorities are not allowed to treat the notice posted on the website as being properly given to exporters. Therefore, such notice is insufficient to satisfy the requirement under Article 6.8 of the *AD Agreement*.

14. In addition, the initiation notice of MOFCOM in this case did not request exporters and producers to submit the specific information but requested them only to register with MOFCOM. MOFCOM, nevertheless, declared that it made determination based on the facts available to the exporters that failed to register. Paragraph 1 of Annex II to the *AD Agreement* makes it clear that the authorities may apply facts available to an exporter only when the authorities gave a notice after the initiation to the exporter of the specific information which the authorities would like it to submit but it did not. In that sense, a mere request in the public notice of the initiation to make themselves known to the authorities within 20 days from the date of initiation cannot be the basis to apply facts available to determine dumping determination.

15. The all others rate, which China determined in the final determination of the antidumping investigation in question, *a*ppears to be based on the facts available, and to apply it to exporters and producers that MOFCOM did not ask to submit any information during the investigation. If it is the case, the application of such all others rate to such exporters and producers is also inconsistent with Articles 6.1 and 6.8 and paragraph 1 of Annex II of the *AD Agreement*.

16. Finally, Japan recalls that the Appellate Body found in *Mexico – Anti-Dumping Measures on Rice* that "it would be anomalous if Article 12.7 of the *SCM Agreement* were to permit the use of "facts available" in countervailing duty investigations in a manner markedly different from that in anti-dumping investigations".[8] Therefore, Japan considers that an investigating authority that uses the facts available in the application for the initiation of the investigation against an exporter that was not given notice of the information the investigating authority requires, acts in a manner inconsistent with Article 12.7 of the *SCM Agreement.*

[7] Appellate Body Report, *Mexico –Anti-Dumping Measures on Rice*, para. 259
[8] Appellate Body Report, *Mexico –Anti-Dumping Measures on Rice*, para. 295

III. CONCLUSION

17. In conclusion, Japan respectfully requests the Panel to review carefully the arguments presented by the parties in this dispute in light of the comments presented in Japan's submission and this oral statement. Japan would be pleased to respond any questions that the Panel may have.

ANNEX D-6

THIRD PARTY ORAL STATEMENT OF THE
KINGDOM OF SAUDI ARABIA

Mr. Chairman, Members of the Panel,

1. The Kingdom of Saudi Arabia affirms all of the positions set out in its Third Party submission, and we need not repeat them today. Instead, we will highlight two key issues of systemic importance. The first issue concerns the evidentiary standards that apply to the initiation of subsidy investigations. The second issue relates to the use of facts available.

I. INITIATION

2. I turn first to the issue of initiation.

3. Article 11 of the SCM Agreement imposes significant evidentiary disciplines on the initiation of subsidy investigations. In recognition of the obligation imposed on all Members not to initiate investigations based on unwarranted claims, Article 11 requires that the complaint contain *sufficient* evidence on each of the required elements of subsidization. Applications must contain a "degree of actual evidence"[1] as well as evidence of the relevant *type*.[2] The Kingdom explained in its submission that there must be sufficient evidence demonstrating the requisite elements of a countervailable subsidy.

4. This interpretation of "sufficient evidence" is consistent with the jurisprudence on initiation, which has established that authorities have an obligation to ensure that the evidence in an application constitutes a "reasonable indication" of the actual existence of subsidization and injury.[3] This is a positive obligation that must be faithfully discharged by the investigating authority.

5. The obligation on the investigating authority is set forth in Article 11.3, which requires the investigating authority to examine both the accuracy and adequacy of the evidence provided *in the application* itself. This imposes a binding obligation on Members not to initiate on the basis of deficient claims.

6. The time to verify the accuracy and adequacy of the complaint is prior to initiation. Verification after initiation falls far short of the duty entrusted to investigating authorities to identify and reject inadequate claims.

7. There are strong policy reasons for the initiation standard advocated here. The initiation of a subsidy investigation imposes a heavy burden on all parties, including the government of the exporting Member. Initiation has an immediate adverse effect on trade, and the chilling effect can remain even when initiation results in a negative finding. Investigations launched on the basis of insufficient evidence undermine the credibility of the entire investigatory process, as well as the justification for final measures.

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[1] Panel Report, *Mexico – Steel Pipes and Tubes*, para. 7.24.

[2] Panel Report, *Guatemala – Cement I*, para. 7.67; Panel Report, *Mexico – Steel Pipes and Tubes*, paras. 7.56, 7.59.

[3] Panel Report, *Guatemala – Cement I*, para. 7.49; Panel Report, *Mexico – Steel Pipes and Tubes*, para. 7.21; Appellate Body Report, *US – Carbon Steel*, para. 115.

8. The Kingdom urges the panel to take this opportunity to reinforce the agreed strong evidentiary standards under Article 11 to provide meaningful disciplines on the initiation of subsidy investigations.

II. FACTS AVAILABLE

9. I now turn to the issue of the use of facts available.

10. The Kingdom wishes to highlight that the SCM and Anti-Dumping Agreements limit both the opportunities to resort to facts available and the manner in which they are used. The use of facts available is disciplined in order to ensure that investigating authorities adopt the best information in their determinations. As the Appellate Body has stated, the use of facts available "permits the use of facts on record *solely for the purpose of replacing information that may be missing*".[4]

11. Accordingly, investigating authorities must accept information provided by the respondent where the respondent acted to the best of its ability. This is required under the Agreements even if other information requested has not been provided by the respondent,[5] and even if that information is submitted after a deadline, but within a reasonable period of time.[6] These standards are intended to ensure that determinations are based on objective evidence, and that "facts available" is not used in a punitive manner.

12. The Kingdom notes the European Union's acknowledgement that the right of an authority to use facts available depends on whether the authority *itself* has "acted in a reasonable, objective and impartial manner".[7] The Kingdom agrees with this statement and would add that at least three elements are relevant to the Panel's examination of the investigating authority's actions: the nature of the requests made by the authority, the efforts made by investigated parties to meet those requests, and the degree of any alleged impediment caused by the investigated party's failure to cooperate.[8]

13. The EU also emphasizes that resort to facts available is precluded in situations where the parties in question were not properly notified and the information not properly requested.[9] The Kingdom agrees and considers that the use of facts available is permissible only when the parties have been given proper notice both of the information required by the investigating authority, and of the possibility of the application of facts available in the case of non-cooperation with the authority.[10]

III. CONCLUSION

14. Mr. Chairman, the Kingdom urges the Panel, when considering the systemic issues raised in this dispute, to preserve the SCM Agreement's carefully negotiated balance of interests between exporting and importing Members. That balance can best be preserved through the strict enforcement of a rules-based system for trade remedies investigations.

15. This concludes the Kingdom's statement. I do thank you.

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[4] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 293 (emphasis added).
[5] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 287 (emphasis original).
[6] *See* Appellate Body Report, *US – Hot-Rolled Steel*, paras. 83-86.
[7] Third Party Submission of the European Union, para. 12, citing Panel Report, *Guatemala – Cement II*, para. 8.251.
[8] *See, for example,* Panel Report, *Guatemala – Cement II*, paras. 8.249-8.251.
[9] Third Party Submission of the European Union, para. 11.
[10] *See generally* Article 6.8 and Paragraph 1 of Annex II to the Anti-Dumping Agreement.

ANNEX D-7

THIRD PARTY ORAL STATEMENT OF KOREA

1. Korea appreciates this opportunity to present its views to the Panel as a third party.

2. The issues presented in this dispute appear to have systemic implications for the Members since the claims presented in this dispute touch upon some of the core procedural elements of AD and CVD investigations. However, with only a limited amount of factual information available, Korea does not attempt to support any particular party in this dispute. Instead, Korea offers its view concerning certain critical issues that may help the Panel reach a proper conclusion in the current proceeding.

I. INITIATION OF A COUNTERVAILING DUTY INVESTIGATION SHOULD BE BASED ON ADEQUATE AND SUFFICIENT EVIDENCE

3. A CVD investigation entails mobilization of a great deal of resources on the part of a responding government and companies. A CVD investigation is also a serious undertaking laden with political sensitivities in that one Member investigates another Member's governmental programs. In Korea's view, these unique aspects of a CVD investigation explain the inclusion of bilateral consultations requirement in Article 13 of the SCM Agreement which do not appear in the AD Agreement.

4. In this spirit, the SCM Agreement clearly guards against initiation of a CVD investigation without adequate and sufficient evidence that cannot justify a lengthy investigation of another government. Although the information to be presented at the initiation stage is not the type of evidence that establishes the existence of subsidization or material injury, the investigating authority should nonetheless examine and confirm that at least a minimal amount of information reasonably indicating subsidization and injury has been submitted by a domestic applicant.

5. In fact, Article 11.2 of the SCM Agreement sets forth a detailed threshold for the initiation of a CVD investigation: in order for there to be initiation, "evidence that substantiates" the existence of a subsidy and injury that is reasonably available to the applicant must be presented in the application. As the panel in *U.S.-Byrd Amendment* opined, this provision is to "ensure that investigations are not initiated on the basis of frivolous or unfounded suits."

6. Article 11.3 of the SCM Agreement in turn requires the investigating authority to confirm the accuracy and adequacy of the evidence itself. Thus, an investigating authority assumes an affirmative obligation to examine all the relevant information and materials contained in the application and to confirm their veracity before making a decision to initiate a CVD investigation. It cannot passively accept the allegations in the petition as true or appearing to be true and initiate the investigation hoping to confirm the veracity down the road. Article 11.9 of the SCM Agreement clearly stipulates that the application should be rejected in such an instance.

7. In short, under the current SCM Agreement, initiation of a CVD investigation is not supposed to be an automatic rubber-stamp process once a petition is filed by a domestic industry. Rather, it is designed and envisioned to be a meaningful step where the investigating authorities carefully look into substantive information contained in the petition and determine whether the petition is really worth the time and resources to be inflicted from the lengthy investigations. Unless this filtering

process operates in a way envisioned in Article 11 of the SCM Agreement, foreign exporters and governments would be in a severely dire situation regardless of the final outcome of a CVD investigation.

II. THE "FACTS AVAILABLE" STANDARD SHOULD NOT BE ABUSED TO PENALIZE FOREIGN RESPONDENTS SIMPLY BECAUSE A REQUEST FROM THE INVESTIGATING AUTHORITY WAS NOT FULLY RESPECTED

8. The SCM Agreement does not provide an unlimited discretion to an investigating authority conducting a CVD investigation whenever it encounters a less than optimal information from a foreign respondent. Instead, these provisions unequivocally provide conditions that need to be satisfied before the investigating authority applies the facts available standard.

9. Article 12.7 of the SCM Agreement, Article 6.8 of the AD Agreement, and Annex II of the AD Agreement provide detailed guidelines in this respect. Likewise, the Appellate Body in *Mexico-Beef and Rice* also stated that even if the request by an investigating authority for certain information is not completely adhered to by a foreign respondent, the investigating authority is nonetheless required to consider information actually provided by the respondent.

10. In Korea's view, Article 12.7 of the SCM Agreement along with other provisions in Article 12 collectively stands for the proposition that fundamental due process rights must be ensured at all times in a CVD investigation. The Panel should carefully review whether this due process right has been adequately respected. The Panel would have to look into the specific situation of the investigation at hand and then determine whether facts available would be warranted in the situation.

III. INVESTIGATING AUTHORITY DOES NOT ENJOY UNBRIDLED DISCRETION REGARDING AN "ALL OTHERS RATE" IN ANTI-DUMPING AND COUNTERVAILING DUTY INVESTIGATIONS

11. One of the contentious claims in this dispute is about all others rates in AD and CVD investigations by MOFCOM. In the underlying investigations, the complainant claims, the all others rates were set at unreasonably high margins without sufficient explanations or rationale other than some cursory statements of policy reasons. The respective all others rates indeed seem extraordinarily high when compared to the margins assigned to the respondent companies, AK and ATI. Unreasonably high "all others rates" disassociated with calculated margins of the respondents participating in the investigations does raise a concern of possible inconsistency with the relevant provision of the SCM Agreement and the AD Agreement.

12. In Korea's view, to the extent the application of "all others rates" constitutes the virtual application of "facts available," as the complainant argues, Article 12.7 of the SCM Agreement and 6.8 of the AD Agreement could be implicated in this context as well. If the facts available standard was imposed on non-participating exporters without satisfying the detailed requirements stipulated by Article 12.7 of the SCM Agreement and Article 6.8 of the AD Agreement, a violation similar to the one discussed previously could be found.

13. Korea appreciates this opportunity to participate in this proceeding, and to present its views to the Panel. /END/

ANNEX E

EXECUTIVE SUMMARIES OF THE SECOND WRITTEN SUBMISSIONS OF THE PARTIES

ANNEX E-1

EXECUTIVE SUMMARY OF THE SECOND WRITTEN SUBMISSION OF THE UNITED STATES

I. Introduction

1. China's responses to the U.S. claims fail to address the substance of the U.S. arguments. In examining China's justifications for its measures in this case, it is useful to focus on what MOFCOM actually found as reflected in its determinations and disclosures, not on the *post-hoc* rationalizations provided by China for purposes of this dispute. As we discuss below, China's first written submission often ignores MOFCOM's actual findings or tries to rewrite them. In some instances, China seeks to justify its measures by referring instead to alleged U.S. practice. In other instances, China has replied with broad assertions that the AD and SCM Agreements create no obligations with respect to the issues that the United States has raised, and that China is free to do whatever it chooses. China is incorrect. The AD and SCM Agreements do place relevant obligations on China, and China has failed to rebut the U.S. *prima facie* case that China has breached these obligations.

II. The Initiation of the Countervailing Duty Investigation for Several Programs Breached Article 11 of the SCM Agreement

A. China's interpretation of Article 11 of the SCM Agreement is erroneous

2. While there are parallels between SCM Agreement Article 11 and AD Agreement Article 5, it is important to note the textual differences between Article 5.2 of the AD Agreement and Article 11.2 of the SCM Agreement. Thus, China's reliance in its first written submission on panel reports interpreting the AD Agreement for its propositions that all that is needed is "the inclusion of raw information," and that information need not be linked with allegations, is misplaced in the context of the SCM Agreement. In contrast to the low standard advocated by China, the text of the SCM Agreement makes clear that what is required is *sufficient evidence.*

B. The Application Presented Insufficient or No Evidence Indicating a Countervailable Subsidy for Several Programs

3. As explained in the U.S. first written submission, the evidence provided in the application in support of applicants' claims with respect to several programs was nonexistent or otherwise not sufficient to support initiation. While China asserts that initiation of the countervailing duty investigation was consistent with Article 11 of the SCM Agreement, for each alleged subsidy, the petition contained serious gaps that would have prevented any reasonable investigating authority from concluding that the evidence provided was sufficient to support initiation.

C. No Unbiased or Objective Investigating Authority Would Have Initiated an Investigation under SCM Agreement Article 11.3 Based on the Conjecture Contained in the Application

4. Instead of carefully examining the application and accompanying evidence, MOFCOM merely accepted the applicants' allegations as is, or initiated an investigation based on sheer speculation regarding the "possibility" of a subsidy, apparently intending to bolster the otherwise deficient application after initiating its investigation.

5. Regarding the Medicare Prescription Drug, Improvement and Modernization Act of 2003, for instance, it is clear that MOFCOM made no attempt to analyze the information provided by applicants to determine whether there was a sufficient basis to support initiation. Regarding the Economic Recovery Tax Act of 1981, Tax Reform Act of 1986, and Clean Air Act allegations, instead of carefully reviewing the evidence provided by applicants to determine whether it was sufficient to support the claims made in the application, MOFCOM simply accepted applicants' assertions that a program that was terminated in the 1980s could continue to provide benefits during the POI. With respect to the Indiana Steel Industry Advisory Service, and Steel Import Stabilization Act of 1984, MOFCOM initiated an investigation on the basis of nothing more than pure speculation.

6. MOFCOM's decision to initiate an investigation into the electricity, coal, natural gas, the 2003 Economic Stimulus Plan of Pennsylvania, and Pennsylvania's Alternative Energy Funding programs serve as particularly egregious examples of MOFCOM's cavalier approach to initiation. Despite the clear deficiencies in the petition, and a submission by the United States highlighting the inadequacies of these allegations, MOFCOM initiated an investigation of these programs. In each of the instances, by initiating an investigation based on the "simple assertion, unsubstantiated by relevant evidence" contained in the application, China breached Article 11.3.

III. MOFCOM Failed to Require Adequate Non-Confidential Summaries, Breaching Article 12.4.1 of the SCM Agreement and Article 6.5.1 of the AD Agreement

A. China's submissions reflect a fundamental misunderstanding of Article 12.4.1 of the SCM Agreement and Article 6.5.1 of the AD Agreement

7. China appears to suggest in its submissions that it need only require "adequate" non-confidential summaries if an interested party objects to the manner in which confidential information is summarized. Yet, whether an interested party objects during the proceeding to the adequacy of a summary is irrelevant to the question of whether the summaries were in fact adequate. The obligation to require adequate non-confidential summaries applies regardless of whether an interested party objects to their adequacy during the proceeding. The obligations contained in SCM Article 12.4.1 and AD Agreement Article 6.5.1 rest with China, not interested parties.

8. China's response reflects the mistaken view that its obligation to ensure that the interested parties furnish adequate non-confidential summaries during the course of the investigation may be excused if it is able to point to some subsequent "non-confidential analysis" contained in its own determinations that provides some indication of the confidential information submitted by the interested party. To adequately defend their interests, parties must have access to adequate non-confidential summaries *during* the course of the investigation, not after the investigating authority has drawn conclusions based on the submitted information. *Ex post facto* "non-confidential analysis" is beside the point. Once the determination is made, the parties' ability to defend their interests has been compromised.

9. China's assertion that the agreements do not provide sufficiently detailed guidance on the requirement to furnish adequate non-confidential summaries is belied by the text of the provisions themselves, as well as how the provisions have been applied. In *Mexico – Olive Oil*, for instance, the panel emphasized that a public version of a document where confidential information has simply been redacted is unlikely to qualify as an adequate non-confidential summary. What is required by Article 12.4.1 are adequate non-confidential *summaries*.

10. Regarding China's claims of exceptional circumstances, as noted in our oral statement, neither the petition nor the documents prepared by MOFCOM during the course of the investigation ever asserted that summarization was not possible or otherwise justified the absence of meaningful

non-confidential summaries. China's *post-hoc* rationalizations that exceptional circumstances existed justifying the inadequate non-confidential summaries should therefore be rejected.

B. The Purported Non-confidential Summaries Contained in Part II of the Petition are Inadequate

11. The application itself demonstrates that the applicants intended the purported non-confidential summaries contained in Part II of the application to be linked with the information redacted. Yet the purported non-confidential summaries were inadequate. Setting aside the fact that Part II in fact contains the purported non-confidential summaries, for each category of confidential information, the application was inadequate as it contained no summary at all, or contained unlabelled trend lines, or year-over-year percentage changes without the necessary context of absolute values and without any justification from the applicants why there were exceptional circumstances that precluded more detailed summarization.

IV. China Breached Article 12.7 of the SCM Agreement Because Its Use of Facts Available Was Improper

A. China's Portrayal of the Facts Is Misleading and Contradicted by the Record

12. While China repeatedly asserts that the respondents "refused" to respond to MOFCOM's questions and "seriously impeded" the investigation, a closer examination of the evidence demonstrates otherwise. At no point did the U.S. companies refuse to cooperate with the investigation. The companies cooperated, responded to MOFCOM's questionnaires, and to the extent they did not provide information it was because MOFCOM's own questionnaires did not require it. When AK Steel provided the data after the preliminary determination (data that were already in the hands of the investigators), MOFCOM chose not to either verify it or use the information to develop a verification plan.

13. Similarly, China's assertion that MOFCOM did not request 15 years of sales data for federal-level procurement is misleading. In its original questionnaire, MOFCOM requested sales information for government procurement "not performed within the POI," or according to China's third re-translation of MOFCOM's questions on this topic, procurement "signed within the POI as well as those for which performance has started but remained unfulfilled by the end of the POI." On page 17 of the new subsidy allegation questionnaire response, MOFCOM asks for sales data for all products during the POI and the prior 14 years, for both state- and federal-level procurement laws: "Please provide, during the POI and the 14 years before the POI, the sales situation of all the products under the influence of Pennsylvania Steel Products Procurement Act *and purchasing American goods clause of other Acts* ." The only other procurement Acts alleged in the questionnaires issued at that time are federal procurement laws.

14. It is also important for the Panel to consider that China has acknowledged in paragraph 154 of its first written submission, and in paragraphs 68-72 of its answers to the Panel's questions, that 14/15 (93.3 percent) of the sales data MOFCOM requested for the alleged procurement program was not necessary. While MOFCOM's desire for the sensitive competitive information appeared to be unlimited, according to the explanation in paragraph 67 of China's Responses to the Panel's questions, its request was motivated by curiosity, rather than necessity.

15. In addition, there are no facts available on the record to support MOFCOM's conclusion that the respondents sold all of their output to the government. As explained in our first written submission, the only facts available on the record suggest that, at most, AK Steel could have sold 29 percent of its output to the government, as part of infrastructure and manufacturing sales. The 29

percent sales figure for infrastructure and manufacturing sales comes from AK Steel's audited financial statements and annual report.

16. Notwithstanding MOFCOM's apparent concern that this percentage may not have held true for the entire POI, which did not correspond to a calendar year, the annual report shows that 26 percent of the company's U.S. sales fell under the infrastructure and manufacturing segment in 2007. These figures demonstrate stability in the sales figures to this particular market segment over 24 months. It defies reason to suggest that the first two months of 2009 would be so drastically different from the preceding 24 months that MOFCOM would reject the figures entirely, and a review of AK Steel's later financial reporting would demonstrate that they were not. Regarding China's assertion that the proposal to use the 29 percent figure was untimely filed, AK Steel's annual report was actually contained in the Application. AK Steel proposed the use of the 29 percent figure from that report after seeing MOFCOM's unreasonable course in the preliminary determination.

17. Furthermore, MOFCOM could have verified that AK Steel or ATI did not sell to any government entity at verification. The 29 percent figure rejected by MOFCOM as the maximum possible percentage of AK Steel sales that could have been relevant to the alleged procurement programs, which focused on research and development funds and construction contracts for infrastructure, was provided in the Application before MOFCOM required AK Steel to translate into Chinese and re-submit the same document in the deficiency letter issued to AK Steel on August 26, 2009. Thus, this information was before MOFCOM well before verification began.

18. Notably, MOFCOM does not have standard timetables or schedules for events in antidumping and countervailing duty investigations. Any purported difficulty analyzing the GOES transactional data timely provided in comments on the Preliminary Determination is a product of MOFCOM's own scheduling, which was not based on any statutory or regulatory requirements but rather the agency's own assessment of when events should take place. It was unreasonable to schedule verification on a timeline that would allegedly make it difficult for MOFCOM to verify data that was timely submitted by AK Steel in response to the Preliminary Determination.

B. China's Claim that the U.S. Companies Seriously Impeded the Investigation Is Not Credible

19. Given the various additional means that MOFCOM had at its disposal to evaluate the U.S. companies' claims with respect to utilization of the government procurement programs and MOFCOM's failure to make use of any of them, China's claim of that the U.S. companies seriously impeded the investigation simply are not credible. Moreover, China's argument that MOFOCOM could review such summary data to uncover "anomalous transactions" makes no sense. As outlined above, MOFCOM's questionnaire did not request transaction-specific data in the absence of any procurement-related sales; it had only requested a "tabulation of all domestic sales by product … including quantity, value, and customer." Such data would not provide the information necessary to perform the analysis China purports it intended to perform.

V. MOFCOM Failed to Make Available the Calculations It Performed to Arrive at the Dumping Margins, Inconsistent with Article 12.2.2 of the AD Agreement

20. China does not deny that MOFCOM failed to provide to each U.S. company the actual, final dumping calculations that it performed for that company. Rather, it claims that there is no obligation to do so under Article 12.2.2, and that the U.S. exporters in this investigation were able to replicate MOFCOM's calculations. China's arguments are without merit.

21. Article 12.2.2 requires that if information on matters of fact that led to the imposition of final measures is relevant, then it must be made available, with due regard paid to the protection of confidential information. China argues that the language of Article 12.2.2 does not mandate the release of the final dumping calculations, but China's argument is contradicted by the text. Article 12.2.2 provides that the investigating authority's final determination must contain "or otherwise make available through a separate report, all relevant information on the matters of fact ... which have led to the imposition of final measures ...." As the United States has demonstrated, the calculations employed by an investigating authority to determine dumping margins, and the data underlying the authority's calculations, constitute "relevant information on the matters of fact ... which have led to the imposition of final measures" within the meaning of Article 12.2.2.

22. The theme running through China's arguments is that Article 12.2 pertains only to "public notice" and to "explanation," but China disregards the fact that Article 12.2.2 mentions the possibility of a "separate report" in addition to a "public notice," and the fact that Article 12.2.2 itself does not even use the word "explanation." China delves into the particular provisions of Article 12.2; if anything, however, these other provisions support the U.S. position, not China's. China's assertion that the two exporters were able to replicate the dumping calculations on their own is unavailing. Even if the exporters were in fact able to replicate the calculations, this would not relieve China of its obligation under Article 12.2.2 to make available the actual dumping calculations that its investigating authority performed.

VI. MOFCOM's Failure to Provide Sufficient Information on the Findings and Conclusions of Law It Considered Material Constitutes a Breach of Article 22.3 of the SCM Agreement

23. Under Article 14(d) of the SCM Agreement, the authorities are to use market prices in the country of purchase unless they establish that those prices are so distorted that the market price is unusable. MOFCOM's flawed logic appears to be based on the assumption that any government involvement in a market leads to a distorted market with prices that are unusable as a benchmark price. Prior reports of the Appellate Body interpreting Article 14(d) directly contradict MOFCOM in this regard. Regarding MOFCOM's benefit determination, Article 22.3 thus requires the investigating authority to provide explanation on how it found that market prices resulting from the competitive bidding process were distorted.

VII. MOFCOM's Determination of the "All Others" CVD Rate was Inconsistent with Articles 12.7 and 12.8

24. The fact that MOFCOM provided notice to the U.S. Government, AK Steel, and ATI is irrelevant to the question of the WTO-consistency of China's application of facts available to companies subject to the 44.6% "all others" subsidy rate. Likewise, placing a copy of the petition in a reading room and publishing notices of initiation is not sufficient to justify the application of facts available. China now acknowledges that "there are no other U.S. producers" of GOES. This begs the question of what basis China had to apply adverse facts available to nonexistent entities for failure to cooperate.

25. Without notice of the investigation and the information required of interested parties subject to the investigation, the unidentified, unknown (indeed non-existent) other U.S. producers/exporters cannot be said to have refused access to the required information, or otherwise failed to provide access to the information within a reasonable period as required under Article 12.7 when read in the context of Article 12.1 before resort to facts available. Neither can such producers/exporters be said to have significantly impeded an investigation of which they were unaware.

26. China acknowledges that many of the programs were "found by MOFCOM not to confer countervailable subsidies on the two known respondents." Nonetheless, China's "all others" calculation appears to include non-countervailable programs representing over one-half the 44.6 percent "all others" rate. China argues that it discharged its obligations under Article 12.8 to inform the interested parties "of the essential facts under consideration" which formed the basis of the "all others" calculation in time for the parties to defend themselves through a single sentence in final determination. However, absent from this sentence are any facts that led MOFCOM to conclude that resorting to facts available was appropriate or any facts that led MOFCOM to determine that a 44.6 percent CVD rate was appropriate to apply to the unknown, unidentified companies.

27. That the United States may have been able to divine some of the essential facts through guesswork from the information provided is of no consequence here. The burden is on China to disclose the essential facts, not on the United States to guess at them. Moreover, putting that aside, the facts that led China to determine that nonexistent companies that were not subject to the investigation nevertheless could be deemed non-cooperative for not having registered to participate in this investigation remains a mystery to the United States. China does not even attempt to demonstrate that MOFCOM disclosed the essential facts under consideration regarding its calculation of the "all others" subsidy rate.

VIII. MOFCOM Acted Inconsistently with Article 6.9 of the AD Agreement by Failing to Disclose the Essential Facts Under Consideration Regarding Its Calculation of the "All Others" Dumping Rate

28. As with the U.S. claim regarding the CVD "all others" rate, the issue before the Panel is whether a single sentence is sufficient disclosure under Article 6.9. It plainly is not. China's defense appears to be that MOFCOM could not disclose the essential facts under consideration because doing so would have revealed the business confidential information of the responding companies. However, China does not explain why MOFCOM failed to disclose the facts forming the basis for its decision to apply the facts available in the first place. These facts would not be confidential to the two responding companies, and would include the actions by all other U.S. companies that indicated to MOFCOM that these companies refused access to, or otherwise did not provide, necessary information within a reasonable period, or that they significantly impeded the investigation. Further, China provides no explanation for why MOFCOM could not have publicly summarized the information used or at least identified the calculation methodology it employed.

IX. The Price Effects Analysis in MOFCOM's Final Determination was Inconsistent with China's WTO Obligations

A. Price Effects and Underselling Findings were Critical to MOFCOM's Analysis

29. For the most part China has failed to respond to the arguments of the United States in its first written submission describing how MOFCOM's price effects analysis fails to satisfy WTO requirements. China variously ignores the U.S. arguments, mistakenly claims that they are irrelevant, or attempts to defend the MOFCOM analysis by recasting it.

30. China improperly mischaracterizes MOFCOM's price effects analysis (i) by suggesting, without citing anything from the final determination, that MOFCOM's price effects findings were unnecessary to support its injury determination and by arguing that MOFCOM did not need to make findings on underselling, and did not do so, and (ii) by arguing that it was not obliged to undertake *any* analysis comparing domestic prices with those of the subject imports.

31. The United States explained at length why the conclusions that MOFCOM reached concerning price comparisons were not supported by positive evidence, did not reflect an objective

examination, and consequently were inconsistent with Articles 3.1 and 3.2 of the AD Agreement and Articles 15.1 and 15.2 of the SCM Agreement. China does not challenge or even respond to this U.S. argument, other than mistakenly to contend that it is irrelevant because MOFCOM made no findings whatsoever on comparative prices. In so doing, China has essentially conceded that there is no positive evidence to support a finding that prices for the imports under investigation were lower than prices for the domestically produced product at any time during the period of investigation.

B. MOFCOM's Findings of Price Depression are Inconsistent with AD Agreement Articles 3.1 and 3.2 and SCM Agreement Articles 15.1 and 15.2

32. Contrary to China's current argument, MOFCOM did not rely exclusively on import volume to explain the domestic industry's price declines. Instead, it stated that the imports caused price depression because of their low prices, notwithstanding China's repeated statements that MOFCOM did not conduct a "price undercutting" analysis. We have previously demonstrated that there is no positive evidence supporting any finding that the imports were priced below the levels of the domestic product, and that any such findings could not have resulted from an objective examination. China has not attempted to rebut these claims.

33. China criticizes the United States for overlooking price depression that supposedly occurred in "late" 2008. MOFCOM, however, never made a finding that price depression occurred in 2008. Even accepting *arguendo* China's contention, any finding of price depression during "late" 2008 would not reflect an objective examination. China now argues that MOFCOM conducted a quarterly analysis for domestic price levels during 2008. MOFCOM's use of quarterly data for 2008 only for the purpose of examining domestic price levels "was selective and provided only a part the picture" of what might have caused any pricing declines in the fourth quarter. It was not consistent with of an objective examination of the data.

C. MOFCOM's Findings of Price Suppression Are Inconsistent With Articles 3.1 and 3.2 of the AD Agreement and Articles 15.1 and 15.2 of the SCM Agreement

34. China's arguments defending MOFCOM's findings of price suppression in 2008 fail to address the defects in the analysis MOFCOM conducted. Materials China introduced to the Panel in connection with the first written submission raise serious questions about whether MOFCOM's analysis of changes in the "price-cost differential" was objective.

35. MOFCOM's stated reason for finding that the increasing ratio of costs to sales revenues in the first quarter of 2009 was the effect of the subject imports was the purported "low price" strategy adopted by the importers under investigation. As we have explained, there is no positive evidence that the imports followed a "low price" policy and China does not even attempt to defend this finding.

D. MOFCOM's Failure to Disclose Facts Critical to Its Price Effects Analysis Breaches Article 6.9 of the AD Agreement and Article 15.8 of the SCM Agreement

36. China does not dispute that MOFCOM failed to disclose several pieces of information critical to its price effects analysis, as we demonstrated in our first written submission. China contends that the failure to disclose this information does not violate Article 6.9 of the AD Agreement and Article 15.8 of the SCM Agreement because the facts not disclosed either were not "essential" or were confidential. China's arguments are without merit.

E. MOFCOM's Measures Were Based on Cursory and Unsupported Findings Concerning Price Effects and are Inconsistent with Article 12.2.2 of the AD Agreement and Article 22.5 of the SCM Agreement

37. China's attempts to justify why the conclusory assertions in MOFCOM's Final Determination about the "strategies" purportedly used by importers to charge "low prices" for their products satisfy the provisions of Article 12.2.2 of the AD Agreement and Article 22.5 of the SCM Agreement are without merit. Indeed, China's inability to identify what findings MOFCOM made and where it made them underscore how its action are inconsistent with the Agreements.

X. The Causation Analysis in MOFCOM'S Final Determination is Inconsistent with China's WTO Obligations

A. MOFCOM's Examination of Causal Link is Inconsistent With Articles 3.1 and 3.5 of the AD Agreement and Articles 15.1 and 15.5 of the SCM Agreement

38. China's argument that the price effects analysis was unnecessary to MOFCOM's conclusion of causal link cannot withstand even casual scrutiny. As we explained, the price effects findings were an essential element of MOFCOM's causal link analysis. Because MOFCOM's analysis of price effects does not satisfy the requirements of the AD and SCM Agreements, China has failed to demonstrate that dumped or subsidized imports are causing injury, as required by Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement.

39. China raises similarly unpersuasive arguments concerning MOFCOM's examination of the Chinese industry's rapid expansion, the industry's increasing production at a rate far greater than the increase in domestic demand, and the consequent inventory overhang that placed downward pressure on prices. China's response to the U.S. argument that it violated Articles 3.1 and 3.5 of the AD Agreement and Articles 15.1 and 15.5 of the SCM Agreement by failing to perform a non-attribution analysis evinces a complete misunderstanding of these provisions.

B. MOFCOM's Failure to Disclose Information Concerning Non-Subject Imports is Inconsistent with Article 6.9 of the AD Agreement and Article 15.5 of the SCM Agreement

40. China does not seriously dispute that neither MOFCOM's Preliminary Determination nor its Essential Facts Disclosure contained any information about the volume and prices of imports of GOES from sources other than Russia and the United States. Nor does China seriously dispute that information concerning the volume and prices of imports from such sources is an essential element of the analysis of causation. Indeed, both Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement identify the volume and prices of imports that are fairly traded as elements that are relevant, and should be examined, in the causation analysis.

41. While China does argue that certain information about trends in market share for nonsubject imports can be inferred from MOFCOM's Preliminary Determination, this is neither responsive nor relevant to the U.S. claim. Information about market share trends is simply not the information about volume or prices that Articles 3.5 and 15.5 direct an authority to examine.

C. MOFCOM's Cursory and Fact-Free Analysis of Non-Subject Imports is Inconsistent with Article 12.2.2 of the AD Agreement and Article 22.5 of the SCM Agreement

42. China's sole response to the U.S. claim that MOFCOM's analysis of nonsubject imports was inconsistent with Article 12.2.2 of the AD Agreement and Article 22.5 of the SCM Agreement because it was devoid of information is the statement that nonsubject import market share increased only modestly in 2008. MOFCOM made no such finding. The finding MOFCOM did make, which is that nonsubject imports "continued to drop," does not appear to be consistent with China's current contention. The divergence between China's proffered justification for the finding that nonsubject imports were not a cause of injury to the domestic GOES industry and MOFCOM's stated justification indicates that the actual basis for the finding remains unclear. The Final Determination therefore does not contain "all relevant information on the matters of fact and law" which led MOFCOM to conclude that nonsubject imports were not causing injury to the Chinese GOES industry.

ANNEX E-2

EXECUTIVE SUMMARY OF THE SECOND
WRITTEN SUBMISSION OF CHINA

I. INTRODUCTION

1. This submission focuses on clarifying the issues, legal arguments, and facts before the Panel at this stage in the proceeding. In addition, the submission identifies omissions, mischaracterizations, and concessions by the United States in its various submissions of the facts and analysis in the underlying investigations. It remains China's position that the determinations of dumping, subsidization, and injury made by the authorities in the underlying investigation were consistent with the relevant obligations of the *SCM Agreement* and *AD Agreement*. The United States has not provided any support for the Panel to find these determinations to be inconsistent with China's obligations.

II. ARGUMENT

A. The United States Has Struggled To Reconcile Its Claims About Initiation Under Article 11 Of The *SCM Agreement* With The Applicable Standard, Its Burden Of Proof, And The Facts Of This Case

1. U.S. efforts to distinguish the standards under Article 5.2 of the *AD Agreement* from Article 11.2 of the *SCM Agreement* are unpersuasive

2. The United States seeks to discredit China's reliance on panel reports interpreting Article 5.2 of the *AD Agreement* in describing the applicable standard under Article 11.2 of the *SCM Agreement*. The U.S. position appears to be that the standard under Article 11.2 of the *SCM Agreement* is somehow more stringent than the standard under Article 5.2 of the *AD Agreement*. China disagrees with this interpretation and finds the textual distinctions upon which the U.S. posits this argument to amount to little practical difference between the two provisions. Indeed, if there is any difference, it is in the particularity of the evidence that must be presented under Article 5.2 of the *AD Agreement*, which provides a much more precise description of the type of evidence that is required to accompany an application.

3. China submits that reliance on panel interpretations of Article 5.2 of the *AD Agreement* in discussing the appropriate standard under Article 11.2 of the *SCM Agreement* is both valid and directly on point. Although the United States wishes to read more into Article 11.2 of the *SCM Agreement*, both the text and context of that provision confirm that the only requirement is that the application contain "sufficient evidence" as opposed to any analysis of that evidence. The application in the underlying proceeding met this standard.

2. The United States has largely failed to advance its initiation arguments beyond simple assertions of "no evidence"

4. It is the United States' burden to present its case. Applying well-accepted principles, the Appellate Body has confirmed that a complaining party must make out a *prima facie* case by presenting sufficient evidence to raise a presumption in favor of its claim. The case must be based on "evidence and legal argument" put forward by the complaining party in relation to each of the elements of the claim. It seems axiomatic that if a complaining party "may not simply submit

evidence and expect a panel to divine from it a claim of WTO-inconsistency," or "simply allege facts without relating them to its legal arguments," it should not be able to simply assert facts without relating them to the evidence presented. The United States, however, has largely failed to move beyond simple assertions of "no evidence" contained at paragraph 78 of its First Written Submission for each of the 11 challenged subsidy allegations. In most instances, it has not even addressed the evidence and documentation directly cited in the petition.

3. The initiation of investigations into the 11 challenged allegations was consistent with Articles 11.2 and 11.3 of the *SCM Agreement*

5. China reiterates that initiation of investigations into the 11 challenged allegations was consistent with Articles 11.2 and 11.3 of the *SCM Agreement*. For purposes of Article 11.2 they adequately met the obligations of that provision in terms of providing information reasonably available to the applicant that addressed the subject matter of Article 11.2(iii), and namely information related to financial contribution, benefit, and specificity. The evidence provided by the applicants further comports with the Article 11.3 standard. The objective at initiation is not to resolve all issues of fact and law. "An . . . investigation is a process where certainty on the existence of all the elements necessary in order to adopt a measure is reached gradually as the investigation moves forward." Consistent with that understanding "the quantity and quality of the information provided by the applicant need not be such as would be required in order to make a preliminary or final determination . . . ." China contends that the application met this standard, and that an unbiased and objective investigating authority would have found that the application contained sufficient information to justify initiation.

B. MOFCOM's Treatment of Confidential Information Was Fully Consistent With The Requirements of Article 6.5.1 Of The *AD Agreement* And Article 12.4.1 Of The *SCM Agreement*

1. The basis of the United States claims about the non-confidential summaries remains unclear

6. It remains unclear from the U.S. argument what provisions of Article 6.5 and 6.5.1 of the *AD Agreement* and 12.4 and 12.4.1 of the *SCM Agreement* China has supposedly violated. The United States appears to have changed its focus from the adequacy of the non-confidential information in allowing parties "a reasonable understanding" of the confidential information to whether or not there was "a link" between the non-confidential information and the redacted confidential information. In addition, the United States claims that even if the methodology used by petitioners to provide an adequate non-confidential summary were acceptable under the Agreements, "interested parties" should not be required "to piece together information" in order to understand the "substance of the confidential information." But the United States has not explained why the non-confidential information actually provided did not allow a reasonable understanding of the confidential information in the petition.

2. Articles 12.4.1 of the *SCM Agreement* and 6.5.1 of the *AD Agreement* are focused on whether the non-confidential summaries allow parties a reasonable understanding of the confidential information submitted and not on the form or placement of such summaries

7. Article 12.4 of the *SCM Agreement* and Article 6.5 of the *AD Agreement* set forth the standards to be applied when confidential information is submitted as evidence in an investigation. The Articles are concerned with ensuring that: (1) confidential information can be used in investigations without risk of disclosure adverse to the submitting party; (2) there is a legitimate reason for authorities to classify information as confidential; and (3) parties other than those

submitting the confidential information have a reasonable understanding of the confidential information submitted by virtue of a non-confidential summary. Contrary to U.S. suggestions, nowhere in Articles 12.4, 12.4.1, 6.5 or 6.5.1 do the *SCM* and *AD Agreements*, respectively, do those provisions address the issues of what constitutes an adequate non-confidential summary, whether and how such a non-confidential summary needs to be identified, or what form the non-confidential summary should take. The United States has failed to address China's arguments based on the facts of this investigation that the non-confidential information provided was sufficient to provide a reasonable understanding to other parties of the confidential information submitted.

3. The approach used in the proceedings at issue to present confidential information in a non-confidential format was adequate to permit a reasonable understanding of the confidential information

8. Although it does not appear that the United States is continuing to contest the adequacy of the non-confidential summaries, the United States now appears to be arguing that it cannot understand the non-confidential summaries because they are in the substantive portion of the text of the petition (Part I) rather than in the portion of the text which describes the categories of information for which confidential treatment is sought and which makes the request for confidential treatment. This issue is irrelevant to the sufficiency of the actual non-confidential summaries and the ability of a party to understand the factual support for the allegations in the petition. The fact that the non-confidential information is set forth in the very same portion of the petition which contains the corresponding confidential information would seem to undermine the U.S. claim. Moreover, neither of the relevant Articles from the *AD* and *SCM Agreements* addresses the principal issue raised by the United States, namely that the formula or form used to present the non-confidential summaries made it difficult to link the non-confidential information with the confidential information being summarized. In any case, this claim is without factual support. The approach taken by petitioners was really quite simple, straight forward, and clear. Indeed, it is difficult to see how much more obvious the link could be between the confidential and non-confidential information.

C. MOFCOM's Disclosure Of How It Calculated The Margins of Dumping Met The Standard Under Article 12.2 Of The *AD Agreement*

1. Article 12.2 does not require an authority to disclose the specific numbers used to calculate the margins of dumping

9. There is no requirement under Article 12.2 that an authority disclose the details of the calculations of the margins of dumping. Article 12.2.2 requires disclosure of "all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures." The United States has not provided the Panel any basis in the *AD Agreement* to conclude that China's disclosure of the methodology used to determine the margins of dumping and the specific sources of the information used in the actual calculations does not constitute disclosure of "all relevant information on the matters of fact and law." As such, given the absence of any legal or interpretive basis for the U.S. claim, China believes that the U.S. claim must fail. Given that the claim should have been properly brought under Article 6.9 and not Article 12.2, the U.S. claim must also fail.

2. MOFCOM's disclosure was sufficient to allow the U.S. respondents to both protect their interests and to replicate the authority's calculation

10. Since the U.S. claim is not supported by any requirement imposed by the relevant Articles of the *AD Agreement*, it relies on an argument that the disclosure was insufficient to allow the U.S. respondents to adequately protect their interests in the investigation. This claim is wrong as a matter of fact. In its disclosure, China provided the details of its calculation methodology and the source of

all of the data used in making the calculation of the margins of dumping. This disclosure enabled the respondents to comment on both the methodology used (e.g did the authority use the correct starting price) and the underlying data applied to the methodology. It also enabled respondents to challenge as being incorrect both the methodology used and the application of the methodology based on the source of the data used for the calculation of each element of the margins of dumping. The disclosure in fact allowed respondents to replicate and check the accuracy of the calculation.

D. MOFCOM Application Of Facts Available With Respect To The Government Purchase Of Goods Program Was Consistent With Article 12.7 Of The *SCM Agreement*

1. The company respondents failed to provide necessary information

11. In its initial questionnaire in the underyling proceeding MOFCOM requested that the company respondents provide transaction data for sales of all steel products over the period of investigation ("POI"). The United States cannot contest that ATI provided no transaction data at all, and AK Steel only belatedly provided POI data on GOES, a very small subset of all POI sales, 126 days beyond the final extended deadline for submission for that information and only three business days before verification. Instead, the United States continues to distract and insist that the scope of information deemed "necessary" by MOFCOM for purposes of the Government Purchase of Goods program included 15 years of information. But the United States has not articulated any purpose under Article 12.7 of the *SCM Agreement* for the fact it is trying to assert – that the application of facts available turned on the company respondents' failure to provide 15 years of data.

12. Although the United States argues about when MOFCOM made known its detailed considerations with respect to its subsidy analysis, the only obligation under the *SCM Agreement* relates to ensuring a clear articulation of the information required by the investigating authority to render its determination. In the underlying proceeding the company respondents knew exactly what MOFCOM was requesting from them. Even if one assumes that beyond an obligation to adequately explain what information is required, an investigating authority must articulate a more detailed explanation of the types of subsidies it is considering in conjunction with its requests, the United States has no argument. The record reflects that MOFCOM made this known as well.

13. The United States has advanced its Article 12.7 claim with respect to the application of facts available to the government purchase of goods program without any foundation for explaining why MOFCOM's choice to apply facts available was inappropriate. MOFCOM made clear in its investigation that it was considering indirect subsidies as contemplated by GATT Article VI.3 and therefore required information on intermediate sales to government contractors and information on sales of non-subject merchandise. The United States has neither brought a substantive claim under GATT Article VI.3, nor has it offered any contextual analysis of GATT Article VI.3 to help define its Article 12.7 claim. Under the circumstances, there is no basis for the Panel to even begin considering whether the requested information was "necessary" in the sense of Article 12.7.

2. The company respondents refused to cooperate to the best of their ability and thereby seriously impeded the investigation

14. Despite the respondents' clear understanding of what MOFCOM sought, they chose to largely ignore MOFCOM's requests for information. Neither respondent made any specific request for an extension of time in which to provide the requested information, indicated that they were preparing the information, or that compilation of the requested information was too difficult. The United States has done very little to address the implications of the underlying record. In summary, the company respondents failed each element of paragraph 3 of Annex II of the *AD Agreement*, which both parties agree is relevant here. They failed to provide information that was: (1) verifiable; (2) appropriately

submitted so that it can be used in the investigation without undue difficulties; (3) supplied in a timely fashion, and, where applicable; and (4) supplied in a medium or computer language requested by the authorities. Where a party fails to satisfy three, and sometimes four, of these elements, an authority is entitled to resort to facts available.

3. MOFCOM's choice of facts available was reasonable under the circumstances created by the respondents

(a) The company respondents were responsible for creating a factual void in the record

15. The company respondents' non-cooperation produced a critical factual void in the record, not by coincidence, but by the calculated choices of the company respondents. There is no other reasonable interpretation of the record evidence. ATI did nothing at all and AK Steel provided only a partial response extremely late in the investigation. In any case, the AK Steel response was still selective. Having provided a full customer list earlier, but with none of the additional quantity and value details that MOFCOM needed to prioritize and evaluate that information, this time AK Steel provided some detail for GOES (that could have been provided months earlier), but no detail at all for other steel sales. MOFCOM knew from the customer lists that AK Steel had many more customers for steel products other than GOES. MOFCOM also knew from the various responses that sales of GOES were a small portion of total AK Steel sales of steel products. Yet AK Steel still refused to provide any meaningful information about the sales other than GOES sales. The United States has not addressed these points to any significant degree in this proceeding. It has simply maintained that the respondents cooperated. Given the record, MOFCOM was entitled to a very different conclusion.

(b) MOFCOM was entitled to infer a less favorable fact than those positioned before MOFCOM through the company respondents' calculated non-co-operation

16. Article 12.7 is intended to ensure that the failure of an interested party to provide necessary information does not hinder an agency's investigation. It is designed to address circumstances in which respondents seek to "game" an investigation result by granting the authority the ability to incentivize cooperation through the application of certain facts, even if those facts are "less favorable" than other facts that might be available. Indeed, authorities may draw certain inferences – plainly adverse -- from that failure to cooperate, and the breadth of inferences available grows commensurate with the level of non-cooperation. Absent this discretion, the investigative process would grind to a halt. The United States has not contested this understanding of Article 12.7.

17. As explained in China's First Written Submission, MOFCOM had four alternatives before it: (1) find 0% utilization; (2) find 29% utilization based on the AK Steel 10-K report; (3) find some other degree of utilization; or (4) find 100% utilization, as it did in the preliminary determination. In the final analysis, MOFCOM had to choose among these alternatives and 100% utilization proved to the must reasonable under the circumstances of the respondents' non-cooperation.

18. China reiterates that respondents who willfully and strategically create a factual void in the record should not be allowed to benefit from that non-cooperation under Article 12.7 of the *SCM Agreement*. To allow such an outcome would undermine the entire purpose of the investigation and allow respondents to manipulate the process by withholding unfavorable information in a calculated manner. Indeed, such manipulation is seen on the face of the U.S. argument. The United States effectively argues that because AK Steel chose to provide insufficient and unusable sales data to MOFCOM with which to investigate the program at issue, Article 12.7 of the *SCM Agreement* requires MOFCOM to accept that no more than 29% of AK Steel's sales can be found to be related to the program at issue. In other words, MOFCOM should be forced to use this information because

sales data is unique and no secondary source exists. This could not have been the intent of the Members in drafting Article 12.7 or Annex II of the *AD Agreement*.

E. MOFCOM Properly Analyzed The Adverse Price Effects From The Subject Imports

19. The record from the underling proceeding shows that domestic prices were falling at the end of 2008 and early 2009. Domestic prices were not covering the increasing costs, and so profitability was falling in 2008 and early 2009. These facts are not in dispute, so the United States tries to shift the focus of its pricing arguments. But the U.S. emphasis is simply an effort to hide a fundamental weakness in its overall case: MOFCOM did rely heavily on adverse volume effects as part of its overall injury findings, and the United States has nothing really to say about these adverse volume effects and so has not challenged these findings. But it is against this context that MOFCOM also found the adverse price effects – both price suppression and price depression – that the United States has made the centerpiece of its claims.

1. MOFCOM properly found price depression and price suppression

20. The key facts are not really in dispute. Domestic prices began to decline in late 2008 and continued to decline sharply in early 2009. Similarly, average domestic prices over the full year 2008 did not increase enough to match the rising costs so profitability, and the falling domestic prices in early 2009, put even stronger downward pressure on domestic industry profitability. These facts support the MOFCOM findings of price depression and price suppression in 2008 and early 2009.

21. Since the United States cannot dispute these key facts, it has tried to shift the focus to price undercutting. Since the United States has no factual or legal basis to challenge MOFCOM's findings of price depression, the United States instead tries to graft price undercutting findings onto the price depression findings, and then attack the price undercutting findings. This U.S. argument is flawed on many levels, and should be rejected.

22. First, price depression can occur with or without price undercutting. The two concepts are factually and legally distinct. Price depression occurs whenever domestic industry prices are declining. Price depression does not depend on any comparison with subject import price levels; it focuses exclusively on the trend in domestic prices. It is this decline in domestic prices that Article 3.2 and Article 15.2 recognize as an adverse price effect. Second, price depression can result from the volume of subject imports. The United States implicitly admits as much, when it argues that the price depression "was not solely because imports were increasing."

23. The U.S. arguments also reflect a misunderstanding of price suppression analysis. Price depression focuses on domestic industry price trends alone. Price suppression goes one step further, and considers domestic prices trends relative to changing costs. Price suppression analysis recognizes that even when prices are going up, there can still be adverse price effects. If prices are going up because costs are also going up, but prices are being "suppressed" and not allowed to increase enough to cover rising costs, Article 5.2 and Article 15.2 recognize such price suppression as an adverse price effect. The United States now complains that MOFCOM did not disclose any information about the changing costs. But these complaints do not really address the issue of price suppression – the price-cost squeeze that MOFCOM documented for both 2008 and early 2009.

24. Perhaps recognizing the weakness of its arguments about both price depression and price suppression, the United States tries to slip into its arguments the notion of causation – that even if price depression and price suppression was occurring, these adverse price effects were not caused by subject imports. For purpose of the claims under Article 3.2 and Article 15.2, however, this approach is legally incorrect. These provisions require only the showing of the existence of the adverse price

effects – the declining prices (price depression), or the price-cost squeeze and declining profitability (price suppression) – and do not require any explanation as to the causes of these adverse price effects.

2. MOFCOM had no obligation to find price undercutting

25. The United States concedes that an authority can find adverse price effects without finding price undercutting. The concession is worded strangely – "we do not disagree" – but the concession has been made nonetheless. But the United States selectively quotes from *EC – Salmon* to suggest price undercutting analysis is "necessary." A full reading of the selected passage stands for something very different. In any event, the MOFCOM determination certainly discussed the issue of relative prices – as the United States repeatedly has pointed out – so there is no issue whether price undercutting was "considered" at some level. After considering all the facts, MOFCOM chose to base its determination on price depression and price suppression.

26. China also disagrees with the panel in *EC -- Salmon* that price undercutting must be considered. The text of both Article 3.2 and Article 15.2 use the key term "or." In other words, the authority "shall consider" either price undercutting or price depression or price suppression. Nothing in the text suggests that all three must each be considered. Given the interpretative significance of this key term "or," the United States is wrong to assert that analysis of price undercutting is "essential to a complete analysis of price effects." Such a view is at odds with the text and at odds with the absence of any requirement for the authorities to use any particular methodology. China recognizes that an authority could reasonably chose to consider price undercutting as part of its analysis; but the authority has the discretion under Article 3.2 and Article 15.2 to consider or not consider price undercutting.

3. Any concerns about price undercutting do not affect MOFCOM's conclusions about price depression or price suppression

27. As discussed above, price depression and price suppression analysis does not depend on the relative prices of domestic product and subject imports. Both price depression and price suppression can occur regardless of whether subject import prices are higher or lower than domestic prices. To this end, U.S. efforts in response to a question from the Panel to use its arguments about price undercutting to attack the MOFCOM findings on price depression and price suppression fail. The United States is confusing the mention of "low price" with specific findings of price undercutting.

28. The U.S. argument is really that MOFCOM did not exercise its discretion to conduct more detailed analysis than that required by Article 3.2 and Article 15.2. The United States appears frustrated that MOFCOM did not engage in analysis of "transaction prices." Although authorities could certainly choose to do so, they are not required to do so. MOFCOM did not pursue specific findings on price undercutting in this particular case because it did not believe such findings were the most appropriate analytic tool given the data available in this case. Moreover, MOFCOM also had to take into account the fact that it would be conducting analysis based on cumulated subject imports, so that any transaction specific data would be blurred and obscured with combined on a cumulated basis. For both of these reasons, MOFCOM focused the broader measure of average prices as reflected in average unit values.

29. Thus, given the data available in this case, MOFCOM properly exercised its discretion to make:

- Specific findings of price depression, based on the facts that domestic prices (as measured by average unit values) began to fall in Q4 2008 and fell more sharply in Q1 2009.

- Specific findings of price suppression, based on the facts that domestic prices did not increase enough in 2008 to cover rising costs, leading to a drop in per unit profits, and domestic prices fell in Q1 2009 exacerbating the drop in per unit profits.
- The general observation that subject import prices were "low" and were "lower than" domestic prices throughout the period.

30. All of these findings are fully supported by the evidence on the record before MOFCOM, and can be seen in both the MOFCOM determinations and in other public documents on the record of this investigation.

F. MOFCOM Properly Analyzed The Ways In Which Subject Imports Caused Material Injury To The Domestic Industry

1. Causal link

31. Essentially, the United States argues that because of its concerns about MOFCOM's lack of any specific findings on price undercutting – analysis that the United States has conceded is not required – then the price effects findings fail and thus the overall finding of a causal link also fails. This U.S. argument ignores the unchallenged findings about adverse volume effects – the significant increase in subject imports and their significant gain of market share. This U.S. argument also ignores the distinct findings on price depression (domestic prices declined) and price suppression (prices did not cover costs, so per unit profits also fell), both of which stand regardless of any price undercutting (the relative prices of subject imports and domestic products). It is hard to see how issues about an optional analysis of price undercutting trump these undisputed volume and price effects that establish a sufficient causal link.

32. Prior panels have deferred to the authorities when assessing claims that the authorities improperly found a causal link. Given the number of aspects of the causal link analysis that the United States has not challenged at all, it is hard to see how one could conclude that MOFCOM "could not" reach the conclusion of causal link that it found here. Increasing volumes of dumped and subsidized imports were taking significant market share away from the domestic industry, and this loss of volume was causing undisputed material injury to the domestic industry. Regardless of the arguments about certain aspects of price effects, the MOFCOM finding on causal link should stand.

2. Non-attribution

33. MOFCOM fully complied with the obligations in Article 3.5 and Article 15.5. First, MOFCOM did "examine" the change in domestic industry capacity. Any implication in the U.S. argument that China did not examine this factor is simply incorrect. Second, MOFCOM fully addressed this issue. It rejected respondents' arguments that the expansion of domestic industry capacity was causing the injury. Third, although MOFCOM could have stopped its analysis by simply noting the respondents' factual premise was incorrect, MOFCOM went further and ensured that it did not "attribute" any effects of the change in domestic industry capacity to subject imports. MOFCOM ensured non-attribution by comparing the relative trends to see whether there was any correlation in the trends that would suggest some adverse effects being improperly attributed. This analysis thus confirmed what MOFCOM had already found – that increased domestic capacity was not the problem, but rather subject imports were the problem.

34. In its arguments on this issue, the United States is confusing two distinct issues. The first issue is what arguments the respondents made to MOFCOM, and how MOFCOM responded to those arguments. But MOFCOM is properly within its discretion to evaluate the issue in light of the facts and arguments before the authorities. The second issue is what the United States must now present to establish a *prima facie* case for its claim. The U.S. argument on this issue is little more than to disagree with the various statements made by MOFCOM in its determination. But each of MOFCOM's findings was correct and supported by the record.

35. The U.S. claim on non-attribution also suffers from other factual and legal defects. The United States has improperly re-characterized the nature of the alternative cause at issue here. It has shifted its argument to "overproduction," and "production growing far more rapidly than demand," even though these arguments about excess production had never been presented to MOFCOM during the investigation. MOFCOM addressed the alternative cause that respondents had raised – excess capacity – and it is improper for the United State now to propose an alternative cause that had never been raised before the authorities.

36. The United States has also tried to dismiss China's argument about domestic capacity expanding less than the total domestic consumption, claiming this fact cannot be "verified from any information MOFCOM disclosed." Yet this statement is incorrect. MOFCOM made a specific finding that there was still a "gap" between domestic industry capacity and total domestic consumption.

37. Beyond these factual defects, the U.S. arguments also suffer from a fundamental legal defect – the United States has at most proposed an alternative explanation for one aspect of domestic industry performance. As other panels have found, such an alternative explanation is not enough, finding inadequate non-attribution arguments that do no more than posit an alternative explanation or a partial explanation for the condition of the domestic industry. This Panel should do the same, and reject the U.S. claim under Article 3.5 and Article 15.5.

III. CONCLUSION

38. For the reasons set forth in this submission, China requests the Panel to issue findings and recommendations consistent with the arguments presented in China's First Written Submission and those set forth above, and uphold the determinations and measures at issue.

ANNEX F

ORAL STATEMENTS OR EXECUTIVE SUMMARIES THEREOF, OF THE PARTIES AT THE SECOND SUBSTANTIVE MEETING

ANNEX F-1

EXECUTIVE SUMMARY OF THE OPENING STATEMENT OF CHINA
AT THE SECOND MEETING OF THE PANEL

I. MOFCOM's CVD Initiation Was Proper

1. The key issue is whether the application contained "sufficient evidence" under Article 11.2 and 11.3 of the SCM Agreement for purposes of initiation. In its first submission China addressed both the factual evidence contained in the application with respect to the various allegations and the relevant legal standard to confirm that initiation was proper. We demonstrated that there was sufficient evidence to commence an investigation. In many respects the United States is really delving into the ultimate merits of the allegations from the standpoint of a preliminary or final determination, not whether the allegation was supported by sufficient evidence for the limited purposes of initiation. China also disagrees with U.S. characterizations regarding what constitutes evidence of specificity, financial contribution, and benefit.

II. MOFCOM's Application Of Facts Available Under The Government Purchase of Goods Program Was Justified

2. Let me turn to U.S. claims regarding the application of facts available in the CVD investigation with respect to the government purchase of goods program. There are four fundamental issues to address. First, was MOFCOM's request for information clearly articulated? Second, what was the scope of "necessary information" for which MOFCOM had to fill gaps with facts available? Third, did the respondents seriously impede the investigation by failing to provide necessary information? Fourth, were the foundations of MOFCOM's choice of 100 percent utilization rate legitimate and contemplated under Article 12.7 of the SCM Agreement?

3. On the first point, China acknowledges that MOFCOM has an obligation to articulate clearly its requests for information. This point is reflected in Article 12.1 of the SCM Agreement, but more on point with respect to the U.S. claim under Article 12.7 of the SCM Agreement, this point is reflected in paragraph 1 of Annex II of the AD Agreement, which both parties agree is relevant here. In this regard, China explained in great detail in its responses to the Panel's questions not only the clarity with which MOFCOM requested information, but also the respondents' obvious understanding of MOFCOM's requests as early as their initial questionnaire responses. China reiterates that the administering authority has no obligation to articulate to the respondents any detailed theory of subsidization it may be considering during the course of the investigation. MOFCOM clearly articulated its request for information, which was its only obligation under Article 12.7.

4. Moving to the second fundamental issue– the scope of necessary information – the United States has not really advanced a coherent argument to challenge MOFCOM's decision. First, the United States protests a request for 15 years of transaction data, but gets the facts wrong about what was requested in the initial questionnaire that ultimately drove MOFCOM's facts available decision. Moreover, the United States has not articulated any purpose for the fact it is trying to assert – that the application of facts available turned on the respondents' failure to provide 15 years of data. China recalls that the legal claim is that China's application of facts available was inconsistent with Article 12.7 of the SCM Agreement. Even assuming that the application of facts available turned on the respondents' failure to provide 15 years of transaction data, which it did not, what is the legal significance the United States it attributing to its asserted fact? Ultimately, the record shows that the application of facts available did not turn on the respondents' failure to provide 15 years of transaction data in response to the supplemental questionnaire.

5. Moving to the third fundamental issue at play – whether the respondents seriously impeded the investigation – there is no question that this was the case. There was an undeniable, outright refusal to provide information to MOFCOM. By attempting to dictate the terms of MOFCOM's investigation and withholding information, the respondents denied MOFCOM any reasonable ability to verify utilization or calculate any corresponding benefit according to its investigation plan.

6. Ultimately, the United States is reduced to arguing that MOFCOM should have conducted its investigation in a different manner, effectively asserting that respondents have the power to dictate the terms of an investigation even to the extent of denying information when they have the capacity to supply it. Note, however, that the United States never really contends that the information MOFCOM sought was not relevant or in fact necessary. The United States simply contends, with no support, that there was an alternative, perhaps more direct, path. But China believes the most direct and comprehensive path was pursued and MOFCOM had discretion to determine that path. The Panel should also note that the United States has not articulated a single objection to MOFCOM's request for data on all sales that is grounded in some substantive provision of the SCM Agreement. Under the circumstances, absent some other procedural defect related to MOFCOM's efforts at articulating its request, providing enough time, or accommodating any other logistical problems experienced by the respondents that were associated with the request, the Panel must set aside the U.S. Article 12.7 claim.

7. This leads me to the final fundamental issue – whether MOFCOM's application of a 100 percent utilization rate as "facts available" was appropriate and permitted under Article 12.7 of the SCM Agreement. The United States has oversimplified the issue by first presenting the question in the context of a cooperating respondent by claiming MOFCOM was compelled to apply the 29 percent figure from AK Steel's annual report as the only facts available on the record. In *EC – DRAMs*, however, the panel in interpreting Article 12.7 concluded that authorities may draw certain inferences – plainly adverse -- from a failure to cooperate, and the breadth of inferences available grows commensurate with the level of non-cooperation. Part of the analysis is the fact that limited facts are available because the respondents refused to cooperate. Thus, the fact that a 29% figure for a particular grouping of sales appears in an annual report, with no factual basis for concluding it constituted the universe of sales under the program, is not grounds for compelling use of that figure where the respondents so completely refused to cooperate as in the case at issue.

III. MOFCOM's Explanation Of Its Benefit Determination Under the Government Purchase of Goods Program Was Proper

8. The United States continues to argue under Article 22.3 of the SCM Agreement that MOFCOM failed to adequately explain its benefit determination. In doing so, it focuses on isolated words out of context and then mischaracterizes the nature of MOFCOM's determination. First, the United States continues to point out that MOFCOM used the term "competitive bidding process" in its discussion of the Buy American Act to suggest that MOFCOM has somehow conceded the entire benefit issue by using this term. In fact, the obvious context that the United States ignores is that MOFCOM's discussion of the "competitive bidding process" under the program was to demonstrate that name was a misnomer and a fallacy.

9. Second, the United States in its second submission latches on to a new argument made by Korea to claim that MOFCOM's benefit determination did not comply with Article 22.3 of the SCM Agreement because MOFCOM failed to do a proper analysis of the market to establish that U.S. market prices were unusable as benefit benchmarks as required by Article 14(d) of the SCM Agreement. The Panel should view this argument with a great deal of circumspection and caution. Not only is the United States trying to impermissibly bootstrap a substantive claim through its procedural challenge under Article 22.3, it is doing it very late in this process. China addressed all of the U.S. Article 22.3 arguments after the U.S. first submission and it seems the United States believes

it needs to shift the focus. The second submission is the first time the United States broaches the Article 14 issue in any form. Nowhere is this issue raised in the U.S. request for consultations or its panel request.

IV. MOFCOM Properly Analyzed The Adverse Price Effects From The Subject Imports

10. Let me now turn to the injury issues. The factual record from the underling proceeding demonstrates three key trends. First, domestic prices were falling at the end of 2008 and early 2009. Second, domestic prices were not successfully covering the increasing costs, and so profitability was falling in 2008 and early 2009. Third, subject import prices remained relatively low throughout the period. These facts are not in dispute. It is against this factual context that MOFCOM found adverse price effects – more specifically, MOFCOM found both price suppression and price depression. Although the United States has made its attack against these MOFCOM's findings a centerpiece of its claims, the United States cannot avoid the fundamental problems with its attack.

11. The key facts regarding price depression are not really in dispute. Domestic prices began to decline in late 2008 and continued to decline sharply in early 2009, supporting MOFCOM's findings of price depression and price suppression in 2008 and early 2009. Since the United States cannot dispute these key facts, it has tried to shift the focus, but the U.S. argument is flawed on many levels, and should be rejected.

12. First, contrary to the U.S. argument, price depression can occur with or without price undercutting. The two concepts are factually and legally distinct. Second, price depression can result from the volume of subject imports. The text of Article 3.2 and Article 15.2 speak only of "the effect of the [dumped/subsidized] imports on prices," and does not limit itself to a focus on the prices of those dumped or subsidized imports. Third, perhaps recognizing the weakness of its arguments about price depression, the United States tries to slip into its arguments the notion of causation – that even if price depression was occurring, these adverse price effects were not caused by subject imports. For purpose of the claims under Article 3.2 and Article 15.2, however, this approach is legally incorrect.

13. The U.S. arguments also reflect a misunderstanding of price suppression analysis. Price depression focuses on domestic industry price trends alone. Price suppression goes one step further, and considers domestic prices trends relative to changing costs. Price suppression analysis recognizes that even when prices are going up, there can still be adverse price effects. If prices are going up because costs are also going up, but prices are being "suppressed" and not allowed to increase enough to cover rising costs, Article 5.2 and Article 15.2 recognize such price suppression as an adverse price effect.

14. Much of the U.S. argument seems to rest on its dissatisfaction with the manner in which MOFCOM wrote up its findings. MOFCOM noted price depression that began in late 2008, but MOFCOM did not discuss the quarterly data in its public discussion. MOFCOM noted price suppression during 2008, but discussed only per-unit costs. These U.S. arguments focusing on either 2008 or 2009 individually, however, largely ignore the evidence of adverse price effects over the combined period late 2008 to early 2009.

15. Given this well supported MOFCOM findings of price depression and price suppression, it is hardly surprising the United States focused its argument elsewhere, on price undercutting. As we noted in our Second Written Submission, the United States has conceded that an authority can find adverse price effects without finding price undercutting. Moreover, the United States does not even attempt to address in its Second Written Submission the extensive body of WTO panel precedent that has confirmed this legal interpretation. Given that MOFCOM had no legal obligation to find price undercutting, and given that MOFCOM in fact found price depression and price suppression, the U.S. arguments about the failure to disclose information about price undercutting largely miss the point.

16. As we have discussed, price depression and price suppression analysis does not depend on the relative prices of domestic products and subject imports. Both price depression and price suppression can occur regardless of whether subject import prices are higher or lower than domestic prices. The U.S. argument is really that MOFCOM did not exercise its discretion to conduct analysis not required by Article 3.2 and Article 15.2. MOFCOM did not make specific findings on price undercutting in this particular case because it did not believe such findings were the most appropriate analytic tool given the data available in this case, and given the need to consider the cumulative effect of imports from both the United States and Russia. For both of these reasons, MOFCOM focused the broader measure of average prices as reflected in average unit values.

V. MOFCOM Properly Analyzed The Ways In Which Subject Imports Caused Material Injury To The Domestic Industry

17. The U.S. Second Written Submission does not advance any new arguments on the causal link itself, as opposed to its arguments about non-attribution. Once again, the United States has essentially said that since the findings of adverse price effects were incorrect, the finding of a causal link is also incorrect.

18. The U.S. arguments really focus more on other causes, and whether MOFCOM met its obligations in Article 3.5 and Article 15.5 not to attribute the effects of other causes to subject imports. MOFCOM examined the change in domestic industry capacity, and concluded that the domestic industry capacity was not injuring the domestic industry. Any implication in the U.S. argument that China did not examine this factor is simply incorrect.

19. The United States also complains about the way that MOFCOM handled the issue of non-subject import, complaining there was insufficient disclosure and insufficient analysis. These arguments lack any merit. China would like to remind the Panel that these arguments are all completely new. Neither the comments by Allegheny Ludlum after the preliminary determination, nor the comments by the U.S. Government after the disclosure of basic facts said anything about non-subject imports. China finds it rather odd that the United States now presents an argument that was not raised at all by the foreign respondents during the investigation before MOFCOM. Notwithstanding this complete absence of any discussion of this issue by the foreign respondents, MOFCOM did in fact consider this issue.

VI. MOFCOM's Provision Of Non-Confidential Summaries Was Proper

20. Turning now to the issue of non-confidential summaries, the United States still has not met its burden to establish that non-confidential summaries provided in the application were inadequate. As China has previously noted, neither of the relevant articles from the AD and SCM Agreements specify a form or formula for providing non-confidential summaries. The Agreements are concerned only with whether or not the non-confidential summaries allow a reasonable understanding of the confidential information being summarized. In addition, neither of the relevant Articles addresses the principal issue now being raised by the United States, namely that the formula or form used to present the non-confidential summaries made it difficult to "link" the non-confidential information with the confidential information being summarized. Notwithstanding that this is not a requirement in the relevant provisions of either Agreement, this claim is also without factual support.

VII. The United States Has Not Established Any Legal Or Factual Basis For Its Complaint Regarding Disclosure of the Dumping Calculations

21. China must agree to disagree with the United States on MOFCOM's obligations with respect to disclosure of the calculations of the margins of dumping. As addressed extensively and with

specific reference to the texts of the relevant portion of Article 12.2, there is no requirement that an authority disclose the details of the calculations of the margins of dumping. Article 12.2.2 requires disclosure of "all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures." This does not encompass the actual calculations. There is no reference in Article 12.2.2 to the calculation of the margins of dumping. Rather, the only reference to the margins of dumping is in Article 12.2.1(iii) which requires that the margins of dumping established be disclosed in the relevant notice or separate report. The margins of dumping are the results of the comparison of export price or constructed export price with normal value as specified in Article 2.4.2 of the AD Agreement. That is, the margins of dumping are the results of particular calculations done by the authorities pursuant to the rules of Article 2 of the AD Agreement and based on the information provided by respondents. The margins of dumping are not the underlying calculations that lead to the margins. Thus, while Article 12.2.2, by virtue of the incorporation of Article 12.2.1(iii), requires authorities to provide notice of the results of its calculations in the form of notice as to the margins of dumping for each respondent, it does not impose any specific requirement regarding the calculation of those margins of dumping.

ANNEX F-2

EXECUTIVE SUMMARY OF THE OPENING STATEMENT OF THE UNITED STATES AT THE SECOND MEETING OF THE PANEL

1. The United States appreciates this opportunity to provide further views on the reasons why China's antidumping (AD) and countervailing duty (CVD) measures on U.S. grain oriented flat-rolled electrical steel (GOES) are inconsistent with WTO rules. Our previous submissions and statements have addressed most of the arguments that China has made in response to our claims. In this statement, we will concentrate on those points that China made for the first time – or chose to re-emphasize – in its second written submission.

A. The Initiation of the Countervailing Duty Investigation for Several Programs Breached Article 11 of the SCM Agreement

2. As the United States demonstrated in its previous submissions, China's decision to initiate a CVD investigation with respect to 11 programs was inconsistent with Article 11 of the SCM Agreement, because the application did not contain sufficient evidence to justify initiation of an investigation – and indeed, in many instances, contained no evidence at all for one or more elements of the subsidy claim. China's response is two fold: first, relying on panel reports addressing Article 5.2 of the AD Agreement (not Article 11 of the SCM Agreement), it asserts that it need not demonstrate that evidence was sufficient but rather merely that "raw information" was contained in the petition. Second, it attempts to rewrite the record in an effort to demonstrate that the evidence provided therein meets the standard China has invented.

3. Regarding China's first assertion, as noted in our previous submissions, China's reliance on panel reports interpreting the AD Agreement for its proposition that all that is needed is "raw information" is misplaced. First, the text of the two provisions is different. Whereas Article 5.2(iii) of the AD Agreement requires "information on prices …", Article 11.2(iii) of the SCM Agreement requires "evidence with regard to the existence, amount and nature of the subsidy in question." This difference matters, because the language reflects the fact that the type of evidence that would merit initiation of a CVD investigation – evidence with regard to financial contribution, benefit, and specificity – is distinct from that required to initiate an AD investigation – e.g., "information on prices." The panel reports cited by China are simply not informative of the meaning of the SCM Agreement obligation at issue.

4. China also argues that Article 5.2(iii) of the AD Agreement specifies a precise type of evidence, while suggesting that Article 11.2(iii) of the SCM Agreement does not specify a precise type of evidence. Contrary to what China suggests, Article 11.2 is precise in what it requires. It makes clear that an application must contain "sufficient ... evidence with regard to the existence, amount and nature of the subsidy in question." Thus, Article 11.2 requires "sufficient evidence" with regard to the existence of a financial contribution and benefit, the amount of the benefit, and whether the subsidy is specific.

5. China attempts to distract the panel from the clear language of the SCM Agreement because when applied to the facts it leads to only one conclusion: The evidence contained in the application was insufficient to initiate a CVD investigation for several programs under Article 11 of the SCM Agreement. While China points to various documents to assert otherwise, and in its second written submission even claims that these documents were the type of information described by the United States as sufficient evidence, the facts demonstrate that this is simply not the case.

B. China Failed to Require Adequate Non-confidential Summaries of Confidential Information

6. In its second written submission, China suggests that the United States has "changed its focus" from the adequacy of the non-confidential summaries to "whether or not there was 'a link' between the non-confidential information and the redacted confidential information." China misrepresents the U.S. position. The United States has consistently argued that the non-confidential summaries provided were labeled as such, but were entirely inadequate.

7. Our second written submission details various instances where China's theory of what constitutes an adequate non-confidential summary would require respondents to engage in a fishing expedition to surmise an understanding of the confidential information. For instance, China attempts to rely on percentage changes provided more than 50 pages later in the petition to argue that the redacted information was somehow discoverable from other parts of the petition. Forcing respondents to engage in this highly speculative exercise fails to satisfy the relevant provisions.

8. China also asserts that the AD and SCM Agreements do not provide enough guidance for determining how best to comply with Article 12.4.1 of the SCM Agreement and Article 6.5.1 of the AD Agreement, and that therefore it is free to decide for itself what constitutes an adequate summary. In asserting that there is no guidance for applying Articles 12.4.1 and 6.5.1, China ignores the fact that previous panels and the Appellate Body have found sufficient guidance in Article 12.4.1 of the SCM Agreement and Article 6.5.1 of the AD Agreement to resolve questions regarding what qualifies as an adequate non-confidential summary and when adequate non-confidential summaries are not required. Insofar as China continues to pursue its exceptional circumstances argument, the fact is the applicants provided no explanation as to why there were exceptional circumstances that precluded more detailed summarization. The Appellate Body has held that a statement of reasons why summarization is not possible must be provided in the record. Without a statement on the record of reasons why a more detailed summarization was not possible, China cannot excuse the deficient non-confidential summaries contained in the application. For the above reasons, China breached Article 12.4.1 of the SCM Agreement and Article 6.5.1 of the AD Agreement.

C. China's Resort to and Application of Facts Available is Inconsistent with Article 12.7 of the SCM Agreement

9. China continues to attempt to obscure the issues at hand in its second written submission. China asserts that the U.S. claim under Article 12.7 somehow fails because the United States has not brought a claim under GATT Article VI:3 or otherwise provided an Article VI:3 analysis of China's request for data. There is no GATT Article VI:3 claim within the terms of reference of this Panel. As the United States has made clear, it is challenging China's decision to resort to facts available and its selection of a 100% utilization rate. China's extensive comments regarding GATT Article VI:3 are not germane to that inquiry.

10. Although China claims that the "record speaks for itself", throughout the proceeding China has sought to back away from the very specific instructions contained in its own questionnaires – largely ignoring its own instructions regarding how to respond to irrelevant or inapplicable questions in general and specifically with respect to the government procurement program, denying the over-broad and burdensome nature of its request (while simultaneously conceding that 93% of their request was irrelevant), and re-translating the questions at issue twice in an apparent attempt to somehow prove the clarity of their request. China claims that the quantity and value data it sought in question 4 of its questionnaire was the only information that would have allowed it to test the U.S. companies' factual assertions and confirm the extent of utilization. This is a gross exaggeration. This information at best provided a roundabout way of confirming the extent of utilization. China itself notes that there

was a more direct means of identifying sales transactions that likely were ultimately destined for use in a government project. Specifically, China states that it was likely that the customers in an indirect transaction would request manufacturer's certificates certifying compliance with Buy American provisions. Yet China never asked for any such certificates.

11. Moreover, we note that China's purported need for the requested quantity and value data was to prepare for verification. That is, according to China, the information was to be mined in order to develop a verification strategy. Given this, there was nothing preventing China from using the databases filed in the AD proceedings to develop its verification strategy. Yet China chose not to do so.

12. Finally, we note that China also claims that its selection of a 100% utilization rate was reasonable and "best reflected the 'facts available' on the record", an assertion that strains credulity. First, China asserts that the United States conceded that the correct utilization rate was greater than zero. The United States is unaware of such a concession, and China's only support for such a concession appears to be its own assertions in a previous submission. How China arrived at 100% as a reasonable rate remains a mystery. The application itself, the source of the 29% alternative proposed by one of the U.S. companies, did not support anything close to a 100% utilization rate. All other evidence on the record indicates that even this 29% figure would be adverse. Selecting a 100% utilization rate in light of the customer lists, the petition, the sales databases, and other record evidence was inconsistent with Article 12.7 of the SCM Agreement.

D. China Acted Inconsistently With Its Obligations Under Article 12.2.2 of the AD Agreement

13. China baldly asserts that the United States has pointed to no text in Article 12.2.2 obligating an investigating authority to make available the specific dumping calculations. To the contrary, China simply has ignored the U.S. arguments on this point. China continues to argue that if any obligation to provide the final dumping calculations exists, it resides in Article 6.9 of the AD Agreement, not Article 12.2.2. Article 6.9, however, pertains to disclosure of the essential facts *before* a final determination. The U.S. claim, on the other hand, pertains to the actual *final* dumping calculations. The final dumping calculations performed by an investigating authority cannot be disclosed prior to the final determination.

14. Finally, China continues to claim that the respondents in the investigation were able to replicate and check the dumping calculations. The United States has already explained why China is wrong on this point, and China's claim is undermined by the express request of ATI during the investigation that MOFCOM release its calculations so that ATI would have "the opportunity to review those calculations for mathematical errors and to provide meaningful comments on the methodology MOFCOM used to calculate dumping margins ...." More fundamentally, the obligation of an investigating authority under Article 12.2.2 exists even if the respondent companies are able to replicate some (or even all) of the authority's calculations. Therefore, China acted inconsistently with Article 12.2.2 of the AD Agreement by failing to make available to the two respondent companies the final dumping calculations it performed.

E. The Injury Analysis in MOFCOM's Final Determination was Inconsistent with China's WTO Obligations

15. China's attempts to rewrite MOFCOM's injury determination are inconsistent with the nature of this dispute resolution process. The dispute resolution process concerns the findings the authority actually made, and during Panel proceedings Members may not offer new rationales or explanations to justify their findings. China's argument that the MOFCOM injury determination can be justified on the basis of volume effects alone cannot be reconciled with the determination itself. MOFCOM's

injury determination relied heavily on price effects findings. If the price effects findings are inconsistent with Articles 3.1 and 3.2 of the AD Agreement and Articles 15.1 and 15.2 of the SCM Agreement, MOFCOM's injury determination cannot stand.

16. Moreover, in an attempt to produce positive evidence to support its price effects findings, China's most recent submissions to the Panel rely heavily on findings nowhere made in the MOFCOM determination and evidence never disclosed to the parties. China's actions cannot be reconciled with the obligations of Articles 6.9 and 12.2.2 of the AD Agreement and Articles 12.8 and 22.5 of the SCM Agreement which require authorities to explain their findings and disclose pertinent non-confidential evidence to the parties. As we will explain, China repeatedly flouts this obligation.

17. A prime illustration of how China has tried to rewrite MOFCOM's price effects analysis appears in paragraph 93 of its second written submission. There China asserts that "[t]he subject imports were gaining market share, and the domestic industry reacted with lower prices to stop the further loss of market share. These lower prices then led to the price depression and price suppression that MOFCOM found." This assertion is incorrect in at least four respects.

18. First, it conforms to no finding that MOFCOM actually made. As we have stated repeatedly during these proceedings, MOFCOM's actual findings were that price depression and price suppression were caused by "low" prices of the imports under investigation. Thus MOFCOM's "low price" finding purported to explain price declines during the first quarter of 2009, notwithstanding MOFCOM's admission that the imports under investigation were priced higher than the domestically produced product. China has consistently declined to defend MOFCOM's "low price" findings, which we have contended are inconsistent with Articles 3.1 and 3.2 of the AD Agreement and Articles 15.1 and 15.2 of the SCM Agreement.

19. Moreover, according to the argument that China has made in paragraph 93, the critical point at which prices for the domestically produced product began to fall was the fourth quarter of 2008. In paragraph 121 of its answers to the first set of panel questions, China points to information it asserts is in the MOFCOM record supporting this proposition. However, MOFCOM's Final Determination supplied no data concerning quarterly pricing or price trends during 2008. It provided only annual average unit value data. The finding that MOFCOM actually made was that prices for domestically produced products followed the same trends as those of the imports under investigation. The only data the determination provided concerning the imports were annual average unit value data. MOFCOM's findings concerning domestic pricing patterns cannot be deemed to refer to quarterly data that nowhere appear in the decision.

20. Second, even if MOFCOM had made the finding that China now attributes to it, it is clear that quarterly pricing data for 2008 is a critical element of MOFCOM's analysis of price effects. But MOFCOM provided no quarterly pricing data in its Essential Facts Disclosure. Indeed, China did not provide the 2008 quarterly pricing data MOFCOM purportedly used until it submitted its answers to the first set of panel questions. This information, incidentally, indicates that the trend data can readily be disclosed in a non-confidential summary format. By not disclosing these essential facts to the parties during the MOFCOM investigation, China violated Article 6.9 of the AD Agreement and Article 12.8 of the SCM Agreement.

21. Third, even if MOFCOM can be deemed to have made a finding concerning quarterly price trends in 2008, it did not conduct the objective examination required by Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement. This is because pricing trends would be the only indicator on which MOFCOM would have performed a quarterly analysis for 2008. MOFCOM did not conduct a quarterly analysis of any other factor that would indicate whether price suppression or price depression was the effect of the imports under investigation, as required by Article 3.2 of the

AD Agreement and Article 15.2 of the SCM Agreement. It did not conduct a quarterly examination of import volumes, and it did not conduct a quarterly examination of import prices.

22. Fourth, China's attempted re-framing of MOFCOM's price effects finding is still not supported by positive evidence. According to China's re-framing in paragraph 93 of its second written submission, increasing subject import market penetration required domestic producers to cut their prices in an effort to regain market share. However, the only time during MOFCOM's period of investigation when the domestic industry lost market share was 2008. And during the bulk of 2008, the domestic industry was not cutting prices. Instead, the information China provided in paragraph 121 of its answers to the first set of panel questions – information, we reiterate, that MOFCOM never disclosed during its investigation – indicates that prices for domestically produced GOES increased throughout the first three quarters of 2008. Prices fell only in the fourth quarter, when the volume of the imports under investigation fell from prior quarterly peaks.

23. Furthermore, contrary to what China suggests in its second written submission, it is not correct that under Articles 3.2 and 15.2 the question is simply whether there is "price suppression" or "price depression" in the abstract. The language of those provisions is clear – the question concerns "the effect of" the imports. An examination of the "effect" of imports necessarily involves a causation analysis. The question is then whether imports have the effect of suppressing or depressing prices. Therefore, an investigating authority's failure to establish a causal link between the imports and the price effects is relevant evidence of a breach of Articles 3.2 and 15.2. The cases cited by China for its theory that these articles do not have any causation aspect do not in fact support China's theory. Rather, these cases involved the separate question of a non-attribution analysis. The causation analysis under Articles 3.2 and 15.2 is analytically distinct from a non-attribution analysis, and the EC – DRAMs panel report, cited by China, is fully consistent with the U.S. approach.

24. The only information in the record concerning quarterly import volumes, which is that in CHN-33 which we reformatted in US-41, indicates that the volume of imports under investigation increased most rapidly during the second and third quarters of 2008. These were the same quarters that, according to China, average unit values for domestically produced GOES peaked. By the fourth quarter of 2008, the quarterly volumes of imports under investigation had begun to decline. Thus, the record does not show that the Chinese industry was forced to cut prices to counter rising import volumes. When quarterly import volumes were reaching their peak, so were quarterly domestic average unit values.

25. Moreover, in attempting to attribute the falling average unit value levels during the fourth quarter of 2008 to the imports under investigation, MOFCOM overlooks other data in its record indicating why prices fell during this time. The ATI comments in CHN-31, whose discussion of pricing trends China has cited with approval, explain that raw materials prices for steel declined beginning in October 2008, and the prices for all types of steel – not merely GOES – declined. Indeed, the data in US-41 indicate that average unit values for both the imports under investigation and nonsubject imports declined in the fourth quarter of 2008. By focusing on per-unit profits, without any consideration of the cost components, MOFCOM had no basis to assess whether changes in per-unit profits were simply related to the start-up of Baosteel's new plant.

26. There are additional evidentiary and logical flaws in the price effects analysis that China has presented to the Panel. MOFCOM's price suppression analysis assumed that the GOES industry faced the same cost structure in 2007 and 2008. It did not, because of the entry of a new producer in 2008. As we explained in our second written submission, new steel production facilities frequently face high costs. MOFCOM's failure to examine whether the entry of a new producer in China skewed any comparison of 2007 and 2008 cost data demonstrates a lack of objective examination.

27. China's current arguments on pricing proceed as if there were a self-evident correlation during MOFCOM's period of investigation between the volume of the imports under investigation, the domestic industry's market share, and the domestic industry's price levels. This is not the case. While subject import volumes rose throughout the period of investigation, during some periods – such as 2007 and the first quarter of 2009 – the domestic industry's market share rose, and at other times, such as 2008, it fell. Similarly, as the quarterly data for 2008 indicate, during certain periods when the imports under investigation were increasing their presence in the market, prices for the domestically produced product rose.

28. There is a more fundamental flaw with MOFCOM's stated reason for finding price effects. There is no correlation between "low" prices for the imports under investigation and the domestic industry's market share. We explained in our first written submission why what MOFCOM presented as a comparative analysis of pricing was not an objective analysis because it did not measure prices at all. MOFCOM combined data for all grades of GOES into a single value measure, and combined all annual transactions into a single price point. We also explained why China violated the obligation to disclose essential facts by not disclosing the non-confidential data it had collected concerning price comparisons. China has now attempted to rectify this omission far too late through the chart it provided on the first page of its November 25 submission to the Panel. (We note, however, that this chart does not provide data for the first quarter of 2009.) Under China's calculations, the largest difference between the value of the imports under investigation and the value of the domestically produced product occurred in 2007 – a year that the Chinese industry raised prices, increased profits by over 50 percent, and gained market share. Consequently, the record for the entire period of investigation does not indicate that lower values of the imports under investigation from 2006 to 2008 required the domestic industry to adjust its pricing to preserve market share.

29. With respect to the issue of causal link, China has repeatedly mischaracterized the U.S. arguments and misrepresented the record. In paragraph 109 of its second written submission, China references the "number of aspects of the causal link analysis that the United States has not challenged at all." This statement does not reflect the U.S. position that MOFCOM's price effects findings were essential to its causation analysis.

30. Further in paragraph 109, China makes the statement that "increasing volumes of dumped and subsidized imports were taking significant market share away from the domestic industry, and this loss of volume was causing undisputed material injury to the domestic industry." This statement does not reflect any finding that MOFCOM actually made. It also does not accurately characterize the record. The only period in which the domestic industry lost market share was 2008. During that year, multiple important indicators of industry performance were positive and many rose by double digit percentages. These included output, sales prices, sales revenues, employment, and wages. The industry's pre-tax profit also rose in 2008. This hardly reflects "undisputed material injury."

31. By contrast, during the first quarter of 2009, numerous indicators of domestic industry performance, including operating income, fell. But this could not have been due to loss of volume to the subject imports. The domestic industry's sales quantities and market share were both higher during that period than they were during the first quarter of 2008. China's inability to show any correlation either between import volume and domestic industry market share, or between the domestic industry's market share and its performance, confirms why the price effects findings that we have challenged are essential to the causation analysis. The contrasts between 2008, when the domestic industry's market share declined and its performance was strong, and the first quarter of 2009 when market share increased and performance deteriorated, indicates that the record does not support the notion that maintaining market share was critical to the condition of the domestic industry.

32. China similarly confuses both the record and the U.S. argument with respect to the issue of non-attribution. Our argument is straightforward: there is no positive evidence supporting

MOFCOM's finding that the imports under investigation were the cause of the domestic industry's difficulties during the latter portion of the period of investigation. Specifically, any objective examination of the record would have indicated that the domestic industry's sharp increases in capacity after 2008 resulted in excessive production and inventory overhangs which in turn led to the domestic industry's price and profitability declines. In light of this, the third sentence of Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement required MOFCOM to engage in a non-attribution analysis to ensure it did not attribute to the imports under investigation any injury attributable to other causes. China's failure to conduct any such analysis consequently violated the agreements.

33. China has used a variety of strategies to avoid responding to our arguments. In its first written submission and at the first panel meeting, it contended that MOFCOM was not required to engage in a non-attribution analysis because the United States had not established that causes other than subject imports had "dramatic" effects. As we explained in our second written submission, nothing in the agreements provides that a non-attribution analysis is required only when factors other than subject imports are having "dramatic" effects. Moreover, the agreements place upon the authority, not the parties challenging imposition of duties, the responsibility to assess the effects of other known causes of injury.

34. In its second written submission, China changed its approach and argued that the overproduction and resulting inventory overhang was not a "known" cause of injury because the only arguments submitted to it concerned excess capacity. This argument is baseless. We observe initially that, in its comments on the preliminary determination that appear at CHN-31, ATI references "the supply-demand relation" several times as an alternate cause of injury. Thus, the asserted cause of injury was not merely a change in capacity, but a change in the amount supplied – in other words, excess production. The petitioners clearly understood this, because their response to the ATI comments in CHN-32 directly, albeit inaccurately, referenced the industry's production levels. Moreover, any possible ambiguity in ATI's comments was rectified by the comments of the U.S. Government. As MOFCOM acknowledged at page 72 of its Final Determination, the United States argued that "the more likely cause of any problems experienced by the Chinese producers is the enormous increase in inventories due to the domestic industry's incorrect assessment of demand." Thus, MOFCOM was well aware that excessive production and inventory overhangs were being asserted as an alternative cause of injury.

35. In its November 25 response to the Panel, China attempts to provide a factual basis for MOFCOM's findings. It has not succeeded. We observe initially that China disclosed critical nonconfidential trend data – most notably concerning capacity utilization levels and the level of the increase in capacity – for the first time in that response. While China apparently now believes that such data are necessary for an understanding of the MOFCOM determination, MOFCOM never disclosed these data to the parties. This provides yet another instance of China's violation of its obligations under Article 6.9 of the AD Agreement and Article 12.8 of the SCM Agreement.

36. China's response does not in fact provide positive evidence to support MOFCOM's findings concerning the effects of causes of injury other than the imports under investigation. While we hope to provide a complete written response, we can now summarize why. First, the information China has submitted confirms that the capacity increase was far greater than warranted by increases in domestic demand. China states that there was an average consumption growth of 20 percent per year. Capacity, however, more than doubled between 2006 and 2008.

37. Second, the capacity increase was large not only in relative terms, but also in absolute terms. This can be illustrated by the confidential data China provided comparing the percentage of Chinese demand the domestic industry could supply at the conclusion of the period of investigation with the percentage it could supply at the beginning of the period. Given the magnitude of this increase, the

only way in which the Chinese industry could have obtained full capacity utilization was by displacing the overwhelming majority of both subject and nonsubject imports from the market. China has not provided – and we cannot discern – any economic basis for the proposition that any capacity increase by a domestic industry is reasonable as long as total domestic industry capacity does not exceed national demand.

38. Third, it was not merely capacity, but also production that increased far more quickly than demand. China did not provide the specific confidential data that the Panel requested concerning demand, capacity, production, and inventories. Nevertheless, we have been able to estimate some data for demand, capacity, and production for 2008 by combining the limited confidential data China did provide with the nonsubject import data for 2008 in US-41. Based on our estimates, the record indicates that even if the volume of imports under investigation had not increased by a single ton in 2008, there still would have been substantial domestic industry overproduction – and consequently an inventory overhang – that year.

39. Moreover, China's November 25 submission conspicuously fails to provide any confidential data concerning the first quarter of 2009. Information in MOFCOM's Essential Facts Disclosure, however, indicates that compared to the first quarter of 2008, production increased by 55.23 percent while demand only increased by 12.46 percent. The Chinese industry's decision to increase production by far more than the increase in demand during the first quarter of 2009 cannot be attributed to the industry losing market share to low-priced imports under investigation, inasmuch as the domestic industry gained market share during this period and the imports under investigation were priced higher than the domestically produced product. The Chinese producers' flooding the market with excess production remains the only plausible explanation for the sharp decline.

40. Finally, China has not justified its failure either to discuss in its determination or disclose to the parties during the course of the MOFCOM investigation information about the volume and prices of nonsubject imports. We have explained in our written submissions how China's inactions in this regard violate Articles 6.9 and 12.2.2 of the AD Agreement and Articles 12.8 and 22.5 of the SCM Agreement. China asserts that MOFCOM did not need to provide any discussion of nonsubject imports because no party raised an argument concerning the issue. But parties could not defend their interests and assert arguments because MOFCOM did not disclose – and indeed, China has continued to fail to disclose – the public data on which it relied. The available data in the record that we have provided in US-41 demonstrate that there is no basis for China's suggestion that nonsubject imports were irrelevant to the injury analysis. Instead, during 2008 – the year China has characterized as critical to the MOFCOM pricing analysis – nonsubject imports had a greater volume and lower average unit values than the imports under investigation.

ANNEX F-3

CLOSING STATEMENT OF CHINA AT THE
SECOND MEETING OF THE PANEL

1. We thank the Panel once again for their dedication to this proceeding. In this closing statement China would like to make a few brief points. We expect to address any other issues through the Panel's written questions.

2. First, in our opening statement we highlighted China's concern regarding the U.S. attempt to raise substantive claims through its procedural challenges where those substantive claims are not part of the terms of reference of the Panel. This was in the context of Articles 22.3 and 14 of the SCM Agreement and U.S. arguments about pricing benchmarks. China appreciates the Panel's own attention to this matter through its questions on the first day with respect to Articles 6.9 and 12.2.2 of the Anti-Dumping Agreement and Articles 12.8, 22.3 and 22.5 of the SCM Agreement. We believe Members should be very concerned about attempts to use procedural provisions as a means for challenging the substantive aspects of a measure. We intend to address this more fully in our responses to the Panel's questions.

3. Second, on initiation, we believe the Panel has raised an interesting point about the textual distinction in Article 11.2(iii) with respect to specificity, where that provision uses the term "subsidy" by which one may refer to the definition of that term in Article 1.1, but then uses the term "nature" rather than any more specific association with the legal element of specificity. China believes this is an important point and helps inform the standard to be applied with respect to evidence of specificity found in an application under Article 11. China will address this issue in more detail in response to the Panel's written questions.

4. Let me now turn to what are the more significant issues in this case related to the application of facts available and injury. On facts available China believes the issue has been narrowed to a simple question. Did the respondents adequately respond to MOFCOM's questionnaire. The United States has taken off the table any issue related to the substantive relevance of the requests for information, the factual relevance, and any question related to burdens placed on the respondents. China has discussed the clarity of MOFCOM's requests as reinforced through its deficiency meetings and letter as well as the plain understanding of the respondents with respect to the nature and expectations of MOFCOM's inquiry. Any objective examination of the record leads to this conclusion.

5. On the question of how MOFCOM would or could have used the requested data if it had been provided, China believes the burden is really on the United States to definitively demonstrate that this data was irrelevant or not useful to the investigation. But, in a situation when the requested information was not even provided, China does not see how U.S. arguments can gain any traction here. China is forced to engage in hypothetical responses about how the information could or would be used in the investigation. All of its uses in this regard will never be known because the respondents deliberately withheld the information. The investigation may have headed down other paths had the respondents in fact done something when they were asked. The United States seems to divine what these paths should or could have been, or what might have been a "better approach." These are not valid arguments. First, the U.S. is not the investigating authority. Second, these are post hoc arguments offered in the face of the respondents refusal to provide the information – a refusal clearly based on their belief regarding the legal relevance of the information, which is an issue the United States does not challenge in this proceeding. Nonetheless, China has explained that, at a minimum, the prospect of assembling AUV time series by product and client would allow MOFCOM

to ask further questions about particular sales that exhibited characteristics indicating utilization – including higher than typical price and/or concentration of such prices around particular customers.

6. On the question of injury, simply stated the United States is pressing the Panel on a series of alternative explanations to explain why MOFCOM's explanation does not suffice. But China would remind the United States of the standard of review involved in this proceeding. The fact that the United States can imagine alternative explanations to the facts in no way renders MOFCOM's explanation WTO inconsistent. It is the Panel's obligation to determine if MOFCOM's explanation was reasonable, not whether there were other reasonable explanations or whether a given alternative explanation sounds better. Even if the United States has offered a reasonable alternative explanation – or even if the U.S. explanation is better – that is not enough. The U.S. alternative explanation must so much better as to render the MOFCOM explanation unreasonable. We submit that the U.S. arguments on price effects and causation in this case do not meet that standard. Even given the U.S. arguments, the MOFCOM explanation stands as a WTO consistent explanation of the factual record before MOFCOM.

7. This concludes China's closing statements. Thank you again for your time.

ANNEX F-4

CLOSING STATEMENT OF THE UNITED STATES AT THE
SECOND MEETING OF THE PANEL

1. Mr. Chairman, Members of the Panel. The United States would like to begin by thanking you and the Secretariat for your efforts in the preparation for and conduct of this hearing.

2. We hope that the discussion held here yesterday and today has assisted the Panel in enhancing its understanding of the issues before it in this case. We look forward to elaborating on our comments in further written submissions.

3. Before these hearings formally close, the United States would like to make a few brief comments.

4. First, while there was limited discussion of the U.S. disclosure claims at this meeting of the Panel, we wish to highlight MOFCOM's repeated failure to disclose essential non-confidential information to the parties during its investigation and to provide more than skeletal information in its Final Determination concerning the facts and reasoning central to its determination. This is evidenced by China's repeated submission to the Panel of new information and new justifications for MOFCOM's determination. What China has complained are the shifting U.S. arguments simply reflect our need to confront a moving target. Had MOFCOM disclosed its facts and underlying reasoning, as required by the Agreements, these proceedings could have been far more focused.

5. With respect to initiation, China in its opening statement referred to our claims regarding Article 11 of the SCM Agreement as "a distraction to other matters before the panel." Contrary to China's assertion, Article 11 of the SCM Agreement is not a distraction – it is an obligation that ensures that CVD investigations are not initiated based on frivolous claims. A party should not have to spend time and resources defending unsubstantiated allegations. MOFCOM did not meet the obligations of Article 11 in this instance.

6. With respect to Facts Available, we would like to emphasize that our position is that the U.S. Companies were cooperative and responded MOFCOM's questions on Government Procurement in accordance with the instructions in the questionnaire. Even if the panel does not ultimately share that assessment, the record does not reflect the sort of egregious non-cooperation that China attempts to paint here. Moreover, the information that China claims should have been provided was in a form that, as we explained, could not have done what China purports it would do. Thus, this information could hardly be critical to MOFOCOM's inquiry.

7. Given the companies engagement with MOFCOM on the question of utilization, the limited value of the alleged missing information, and the overwhelming facts showing that the utilization rate (direct or indirect) was zero, an adverse inference that 100% utilization on all sales of all products is not appropriate. At most, the record would support an adverse rate of 29%, which would represent an adverse inference of 100% utilization for the infrasturcture/construction sales, the only sector sales for which the applicant alleged a subsidy.

8. With respect to injury, we have had a great deal of discussion on price effects. We would like to highlight two principal points. First, the Agreements specifically require that any price depression and suppression be significant and be the effect of the subject imports. The Panel should not permit China to read this language out of the Agreements. Second, China's price depression and price

suppression analysis are ultimately dependent on MOFCOM's low price findings. These findings are not supported by positive evidence and do not reflect an objective examination.

9. Finally, we emphasize that even if subject import prices were low, they cannot explain domestic industry price declines in the first quarter of 2009 far greater than necessary to meet import competition, which led to the industry's decline in financial performance. These can be explained only by the massive inventory overhangs that developed due to overproduction. MOFCOM's conclusion that the overproduction and inventory overhang did not cause injury is not supported by positive evidence.

10. The United States would like to conclude by again thanking the Panel and Secretariat for their efforts. We look forward to receiving your written questions and continuing this discussion in future submissions.

ANNEX G

REQUEST FOR THE ESTABLISHMENT OF A PANEL

ANNEX G-1

REQUEST FOR THE ESTABLISHMENT OF A PANEL BY
THE UNITED STATES

WORLD TRADE ORGANIZATION

WT/DS414/2
14 February 2011

(11-0758)

Original: English

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

Request for the Establishment of a Panel by the United States

The following communication, dated 11 February 2011, from the delegation of the United States to the Chairman of the Dispute Settlement Body, is circulated pursuant to Article 6.2 of the DSU.

On September 15, 2010, the United States Government requested consultations with China pursuant to Article 4 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes (*"DSU"), Article XXII:1 of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994"), Article 17.3 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("AD Agreement"), and Article 30 of the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement").[1] The United States and China held such consultations on November 1, 2010. Unfortunately these consultations did not resolve the dispute.

The United States considers that certain measures of the Government of the People's Republic of China ("China") are inconsistent with China's commitments and obligations under the GATT 1994, the AD Agreement, and the SCM Agreement. The measures impose countervailing duties and anti-dumping duties on grain oriented flat-rolled electrical steel ("GOES") from the United States, and are set forth in Ministry of Commerce of the People's Republic of China ("MOFCOM") Notice No. 21 [2010], including its annexes.

These measures appear to be inconsistent with the following provisions of the AD Agreement, SCM Agreement, and GATT 1994:

[1] WT/DS414/1.

Initiation of the Investigation

1. Articles 11.2 and 11.3 of the SCM Agreement, because:

   (a) The application for a countervailing duty investigation failed to contain information reasonably available to the applicant regarding the existence of a financial contribution, a benefit, or specificity for several of the alleged subsidy programs; and

   (b) There was insufficient evidence in the application to justify the initiation of an investigation for several of the alleged subsidy programs.

Subsidy Rate Determinations

2. Article 12.7 of the SCM Agreement, because China improperly made its subsidy rate determinations based on the facts available. In particular, China was not entitled to reject necessary information submitted by respondent producers. The respondent producers submitted the necessary information in a reasonable period of time, and did not significantly impede the investigation. In addition, China applied facts available in a punitive manner, and disregarded its own findings in doing so.

3. Article 12.8 of the SCM Agreement, because China failed to disclose the essential facts underlying its final determination with regard to the subsidy rates, thus impairing the respondents' ability to defend their interests.

4. Article 22.3 of the SCM Agreement, because China failed to provide in sufficient detail the findings and conclusions it reached on all issues of fact and law it considered material in making its preliminary and final determinations, including with respect to its use of facts available.

All Others Subsidy Rate Determination

5. Article 12.7 of the SCM Agreement, because China improperly applied facts available in determining the duty rate applicable to exporters that were not known at the time of the investigation, including potential "new shippers" and exporters that were not given notice of the information required by the investigating authority. In addition, China applied facts available in a punitive manner, and disregarded its own findings in doing so.

6. Article 12.8 of the SCM Agreement, because China failed to disclose the essential facts underlying its determination regarding the all others subsidy rate, thus impairing the interested parties' ability to defend their interests.

7. Article 22.3 of the SCM Agreement, because China failed to provide in sufficient detail the findings and conclusions it reached on all issues of fact and law it considered material in makings its preliminary and final determinations. China also did not explain why the all others subsidy rate increased from the preliminary determination to the final determination.

Antidumping Margin Determinations

8. Articles 6.9 and 12.2.2 of the AD Agreement, because China failed to disclose the essential facts underlying its determination and make available all relevant information on the matters of fact and law and reasons which led to the imposition of the final measures, thus impairing the respondents' ability to defend their interests.

All Others Dumping Determination

9. Article 6.8 and paragraph 1 of Annex II of the AD Agreement, because China improperly applied facts available in determining the duty rate applicable to exporters that were not known at the time of the investigation, including potential "new shippers" and exporters that were not given notice of the information required by the investigating authority.

10. Article 6.9 of the AD Agreement, because China failed to disclose the "essential facts" underlying its determination regarding the all others dumping rate, thus impairing the respondents' ability to defend their interests.

11. Article 12.2 of the AD Agreement, because China failed to provide in sufficient detail the findings and conclusions it reached on all issues of fact and law it considered in making its preliminary or final determination regarding the all others dumping rate. China also did not explain why the all others dumping rate increased from the preliminary determination to the final determination.

12. Article 12.2.2 of the AD Agreement because China failed to make available all relevant information on the matters of fact and law and reasons which led to the imposition of the final measure.

Explanation of Final Countervailing Duty Determination

13. Article 22.5 of the SCM Agreement because China failed to make available all relevant information on the matters of fact and law and reasons which led to the imposition of the final measure.

Confidential Information

14. Articles 6.4 and 6.5.1 of the AD Agreement, and Articles 12.3 and 12.4.1 of the SCM Agreement, because China failed to provide, or require the applicant to provide, adequate non-confidential summaries of allegedly confidential information. China's treatment of confidential information did not allow the interested parties to obtain a reasonable understanding of the substance of the confidential information prior to the preliminary and final determinations, such that they could prepare presentations on the basis of this information. China did not give any indication that the information could not be summarized and did not provide the reasons why summarization was not practicable.

Injury Determination: Price Effects Analysis

15. Article VI of the GATT 1994 and Articles 3.1, 3.2 , 6.9, and 12.2.2 of the AD Agreement, and Articles 12.8, 15.1, 15.2, and 22.5 of the SCM Agreement, because in its analysis of the price effects of imports under investigation, China did not discharge its obligations to determine whether there had been significant price undercutting by the allegedly dumped imports, whether the effect of such imports was to depress prices to a significant degree, or prevent price increases which would otherwise have occurred to a significant degree. In particular:

(a) China never disclosed several pieces of information critical to its price effects analysis;

(b) China failed to provide in sufficient detail the findings and conclusions reached on all issues of fact and law it considered material and failed to provide the reasons for the

acceptance or rejection of the relevant argument or evidence by the exporters or importers; and

(c) China's findings that the dumped and subsidized imports had significant price effects failed to reflect an objective examination of the evidence in the record and/or are unsupported by positive evidence.

Injury Determination: Causation

16. Articles 3.1, 3.5, 6.9, and 12.2.2 of the AD Agreement, and Articles 12.8, 15.1, 15.5, and 22.5 of the SCM Agreement, in particular:

(a) China's causal link analysis relied on findings that did not reflect an objective examination of the record and/or are unsupported by positive evidence. China failed to examine all relevant evidence;

(b) China never disclosed several pieces of information critical to its causation analysis; and

(c) China failed to provide in sufficient detail the findings and conclusions reached on all issues of fact and law it considered material.

In view of the claims set forth above, the United States considers that China has also acted inconsistently with Article VI of the GATT 1994, Article 1 of the AD Agreement, and Article 10 of the SCM Agreement, which only permit anti-dumping or countervailing duty measures to be applied under the circumstances provided for in Article VI of the GATT 19994 and conducted in accordance with the AD Agreement and the SCM Agreement. These measures also appear to nullify or impair the benefits accruing to the United States directly or indirectly under the cited agreements.

Therefore, the United States respectfully requests, pursuant to Article 6 of the DSU, Article 17.4 of the AD Agreement, and Article 30 of the SCM Agreement, that the Dispute Settlement Body establish a panel to examine this matter, with the standard terms of reference as set out in Article 7.1 of the DSU.

ANNEX H

RELATIONSHIP BETWEEN DOMESTIC PRODUCTION AND SUBJECT IMPORTS

ANNEX H-1

RELATIONSHIP BETWEEN DOMESTIC PRODUCTION AND SUBJECT IMPORTS

[[BUSINESS CONFIDENTIAL INFORMATION]]

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