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CHINA - ANTI-DUMPING AND COUNTERVAILING DUTIES ON CERTAIN AUTOMOBILES FROM THE UNITED STATES

REPORT OF THE PANEL

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Argentina – Poultry Anti-Dumping Duties	Panel Report, *Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil*, WT/DS241/R, adopted 19 May 2003, DSR 2003:V, p. 1727
Argentina – Textiles and Apparel	Appellate Body Report, *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, WT/DS56/AB/R and Corr.1, adopted 22 April 1998, DSR 1998:III, p. 1003
Argentina – Textiles and Apparel	Panel Report, *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, WT/DS56/R, adopted 22 April 1998, as modified by Appellate Body Report WT/DS56/AB/R, DSR 1998:III, p. 1033
China – Broiler Products	Panel Report, *China – Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States*, WT/DS427/R and Add.1, adopted 25 September 2013
China – GOES	Appellate Body Report, *China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States*, WT/DS414/AB/R, adopted 16 November 2012
China – GOES	Panel Report, *China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States*, WT/DS414/R and Add.1, adopted 16 November 2012, upheld by Appellate Body Report WT/DS414/AB/R
China – X-Ray Equipment	Panel Report, *China – Definitive Anti-Dumping Duties on X-Ray Security Inspection Equipment from the European Union*, WT/DS425/R and Add.1, adopted 24 April 2013
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, p. 2077
EC – Bed Linen (Article 21.5 – India)	Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India*, WT/DS141/AB/RW, adopted 24 April 2003, DSR 2003:III, p. 965
EC – Export Subsidies on Sugar	Appellate Body Report, *European Communities – Export Subsidies on Sugar*, WT/DS265/AB/R, WT/DS266/AB/R, WT/DS283/AB/R, adopted 19 May 2005, DSR 2005:XIII, p. 6365
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, DSR 2011:VII, p. 3995
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, DSR 2011:VIII, p. 4289
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, p. 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, p. 3
Egypt – Steel Rebar	Panel Report, *Egypt – Definitive Anti-Dumping Measures on Steel Rebar from Turkey*, WT/DS211/R, adopted 1 October 2002, DSR 2002:VII, p. 2667
EU – Footwear (China)	Panel Report, *European Union – Anti-Dumping Measures on Certain Footwear from China*, WT/DS405/R, adopted 22 February 2012

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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, p. 10637
Korea – Commercial Vessels	Panel Report, *Korea – Measures Affecting Trade in Commercial Vessels*, WT/DS273/R, adopted 11 April 2005, DSR 2005:VII, p. 2749
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, p. 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, p. 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, p. 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, p. 1207
Thailand – Cigarettes (Philippines)	Appellate Body Report, *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines*, WT/DS371/AB/R, adopted 15 July 2011, DSR 2011:IV, p. 2203
Thailand – Cigarettes (Philippines)	Panel Report, *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines*, WT/DS371/R, adopted 15 July 2011, as modified by Appellate Body Report WT/DS371/AB/R, DSR 2011:IV, p. 2299
Thailand – H-Beams	Panel Report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, WT/DS122/R, adopted 5 April 2001, as modified by Appellate Body Report WT/DS122/AB/R, DSR 2001:VII, p. 2741
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, DSR 2011:V, p. 2869
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, p. 8131
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, p. 4697
US – Hot-Rolled Steel	Panel Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/R, adopted 23 August 2001 modified by Appellate Body Report WT/DS184/AB/R, DSR 2001:X, p. 4769
US – Lamb	Appellate Body Report, *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, WT/DS177/AB/R, WT/DS178/AB/R, adopted 16 May 2001, DSR 2001:IX, p. 4051
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, p. 3609
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, p. 571
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, p. 4865

Short title	Full case title and citation
US – Steel Plate	Panel Report, *United States – Anti-Dumping and Countervailing Measures on Steel Plate from India*, WT/DS206/R and Corr.1, adopted 29 July 2002, DSR 2002:VI, p. 2073
US – Wheat Gluten	Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS166/AB/R, adopted 19 January 2001, DSR 2001:II, p. 717
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, p. 323

ABBREVIATIONS USED IN THIS REPORT

Abbreviation	Description
AD	Anti-dumping
Anti-Dumping Agreement	Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994
AUVs	Average unit values
BCI	Business Confidential Information
BMW USA	BMW Manufacturing LLC
CAAM	China Association of Automobile Manufacturers
China	People's Republic of China
Chrysler USA	Chrysler Group LLC
CNY	Chinese Yuan
CVD	Countervailing duty
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
EC	European Communities/European Communities'
EU	European Union/European Union's
Ford USA	Ford Motor Company
GATT 1994	General Agreement on Tariffs and Trade 1994
GM USA	General Motors LLC
IA	Investigating authority
Honda USA	Honda of America Mfg., Inc. and American Honda Motor Co., Inc.
Mercedes-Benz USA	Mercedes-Benz U.S. International, Inc.
Mitsubishi USA	Mitsubishi Motors North America Inc.
MOFCOM	Ministry of Commerce of the People's Republic of China
POI	Period of Investigation
Saudi Arabia	Kingdom of Saudi Arabia
SCM Agreement	Agreement on Subsidies and Countervailing Measures
USTR	Office of the United States Trade Representative
United States	United States of America
US	United States/United States'
Vienna Convention	Vienna Convention on the Law of Treaties, Done at Vienna, 23 May 1969, 1155 UNTS 331; 8 International Legal Materials 679
WTO	World Trade Organization

1 INTRODUCTION

1.1 Complaint by the United States

1.1. On 5 July 2012, the United States requested consultations with China pursuant to Articles 1 and 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU"), Article XXIII:1 of the General Agreement on Tariffs and Trade 1994 ("GATT 1994"), Article 30 of the Agreement on Subsidies and Countervailing Measures ("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 ("Anti-Dumping Agreement") with respect to the measures and claims set out below.[1]

1.2. Consultations were held on 23 August 2012. No mutually agreed solution was reached.

1.2 Panel establishment and composition

1.3. On 17 September 2012, the United States requested the establishment of a panel pursuant to Article 6 of the DSU with standard terms of reference.[2] At its meeting on 23 October 2012, the Dispute Settlement Body ("DSB") established a panel pursuant to the request of the United States in document WT/DS440/2, in accordance with Article 6 of the DSU.[3]

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

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

1.5. On 1 February 2013, the United States requested the Director-General to determine the composition of the Panel, pursuant to Article 8.7 of the DSU. On 11 February 2013, the Director-General accordingly composed the Panel as follows:

Chairperson:	Mr Pierre Pettigrew
Members:	Ms Andrea Marie Brown Ms Enie Neri De Ross[5]

1.6. Colombia, the European Union ("EU"), India, Japan, Korea, Oman, the Kingdom of Saudi Arabia ("Saudi Arabia"), and Turkey notified their interest in participating in the Panel proceedings as third parties.

1.3 Panel proceedings

1.3.1 General

1.7. After consultation with the parties, the Panel adopted its working procedures[6] on 28 February 2013 (amended on 16 April 2013) and timetable on 28 February 2013 (finalized on 10 March 2014).

1.8. The Panel held a first substantive meeting with the parties on 25 June 2013. A session with the third parties took place on 26 June 2013. The Panel held a second substantive meeting with the parties on 15 October 2013. On 15 November 2013, the Panel issued the descriptive part of its report to the parties. The Panel issued its interim report to the parties on 21 February 2014. The Panel issued its final report to the parties on 24 March 2014.

[1] WT/DS440/1.
[2] WT/DS440/2.
[3] WT/DSB/M/323.
[4] WT/DS440/3.
[5] WT/DS440/3.
[6] See the Panel's Working Procedures in Annex A-1.

1.3.2 Working procedures concerning Business Confidential Information ("BCI")

1.9. On 28 February 2013, the Panel adopted additional working procedures concerning BCI.[7]

1.3.3 Additional comments of the United States following the second Panel meeting

1.10. On 15 November 2013, the United States requested the Panel's leave to submit additional comments on China's reaction to the US opening statement at the second Panel meeting, which the United States attached to its request letter. On 19 November 2013, China requested the Panel to reject the US request for leave, citing the requirement in Article 12 of the DSU that disputing parties respect the various deadlines for written submissions set by the panel to a dispute. In the alternative, China requested the Panel to grant it a reasonable period of time to provide comments on the US additional comments.

1.11. On 20 November 2013, the Panel notified the parties that it would admit the US additional comments into the record, and gave China until close of business on 27 November 2013 to react to these additional comments. The Panel also adjusted the deadline for the parties' comments on the draft descriptive part of the Panel report to accommodate this additional comment period. On 27 November 2013, China submitted its comments on the US additional comments.

2 FACTUAL ASPECTS

2.1. The US claims concern various aspects of the anti-dumping ("AD") and countervailing duty ("CVD") measures imposed by China on certain automobiles from the United States with engine displacements equal to or greater than 2500 cubic centimetres ("cc"), set forth in MOFCOM Notices Nos. 20 and 84 of 2011, and accompanying annexes, as well as various aspects of the investigations leading to the imposition of these measures.[8] Notice No. 20 of 2011 contains MOFCOM's final determinations in the AD and CVD investigations of certain imports of automobiles from the United States. In that Notice, MOFCOM found that the dumped and subsidized imports from the United States had caused material injury to the domestic industry. MOFCOM determined individual dumping margins for five of the six respondent companies in the AD investigation. The sixth respondent company (Ford Motor Company) did not export during the periods of investigation ("POI"), and therefore MOFCOM did not calculate an individual dumping margin rate for it. Furthermore, MOFCOM determined individual CVD rates for all six respondent companies in the CVD investigation. Despite finding dumping, subsidization, and injury, MOFCOM provisionally determined not to levy AD or CVD rates on US automobiles as of the date of its final determination.[9] Subsequently, MOFCOM issued Notice No. 84 of 2011, which authorized the levying of AD and CVD rates on certain US automobiles effective 15 December 2011, at the rates established in the final determination.

2.2. On 9 September 2009, the China Association of Automobile Manufacturers ("CAAM"), an association of Chinese domestic automobile manufacturers, filed a petition seeking the imposition of anti-dumping and countervailing duties on imports of certain automobiles with an engine capacity equal to or greater than 2000cc from the United States.[10] On 19 October 2009, the CAAM filed an amended petition containing more industry data.[11] The original petition identified General Motors LLC ("GM USA"), Ford Motor Company ("Ford USA") and Chrysler Group LLC ("Chrysler

[7] Additional Working Procedures of the Panel Concerning Business Confidential Information, Annex A-2.

[8] *Announcement No. 20, 2011, of the Ministry of Commerce of the People's Republic of China* (Exhibit USA-01) *and Appendix, "Final Determination of the People's Republic of China concerning the Anti-dumping and Countervailing Investigation on Imports of Certain Automobiles Originating in the United States",* 5 May 2011 ("final determination")(Exhibit USA-02); *Announcement No. 84, 2011, of the Ministry of Commerce of the People's Republic of China,* 14 December 2011 (Exhibit USA-03). In connection with its first written submission, China submitted its own English translation of the Appendix (as Exhibit CHN-07) earlier submitted as Exhibit USA-02. The United States has not objected to the accuracy of the translation presented in Exhibit CHN-07 (US response to Panel question No. 24). Therefore, we base our analysis on this version of the Appendix.

[9] Notice No. 20, Exhibit USA-01, p. 2.

[10] *Anti-Dumping and Anti-Subsidy Investigation Application*, 9 September 2009 ("original petition")(Exhibit USA-04).

[11] *Petition for Antidumping and Countervailing Duty Investigation*, 19 October 2009 ("amended petition")(Exhibit CHN-01), p. 1.

USA") as known exporters of the subject product.[12] MOFCOM initiated AD and CVD investigations on 6 November 2009.[13]

2.3. In its notices of initiation, MOFCOM set the POI for the AD and CVD investigations as 1 September 2008 to 31 August 2009, and for the injury aspect of the investigations as 1 January 2006 to 30 September 2009.[14] Also in its notices of initiation, MOFCOM set a 20-day deadline for interested parties to register to participate in the AD and CVD investigations.[15] GM USA, Ford USA, Chrysler USA, Mercedes-Benz USA International Inc. and Daimler AG (collectively, "Mercedes-Benz USA"), BMW Manufacturing LLC ("BMW USA"), Honda of America Mfg. Inc. and American Honda Motor Co., Inc. (collectively, "Honda USA"), and Mitsubishi North America Inc. ("Mitsubishi USA") registered as respondent companies in both investigations prior to the closing date of 26 November 2009. The Office of the United States Trade Representative ("USTR") registered to participate on behalf of the United States as a CVD respondent within the period for registration.[16] MOFCOM sent these respondents AD and/or CVD questionnaires on 9 December 2009. The deadline for responses to these questionnaires was extended upon request to 29 January 2010. All respondents except Mitsubishi USA submitted responses to MOFCOM's questionnaires by this date.[17]

2.4. MOFCOM issued separate notices, also on 6 November 2009, inviting interested parties to register to participate in its AD and CVD injury investigations.[18] The CAAM registered to participate in these investigations.[19] No other interested parties registered as domestic producers. Concurrently with their responses to the notices of initiation, GM USA, Ford USA, Chrysler USA, Mercedes-Benz USA, BMW USA, Honda USA, and Mitsubishi USA registered to participate as foreign producers and exporters in MOFCOM's injury investigations prior to the closing date of 26 November 2009 specified in the injury registration notices.[20] Mitsubishi USA subsequently withdrew from the investigations, on 28 December 2009.[21]

2.5. MOFCOM issued notices of extension in both investigations on 6 November 2010.[22] On 10 March 2011, MOFCOM sent supplemental injury questionnaires to the remaining respondents. All remaining respondents submitted their responses on time.[23] On 8 March 2011, the petitioner applied to have the scope of the investigations amended to include only imports of certain US automobiles of a cylinder capacity equal to or greater than 2500cc.[24] The petitioner submitted supplementary domestic industry data on such automobiles on 21 March 2011.[25] MOFCOM accepted the petitioner's application, and adjusted the scope of the product under investigation to include only saloon cars and cross-country cars of a cylinder capacity equal to or greater than 2500cc.[26]

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[12] Original petition, Exhibit USA-04, p. 15.

[13] *Initiation of Antidumping Investigation into Saloon Cars and Cross-country Cars (of a Cylinder Capacity ≥ 2000cc) Originating from the United States*, MOFCOM Public Notice [2009] No. 83, 6 November 2009 ("AD notice of initiation")(Exhibit USA-06); *Initiation of Countervailing Duty Investigation into Saloon Cars and Cross-country Cars (of a Cylinder Capacity ≥ 2000cc) Originating from the United States*, MOFCOM Public Notice [2009] No. 84, 6 November 2009 ("CVD notice of initiation")(Exhibit USA-07).

[14] AD notice of initiation, Exhibit USA-06, p. 1; CVD notice of initiation, Exhibit USA-07, p. 2.

[15] AD notice of initiation, Exhibit USA-06, p. 2; CVD notice of initiation, Exhibit USA-07, p. 4.

[16] Final determination, Exhibit CHN-07, pp. 7-8, 10.

[17] Final determination, Exhibit CHN-07, pp. 8-9, 11-12. As noted below, Mitsubishi USA withdrew from the investigations. See para. 2.4 of this Report.

[18] Final determination, Exhibit CHN-07, pp. 18-20. See AD injury registration notice, Exhibit CHN-02 and CVD injury registration notice, Exhibit CHN-11.

[19] Final determination, Exhibit CHN-07, pp. 18-20.

[20] AD injury registration notice, Exhibit CHN-02, p. 1.

[21] *Mitsubishi Motors North America Inc. letter for quitting the anti-dumping investigation against saloon cars and cross-country cars of a cylinder capacity ≥ 2000cc*, 28 December 2009 ("Mitsubishi withdrawal letter (AD)")(Exhibit CHN-03); *Mitsubishi Motors North America Inc. letter for quitting the countervailing investigation against saloon cars and cross-country cars of a cylinder capacity ≥ 2000cc*, 28 December 2009 ("Mitsubishi withdrawal letter (CVD)")(Exhibit CHN-04).

[22] Final determination, Exhibit CHN-07, p. 27.

[23] Final determination, Exhibit CHN-07, pp. 23-24.

[24] Final determination, Exhibit CHN-07, p. 48.

[25] Final determination, Exhibit CHN-07, p. 27.

[26] *Preliminary Determination of the People's Republic of China concerning the Anti-dumping and Countervailing Investigation on Imports of Certain Automobiles Originating in the United States*, 2 April 2011 ("preliminary determination")(Exhibit CHN-05), p. 31.

2.6. MOFCOM issued its preliminary determinations on 2 April 2011. It found that the subject product was dumped and subsidized, and that the dumped and subsidized imports caused material injury to the domestic industry.[27] MOFCOM established the following AD and CVD rates in its preliminary determinations:

Table 1: Preliminary Duty Rates

Respondent	AD Rate (%)	CVD Rate (%)
GM USA	9.9	12.9
Chrysler USA	8.8	6.2
Mercedes-Benz USA	2.7	0
BMW USA	2.0	0
Honda USA	4.4	0
"All others"	21.5	12.9

2.7. MOFCOM issued its final determinations on 5 May 2011. It found that the subject product was dumped and subsidized, and that the dumped and subsidized imports caused injury to the domestic industry.[28] MOFCOM established the following AD and CVD rates in its final determinations:

Table 2: Final Duty Rates

Respondent	AD Rate (%)	CVD Rate (%)
GM USA	8.9	12.9
Chrysler USA	8.8	6.2
Mercedes-Benz USA	2.7	0
BMW USA	2.0	0
Honda USA	4.1	0
Ford USA	-	0
"All others"	21.5	12.9

3 PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

3.1 United States

3.1. The United States requests that the Panel find as follows[29]:

a. With respect to the alleged procedural violations, that:

i. MOFCOM acted inconsistently with Article 6.5.1 of the Anti-Dumping Agreement and Article 12.4.1 of the SCM Agreement by failing to require the petitioner to provide adequate non-confidential summaries of allegedly confidential information.

[27] Preliminary determination, Exhibit CHN-05, p. 107.
[28] Final determination, Exhibit CHN-07, p. 170.
[29] US first written submission, paras. 2-5, 176-177. The United States dropped its consequential claim under Article VI of the GATT 1994 in its second written submission. See US second written submission, fn. 153.

ii. MOFCOM acted inconsistently with Article 6.9 of the Anti-Dumping Agreement by failing to disclose essential facts to US respondents, particularly the data and calculations underlying their respective dumping margins.

b. With respect to MOFCOM's reasoning and conclusions for its AD determinations, that:

i. MOFCOM acted inconsistently with Articles 6.8, 6.9, 12.2, 12.2.2, and paragraph 1 of Annex II of the Anti-Dumping Agreement by: (i) imposing an "all others" rate based on facts available to producers that MOFCOM did not notify of the information required of them, and that did not refuse to provide necessary information or otherwise impede the dumping investigation; (ii) failing to inform the United States and other interested parties of the essential facts under consideration that formed the basis for the application of facts available or the margin calculation; and (iii) failing to disclose in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by MOFCOM, or all relevant information on matters of fact and law and reasons which led to the imposition of final measures.

c. With respect to MOFCOM's reasoning and conclusions for its CVD determinations, that:

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

d. With respect to MOFCOM's reasoning and conclusions for its injury determinations, that:

i. MOFCOM acted inconsistently with Articles 3.1 and 4.1 of the Anti-Dumping Agreement and Articles 15.1 and 16.1 of the SCM Agreement by defining the domestic industry to include only those firms that supported the AD and CVD investigations and by failing to ensure that the domestic industry, as MOFCOM defined it, was capable of providing ample data that would ensure an accurate injury analysis.

ii. MOFCOM acted inconsistently with Articles 3.1 and 3.2 of the Anti-Dumping Agreement and Articles 15.1 and 15.2 of the SCM Agreement because its price effects finding was not based on positive evidence and did not involve an objective examination, as: (i) MOFCOM's finding of parallel pricing was contradicted by record evidence and, in any event, MOFCOM failed to explain the relevance of parallel pricing; (ii) MOFCOM failed to address evidence that subject imports oversold the domestic like product during the period in which MOFCOM identified price depression; (iii) MOFCOM failed to make needed adjustments to average unit values that it used in its price effects analysis; (iv) MOFCOM failed to consider or address evidence that the market share of domestic products increased along with that of subject imports; and (v) MOFCOM's price effects analysis was compromised by its flawed domestic industry definition.

iii. MOFCOM acted inconsistently with Articles 3.1 and 3.5 of the Anti-Dumping Agreement and Articles 15.1 and 15.5 of the SCM Agreement because its causation analysis was neither objective nor based on positive evidence, as: (i) MOFCOM's causation analysis was premised on its flawed domestic industry definition and its flawed price effects analysis; (ii) MOFCOM failed to examine evidence indicating that subject imports took market share from non-subject imports and not from domestic like products; (iii) MOFCOM failed to examine evidence regarding the Chinese industry's sharp decline in productivity throughout the period of investigation; (iv) MOFCOM failed to examine the lack of competition between subject imports and the

domestic like products; (v) MOFCOM failed to examine the sharp drop in demand during the period in which it found material injury; (vi) MOFCOM failed to examine the effect of an increase in sales tax on larger engine vehicles during the period in which it found material injury; and (vii) MOFCOM failed to examine the effect of increases in average wages and employment over the period of investigation on the domestic industry's pre-tax profits.

e. And, as a consequence of these violations, that:

i. MOFCOM's conduct in the AD investigation violated Article 1 of the Anti-Dumping Agreement.

ii. MOFCOM's conduct in the CVD investigation violated Article 10 of the SCM Agreement.

3.2. The United States further requests that, pursuant to Article 19.1 of the DSU, the Panel recommend that China bring its measures into conformity with the Anti-Dumping and SCM Agreements.[30]

3.2 China

3.3. China requests that the Panel reject the US claims, finding instead that MOFCOM's determinations in the underlying investigations were fully consistent with China's WTO rights and obligations.[31]

4 ARGUMENTS OF THE PARTIES

4.1. The arguments of the parties, other than in their answers to questions, are reflected in their written submissions, oral statements or executive summaries thereof, provided to the Panel in accordance with paragraph 18 of the working procedures adopted by the Panel (see Annexes B and C).

5 ARGUMENTS OF THE THIRD PARTIES

5.1. The arguments of the third parties, other than in their answers to questions, are reflected in their written submissions, oral statements or executive summaries thereof, provided to the Panel in accordance with paragraph 18 of the working procedures adopted by the Panel (see Annex D). Colombia, India and Oman did not submit written or oral arguments to the Panel.

6 INTERIM REVIEW

6.1 Introduction

6.1. On 21 February 2014, we issued our interim report to the parties. In accordance with our working procedures, the United States submitted a written request for the review of precise aspects of the interim report on 5 March 2014. China did not submit its written request by the agreed deadline, citing technical communications problems between its representation in Geneva, and Beijing. China did submit its written request for the review of precise aspects of the interim report on 6 March 2014. On 10 March 2014, the United States requested that, given the delay in China's submission of its written request for the review of the interim report, the Panel grant the parties a one-day extension, until 13 March 2014, to provide comments on each other's written request. We granted the US request, changed the date in our timetable for the submission of parties' comments on each other's written request from 12 to 13 March and communicated this to the parties on 10 March 2014. Neither party requested an additional meeting with the Panel.

6.2. In this section of our report, we explain how we addressed the changes of a substantive nature requested by the parties. As a result of the changes that we have made to our interim report, the numbering of footnotes in the final report has changed from the interim report.

[30] US first written submission, para. 178 (as modified by US second written submission, fn. 153).
[31] China's first written submission, para. 272.

However, none of these changes have affected the numbering of the footnotes referred to below in our evaluation of the parties' requests for changes to the interim report. The numbering of paragraphs is unchanged from the interim report. We have also corrected typographical and other non-substantive errors throughout the report, including those identified by the parties, which are not referred to specifically below.

6.2 Parties' requests for changes to the interim report

6.3. **Paragraph 7.30:** China notes that the sixth sentence of this paragraph mischaracterizes China's argument regarding the relevance of US respondents' failure to object to the non-confidential summary of the petition in the underlying investigations to our assessment of the US claims under Articles 6.5.1 of the Anti-Dumping Agreement and 12.4.1 of the SCM Agreement and requests that the sentence be deleted. Specifically, China underlines that its argument is that such failure should impact the Panel's evaluation of the merits of the US claims, not that it precludes the Panel from addressing such claims. China therefore requests that this sentence be deleted. The United States has not commented on this request by China.

6.4. Since the requested modification represents an accurate description of China's argument, we have granted it. To this end, we have not deleted but modified the sentence cited by China and made further modifications to paragraph 7.30 to preserve its internal coherence in light of this change.

6.5. **Paragraph 7.70:** China takes issue with the description by the Panel of the issue before it in respect of the US claim under Article 6.9 of the Anti-Dumping Agreement. China notes that in paragraph 7.70 the Panel describes the issue before it as the adequacy of MOFCOM's disclosure and requests the Panel to clarify that another issue presented by this claim is the extent of the burden of proof on the United States as the complaining party. The United States disagrees with China and argues that the issue before the Panel is correctly described as whether MOFCOM's disclosure letters contained the essential facts and that in analysing that issue the Panel devotes considerable attention to whether the United States has made a *prima facie* case.

6.6. In paragraphs 7.69 and 7.70 of our report, we identify the crux of the US claim under Article 6.9 of the Anti-Dumping Agreement and note that the principal question that this claim raises is whether or not MOFCOM disclosed essential facts to the US respondents as required under Article 6.9 of the Anti-Dumping Agreement. In the three paragraphs that follow, we analyse the legal provision at issue and in paragraph 7.74 we note that the resolution of the issue presented by this claim centres on burden of proof. From paragraph 7.75 onwards, we discuss the allocation of the burden of proof in the particular circumstances of this dispute and come to a conclusion in paragraph 7.86. As such, our assessment of this claim follows a logical path and correctly describes the issue before us. In our view, it is obvious that the central element of our assessment of the issue raised under this claim is the incidence of the burden of proof but the issue is whether MOFCOM disclosed essential facts pursuant to Article 6.9 of the Anti-Dumping Agreement. We therefore have not modified paragraph 7.70 of the report.

6.7. **Paragraphs 7.72 and 7.73:** China contends that the Panel's expression of agreement with the reasoning of the panel in *China – Broiler Products* that the formula used by MOFCOM to calculate dumping margins constitutes an essential fact within the meaning of Article 6.9 of the Anti-Dumping Agreement is not well explained and holds MOFCOM to a broader standard of disclosure than that contemplated in this provision. In China's view, the Panel fails to explain how a formula can constitute a "fact", rather than "reasoning" within the meaning of Article 6.9. The United States asserts that China offers no basis for the Panel to modify its reasoning or findings in these paragraphs and that therefore China's request should not be granted.

6.8. In paragraphs 7.71-7.73 of the report, we note the reasoning of previous panels, including the panel in *China – Broiler Products*, with respect to what constitutes an essential fact within the meaning of Article 6.9 of the Anti-Dumping Agreement and express our agreement with that reasoning. In our view, paragraph 7.72 as originally drafted explained clearly why we agree with the reasoning of the panel in *China – Broiler Products* on whether or not the formula used in dumping margin calculations constitutes an essential fact. We nevertheless modified paragraph 7.73 to provide further clarity in this regard.

6.9. **Paragraph 7.77:** China disagrees with the Panel's finding that the United States satisfied its burden of proof by submitting to the Panel MOFCOM's disclosure letter to the US government and assertions about its understanding of the substance of MOFCOM's disclosure letters to the US company respondents. China argues that documents other than those forming the basis for the US claim and speculation about the contents of those documents do not suffice to discharge the burden of proof on the United States in respect of this claim. China considers that the interim report does not adequately explain how the burden of proof shifted to China. For the same reasons, China asserts that the Panel had no factual basis to make findings as to the adequacy of MOFCOM's company-specific disclosure documents. The United States argues that China's request should be rejected because the Panel adequately explains why the burden of proof shifted to China and that it is unclear what review China is seeking through this request.

6.10. China's argument regarding the shifting of the burden of proof to China simply repeats the arguments made by China throughout these proceedings and which we address in our evaluation of the US claim. As for China's assertion that the Panel made findings regarding the adequacy of MOFCOM's company-specific disclosures, we note that we have not made such a finding. China does not refer to a specific part of the interim report where such a finding is made. Indeed, in relation to the letter submitted by Mercedes-Benz USA, we note in paragraph 7.84 of the report that "[w]hile this [letter] does not demonstrate, in itself, that the disclosure was inconsistent with the requirements of Article 6.9, it does lend support to the US claim, and is unrebutted by any evidence put forward by China." This statement shows that in finding that the United States satisfied its burden of proof in respect of this claim, we did not make any legal conclusions regarding the substantive adequacy of the company-specific disclosures sent by MOFCOM. We therefore have not modified our report in this regard.

6.11. **Paragraph 7.77, footnote 166:** China notes our reference to the panel report in *Argentina – Textiles and Apparel* regarding a responding party's obligation to provide documents in its sole possession, including in particular paragraph 6.40 of that report where the panel states that this obligation "does not arise until the claimant has done its best to secure evidence and has actually produced some *prima facie* evidence in support of its case." While China agrees with this reasoning, it argues that in our report, we do not hold the United States to this standard. More specifically, China contends that our report does not explain how the burden to produce company-specific disclosure letters could have shifted to China without the United States doing its best to provide such letters. The United States has not commented on this request by China.

6.12. In paragraph 7.77 of our report, we explain the reasons that led us to conclude that the United States had done its best in order to discharge its burden of proof regarding the alleged inadequacy of the company-specific disclosures sent by MOFCOM. Specifically, we note the fact that, in the normal course of an AD investigation, company-specific disclosures are only sent to the companies subject to the investigation, not to the government of the exporting Member and that therefore it is normal for the United States not to have the actual company-specific disclosures in its possession. Therefore, we have not made any substantive modifications to our report in this regard. We did however add one sentence to the text of footnote 166 specifically relating the reasoning of the panel in *Argentina – Textiles and Apparel* to the circumstances of this dispute.

6.13. **Paragraph 7.78:** China argues that the Panel's statement that the part of the record cited by China as demonstrating that company-specific disclosure letters were in fact sent to US respondents gives the wrong impression that China attempted before the Panel to demonstrate the substantive adequacy of those letters. China therefore requests that this paragraph be deleted from the report. The United States disagrees with China, arguing that China did in fact endeavour to defend the adequacy of the company-specific disclosure letters. In the US view, therefore, this paragraph should not be deleted.

6.14. We accept China's representation that it did not defend the substantive adequacy of MOFCOM's company-specific disclosure letters on the basis that the burden of proof did not shift to it to do so. Paragraph 7.78 of our report was not meant to say otherwise. The part of the final determination quoted in that paragraph is an element of China's argument in response to the US claim under Article 6.9 of the Anti-Dumping Agreement, other than its burden of proof argument. However, because China's comment concerns the description of its own arguments in respect of this claim, we have modified the text of this paragraph to clarify that China indeed did not argue before the Panel that the company-specific disclosure letters sent to US respondents were substantively in conformity with the requirements of Article 6.9 of the Anti-Dumping Agreement.

6.15. **Paragraphs 7.79 to 7.83:** China expresses concern regarding the Panel's acceptance of the Mercedes-Benz USA letter, submitted by the United States during the second Panel meeting, into evidence. China considers that the Panel's approach in this regard may set a precedent that could encourage parties in future WTO panel proceedings to abuse panel flexibility by delaying the submission of evidence that, as with the Mercedes-Benz USA letter, could have been submitted earlier. Accordingly, China requests the Panel to clarify that circumstances may arise in which the submission of relevant evidence at the second Panel meeting would compromise the other party's rights of due process. China otherwise reiterates its disagreement with the Panel's finding that the Mercedes-Benz USA letter, which is a document other than the actual disclosure letters sent by MOFCOM to the US respondents, can constitute an adequate basis for the burden of proof to shift to China. The United States argues that China expresses dissatisfaction with the Panel's conclusion without offering specific suggestions on how to correct the perceived problems. In the US view, the Panel's statements are clear and China's concerns on due process and potential adverse precedent are misplaced. Therefore, the United States contends that China's request should be dismissed.

6.16. In our view, paragraphs 7.79-7.83 of our report make it abundantly clear that we discuss the issue of the acceptance of the Mercedes-Benz USA letter into evidence in light of the particular circumstances of this dispute, and do not consider that the same outcome would be required in future WTO disputes, as argued by China. We nevertheless added language to paragraph 7.83 to further clarify this. As for China's argument that the Mercedes-Benz USA letter does not suffice to shift the burden of proof to China, this simply repeats China's argument regarding this claim, which we thoroughly addressed in our decision. In this regard, we note that there are two types of burdens, namely the burden of coming forward with evidence and the burden of proof. With respect to the US claim under Article 6.9 of the Anti-Dumping Agreement, it is the former, not the latter, burden that shifted to China in these proceedings. The United States made its claim and came forward with some evidence to support it. While the burden of proof always rested on the United States as the party making the claim, for the reasons that are explained as from paragraph 7.74 of our report, we considered that the burden of coming forward with evidence shifted to China, which burden China has failed to satisfy despite the Panel's invitation to submit MOFCOM's company-specific disclosure letters. We therefore do not make any modification to our report in this regard.

6.17. **Paragraph 7.125 and footnote 215:** The United States requests that the Panel modify the last sentence of this paragraph to more accurately reflect its argument that the unknown US exporters were not notified of the information required and thus cannot be said to have failed to cooperate and that therefore MOFCOM's notification efforts were insufficient to justify the use of facts available in the calculation of the residual duty rates. The United States also proposes to add a portion of its response to Panel question No. 7 to footnote 215 of the report in order to give a more precise description of its argument. China has not commented on this request by the United States.

6.18. Given that the requested modification concerns the description of the US own arguments as presented to the Panel and that it has a basis on the record, we have granted it and modified paragraph 7.125 accordingly. We have also added to footnote 215 the part of the US answer to Panel question No. 7 cited by the United States.

6.19. **Paragraphs 7.136 and 7.138:** China takes issue with our finding that the disparity between the information required in the registration process and that subsequently requested through exporter's questionnaires undermines the due process rights of the parties concerned. Specifically, China argues that MOFCOM could reasonably conclude that by not registering for participation, the relevant US respondents conveyed to MOFCOM their decision not to provide <u>any</u> information. China draws attention to our finding that MOFCOM's efforts in reaching out to the US respondents were adequate, and contends that therefore MOFCOM could conclude that non-registering US respondents would respond to <u>none</u> of MOFCOM's subsequent information requests. China therefore requests that we modify our finding concerning the impact of MOFCOM's use of facts available on the due process rights of the potential US respondents. China also reiterates its point of view that a decision not to participate in an investigation is tantamount to a decision to refuse access to relevant information within the meaning of Article 6.8 of the Anti-Dumping Agreement. China therefore disagrees with our finding that failure to register to participate in an investigation does not establish a legal prerequisite allowing the use of facts available in the calculation of residual duty rates. The United States argues that China's request regarding these two paragraphs amounts to re-arguing the merits of the claim and therefore should be dismissed.

6.20. These aspects of China's request merely repeat China's main argument regarding this particular claim, which we rejected for the reasons that are explained in paragraphs 7.129-7.140 of our report. We therefore see no reason to make any modification to our report in this regard.

6.21. **Paragraphs 7.281 and 7.282:** China disagrees with two aspects of the Panel's finding that MOFCOM should have inquired further into price comparability issues in the course of its price depression analysis. First, in China's view, adjusting for price comparability is not necessary in a price depression analysis, where an IA is not comparing prices, but rather is assessing price trends over time. China contends that the Panel's finding goes beyond that of the Appellate Body in *China – GOES* and prior panels, insofar as WTO precedent on price comparability is limited to instances of price undercutting. Second, China submits that the Panel has applied an unduly rigid standard in finding that MOFCOM should have known that subject imports were not "identical" to the domestic like product. China considers that the issue is not whether the products were "identical", but rather whether they were sufficiently similar such that adjustments for price comparability were not needed. China refers the Panel in this regard to MOFCOM's determination that there was sufficient competitive overlap between both baskets of goods, which in China's view obviated the need for price adjustments. China adds that MOFCOM found no evidence that the product mix of either basket of goods changed over time, which in its view further obviated the need for price adjustments in MOFCOM's price depression analysis. The United States submits that China's request repeats its arguments regarding this claim and offers no basis for the Panel to modify its findings in these two paragraphs. China does not even request the Panel to make modifications in this regard. The United States also argues that China mischaracterises the Panel's findings by arguing that the Panel reasons that adjustments are needed when the goods being compared are not identical. The United States therefore requests that China's request be rejected.

6.22. With respect to China's first comment, we have rejected China's contention that price adjustments are only required in a price undercutting analysis, as distinct from a price depression (or suppression) analysis. For the reasons set forth in paragraph 7.277 and footnote 438 of our report, we consider that the Appellate Body's findings in *China – GOES* on the importance of ensuring price comparability between subject imports and the domestic like product, with which we agree, apply as well in the context of price depression analyses. We also reject China's contention, in its second comment, that price adjustments were not required in MOFCOM's investigations, having regard to the competitive overlap between subject imports and the domestic like product, and static product mix during the POI. Nevertheless, we have added a footnote to paragraph 7.281 to clarify that price adjustments are not necessarily required where subject imports and the domestic like product are identical.

6.23. **Paragraph 7.288:** The United States requests that the Panel modify this paragraph to more accurately reflect its arguments. Specifically, the United States maintains that its argument is not that subject imports took market share from Chinese producers not part of the domestic industry as defined by MOFCOM and third country imports, as opposed to taking it from the domestic industry. Rather, the US argument was that Chinese producers not part of the domestic industry and third country imports gained most of the market share lost by the domestic industry, while the market share of subject imports increased only very modestly. China argues that the United States did in fact argue that subject imports took market share from Chinese producers outside the domestic industry definition and third country imports and that therefore the US request should be dismissed.

6.24. We note that the requested modification represents an accurate description of the US argument as presented to the Panel. We disagree with China's contention that the United States argued in this context that subject imports took market share from Chinese producers outside the domestic industry definition and third country imports. In support of its comment, China refers to the statement in paragraph 79 of the US opening statement at the first substantive meeting with the Panel. That statement, however, pertains to the developments between interim 2008-interim 2009, not between 2006-2007 which is what the US request is about. We have therefore granted the request and modified paragraph 7.288 of the report accordingly. We note that the description of the US argument in the modified paragraph 7.288 is identical to that in paragraph 7.242 of our report.

6.25. **Paragraph 7.303:** The United States requests that the Panel modify the penultimate sentence of this paragraph to better describe its argument that the domestic industry lost nearly

half its market share in the 2006-2008 period. China has not commented on this modification requested by the United States.

6.26. Given that the modification requested accurately reflects the US argument as presented to the Panel, we have granted it and modified the penultimate sentence of paragraph 7.303 accordingly.

6.27. **Paragraph 8.3:** China states that the AD and CVD measures at issue in this dispute were terminated on 15 December 2013 and that therefore there is no basis for the Panel to make recommendations under Article 19.1 of the DSU. In support of its request, China cites the WTO jurisprudence on whether a panel should make recommendations regarding a measure that is no longer in existence. On this basis, China requests that the recommendation in paragraph 8.3 of our report be deleted. The United States notes that there is no evidence on the record of this dispute to support China's assertion that the AD and CVD measures at issue have been terminated. If China's request is premised on the Panel's accepting China's assertion as new evidence, the United States asserts that the Panel should reject the introduction of new evidence during the interim review stage of the case. The United States argues that Article 19.1 of the DSU requires the Panel to make recommendations in these circumstances. In the view of the United States, whether the measures at issue are still in force, whether they have been replaced by new measures and whether any such new measures are WTO-consistent are matters that have to be discussed by the parties to the dispute following the adoption of the Panel report by the DSB. On this basis, the United States contends that China's request should be rejected and the Panel should make recommendations regarding the measures that are found to be inconsistent with China's WTO obligations.

6.28. While China argues that the AD and CVD measures at issue in this dispute were repealed on 15 December 2013, China has not brought to our attention any official documentation that would support this contention. Therefore, as far as the official record of this dispute is concerned, we are not in a position to find that the measures have been terminated. Hence, we have no basis to grant China's request. We therefore dismiss China's request and maintain our recommendation, as provided for in Article 19.1 of the DSU, that China bring its measures into conformity with its obligations under the Anti-Dumping and SCM Agreements.

7 FINDINGS

7.1 General principles regarding treaty interpretation, the applicable standard of review, and the burden of proof

7.1.1 Treaty interpretation

7.1. Article 3.2 of the DSU provides that the WTO dispute settlement system serves to clarify the existing provisions of the covered agreements "in accordance with customary rules of interpretation of public international law". Likewise, Article 17.6(ii) of the Anti-Dumping Agreement requires panels to interpret that Agreement's provisions in accordance with the 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.

7.2. Article 17.6(ii) of the Anti-Dumping Agreement also provides that if a panel finds that a provision of the Anti-Dumping Agreement admits of more than one permissible interpretation, it shall uphold a measure that rests upon one of those interpretations.

7.1.2 Standard of review

7.3. 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.

7.4. The Appellate Body has explained that where a panel is reviewing an investigating authority's ("IA"'s) determination, the "objective assessment" standard in Article 11 of the DSU requires a panel to review whether the authorities have 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 support the overall determination.[32] Furthermore, in addition to the obligation to conduct an objective assessment under Article 11 of the DSU, in AD disputes, Article 17.6(i) of the Anti-Dumping Agreement provides that:

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

7.5. The Appellate Body has clarified that a panel should not conduct a *de novo* review of the evidence, nor substitute its judgment for that of the IA. A panel must limit its examination to the evidence that was before the IA during the course of the investigation and must take into account all such evidence submitted by the parties to the dispute.[33] At the same time, a panel must not simply defer to the conclusions of the IA; a panel's examination of those conclusions must be "in-depth" and "critical and searching".[34]

7.1.3 Burden of proof

7.6. 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.[35] Therefore, as the complaining party, the United States bears the burden of demonstrating that certain aspects of the AD and CVD measures at issue are inconsistent with the Anti-Dumping Agreement and the SCM Agreement. 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.[36] Finally, it is generally for each party asserting a fact to provide proof thereof.[37]

7.2 Whether the non-confidential summary of the petition was consistent with Article 6.5.1 of the Anti-Dumping Agreement and Article 12.4.1 of the SCM Agreement

7.2.1 Provisions at issue

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

> [t]he 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.[38]

7.2.2 Factual background

7.8. The petitioner, the CAAM, filed a single petition on behalf of Chinese producers of automobiles requesting the initiation of both the AD and CVD investigations on

[32] Appellate Body Reports, *US – Countervailing Duty Investigation on DRAMS*, para. 186; *US – Lamb*, para. 103.
[33] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, paras. 187-188.
[34] Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93.
[35] Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14.
[36] Appellate Body Report, *EC – Hormones*, paras. 98, 104.
[37] Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14.
[38] The SCM Agreement includes the reference to "Members".

9 September 2009[39], which it amended with additional data on 19 October 2009.[40] The CAAM submitted two versions of the petition to MOFCOM: a confidential version and a non-confidential version. The non-confidential version includes a section entitled "Application for Confidentiality", which contains the following statement under the heading "Non-confidential Summary":

> [f]or the purpose that the interested parties of this case can learn the comprehensive substance of the information treated as confidential, the petitioner hereby makes the non-confidential part for the petition and annexes, in which the explanation and non-confidential summary are provided for the information and annexes treated as confidential. Since the confidential part of the petition involves the business confidential information of CAAM and the domestic industry represented by CAAM, to whom the disclosure of the confidential information would cause a significantly adverse effect, the petitioner hereby requests to treat it as confidential.[41]

7.9. Injury data was presented in the petition in a section entitled "Impact of the Subject Product on Domestic Industry" for the following periods: 2006, 2007, 2008, the first three quarters of 2008 ("interim 2008"), and the first three quarters of 2009 ("interim 2009").[42] The non-confidential version of the petition redacts information pertaining to various injury factors, including the factors identified by the United States in its complaint.[43] Where information is redacted, the non-confidential version of the petition states "Confidential".[44] Where confidential information is redacted, a non-confidential summary of the redacted information is provided. It is the adequacy of some of those summaries that is in dispute.

7.10. Each non-confidential summary contains a table in which the column or row displaying aggregated yearly data for the domestic industry is redacted. The tables do not present this information in the same format. In some cases, the data is presented in rows, with the POI years identified as column headings, and in others the data is presented in columns, with the POI years identified as row headings. These tables may contain a second column or row, depending on how information is presented, displaying year-on-year percentage changes in the redacted data over the POI. Each summary is followed by text describing trends in the table. Some summaries also contain a graph showing a trend line representing the data whose X-axis (horizontal) is labelled with yearly intervals corresponding to the POI but whose Y-axis (vertical) is unlabelled.

7.2.3 Arguments of the parties

7.2.3.1 United States

7.11. The United States argues that MOFCOM acted inconsistently with Article 6.5.1 of the Anti-Dumping Agreement and Article 12.4.1 of the SCM Agreement by failing to require the petitioner to provide adequate non-confidential summaries of certain confidential information submitted in the petition.[45] The United States observes that the obligation to either provide a non-confidential summary or an explanation of why summarisation is not possible rests on the interested party submitting the information, and not on the IA.[46] The United States contends that MOFCOM failed to require the petitioner either to prepare adequate non-confidential summaries of information contained in the confidential version of the petition, or to provide an explanation as to why this information was not susceptible to summarization.[47]

7.12. In assessing the conformity of the non-confidential summaries at issue with Articles 6.5.1 and 12.4.1, the United States disagrees with China's suggestion that the obligation to provide adequate non-confidential summaries under these provisions should be assessed in light of the particular substantive provisions contained in Article 3.4 of the Anti-Dumping Agreement and

[39] Original petition, Exhibit USA-04.
[40] Amended petition, Exhibit CHN-01.
[41] Amended petition, Exhibit CHN-01, p. 60.
[42] Amended petition, Exhibit CHN-01, pp. 38-52.
[43] Amended petition, Exhibit CHN-01, p. 59.
[44] See for example amended petition, Exhibit CHN-01, p. 38 (in relation to data for production capacity).
[45] US first written submission, para. 35.
[46] See for instance US first written submission, para. 39.
[47] See for instance US first written submission, para. 42.

Article 15.4 of the SCM Agreement, and notes that these provisions contain no cross-reference to Articles 6.5.1 and 12.4.1, and *vice-versa*.[48]

7.13. The United States specifies 12 injury factors with respect to which the non-confidential version of the petition allegedly contained inadequate summaries: sales-to-output ratio, return on investment, salary, apparent consumption, product capacity, output, sales volume, inventory, pre-tax profit, number of employees, productivity, and cash flow.[49] The United States alleges the following deficiencies in the non-confidential summaries: (i) the textual explanations provided consist of general statements addressing topics only peripherally related to the confidential information[50], (ii) the year-on-year percentage changes provided in tables lack any indication of the significance of the changes[51], and (iii) the trend lines provided are labelled only by year, and lack any indication of scale, without which, the United States argues, US respondents could not form a reasonable understanding of the substance of the confidential information.[52]

7.14. The United States submits that MOFCOM could have provided an average of absolute values per year in the tables, instead of percentage changes. This would have given US respondents a reasonable understanding of the substance of the confidential information.[53] The United States contends in this regard that reading the percentage changes contained in some of the tables in conjunction with the trend lines in the non-confidential summaries at issue does not remedy these inconsistencies, insofar as both elements are themselves inconsistent with Articles 6.5.1 and 12.4.1.[54]

7.15. The United States submits that insofar as China argues that non-confidential summaries of some of the confidential information at issue can be ascertained in terms of their relationships with other data in the non-confidential version of the petition, this would require that interested parties infer, derive and piece together possible non-confidential summaries in a manner inconsistent with Articles 6.5.1 and 12.4.1.[55]

7.16. The United States disagrees with China's contention that MOFCOM was only obligated to require adequate non-confidential summaries where an interested party objected to the adequacy of such summaries in the underlying investigations. Noting that it is the IA's responsibility, not that of opposing interested parties, to ensure that adequate non-confidential summaries accompany any confidential information submitted by an interested party in an investigation, the United States contends that the fact that no US respondent objected to the adequacy of the non-confidential summaries in the course of these investigations is immaterial to a finding of a violation of Articles 6.5.1 and 12.4.1.[56]

7.2.3.2 China

7.17. China argues that since MOFCOM deemed the non-confidential summaries submitted by the petitioner adequate for the purposes of Article 6.5.1 of the Anti-Dumping Agreement and Article 12.4.1 of the SCM Agreement, the record contains no explanation as to why the information at issue was not susceptible to summarization.[57] China maintains in this regard that neither Article 6.5.1 nor Article 12.4.1 sets a specific level of detail or format for non-confidential summaries and that therefore the adequacy of non-confidential summaries must be evaluated on a case-by-case basis.[58] China observes, in this respect, that Articles 6.5.1 and 12.4.1 seek to balance the protection of confidential information submitted to the IA by an interested party with the need for transparency in such an investigation.[59]

[48] See for instance US second written submission, paras. 11-12.
[49] US first written submission, paras. 42-45.
[50] See for instance US first written submission, para. 43.
[51] See for instance US comments on China's response to Panel question No. 25.a.
[52] See for instance US comments on China's responses to Panel questions Nos. 25.a and 25.c.
[53] See for instance US comments on China's response to Panel question No. 25.a.
[54] See for instance US opening statement at the second Panel meeting, para. 12.
[55] See for instance US second written submission, paras. 17, 22.
[56] See for instance US opening statement at the second Panel meeting, paras. 7-8.
[57] China's second written submission, para. 24.
[58] See for instance China's first written submission, para. 39.
[59] China's first written submission, para. 40.

7.18. China argues that the term "substance" in Articles 6.5.1 and 12.4.1 should be understood in light of the substantive obligations of Article 3.4 of the Anti-Dumping Agreement and Article 15.4 of the SCM Agreement, which require an IA to evaluate industry indicators bearing upon the state of the domestic industry in terms of trends in the movement of various indicators, rather than changes in the underlying absolute figures themselves. China contends that the panel in *EU – Footwear (China)* followed a similar approach in evaluating the "substance" of certain confidential information at issue in that dispute against other provisions of the Anti-Dumping Agreement.[60] From this point of view, China contends that the non-confidential summaries at issue provide a reasonable understanding of the "substance" of relevant trends.[61]

7.19. China considers that the US claim ignores significant information contained in the non-confidential version of the petition. Specifically, China argues that the United States ignores: (i) the text[62] that appear below each of the tables that the United States alleges are not adequately summarized, (ii) the year-on-year percentage changes reported in some of these tables[63], and/or (iii) trend lines[64] representing the redacted data for the injury factors at issue under this claim.[65] China contends that the provision of year-on-year percentage changes in the tables is functionally equivalent to the use of indices, and submits that the trend lines visually depict the percentage changes set out in the tables.[66]

7.20. According to China, the non-confidential summaries of redacted domestic industry-wide aggregated figures per year at issue were sufficiently detailed to allow interested parties a reasonable understanding of the substance of the relevant confidential information.[67] China notes in this regard that the US claim relates to MOFCOM's treatment of non-confidential summaries provided in the petition, and not to MOFCOM's decision to grant confidential treatment to the information at issue.[68] China characterizes the US argument that MOFCOM could have requested the petitioner to provide averages of absolute values per year in the non-confidential version of the petition as circular, contending that it seeks to have MOFCOM disclose the very data for which it granted confidential treatment.[69]

7.21. China submits that the non-confidential summary of the sales-to-output ratio provides more than a reasonable understanding of the substance of the information at issue, particularly when examined in terms of its relationship with the non-confidential summaries for apparent consumption and inventory shifts.[70] With respect to the non-confidential summary for apparent consumption, China adds that if viewed alongside figures for total domestic demand, found elsewhere in the non-confidential version of the petition, this summary provides interested parties with a reasonable understanding of the substance of the confidential information within the meaning of Articles 6.5.1 and 12.4.1.[71]

7.22. Finally, China contends that if any of the respondents felt prejudiced by the alleged inadequacies in the non-confidential version of the petition, they should have raised this concern during the investigations at issue, which they did not. In China's view, raising this issue for the first time before the Panel should be taken into consideration in the assessment of the merits of the US claim.[72] China considers that the panel in *Korea – Commercial Vessels* came to a similar conclusion in characterizing an argument raised by one of the parties late in the panel proceedings as lacking in conviction.[73]

[60] China's second written submission, para. 16.
[61] See for instance China's second written submission, paras. 14-15.
[62] See for instance China's first written submission, para. 47.
[63] See for instance China's first written submission, para. 57.
[64] See for instance China's first written submission, para. 48.
[65] China's first written submission, para. 46.
[66] See for instance China's response to Panel questions Nos. 25.a and 25.b.
[67] See for instance China's opening statement at the first Panel meeting, para. 4.
[68] China's first written submission, paras. 42-43.
[69] By multiplying the average data by the number of domestic industry producers who provided the data contained in the petition. See China's second written submission, paras. 25-27.
[70] China's first written submission, para. 48.
[71] China's first written submission, para. 55, referring to the discussion of "Demand of Domestic Market" in the amended petition, Exhibit CHN-01, pp. 55-56.
[72] See for instance China's first written submission, para. 72.
[73] China's second written submission, para. 30.

7.2.4 Arguments of the third parties

7.23. **Japan** notes that non-confidential summaries should provide a reasonable understanding of the substance of the confidential information and argues that an IA may permit an interested party not to submit such a non-confidential summary only where there is a reason that outweighs the due process rights of other interested parties. In such exceptional circumstances, an IA must issue a statement of reasons for non-summarization. Japan considers that general statements on non-summarization are insufficient to meet an IA's obligation in these situations, as such statements constitute unsupported assertions rather than a statement of reasons for the purposes of Article 6.5.1 of the Anti-Dumping Agreement and Article 12.4.1 of the SCM Agreement.[74]

7.2.5 Evaluation by the Panel

7.24. The issue before us with respect to this claim is whether the non-confidential summaries of data concerning 12 injury factors referenced by the United States were adequate. The United States argues that the non-confidential summaries did not meet the requirements of Article 6.5.1 of the Anti-Dumping Agreement and 12.4.1 of the SCM Agreement. China's position is that the non-confidential version of the petition contains summaries in the form of text and tables adjoining the redacted information, permitting a reasonable understanding of the relevant confidential information. In order to decide this claim, we must determine whether those summaries allowed interested parties a reasonable understanding of the substance of the confidential information as required by Articles 6.5.1 and 12.4.1.

7.25. Articles 6.5.1 and 12.4.1 require an IA, when granting confidential treatment to information submitted by interested parties, to ensure that the party submitting the information provides, in addition to the confidential information, a non-confidential summary of that information that is "in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence". In *EC – Fasteners (China)*, the Appellate Body stated that while the sufficiency of a non-confidential summary will turn on the confidential information at issue, the summary must be sufficiently detailed to allow a reasonable understanding of the substance of the information withheld, and allow the other parties to the investigation a meaningful opportunity to respond and defend their interests.[75]

7.26. Prior panels have found that neither general statements unsupported by evidence[76], nor the possibility for interested parties to infer the "main point" of the confidential information from the context surrounding redaction[77], suffice for the purposes of conforming to Articles 6.5.1 and 12.4.1. In this respect, panels have considered that an IA does not discharge its obligation to require adequate non-confidential summaries where the non-confidential version of the petition requires interested parties to "infer, derive and piece together a possible summary of the confidential information."[78] Further, data gaps in non-confidential summaries may deprive respondents of a "reasonable understanding" of the substance of the confidential information at issue.[79]

7.27. Recognizing that it is not always possible to summarize confidential information in non-confidential form, Articles 6.5.1 and 12.4.1 provide that, in exceptional circumstances, where summarization of the confidential information submitted is not possible, a statement explaining the reasons for this must be submitted by the party submitting the information. In this case, it is undisputed that the petitioner did not assert that "exceptional circumstances" made summarization of any of the confidential information submitted impossible, and provided no explanations in this regard.

7.28. Before examining whether the 12 non-confidential summaries challenged by the United States satisfy the requirements of Articles 6.5.1 and 12.4.1, we find it useful to discuss two issues. First, we address China's argument that the adequacy of these summaries should be

[74] Japan's third party submission, para. 6.
[75] Appellate Body Report, *EC – Fasteners (China)*, paras. 541-542. See also Panel Reports, *China – GOES*, para. 7.188; *China – Broiler Products*, para. 7.50.
[76] Panel Report, *Mexico – Olive Oil*, para. 7.101.
[77] Panel Report, *China – GOES*, para. 7.202.
[78] Panel Reports, *China – GOES*, para. 7.202; *China – Broiler Products*, para. 7.60.
[79] Panel Report, *China – GOES*, paras. 7.216-7.220, 7.224.

assessed against what China contends is the "trends-based nature" of Article 3.4 of the Anti-Dumping Agreement and Article 15.4 of the SCM Agreement. Second, we address China's argument that the fact that no US respondent challenged the adequacy of these summaries during MOFCOM's investigations should affect our assessment of the merits of the US claim.

7.29. China argues that the 12 non-confidential summaries should be assessed against the "substance" required of an injury enquiry pursuant to Articles 3.4 and 15.4. We find this argument unconvincing for three reasons. First, we note that the text of Articles 6.5.1 and 12.4.1 does not refer to particular substantive obligations. It merely requires the submission of non-confidential summaries of any confidential information submitted to an IA by an interested party, unless an explanation of why summarization is impossible is provided (and accepted by the IA). Second, the legal basis for China's argument is not entirely clear. China cites the panel report in *EU – Footwear (China)* to support its argument.[80] Yet, that panel examined the adequacy of a non-confidential summary of price information in the form of average prices in light of Article 5.2(iii) of the Anti-Dumping Agreement, which requires a *complainant* to provide "information" on normal value and export price.[81] Articles 3.4 and 15.4, in contrast, address the obligations of an *IA* to assess the consequent impact of subject imports on various industry indicators in the course of its injury determination. We do not see anything in that panel decision which would suggest that whether a non-confidential summary is adequate should be judged in relation to the analysis of injury information that the IA will undertake in its investigation. Third, we note that Articles 3.4 and 15.4 provide no guidance as to how an IA is to evaluate the relevant factors in analysing injury. Thus, although we make no finding in this regard, we see no basis for the view, underlying China's argument, that Articles 3.4 and 15.4 in fact require an IA to evaluate industry indicators on the basis of trends. Accordingly, we consider that there is no reason to conclude that non-confidential trend information will satisfy the requirements of Articles 6.5.1 and 12.4.1 because of the nature of the injury analysis.

7.30. China also argues that the failure of US respondents to object to the adequacy of the non-confidential summaries during the investigations should affect our evaluation of the merits of the US claim. We see no legal basis for this argument. China cites the panel report in *Korea – Commercial Vessels* to support this argument.[82] However, the situation in that dispute was entirely different from the situation here. In *Korea – Commercial Vessels*, the panel was addressing whether Korea's failure to object to the European Communities' use of a specified time period for the construction of a market benchmark at an earlier stage of panel proceedings rendered Korea's objection at a later stage of those proceedings as lacking in conviction.[83] We see nothing in this report which would suggest that a party's failure to object to an aspect of an AD or CVD investigation should affect the assessment by a WTO panel of a claim pertaining to that particular aspect of the investigation. We thus find China's argument unconvincing, and will consider the US claim without taking into account whether or not any objections to the non-confidential summaries were made during the investigations.

7.2.5.1 Horizontal assessment

7.31. Turning now to the issue of adequacy of the non-confidential summaries, we note that the 12 non-confidential summaries at issue are not identical in form or content, although there are certain common elements among them. Thus, each summary contains a table from which confidential yearly industry-wide absolute values are redacted in the relevant rows or columns.[84] In addition, each summary contains at least one of the following two elements: a second column or row in the table showing the year-on-year percentage changes in the data over the period and/or a trend line depicting the data graphically over the same period. Finally, each summary contains some text, which in each case describes trends in the data shown in the tables and/or trend lines with respect to the injury factor concerned.

[80] China's second written submission, para. 16.
[81] Panel Report, *EU – Footwear (China)*, para. 7.730.
[82] China's second written submission, para. 30.
[83] In that CVD dispute, in presenting its evidence concerning the existence of a benefit to the panel, the EC had constructed a market benchmark on the basis of data for certain periods. Korea did not originally object the EC approach, but subsequently argued that the EC methodology was flawed. The Panel accepted the EC approach, rejecting Korea's objection as "lack[ing] conviction". Panel Report, *Korea – Commercial Vessels*, para. 7.272.
[84] Tables do not present this information in the same format.

7.32. Given the common elements among the 12 non-confidential summaries at issue, we find it useful to first consider whether, as a general matter, these tables, trend lines and texts can constitute an adequate non-confidential summary of the confidential information submitted, before evaluating the adequacy of each of the individual non-confidential summaries at issue.

7.33. The tables present data for each injury factor at issue on an annual basis for the period, either in columns or rows.[85] The tables set out yearly industry-wide absolute values, which are in each case redacted from the non-confidential version. Some of the tables contain an additional column or row setting out year-on-year percentage changes in the redacted data throughout the relevant period.[86] Hence percentage changes from 2006 to 2007, from 2007 to 2008 and from interim 2008 to interim 2009 are shown in each such table. The year-on-year percentage changes do not indicate the significance of the changes. That is, an increase of 100%, for instance, may represent an increase from 1 to 2 units, or an increase from 100 to 200 units in any given case.[87]

7.34. China asserts that the year-on-year percentage changes are "functionally equivalent" to the use of indices, insofar as both methods show the degree or magnitude of changes.[88] In our view, the significance of the absolute change in the data being summarized is not a critical component of an adequate non-confidential summary. For instance, a decline from 100,000 units to 50,000 units produced, and a decline from 1,000,000 units to 500,000 units produced over a period, is in either case a 50% decline in production. Knowing that the industry's production declined by 50% during the period is, in our view, generally sufficient to "permit a reasonable understanding of the substance of the information submitted in confidence" as required by Articles 6.5.1 and 12.4.1, even without knowing the significance, in absolute terms, of the change.[89] Therefore, we consider that percentage changes such as those used in this case, are similar, in terms of the understanding of the redacted confidential information conveyed, to the use of indexing based on year-on-year changes. In the case of indexing, an absolute value (e.g. 100) is used to represent the information for the first year, and is shown in a table as a baseline. The data for the subsequent years is shown as percentage changes from the baseline. Thus, an increase of 25% in the second year would be represented by an index value of 125, and a decrease of 20% in the third year would be represented by an index value of 100. As is the case with the percentage changes at issue here, the significance of the changes in absolute terms is unknown in the case of indexing.[90] We therefore find that the tables, where they set out percentage changes, give interested parties a reasonable understanding of the substance of the confidential information at issue.[91]

7.35. The trend lines, set out below the tables, are only partially labelled: while the X-axes are labelled with the same yearly intervals as are set out in the tables, the Y-axes are unlabelled. The

[85] Compare the table for sales revenue, which lists the years of the POI in columns, with the table for apparent consumption, which lists these years in rows. Amended petition, Exhibit CHN-01, pp. 41-42.

[86] In other instances, data in the tables are completely redacted. The table for apparent consumption, further, is missing percentage change data from interim 2008 to interim 2009. We discuss this further below.

[87] See for instance US response to Panel question No. 2.

[88] See for instance China's first written submission, para. 57.

[89] We are aware that the panel in *China – Broiler Products*, when faced with a similar claim from the United States, came to a different conclusion. See Panel Report, *China – Broiler Products*, para. 7.63. Insofar as the panel in *China – Broiler Products* considered that the absence of a baseline figure deprived interested parties of a reasonable understanding of the magnitude of changes in a manner inconsistent with Articles 6.5.1 and 12.4.1, we respectfully disagree with that panel's reasoning for the reasons we set out above. See Panel Report, *China – Broiler Products*, para. 7.63.

[90] Where interested parties use a baseline value in reading these percentage changes, they are effectively engaging in indexing based on year-on-year changes. We note that confidential information is sometimes summarized by reporting a range of figures, which would give interested parties a better sense of the significance or magnitude of changes. However, neither Article 6.5.1 nor Article 12.4.1 provides any guidance as to methods that may be used in preparing non-confidential summaries, and we see no basis on which to conclude that any one method is either necessarily appropriate or necessarily insufficient to allow for an adequate non-confidential summary. Members may specify a methodology which in their view will provide for adequate non-confidential summaries, but this does not guarantee that such summaries will withstand a challenge in WTO dispute proceedings. We certainly see no basis on which we could conclude that only one method of summarization is required.

[91] The United States appears to suggest, in its comments on China's response to Panel question No. 25.a, that only non-confidential summaries containing averages of redacted information can be consistent with Articles 6.5.1 and 12.4.1. See US comments on China's response to Panel question No. 25.a. As noted above, in footnote 90, we see no such limitation on the possible means of preparing adequate non-confidential summaries in these provisions.

United States argues that the trend lines lack any indication of scale, without which, interested parties could not form a reasonable understanding of the substance of the confidential information. China, in its written submissions, states that the trend lines graphically depict the percentage changes shown in the tables.

7.36. We consider that the trend lines correspond to the percentage changes contained in some of the tables at issue. However, because they are unlabelled on the Y-axis, it is impossible to determine the percentage changes being depicted. Thus, no value is added to the information on percentage changes reported in the tables.[92] We therefore find that the trend lines alone do not allow interested parties a reasonable understanding of the substance of the confidential information at issue.

7.37. The texts come after the tables and/or trend lines, and describe the trends in the data depicted in the tables and/or trend lines for the relevant period with respect to each injury factor at issue. The United States submits that these texts are not revealing of the contents of the redacted information. China contends that the texts contain narrative that allowed interested parties a reasonable understanding of the substance of the confidential information at issue.

7.38. The texts in question typically set out in words what is shown graphically in the relevant tables and/or trend lines. In doing so, absolute figures are redacted from the texts. In some instances, the texts also refer to matters other than the data in the relevant table and/or the trend line. However, these references, in most cases are in our view either irrelevant to the data or the injury factor at issue or simply state a conclusion that subject imports are the cause of negative trends in the data. We therefore find that, like the unlabelled trend lines, the texts add no additional explanation to the tables. Accordingly, we find that the texts alone do not permit a reasonable understanding of the substance of the confidential information at issue.

7.39. We now turn to our evaluation of the adequacy of each of the 12 non-confidential summaries challenged by the United States. Having concluded that the additional elements relied on by China, unlabelled trend lines and text, do not provide additional bases to permit a reasonable understanding of the confidential information at issue, we focus on the non-confidential tables summarizing the data for each of the 12 injury factors concerned. In doing so, we have found it useful to group those summaries into the following two categories:

- confidential information in respect of which data in tables is redacted, but percentage changes are provided; and
- confidential information in respect of which data in tables is redacted and no percentage changes are provided.

7.2.5.2 Confidential information in respect of which data in tables is redacted, but percentage changes are provided

7.40. This category includes non-confidential summaries of information concerning production capacity, output, sales volume, inventory, pre-tax profits, number of employees, productivity, apparent consumption, and cash flow. However, the summary for apparent consumption differs from the other eight summaries in this category, in that the parties present additional arguments with respect to the adequacy of this summary. We will first consider the non-confidential summaries for production capacity, output, sales volume, inventory, pre-tax profits, number of employees, productivity, and cash flow, before moving on to an assessment of the non-confidential summary for apparent consumption.

7.2.5.2.1 Production capacity, output, sales volume, inventory, pre-tax profits, number of employees, productivity, and cash flow

7.41. The non-confidential summaries of information regarding production capacity[93], output[94], sales volume[95], inventory[96], pre-tax profits[97], number of employees[98], productivity[99], and cash

[92] We note, in this respect, China's indication that the trend lines "merely provide the interested parties a visual illustration of the percentage changes". See China's response to Panel question No. 25.c.

[93] Amended petition, Exhibit CHN-01, p. 38.

[94] Amended petition, Exhibit CHN-01, pp. 38-39.

flow[100] all follow a similar pattern, with a table setting out year-on-year percentage changes from 2006 to 2007, 2007 to 2008, and interim 2008 to interim 2009, as well as text describing the information therein. With the exception of the summaries of data relating to the number of employees and cash flow, they also contain a trend line which seems to correspond to the percentage changes in the table.

7.42. We note the US argument that MOFCOM could have provided averages of absolute values per year, instead of year-on-year percentage changes, to provide respondents a reasonable understanding of the substance of the confidential information.[101] We recall that the confidential information at issue here is aggregate data pertaining to the domestic industry as a whole.[102] The confidential aggregate data could be derived from average annual data simply by multiplying the average for each year by the number of domestic industry producers in that year. The United States has not challenged MOFCOM's decision to grant confidential treatment to the aggregate data in the petition. We find the US position, which would make possible the disclosure of the very information treated as confidential, to be unpersuasive.[103]

7.43. As stated above[104], we consider that the percentage changes shown in the tables permit a reasonable understanding of the redacted confidential information, and consequently satisfy the requirements of those provisions, fulfilling the objective of the requirement to provide non-confidential summaries. Although, as also stated above[105], the trend lines and textual explanations do not add to the understanding of the data in the tables, we consider that the tables, on their own, are sufficient to permit a reasonable understanding of the substance of the redacted information. We therefore conclude that the non-confidential summaries for production capacity, output, sales volume, inventory, pre-tax profits, number of employees, productivity, and cash flow are consistent with Articles 6.5.1 and 12.4.1.

7.2.5.2.2 Apparent consumption

7.44. The non-confidential summary of data regarding apparent consumption includes two tables showing "Changes in Market Share of the Domestic Like Product" in 2006, 2007, 2008, and interim 2009, and text describing the information therein. The first table contains a column setting out year-on-year percentage changes in apparent consumption for the domestic industry from 2006 to 2008.[106] Percentage changes from interim 2008 to interim 2009 are redacted in this table. The second table contains a column setting out yearly market share figures for the POI.[107] Data for sales volume and apparent consumption are redacted from this table.

7.45. The United States argues that the non-confidential summary for apparent consumption is inadequate for the reasons we have already addressed above, but also points out that in the case of this table, the percentage change from interim 2008 to interim 2009 is missing. In addition, the United States observes that China refers to other parts of the petition to explain how a reasonable understanding of the substance of redacted confidential information can be formed. Thus, following China's own reasoning, the United States contends that interested parties would have to infer, derive and piece together a possible summary of confidential information for themselves.[108] In addition to general arguments we have already addressed, China asserts that figures for total domestic demand are indicated elsewhere in the petition, and contends that the non-confidential

[95] Amended petition, Exhibit CHN-01, pp. 39-40.
[96] Amended petition, Exhibit CHN-01, p. 44.
[97] Amended petition, Exhibit CHN-01, pp. 46-47.
[98] Amended petition, Exhibit CHN-01, pp. 48-49.
[99] Amended petition, Exhibit CHN-01, pp. 50-51.
[100] Amended petition, Exhibit CHN-01, pp. 51-52.
[101] See for instance US comments on China's response to Panel question No. 25.a.
[102] China's response to Panel question No. 3.
[103] See in this regard Panel Report, *China – GOES*, para. 7.210.
[104] See para. 7.34 of this Report.
[105] See paras. 7.36 and 7.38 (on the horizontal assessment of the trend lines and texts, respectively) of this Report.
[106] The table indicates that apparent consumption equals "total domestic production + total import volume - total export volume". Amended petition, Exhibit CHN-01, p. 43.
[107] The table indicates that market share equals "sales volumes / apparent consumption". Amended petition, Exhibit CHN-01, p. 43.
[108] See for instance US second written submission, para. 22.

summary for apparent consumption, coupled with these figures, provided interested parties a reasonable understanding of the substance of the confidential information at issue.[109]

7.46. We are of the view that the non-confidential summary for apparent consumption is inconsistent with Articles 6.5.1 and 12.4.1. While we have found that the tables, where they contain a column or row displaying percentage changes, are generally sufficient to provide interested parties with an understanding of the redacted information[110], in this instance, percentage change information for the period interim 2008 to interim 2009 is not reported, despite the corresponding information having been included in the other non-confidential summaries at issue. There is no explanation for this omission in the case of the non-confidential summary of data for apparent consumption. China argues that the reason for this omission was because there was no underlying confidential data for apparent consumption for this particular period, and this was clear from the record.[111] We find this argument unconvincing, however, as the record does not so state. We consider that the absence of this data creates a gap in the non-confidential summary for apparent consumption that deprived interested parties of a reasonable understanding of the substance of the redacted information.[112] Even if we were to accept China's argument that apparent consumption data could be found elsewhere in the petition, further, we note that the data on total domestic demand referred to by China does not cover interim 2009.[113] In any event, we consider that a non-confidential summary that requires interested parties to connect information from different parts of the petition in order to obtain a reasonable understanding of the substance of the confidential information is not consistent with Articles 6.5.1 and 12.4.1.[114]

7.2.5.3 Confidential information in respect of which data in tables is wholly redacted, and no percentage changes are provided

7.47. This category includes non-confidential summaries for sales-to-output ratio, return on investment and salary. However, the summary for sales-to-output ratio differs from the other two summaries in this category, in that the parties present additional arguments with respect to this summary. Therefore, we will first consider the non-confidential summaries for return on investment and salary, before moving onto an assessment of the summary for sales-to-output ratio.

7.2.5.3.1 Return on investment and salary

7.48. The non-confidential summaries for return on investment[115] and salary[116] follow a similar pattern. These summaries include a table setting out information concerning developments in each injury factor in 2006, 2007, 2008, interim 2008, and interim 2009, in which percentage changes are wholly redacted. These summaries also include a trend line which displays "changes" in each injury factor over the POI.[117] The tables and trend lines are followed by text describing the information in the tables.

7.49. As stated above[118], partially unlabelled trend lines and text such as those provided in these summaries are not, on their own, sufficient to permit a reasonable understanding of the substance of the redacted information. In the absence of additional information, such as that provided in

[109] China's first written submission, para. 55, referring to the discussion of "Demand of Domestic Market" in amended petition, Exhibit CHN-01, pp. 55-56.
[110] See para. 7.34 of this Report.
[111] China's first written submission, fn. 47.
[112] See, in this regard, Panel Report, *China – GOES*, paras. 7.216-7.220, 7.224.
[113] Amended petition, Exhibit CHN-01, pp. 55-56.
[114] Panel Reports, *China – GOES*, para. 7.202; *China – Broiler Products*, para. 7.60. The second table does not affect our conclusion. This table reports information on market shares. Neither it, nor the text accompanying both tables, does anything to remedy the data gap in the table setting out year-on-year percentage changes in apparent consumption, and thus does not add anything to the understanding of the substance of the confidential information in question. Amended petition, Exhibit CHN-01, p. 39. See, in this regard, para. 7.38 of this Report.
[115] Amended petition, Exhibit CHN-01, pp. 47-48.
[116] Amended petition, Exhibit CHN-01, pp. 49-50.
[117] While the trend line for return on investment does not contain the term "change" in the heading, we note that the heading for the non-confidential summary for return on investment reads "Change in Rate of Return on Investment of the Domestic Product".
[118] See paras. 7.36 and 7.38 (on the horizontal assessment of the trend lines and texts, respectively) of this Report.

other summaries by the tables showing percentage changes, we consider that these summaries fail to permit a reasonable understanding of the substance of the confidential information at issue. We therefore conclude that the non-confidential summaries for return on investment and salary are inconsistent with Articles 6.5.1 and 12.4.1.

7.2.5.3.2 Sales-to-output ratio

7.50. The non-confidential summary of confidential information concerning the sales-to-output ratio includes a table from which percentage changes are wholly redacted.[119] This summary also includes a trend line showing "Changes in the Proportion of Products Sold" over the POI.[120] The table and trend line are followed by a text describing the information.

7.51. In addition to arguments we have already addressed above, the United States observes that China refers interested parties to other parts of the petition to explain how a reasonable understanding of the substance of redacted confidential information can be formed. Thus, following China's own reasoning, interested parties would have to infer, derive and piece together a possible summary of confidential information for themselves.[121] China asserts that the trend line and text adequately provided interested parties with a reasonable understanding of the changes in sales-to-output ratio over the POI, particularly when considered in terms of the relationship of data for sales-to-output ratio with data for apparent consumption and inventory shifts.[122]

7.52. We are of the view that the non-confidential summary for sales-to-output ratio is inconsistent with Articles 6.5.1 and 12.4.1. As stated above[123], we consider that partially labelled trend lines and text alone are not generally sufficient to provide an adequate understanding of confidential information, unlike a table showing year-on-year percentage changes. We note that the confidential information is redacted from the text that China relies on in this context[124], and accordingly, it does nothing to permit a reasonable understanding of the confidential information in question. Moreover, as we have previously found, a non-confidential summary that only provides a reasonable understanding of confidential information if interested parties themselves connect information from different parts of the petition is generally inconsistent with Articles 6.5.1 and 12.4.1.[125] Even assuming we were to accept China's position that the non-confidential summary for sales-to-output ratio should be assessed in terms of its relationship with the non-confidential summaries for apparent consumption and inventory, we recall that we have found above that the non-confidential summary for apparent consumption is inconsistent with Articles 6.5.1 and 12.4.1.[126] We fail to see how considering another insufficient non-confidential summary together with the summary at issue here would serve to permit a reasonable understanding of the confidential information in question.

7.2.6 Conclusion

7.53. In light of the above, we conclude that the non-confidential summaries of confidential information concerning production capacity, output, sales volume, inventory, pre-tax profits, number of employees, productivity, and cash flow permit a reasonable understanding of the substance of the confidential information at issue, and thus were consistent with Article 6.5.1 of the Anti-Dumping Agreement and Article 12.4.1 of the SCM Agreement.

7.54. However, with respect to the non-confidential summaries of confidential information concerning apparent consumption, return on investment, salary, and sales-to-output ratio, we conclude that these do not permit a reasonable understanding of the substance of the confidential information at issue, and accordingly, we find that China failed to comply with the requirements of Articles 6.5.1 and 12.4.1 with respect to these four non-confidential summaries in the investigations at issue.

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[119] Amended petition, Exhibit CHN-01, pp. 40-41.
[120] Amended petition, Exhibit CHN-01, p. 41.
[121] See for instance US second written submission, para. 17.
[122] China's first written submission, para. 48.
[123] See paras. 7.36 and 7.38 (on the horizontal assessment of the trends lines and texts, respectively) of this Report.
[124] Amended petition, Exhibit CHN-01, p. 41.
[125] Panel Reports, *China – GOES*, para. 7.202; *China – Broiler Products*, para. 7.60.
[126] See para 7.46 of this Report.

7.3 Whether MOFCOM disclosed the "essential facts" as required by Article 6.9 of the Anti-Dumping Agreement

7.3.1 Provision at issue

7.55. Article 6.9 provides:

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

7.3.2 Factual background

7.56. This claim only concerns MOFCOM's AD investigation. In the investigations at issue, MOFCOM issued final disclosure letters to the individual US respondents, as well as two final disclosure letters to the US government, purportedly setting out the "basic facts" that would underpin the final determination. The first letter sent to the US government set out factors upon which MOFCOM would base its injury determinations in the final determination.[127] The second letter sent to the US government addressed the AD and CVD rates to be set in the final determination.[128] The final disclosure letters to the US respondents other than the US government have not been submitted as evidence in this dispute.

7.57. The second letter to the US government provides a narrative description of how MOFCOM determined normal value, export price, and certain adjustments to normal value and export price. This description is accompanied by a table setting out company-specific total dumping margins, and the "all others" residual AD duty rate.[129] The company-specific data is redacted in the second final disclosure letter to the US government, showing only the "all others" residual AD duty rate of 21.5%.

7.3.3 Arguments of the parties

7.3.3.1 United States

7.58. The United States argues that MOFCOM acted inconsistently with Article 6.9 of the Anti-Dumping Agreement by failing to inform the US respondents of all "essential facts" forming the basis of its decision to apply the AD duties prior to releasing its final determination.[130]

7.59. The United States contends that MOFCOM should have disclosed data and calculations to US respondents, including details of any data adjustments or manipulations, bearing upon determinations of: (i) normal values, (ii) export prices, and (iii) costs of production.[131] The United States considers that without the data underlying MOFCOM's calculations, the US respondents were deprived of an understanding of basic information relating to how dumping margins were determined. The United States adds that without the actual calculations used by MOFCOM, these respondents could not verify the completeness and accuracy of MOFCOM's calculations.[132] The United States argues that China's reference to language in MOFCOM's final determination as evidence that MOFCOM disclosed essential facts to US respondents fails to establish this as a fact, contending that the final determination is conclusory in this regard.[133]

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[127] *Disclosure of Basic Facts upon which the Industry Injury Determination is based in the AD and CVD Investigations of Some Cars Originating from the US, 15 April 2011* ("final disclosure (injury)") (Exhibit USA 10). The Panel notes that China submitted an alternative translation of the final disclosure (injury) as Exhibit CHN-06.

[128] *Disclosure of Basic Facts upon which the Dumping Margin and Ad Valorem Subsidy Rate are based in the Final Determination of the Auto AD and CVD Investigation against the US, 18 April 2011* ("final disclosure (AD/CVD)") (Exhibit USA-11).

[129] Final disclosure (AD/CVD), Exhibit USA-11, p. 25.

[130] See for instance US first written submission, para. 47.

[131] US first written submission, para. 55.

[132] See for instance US first written submission, fn. 80.

[133] See for instance US second written submission, para. 28.

7.60. The United States asserts that it does not have copies of the final disclosure letters sent to the US respondents in its possession, and contends that it is for China to submit these letters to the Panel. The United States notes in this regard that these documents are necessarily within China's possession, following from the normal course of an AD proceeding.[134] Noting China's concern that submitting these letters to the Panel would result in the unauthorized release of BCI, the United States argues that the Panel's BCI procedures adequately address such concerns.[135] The United States asks the Panel to infer from China's failure to submit the letters in this dispute that these letters contain information unfavourable to China's position.[136]

7.61. At the second Panel meeting, the United States submitted into evidence a letter[137] from Mercedes-Benz USA to MOFCOM dated 28 April 2011 which, in the US view, demonstrates that MOFCOM failed to disclose the essential facts to the US respondents. Responding to China's objection to the submission of this evidence after the first Panel meeting, the United States draws the Panel's attention to paragraph 8 of the Panel's working procedures, which allows for the submission of evidence after the first Panel meeting for the purposes of rebuttal. Specifically, the United States contends that the Mercedes Benz USA letter rebuts China's assertion that MOFCOM's final disclosures to the US respondents disclosed essential facts within the meaning of Article 6.9.[138]

7.3.3.2 China

7.62. China contends that it is for a complaining party to provide adequate evidence and legal argument tying alleged facts to a claim, in the absence of which the burden cannot shift to the responding party.[139] China argues that as the United States claims that the final disclosures sent by MOFCOM to the US respondents were inconsistent with Article 6.9 of the Anti-Dumping Agreement, it is for the United States, as complainant, to provide proof of these allegedly flawed disclosures to the Panel.[140] China submits that the United States has not adduced any evidence showing the alleged deficiencies in the final disclosures sent by MOFCOM to the US respondents.[141] China notes in this respect that the United States has previously submitted final disclosures into evidence in other disputes.[142]

7.63. China asserts that the record contains evidence that MOFCOM did make such disclosures of essential facts, drawing the Panel's attention to a statement to this effect in the final determination.[143] In China's view, data underlying dumping margin calculations may or may not constitute essential facts, depending on their overall significance to the findings and determinations reached by an IA. Calculations, in contrast, constitute the "consideration" of facts for the purposes of Article 6.9, and thus, for China, fall outside the scope of Article 6.9.[144]

7.64. China objects to the US submission into evidence of the letter from Mercedes-Benz USA to MOFCOM dated 28 April 2011 at the second Panel meeting. In China's view, the timing of this submission infringes its due process rights. In this regard, China points to paragraphs 6 and 8 of the Panel's working procedures, which China asserts establish the rule that each party must submit factual evidence to the Panel no later than during the first Panel meeting. China contends that the United States cannot submit this letter as a rebuttal to the contention that MOFCOM's final

[134] See for instance US comments on China's response to Panel questions Nos. 27.a and 27.b.
[135] See for instance US opening statement at the second Panel meeting, para. 15.
[136] In the view of the United States, such an adverse inference would be consistent with the position taken by China in other disputes relating to the non-disclosure of certain data and calculations underlying dumping margins. See US comments on China's response to Panel questions Nos. 27.a and 27.b.
[137] Mercedes-Benz comment on MOFCOM final disclosure, Exhibit USA-20. Exhibit USA-20 contains the original Chinese version of the letter and a partial translation in English. At our request, the United States submitted a full English translation of the Chinese version as Comments of Mercedes-Benz on the U.S. Portion of the Final Disclosure in Imported Auto AD and CVD Investigations, Exhibit USA-21. We note that Exhibit USA-20, the original Chinese version, is dated 28 April 2011. Exhibit USA-21 is however dated 28 April 2013. We assume "2013" is a typographical error.
[138] See for instance US response to Panel question No. 28.
[139] See for instance China's opening statement at the second Panel meeting, para. 17.
[140] See for instance China's response to Panel questions Nos. 27.a and 27.b.
[141] China's second written submission, para. 34.
[142] China points to the proceedings in the *China – Broiler Products* dispute. See China's response to Panel questions Nos. 27.a and 27.b.
[143] See for instance China's response to Panel question No. 6.a.
[144] China's response to Panel question No. 5.

disclosures to the US respondents contained the essential facts, as China never argued before the Panel that the substance of those final disclosures satisfied Article 6.9. In China's view, the burden of proof never shifted so as to require it to make such a substantive argument.[145]

7.3.4 Arguments of the third parties

7.65. The **European Union** contends that the actual data and calculations used to establish dumping margins constitute "essential facts" within the meaning of Article 6.9 of the Anti-Dumping Agreement. The European Union observes that such data and calculations are both material to an IA's final decision and form an important component of any final determination.[146] Further, the European Union submits that without access to such data, affected exporters cannot check an IA's methodology and calculations for errors. The European Union adds in this regard that even seemingly small errors can lead to serious distortions of dumping margins.[147]

7.66. **Japan** argues that the Article 6.9 disclosure obligation applies to facts "related to" the existence of the dumping margin, and includes transaction-specific price and adjustment data developed and used by an IA to establish a dumping margin.[148] In this regard, Japan notes that disclosure of the finally-calculated normal value and export price would be insufficient to allow an interested party a fair opportunity to prepare and present their defence.[149]

7.67. **Saudi Arabia** observes that "essential facts", which may vary according to the factual circumstances of a dispute, must in all cases include facts relating to the requisite elements for the imposition of definitive measures, which necessarily include facts relating to the existence of dumping, injury and causation.[150] Saudi Arabia submits in this regard that essential facts should encompass not only the facts that support the final decision reached by the IA but also the facts necessary to ascertain "the process of analysis and decision-making" by an IA in reaching that decision.[151]

7.68. **Turkey** submits that the actual data and calculations used to establish dumping margins, in addition to those facts related to injury to the domestic industry and the causal link between subject imports and such injury, constitute "essential facts" within the meaning of Article 6.9 of the Anti-Dumping Agreement.[152] Turkey notes that the Article 6.9 disclosure obligation, which in most cases will include company-specific confidential information, should only be made to the company whose confidential data forms the subject of the disclosure.[153]

7.3.5 Evaluation by the Panel

7.69. The question before us is whether MOFCOM disclosed "essential facts" within the meaning of Article 6.9 of the Anti-Dumping Agreement to the US respondents in the AD investigation at issue. Article 6.9 does not require the disclosure of the IA's reasoning; nor does it require the disclosure of all facts, but rather of "essential" facts.[154] In resolving this issue, we will thus have to consider the meaning of the term "essential facts".

7.70. Article 6.9 requires an IA to notify interested parties, before a final determination is made, of the essential facts under consideration which form the basis for the decision whether to apply definitive measures. Article 6.9 is silent on the form that such a disclosure should take, but makes clear that this disclosure must occur before the IA issues its final determination.[155] In the investigation at issue, MOFCOM issued letters to US respondent companies and to the US government which China contends disclosed the essential facts. There is no dispute that those letters were provided prior to the final determination. Thus, the only question before us is the

[145] See for instance China's comments on the US response to Panel question No. 28.
[146] EU third party submission, para. 5.
[147] EU third party submission, para. 6.
[148] Japan's third party submission, para. 11.
[149] Japan's third party submission, para. 13.
[150] Saudi Arabia's third party submission, para. 11.
[151] Saudi Arabia's third party submission, para. 12.
[152] Turkey's third party submission, paras. 26-28.
[153] Turkey's third party submission, para. 29.
[154] Panel Report, *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*, para. 7.148.
[155] Panel Report, *EC – Salmon (Norway)*, para. 7.797.

adequacy of the disclosure, that is, whether the contents of those letters set out the relevant "essential facts".

7.71. In addressing this question, we recall that prior panels have found that the term "essential facts" within the meaning of Article 6.9 refers to the body of facts essential to the determinations that must be made by the IA before it can decide whether to apply definitive measures. In order to apply definitive measures at the conclusion of AD investigations, an IA must find three key elements: (i) dumping; (ii) injury; and (iii) a causal link. Therefore, the "essential facts" underlying the findings and conclusions relating to these elements form the basis for the decision to apply definitive measures, and must be disclosed.[156] We also note that the panel in *EC – Salmon (Norway)* stated that the "essential facts" are the:

> body of facts essential to the determinations that must be made by the IA before it can decide whether to apply definitive measures. That is, they are the facts necessary to the process of analysis and decision-making by the IA, not only those that support the decision ultimately reached.[157]

7.72. What constitutes essential facts must therefore be understood in light of the content of the findings needed to satisfy the substantive obligations with respect to the application of definitive measures under the Anti-Dumping Agreement, as well as the factual circumstances of each case. In the context of assessing what data constitutes essential facts for the purposes of a dumping determination, we recall the views of the panel in *China – Broiler Products*, which concluded that such data must relate to the elements set forth in Article 2 of the Anti-Dumping Agreement, including the determination of normal value and export price, the determination of constructed normal value and constructed export price, if relevant, and the fair comparison between these normal values and export prices.[158] The panel in *China – Broiler Products* further concluded that the formula used by MOFCOM to calculate dumping margins calculations, as distinct from any internal work product of the IA containing dumping margin calculations or mathematical determinations, constitutes an essential fact within the meaning of Article 6.9.[159]

7.73. We agree with these views. Like the panel in *China – Broiler Products*, we consider that knowing the formula that an IA applied in dumping calculations is as important to a foreign exporter as knowing the domestic and export sales transactions that were taken into consideration in that calculation.[160] In our view, a foreign exporter would be left at least partly in the dark in terms of how dumping margins were calculated by an IA without knowing the particular formula employed in the calculation. In this regard, we see a formula, which in our view is a fact within the meaning of Article 6.9, as being different from the application of such a formula in a given investigation, which represents an aspect of the IA's reasoning. We will therefore evaluate the US claim on the basis of this distinction.

7.74. The United States asserts that essential facts were not disclosed to the US respondents in the AD investigation underlying this dispute. In this regard, we note that there seems to be no dispute between the parties that MOFCOM actually sent final disclosures to the US respondents.[161] Rather, the issue before us is whether these disclosures conformed to the substantive requirements of Article 6.9 of the Anti-Dumping Agreement. The United States contends that they did not, and are therefore inconsistent with Article 6.9, whereas China maintains that the United States has not made a *prima facie* case of a violation of Article 6.9.

7.75. It is important to note that we have not been provided with copies of the final disclosures sent to the US respondent companies in this dispute. Those letters are presumably in China's

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[156] Panel Reports, *Mexico – Olive Oil*, para. 7.110; *China – GOES*, para. 7.652; *China – Broiler Products*, para. 7.86.

[157] Panel Report, *EC – Salmon (Norway)*, para. 7.807.

[158] Panel Report, *China – Broiler Products*, para. 7.89.

[159] Panel Report, *China – Broiler Products*, paras. 7.91–7.92 (distinguishing from Panel Report, *China – X-Ray Equipment*, para. 7.420).

[160] Panel Report, *China – Broiler Products*, para. 7.91.

[161] Evidence submitted by both parties corroborates this. See Comments of Mercedes-Benz on the U.S. Portion of the Final Disclosure in Imported Auto AD and CVD Investigations, Exhibit USA-21. p. 3; and final determination, Exhibit CHN-07, pp. 28-30. China indicated in its response to Panel questions that MOFCOM sent final disclosures to GM USA, Chrysler USA, Mercedes-Benz USA, BMW USA, Honda USA, and Ford USA. See China's response to Panel question No. 6.

possession, as they were prepared by MOFCOM in the course of the AD investigation. However, China, despite having been requested to do so by the Panel, declined to submit them in evidence, resting on its view that the burden of proof lies with the United States, and has not been satisfied in this regard, and that the United States has therefore failed to make a *prima facie* case in support of its claim and there is nothing for China to rebut.

7.76. We recall that 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. It is thus clear that the United States, as complainant, bears the burden of demonstrating the violations it alleges, both legally and as a matter of fact.[162] However, we also recall that it is generally for each party asserting a fact to provide proof thereof.[163]

7.77. Certainly, submission of the final disclosures sent to the US respondent companies by the United States would have allowed us to review those letters to determine whether the United States had discharged its burden of proof in this regard. However, the United States asserts that it does not have copies of these disclosures in its possession, an assertion which is undisputed by China. The United States submits that this follows naturally from the normal course of an AD investigation, in which an IA sends final disclosures (which may contain confidential information) directly to each respondent company concerned. Indeed, based on our understanding of events, this is what MOFCOM did in this case.[164] In these circumstances, we accept that the United States cannot produce copies of MOFCOM's final disclosures to the US respondent companies for our review in this dispute.[165] The United States submitted the final disclosure which was sent to the US government as a party to the investigation. We do not believe that the United States is precluded from making a claim in this regard. The United States appears to have based its claim on the contents of the disclosure letters sent to the US government, and its understanding of the contents of the disclosure letters to the US respondent companies, which are not in its possession. Thus, in our view, the United States has made a claim based on an assertion of law and fact with respect to the contents of the disclosure letters which is supported by facts, and which, in our view, China must rebut in order to prevail.[166]

7.78. In response to the US claim, China relies on its view that the United States failed to make a *prima facie* case, and therefore there is nothing for China to rebut. China's sole affirmative assertion with respect to this claim is that MOFCOM did in fact send final disclosures to the US respondents as required under Article 6.9. In support of this, China points to the statement in the final determination that:

> MOFCOM, the investigating authority disclosed and explained essential facts to American Government and all respondents on the basis of which MOFCOM calculate

[162] See para. 7.6 of this Report.

[163] Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14.

[164] That the United States has previously submitted copies of final disclosures before other panels is, in our view, immaterial to whether the US failure to submit the disclosures at issue in these proceedings is justified or reasonable.

[165] That the United States was able to obtain these disclosure documents from private companies in prior panel proceedings cannot somehow bind the United States to do so in future disputes. We consider that the ability of the United States to obtain copies of these documents is contingent on companies agreeing to disclose these documents to it.

[166] We note that, addressing the intersection between the parties' burden of proof and their duty to collaborate, the panel in *Argentina – Textiles and Apparel* stated that "[a]nother incidental rule to the burden of proof is the requirement for collaboration of the parties in the presentation of the facts and evidence to the panel and especially the role of the respondent in that process". In this context, the panel continued, "the most important result of the rule of collaboration appears to be that the adversary is obligated to provide the tribunal with relevant documents which are in its sole possession". However, in the view of the panel, "[t]his obligation does not arise until the claimant has done its best to secure evidence and has actually produced some prima facie evidence in support of its case". Panel Report, *Argentina –Textiles and Apparel*, para. 6.40. Finally, in accepting evidence submitted by one party in the form of copies rather than the originals, which were not in its possession, the panel observed that "[b]efore an international tribunal, parties do have a duty to collaborate in doing their best to submit to the adjudicatory body all the evidence in their possession." Ibid., para. 6.58. In the circumstances of these proceedings, we see no reason to conclude that the United States has done less than its best in order to provide the Panel with the evidence needed to assess the conformity with Article 6.9 of the Anti-Dumping Agreement of the company-specific disclosure letters sent by MOFCOM to US respondents.

> [*sic.*] dumping margins of all companies before the final determination of this case, as well as provided opportunities of comments and opinions to all interested parties.[167]

While this statement factually shows that company-specific disclosure letters were sent to the US respondents, it does not shed light on the issue before us, namely whether or not such disclosures were substantively consistent with the requirements of Article 6.9. In any event, we note that China has not attempted to demonstrate to the Panel the substantive consistency of such disclosure letters with the requirements of Article 6.9 on the basis that the burden has not shifted to it to do so.

7.79. The United States submitted a letter from Mercedes-Benz USA to MOFCOM dated 28 April 2011 into evidence at the second Panel meeting, which the United States characterises as rebuttal evidence to China's assertion that MOFCOM's final disclosures to the US respondents contained the essential facts within the meaning of Article 6.9. China contends that, the United States having failed to make a *prima facie* case of violation, the burden of making a substantive showing that MOFCOM's final disclosures contained essential facts within the meaning of Article 6.9 never fell upon China. Therefore, in China's view, the Mercedes-Benz USA letter cannot be characterized as rebuttal evidence, and may not be taken into consideration by the Panel. We thus must resolve whether to accept this letter as evidence.

7.80. Having reviewed the parties' arguments, we consider it appropriate to accept the Mercedes-Benz USA letter. While we acknowledge that China did not affirmatively argue that the substance of MOFCOM's final disclosures to the US respondents satisfied the requirements of Article 6.9, which leaves in some question whether the letter may be characterized formally as rebuttal evidence, we nevertheless consider the letter to be relevant to the issues before us, and therefore should be considered, provided that doing so does not infringe on China's due process rights in this dispute.

7.81. We note that nothing in the DSU or our working procedures precludes us from accepting evidence after the first Panel meeting.[168] The DSU does not address the timing of submission of evidence.[169] Nor do our working procedures, which do address the timing of submission of evidence by the parties, establish inflexible barriers to our ability to accept evidence, even if such evidence is not submitted in compliance with the procedures.[170] While our working procedures are to be respected, the principal goal of those procedures is to enable us to resolve the dispute presented to us on the basis of an objective evaluation of relevant evidence, while respecting the due process rights of the parties involved. Thus, the particular circumstances must be considered in deciding whether we will consider evidence which is not submitted in conformity with the normal timeline provided for in our working procedures. Indeed, this is clear in the working procedures themselves, which provide that, while factual evidence should be submitted no later than during the first meeting, exceptions shall be granted upon a showing of good cause, in which case the other party must be given an opportunity for comment. This is, in our view, the situation here.

7.82. While the Mercedes-Benz USA letter was not submitted prior to, or even at, the first meeting with the Panel, we recall that we made several efforts between the first and second Panel meetings to obtain from the parties copies of MOFCOM's final disclosures to the US respondents. The United States could not provide them, as it did not possess copies of these disclosures[171], and China declined to do so. While this letter was submitted at our second meeting, later than provided for in our working procedures, this was the first opportunity after it became clear that the most relevant evidence, the final disclosures themselves, would not be produced. Indeed, it seems to us that the letter, which is less probative than the final disclosures would have been with respect to the issue of the consistency of the final disclosures with Article 6.9, might not have been submitted into evidence at all, but for China's refusal to submit the final disclosures to us in the course of these proceedings.

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[167] Final determination, Exhibit CHN-07, p. 30.

[168] Panel Report, *Thailand – Cigarettes (Philippines)*, para. 6.125 (upheld by Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 161).

[169] Appellate Body Report, *Argentina – Textiles and Apparel*, para. 79.

[170] Appellate Body Report, *Argentina – Textiles and Apparel*, para. 80.

[171] US opening statement at the second Panel meeting, para. 17.

7.83. Following the US submission of the Mercedes Benz USA letter, we specifically afforded China the opportunity, after the second Panel meeting, to submit copies of MOFCOM's final disclosures to the US respondents into evidence. This would have enabled China to rebut the letter from Mercedes-Benz USA to MOFCOM. China declined to do so, maintaining its position that it was for the United States as complainant to adduce this evidence. We do not consider it would be appropriate for us to make a decision on the basis that the United States did not produce evidence that was not in its possession. China recognizes the Panel's right under Article 13 of the DSU to seek information from any individual or body which it deems appropriate. However, citing the Appellate Body report in *Japan – Agricultural Products II*, China argues that the Panel should not use this right so as to rule in favour of the United States, which China argues has failed to make a *prima facie* case.[172] In our view, China's objection is misplaced. We note that the letter at issue was not submitted by the United States in response to a request by the Panel under Article 13 of the DSU. Rather, the United States submitted this letter at its own initiative. Having accepted this letter into evidence, the Panel of course used it in its assessment of the US claim. Finally, China clearly had an adequate opportunity to comment on the substance of this letter, and the US arguments concerning it. Indeed, China made detailed arguments in this regard in its responses to Panel questions and its comments on the US responses to Panel questions following the second Panel meeting.[173] Thus, it is clear to us that China's due process rights have not been adversely affected by our consideration of the letter in resolving this claim.[174] Before turning to a substantive assessment of the Mercedes-Benz USA letter, we would underline that our decision to accept this letter into evidence is based solely on the circumstances presented in this dispute. There may well be other cases where circumstances are different and accepting evidence submitted during a panel's second meeting with the parties would not be appropriate.

7.84. Having accepted the Mercedes-Benz USA letter into evidence, we note that this letter shows that Mercedes-Benz USA objected to the substance of the final disclosure to it, maintaining that it was insufficient. The letter states in relevant part:

> [f]inally, [Mercedes-Benz USA] reiterates MOFCOM did not provide sufficient information in the final disclosure. [Mercedes-Benz USA] cannot fully understand the related measures and methodology MOFCOM adopted in the final disclosure. Regarding the sufficiency of the information disclosure, MOFCOM says:
>
> *"The investigating authority determines that the investigating authority has already fully disclosed all the facts including data, source of data and detailed calculation in the disclosure after the preliminary determination. The investigating authority does not accept this position".*
>
> However, the actual situation was not as described above. The insufficiency of the information disclosure appeared most obvious in the adjustment MOFCOM made to the indirect sales costs and profits in the calculation of China export price. This is the most important adjustment to the data [Mercedes-Benz USA] submitted, a key factor leading to the dumping margin. MOFCOM failed to explain in detail how it generated the margins in the final disclosure and did not provide the calculation steps, detailed descriptions, formulas and program language, nor did MOFCOM describe the relevant calculation process in the final disclosure. Though [Mercedes-Benz USA] made great efforts, MOFCOM still has not taken into account the data it provided or put forward a detailed explanation of the information relevant to the margin calculation. Therefore, MOFCOM did not provide meaningful disclosure to this most important adjustment item.[175] (original emphasis)

This clearly shows that Mercedes-Benz USA was of the view that MOFCOM's final disclosure of essential facts with respect to it was inadequate, and objected to the final disclosure on that basis, which objection MOFCOM dismissed. While this does not demonstrate, in itself, that the disclosure

[172] China's response to Panel questions Nos. 27.a and 27.

[173] China's response to Panel question No. 28.

[174] We note that the Appellate Body in *Thailand – Cigarettes (Philippines)* found that the submission by a complainant of evidence appended to its comments on the respondent's responses did not *a priori* compromise that respondent's due process rights. See Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 161.

[175] Comments of Mercedes-Benz on the U.S. Portion of the Final Disclosure in Imported Auto AD and CVD Investigations, Exhibit USA-21, p. 3.

was inconsistent with the requirements of Article 6.9, it does lend support to the US claim, and is unrebutted by any evidence put forward by China.

7.85. On the basis of the above, we find that the United States has made a *prima facie* case that MOFCOM failed to disclose the essential facts to the US respondents. China has made no argument and provided no evidence, other than the reference to the final determination, that would suggest that MOFCOM's disclosures to the US respondents were, in fact, consistent with the requirements of Article 6.9. In light of this, and in addition, taking account of the Mercedes-Benz USA letter, we therefore conclude that China has failed to rebut the US *prima facie* case. Accordingly, we find that the United States has shown that China acted inconsistently with Article 6.9.[176]

7.3.6 Conclusion

7.86. For the reasons set forth above, we find that China acted inconsistently with Article 6.9 of the Anti-Dumping Agreement, in that MOFCOM failed to disclose essential facts to US respondents prior to making its final determination in the AD investigation at issue.

7.4 Determination of "residual" AD and CVD rates

7.4.1 Factual background

7.87. MOFCOM initiated the AD and CVD investigations at issue on 6 November 2009. It published AD[177] and CVD[178] notices of initiation, posted them, together with the relevant registration forms, on its website[179] and transmitted them to the US Embassy in Beijing.[180] In the notices, MOFCOM provided basic information concerning the investigations, indicated that any interested party – including any US exporters – that wished to participate in the investigations was required to register with MOFCOM by 26 November 2009, and stated that failure to participate and provide the information requested by MOFCOM could result in a determination based on facts available.[181] The notices of initiation asked foreign exporters to provide information on the volume and value of their exports of the subject product to China during the POI.[182] The registration forms[183], attached to the notices, also asked foreign exporters to provide contact information for their companies, and information on the volume and value of their sales of automobiles exported to China during the POI.

7.88. MOFCOM received AD and CVD registration forms from seven US exporters (three of which were named in the petition): General Motors USA, Chrysler USA, Mercedes-Benz USA, BMW USA, Honda USA, Mitsubishi and Ford USA. MOFCOM sent AD and CVD questionnaires to these seven respondents on 9 December 2009.[184] One of the seven, Mitsubishi, withdrew from MOFCOM's investigations on 28 December 2009.[185] The remaining respondents submitted their responses to the questionnaires on 15 and 29 January 2010.[186]

7.89. In its preliminary AD determination, MOFCOM determined the following individual dumping margins for five of the six remaining respondents: General Motors USA, 9.9%; Chrysler USA, 8.8%; Mercedes-Benz, 2.7%; BMW USA, 2.0%; and Honda USA, 4.4%.[187] MOFCOM also

[176] Our conclusion is not based on inferences drawn from the positions purportedly taken by China, or from the actions of the United States in other disputes relating to the non-disclosure of certain data and calculations underlying dumping margins, which we consider immaterial to our resolution of this claim. Rather, our conclusion is based on the facts and evidence that have been put before us by the parties in this dispute, the requirements of Article 6.9 of the Anti-Dumping Agreement, and the application of general principles regarding the allocation of the burden of proof in WTO dispute settlement.

[177] AD notice of initiation, Exhibit USA-06.

[178] CVD notice of initiation, Exhibit USA-07.

[179] See AD notice of initiation, Exhibit USA-06, p.2; CVD notice of initiation, Exhibit USA-07, p. 4.

[180] Final determination, Exhibit CHN-07, p. 5.

[181] See AD notice of initiation, Exhibit USA-06, p.3; and CVD notice of initiation, Exhibit USA-07, p. 4.

[182] AD notice of initiation, Exhibit USA-06, p. 2; CVD notice of initiation, Exhibit USA-07, p. 4.

[183] See AD registration form, Exhibit CHN-09; CVD registration form, Exhibit CHN-10.

[184] Final determination, Exhibit CHN-07, pp. 7-12.

[185] See Mitsubishi withdrawal letter (AD), Exhibit CHN-03; Mitsubishi withdrawal letter (CVD), Exhibit CHN-04.

[186] Final determination, Exhibit CHN-07, p. 9.

[187] Preliminary determination, Exhibit CHN-05, p. 60. MOFCOM did not determine an individual dumping margin for Ford USA.

determined the following subsidy rates for these respondents: General Motors USA, 12.9%; Chrysler USA, 6.2%; Mercedes-Benz USA, 0%; BMW USA, 0%; Honda USA, 0%, and Ford USA, 0%.[188]

7.90. MOFCOM preliminarily determined a dumping margin of 21.5% for "all other" US companies, which had not registered with MOFCOM in the AD investigation (and as a consequence, had not filed a questionnaire response).[189] The preliminary determination states that:

> [w]ith regard to all other American companies, in accordance with Article 21 of *Anti-dumping Regulation*, the investigating authority decides to adopt the facts already known and the best information available, and applies the dumping margin claimed in the petition to them.[190]

MOFCOM preliminarily determined a subsidy rate of 12.9% for "all other" US companies, which had not registered with MOFCOM in the CVD investigation (and as a consequence, had not filed a questionnaire response).[191] The preliminary determination states that:

> [r]egarding all other companies, in accordance with Article 21 of Countervailing Regulation, the investigating authority decides to adopt facts available, and applied the ad valorem subsidy rate of General Motors to them.[192]

7.91. In the final disclosure sent to the US government, MOFCOM redacted the respondent-specific dumping margins and subsidy rates, and listed only the dumping margin and subsidy rate for "all others".[193] These remained unchanged from the preliminary determination.

7.92. In the final determination, MOFCOM determined lower dumping margins for two companies: General Motors USA 8.9%; and Honda USA, 4.1%. MOFCOM made no changes to the individual dumping margins or the individual subsidy rates determined for the other remaining respondents.[194] The dumping margins and subsidy rates determined for individual companies are not at issue in this dispute. The "all others" dumping margin and subsidy rate were also unchanged in MOFCOM's final determination.[195]

7.93. MOFCOM, noting arguments by the US government with respect to the application of facts available to determine the "all others" dumping margin and the use of such facts to determine the dumping margin for Ford USA, stated the following in its final determination:

> [a]fter the preliminary determination, the U.S. Government claimed in its comments that, the investigating authority adopted adverse data to determine the dumping margin of other American companies in the preliminary determination without providing the reasons, and did not explain how the exporters did not cooperate in this investigation. The U.S. Government requested the investigating authority to apply weighted average duty rates to the companies which were not uncooperative clearly in this investigation.
>
> In this regard, the investigating authority finds that: before and after the initiation, the investigating authority had informed all exporters or producers listed in the petition, and also required the U.S. Government to inform all exporters or producers. The public notice of initiation can also be obtained on the website of MOFCOM. After the initiation, the investigating authority set the procedures of registration for participating in the investigation; meanwhile, the investigating authority also issued the investigation questionnaire to the companies filing for participating in this investigation. Besides, the investigation questionnaire can also be obtained by public

[188] Preliminary determination, Exhibit CHN-05, p. 88.
[189] Preliminary determination, Exhibit CHN-05, p. 60.
[190] Preliminary determination, Exhibit CHN-05, p. 59.
[191] Preliminary determination, Exhibit CHN-05, p. 88.
[192] Preliminary determination, Exhibit CHN-05, p. 88.
[193] Final disclosure (AD/CVD), Exhibit USA-11, pp. 25, 41.
[194] Since MOFCOM did not calculate an individual dumping margin for Ford USA, this company's exports to China were subjected to the residual duty rate of 21.5%. This, however, is not at issue in this dispute.
[195] Final determination, Exhibit CHN-07, pp. 86, 127.

> on the website of MOFCOM. The investigating authority holds that within the best of its abilities, all exporters have obtained the opportunities to cooperate in the investigation through the aforesaid procedures; any exporter willing to cooperate in the investigation should have made the proper response. As to any exporter who did not make clear response, the investigating authority may certainly and reasonably believe that it did not have the intention of cooperation, and determined the dumping margin in accordance with the best information available rather than the adverse information. Therefore, the investigating authority decides not to accept the claims of the U.S. Government and maintain its finding in the preliminary determination.
>
> After the preliminary determination, Ford Company claimed in its comments that, although it did not export during the POI, the investigating authority shall determine the dumping margin for it due to its cooperation in the investigation. Upon examination, the investigating authority holds that, the dumping margin shall be established based on the comparison between the normal value and the export price, and since Ford Company did not export during the POI, there was no export price for it. Therefore, this claim has no factual and legal basis. The investigating authority does not accept this claim. When complying with conditions, Ford Company may apply to the investigating authority for the new exporter review in order to obtain an individual duty rate.[196]

7.94. MOFCOM, in reaffirming the "all others" subsidy rate in its final determination, noted that the United States submitted comments on that rate, stated that it had responded to those arguments in the dumping determination, and did not repeat that discussion.[197]

7.4.2 Introduction

7.95. The United States challenges the "all others" rates imposed by China in the AD and the CVD investigations at issue in these proceedings under Articles 6.8, 6.9, 12.2, 12.2.2 and paragraph 1 of Annex II of the Anti-Dumping Agreement and Articles 12.7, 12.8, 22.3, and 22.5 of the SCM Agreement. Before addressing the parties' arguments and resolving those claims, we find it useful to clarify the terminology we have used in referring to the duty rates at issue.

7.96. Both parties refer to the duty rates at issue as the "all others" rates. However, we find the term "all others" unclear as used in this context. We note that an IA may determine various duty rates for different exporters or foreign producers in an AD (or CVD) investigation. The general rule under the Anti-Dumping Agreement calls for the determination of an individual duty rate for each known foreign producer or exporter, up to the amount of the dumping margins calculated in accordance with Article 2 of the Agreement for each of them. Some of these dumping margins may be calculated based entirely or in part on facts available, depending on whether or not an individual producer or exporter provided the information required to calculate an individual dumping margin for it in the investigation. In addition, an IA may limit the number of individually calculated dumping margins in certain circumstances, pursuant to Article 6.10 of the Anti-Dumping Agreement. In these cases, the IA may nonetheless apply an AD duty to the remaining known foreign producers or exporters, which it did not individually examine ("unexamined exporters"). The rate that may be applied is limited by the cap calculated pursuant to Article 9.4 of the Anti-Dumping Agreement. This rate is commonly referred to as an "all others" rate, as it applies to "all other" producers known to the IA, but which were not individually examined.

7.97. However, an IA may also wish to determine an AD duty rate which could be applied to exporters or foreign producers that either were not known to the IA (for whatever reason) or did not exist at the time of the investigation, in the event that such enterprises commence exporting the product subject to the investigation to the investigating country at a later date while a measure is in force. It is such a duty rate that is at issue in this dispute. In these proceedings, and in several previous disputes in which similar duty rates were considered, parties have used the term "all others" rate to refer to the rates applicable to companies that either were not known to the IA (for whatever reason) or did not exist at the time of the investigation. We find the use of

[196] Final determination, Exhibit CHN-07, pp. 83-85. We note that the final determination repeats similar language contained in the final disclosure sent to the US government. See final disclosure (AD/CVD), Exhibit USA-11, p. 24.

[197] Final determination, Exhibit CHN-07, p. 126.

the same term to refer to AD duty rates applied to groups of exporters or foreign producers in two distinct and separate situations to be potentially confusing. Therefore, in order to avoid such confusion, we consider it more appropriate to refer to the rate applied in situations under Articles 6.10 and 9.4 as a "limited examination" rate and to refer to the rate applied to exporters that either were not known to the IA (for whatever reason) or did not exist at the time of the investigation, which is the situation in this dispute, as a "residual duty" rate. There is no equivalent to Articles 6.10 and 9.4 of the Anti-Dumping Agreement in the SCM Agreement, so it is not clear whether or how a "limited examination rate" would apply in a CVD context. However, the possibility of a residual duty rate is equally likely to arise in a CVD investigation, as it did in these investigations. Thus, for the sake of clarity and consistency, we will also use the term "residual duty" rate in respect of the CVD rate at issue in this dispute.

7.98. We also find it useful to underline at the outset that the US claims regarding the residual AD and CVD rates at issue do not concern the permissibility in general of imposing residual duties with respect to exporters that either were not known to the IA (for whatever reason) or did not exist at the time of the investigation. The United States makes no claim or argument suggesting that residual duties are in general not allowed under the Agreements.[198] Rather, its claims concern the way in which MOFCOM determined the residual AD and CVD rates applied in the investigations at issue.

7.99. We agree with the general understanding of the parties that residual duty rates are permitted in AD and CVD cases. In our view, Article 9.5 of the Anti-Dumping Agreement and Article 19.3 of the SCM Agreement, which require that IAs undertake a review for the purpose of determining individual margins of dumping or subsidy rates for any exporters or foreign producers in the exporting country in question that did not export the subject product to the investigating country during the POI, strongly support the conclusion that residual duties are generally allowed under both Agreements. While no duties may be levied until such reviews are carried out, these provisions allow the authorities in the investigating country to request guarantees to ensure that, if the review results in a determination of dumping or subsidization with respect to the new exporter, duties can be levied retroactively to the date of initiation of the review. In the absence of residual duties, the importing country would have no basis on which to establish a level for such guarantees, and thus, the provisions of the Agreements in this regard would be *inutile*.

7.100. We also consider that residual duties serve an important policy objective, namely, ensuring the effectiveness of anti-dumping and countervailing measures which the WTO rules allow its Members to impose provided they determine through the appropriate investigative process that the conditions set forth in the Anti-Dumping or the SCM Agreements are satisfied. We note that imposing residual duties may allow an IA to preclude the circumvention of AD and CVD rates imposed following an investigation. This is because, in the absence of residual duties, exporters that refrained from making themselves known to the IA during an investigation, as well as those that started exporting the subject product to the investigating country following the imposition of duties, could access the market of that country free of AD or CVD duties, thus undermining their effectiveness. Moreover, existing exporters may consider that there is no incentive for them to try to cooperate with the investigating authorities of the importing country, if residual duties were not permitted under the Agreements. Obviously, such a result would frustrate the objective of anti-dumping and countervailing measures, to offset the injurious effects of dumped and subsidized imports on the domestic industry in the importing country.

7.4.3 Determination of the residual AD duty rate: Alleged violations of Articles 6.8, 6.9, 12.2 and 12.2.2 and Paragraph 1 of Annex II of the Anti-Dumping Agreement

7.4.3.1 Provisions at issue

7.101. Article 6.8 of the Anti-Dumping Agreement provides:

[198] See for instance US opening statement at the second Panel meeting, para. 22:
China cannot brush off its responsibility to comply with the covered agreements. The United States agrees that investigating authorities may exercise discretion in calculating all others rates for unknown exporters, but as stated by the *China – GOES* panel, "this discretion should not extend to acting inconsistently with the express terms of" the covered agreements." (footnote omitted)

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

7.102. Paragraph 1 of Annex II to the Anti-Dumping Agreement reads:

> [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, 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.

7.103. Article 6.9 of the Anti-Dumping Agreement requires the disclosure of "the essential facts under consideration". Its text is set out in preceding sections of this Report.[199]

7.104. Article 12.2 of the Anti-Dumping Agreement requires public notice of "the findings and conclusions reached on all issues of fact and law considered material" in an AD investigation as follows:

> [p]ublic notice shall be given of any preliminary or final determination, whether affirmative or negative, of any decision to accept an undertaking pursuant to Article 8, of the termination of such an undertaking, and of the termination of a definitive anti-dumping duty. 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. All such notices and reports shall be forwarded to the Member or Members the products of which are subject to such determination or undertaking and to other interested parties known to have an interest therein.

The obligation in Article 12.2 in relation to a final determination is further elaborated in subparagraph Article 12.2.2, as follows:

> [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.

7.4.3.2 Arguments of the parties

7.4.3.2.1 United States

7.105. The United States argues that MOFCOM erred by determining the residual AD duty rate on the basis of facts available and thereby violated Article 6.8 of the Anti-Dumping Agreement and paragraph 1 of its Annex II. The United States contends that following the initiation of the AD investigation at issue, MOFCOM sent questionnaires only to the exporters that the petitioners had identified in the petition. It did not make a further effort to identify other exporters.[200] The

[199] See para. 7.55 of this Report.

[200] Initially, the United States argued that MOFCOM had sent questionnaires only to the producers identified in the petition and that it had not attempted to identify whether any other US producer of the like product existed. It also argued that, as in the investigation underlying the *China – GOES* dispute, no other US exporters of automobiles existed at the time of the AD investigation at issue here. See for instance US first

United States acknowledges that MOFCOM also notified the US Embassy of the initiation and requested that it notify the relevant US exporters, but argues that any notification steps that MOFCOM may have taken in reaching out to such US exporters are irrelevant because, as a matter of logic, the unknown US exporters were not notified of the information required and cannot be said to have engaged in any of the acts identified in Article 6.8 as justifying the use of facts available. In any event, the United States contends that the notification steps taken by MOFCOM were insufficient to justify the use of facts available.[201] In this regard, the United States submits that posting the notice of initiation on MOFCOM's website does not provide sufficient notice to an exporter unless that exporter actively reviews that website. Second, placing the notice in a public reading room, with no additional targeted communication, is even less likely to give adequate notice. Third, as noted by the Appellate Body in *China – GOES*, an embassy is not obliged to make its exporters aware of an investigation.[202] Whether or not US exporters other than those identified in the petition came forward to participate in the investigation is, in the view of the United States, beside the point because the fact remains that the residual duty rate imposed by MOFCOM did apply to US exporters that did not register or were otherwise unknown to MOFCOM.

7.106. The United States claims that under the Anti-Dumping Agreement, the pre-condition to resort to facts available with respect to an exporter is to give that exporter an opportunity to provide the information required of it. Use of facts available can only be justified if the exporter then engages in any of the behaviours set out in Article 6.8 of the Anti-Dumping Agreement, namely refusing access to or otherwise not providing information that is necessary to the investigation, or otherwise significantly impeding the investigation. In this investigation, no US exporter was found to have engaged in any of these acts. In fact, the US exporters to which the contested residual rate applied were non-existent. Hence, it was logically impossible to inform a non-existent exporter of the information required by the IA and for that exporter to then fail to cooperate with the IA. Therefore, argues the United States, MOFCOM's use of facts available in the determination of the residual AD duty rate was inconsistent with the Anti-Dumping Agreement. In respect of this claim, the United States finds the reasoning of the panel in *China – GOES* to be persuasive and requests that this Panel follow the same approach. The US claim under Article 6.8 and paragraph 1 of Annex II of the Anti-Dumping Agreement relates to MOFCOM's use of facts available in the calculation of the contested residual AD duty rate; it does not extend to MOFCOM's choice of facts available.[203]

7.107. Further, the United States argues that in applying facts available in the determination of the contested residual AD duty rate, MOFCOM also violated certain procedural obligations set forth in the Anti-Dumping Agreement. First, the United States contends that MOFCOM violated Article 6.9 of the Anti-Dumping Agreement by failing to disclose the essential facts underlying the determination of the residual AD duty rate. Specifically, the United States submits that MOFCOM failed to disclose essential facts with regard to: (i) whether the US exporters refused access to necessary information or significantly impeded the investigation; (ii) why a 21.5% residual AD duty rate was deemed to be appropriate; and (iii) the facts underpinning and details of the calculation of the 21.5% rate.[204] The United States notes that the MOFCOM's explanation in the final determination was limited to a cursory explanation in one sentence, which also appeared in its preliminary determination and the final disclosure. The lack of sufficient explanation deprived the investigated US exporters of their right to defend their interests.

7.108. Second, the United States asserts that MOFCOM acted inconsistently with Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement because it failed to explain the factual and legal bases of its decision to apply facts available in the determination of the residual AD duty rate. In this regard, the United States refers to the factual and legal bases for MOFCOM's use of facts available

written submission, paras. 63-64. However, it did not pursue these arguments later in the proceedings, and the record of the investigation clearly shows that MOFCOM did attempt to identify other US exporters and that four additional producers registered to participate as a result.

[201] US second written submission, para. 35.

[202] US second written submission, paras. 41-43.

[203] See US response to Panel question No. 32:

> The United States is not asking the Panel to make findings that MOFCOM's selection of "adverse facts available" was inconsistent with Article 6.8 and Annex II of the AD Agreement. See US response to Panel question No. 32.

[204] US first written submission, para. 71.

pursuant to its regulations as relevant information on matters of fact and law and reasons that led to the imposition of final measures within the meaning of Article 12.2.2.[205]

7.4.3.2.2 China

7.109. China acknowledges that MOFCOM determined a residual AD duty rate based on facts available, using in this regard the 21.5% dumping margin alleged in the petition. China notes that the Anti-Dumping Agreement does not prescribe a particular methodology for the determination of the residual rate where the IA calculates individual margins for all foreign exporters subject to an investigation, as it did in this case, and asserts that this "silence" gives IAs discretion in determining residual duty rates. Given this "gap" in the Anti-Dumping Agreement, China considers that Article 6.8 provides a logical basis for the determination of residual duty rates in the situation of this investigation.[206]

7.110. China claims that in the AD investigation at issue, MOFCOM complied with the requirements of Article 6.8 of the Anti-Dumping Agreement and Annex II in using facts available in the determination of the residual AD duty rate. It took all the reasonable steps to identify all exporters of the subject product from the United States. The notice of initiation invited all interested parties to register for participation in the investigation within 20 days of its publication and specified that, in the event of non-cooperation, MOFCOM could make its determinations on the basis of existing materials. The notice was posted on MOFCOM's website and made available in its public reading room. MOFCOM also asked the US government to inform all US exporters of the subject product of the initiation of the investigation. MOFCOM subsequently sent questionnaires to the US exporters identified in the petition, and also to four additional exporters that had registered for participation by the relevant deadline. In China's view, these steps constituted a reasonable and comprehensive notification effort, and consequently, MOFCOM was justified in considering as non-cooperating any US exporters that had failed to register for participation within the 20-day period and applying a residual duty rate determined on the basis of facts available to any exports from such exporters. China argues that the fact that four US exporters in addition to those identified in the petition registered for participation in the investigations at issue underlines the adequacy of MOFCOM's notification efforts.[207]

7.111. China also submits that the logic of applying a residual rate determined on the basis of facts available to non-cooperating foreign exporters is to encourage cooperation in AD investigations. China disagrees with the reasoning of the panel in *China – GOES*, which, China contends, failed to take into account MOFCOM's reasonable approach in the underlying investigation, namely that any exporter not responding to the notice of initiation can be treated as non-cooperating for purposes of Article 6.8 of the Anti-Dumping Agreement. In China's view, contrary to the reasoning of that panel, "an investigating authority should not be required to conduct the futile act of continuing to solicit information from an interested party that has, upon notification of the requirements for participation in an investigation, determined not to cooperate."[208] China is of the view that provided an IA engages in a reasonable and comprehensive notification effort, it can treat as non-cooperating any exporter that fails to participate in the investigation, irrespective of whether such exporter does not exist or exists but has chosen not to make itself known.[209] In this regard, China notes the finding by the panel in *China – Broiler Products* that it would be reasonable for an IA to consider as non-cooperating exporters that fail to make themselves known following the initiation of an investigation and to calculate a residual duty rate on the basis of facts available for such exporters.

7.112. As far as the procedural violations alleged by the United States are concerned, China notes that this case is different from *China – GOES*. Unlike *China – GOES*, where the basis of the determination of the residual rate was unclear, in the AD investigation at issue here it is abundantly clear that the residual duty rate was based on the dumping margin alleged in the petition. Therefore, China contends that MOFCOM's final disclosure contained, as required under Article 6.9 of the Anti-Dumping Agreement, all pertinent facts on which the determination of the residual rate was based. To the extent that the United States argues that the Article 6.9 disclosure

[205] US first written submission, para. 77.
[206] China's first written submission, paras. 100-101.
[207] China's second written submission, para. 44.
[208] China's second written submission, para. 40.
[209] China's second written submission, para. 46.

obligation also applies to the IA's reasoning, China disagrees, asserting that the obligation only applies to facts underlying the decision on the application of definitive measures.

7.113. China also submits that the public notice given by MOFCOM in respect of the residual duty rate complied with the requirements of Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement. China argues that the legal and factual bases for MOFCOM's determination of the contested residual AD duty rate are explained on the record and reflected in MOFCOM's final determination of which public notice was given. Specifically, China states that the final determination explains that, following its notification efforts to US exporters, MOFCOM considered as non-cooperating those producers that failed to register for participation and calculated a residual duty rate for them on the basis of facts available. It also explains that as facts available MOFCOM relied on the dumping margin claimed in the petition. Regarding the notice obligation under Article 12 of the Agreement, China sees an important difference between the facts of the investigation at issue and the investigation subject to the *China – GOES* dispute. Specifically, China asserts that, unlike in the automobiles investigation, in the GOES investigation the basis on which the residual AD duty had been calculated was not clear. Thus, China urges the Panel not to follow the reasoning of the panel in *China – GOES* with regard to this aspect of the US claim.[210]

7.4.3.3 Arguments of the third parties

7.114. With regard to the US claim under Article 6.8 and paragraph 1 of Annex II of the Anti-Dumping Agreement, the **European Union** notes that the United States relies on the Appellate Body report in *Mexico – Anti-Dumping Measures on Rice* and the panel report in *China – GOES*. However, the European Union notes that the panel in *China – GOES* decided the issue on the narrow proposition that the notice of initiation was insufficiently detailed and that it declined to comment on the question of whether notice can ever be given publically. The European Union notes that the United States does not explain how an IA can give notice to producers that exist but are not known and do not make themselves known to the IA.[211] The European Union anticipates that this Panel will follow prior decisions on this matter unless it finds cogent reasons not to do so but notes that this would nevertheless leave the question of what an IA should do in order to ensure public notice of investigations. In this regard, the European Union is of the view that an IA can request the government of the exporting country to identify the exporters of the subject product.

7.115. With respect to the Articles 6.9 and 12.2 aspects of the claim, the European Union agrees with the United States that MOFCOM did not provide an adequate final disclosure or public notice of the final determination, respectively.

7.116. **Japan** notes that the prerequisite to using facts available in an AD investigation is to give the interested party concerned notice of the information requested of it and of the fact that failure to provide that information may lead to a determination based on facts available. Hence, an IA cannot base the dumping margin determination for a foreign exporter on facts available without first putting the exporter on notice of the information requested of it for that determination. Japan is of the view that, as clarified by the panel in *China – GOES*, posting a notice in a public place or on the internet may not necessarily satisfy this notice requirement. This is all the more true with respect to exporters that did not exist during the relevant POI because such exporters cannot possibly refuse to cooperate with the IA.

7.117. **Korea** divides non-investigated foreign exporters in an AD investigation into three categories, namely, (i) those willing to participate in the investigation but which are discouraged from doing so for reasons of impracticability; (ii) those unwilling or having no interest in participating in the investigation, and (iii) those that are either unaware of, or non-existent at the time of, the investigation. Korea contends that exporters in the first category should be subjected to a duty rate calculated pursuant to Article 9.4 of the Anti-Dumping Agreement. Those in the second category may have their margins calculated on the basis of facts available. Margins for exporters in the third category may be calculated based on facts available if the IA made its best efforts in notifying interested parties of the initiation of the investigation. In Korea's view, exporters that did not exist at the time of the investigation may request a new shipper's review under Article 9.5 of the Agreement.

[210] See for instance China's second written submission, para. 56.
[211] EU oral statement, para. 9.

7.118. **Saudi Arabia** underlines that an IA may only have recourse to facts available after notice is given to the relevant interested party of the information required of it and the latter fails to cooperate with the IA. It also submits that where the IA resorts to facts available to make a certain determination, its Article 6.9 disclosure and Article 12.2 public notice should explain, *inter alia*, the facts that lead the IA to resort to facts available. Further, facts available may only be used in order to fill in the gaps in the necessary information requested of the relevant interested party. In filling in such gaps, argues Saudi Arabia, the IA has to use the most fitting or most appropriate facts available. In Saudi Arabia's view, facts available may not be used where the absence of the information is directly attributable to the IA's own failure to request it.

7.119. **Turkey** contends that there is no rule, principle or guidance in the Anti-Dumping Agreement regarding the imposition of a residual duty for exporters that are not identified by the complainant or the IA, and which did not cooperate during the investigation. In Turkey's view, there is a *lacuna* in the Anti-Dumping Agreement in this regard and the *lacuna* should be addressed in a way that would observe due process rights of foreign exporters while having regard to the ultimate objective of trade remedies to protect domestic industries against unfair trade practices. Turkey notes that the WTO jurisprudence limits an IA's discretion in resorting to facts available in the determination of dumping margins for unknown exporters and contends that this has the potential to seriously undermine the effectiveness of AD and CVD measures. Turkey underlines that the issue before this Panel is whether facts available may be used in the determination of a residual AD duty rate, not the more fundamental question of whether the imposition of such a rate is generally permitted under the Agreement. Nonetheless, Turkey points out that it considers the imposition of a residual AD duty rate essential for several reasons. First, the absence of such a rate will undermine the effectiveness of AD measures. Second, without a residual duty rate, exporters for which no individual duty has been imposed will continue to ship the subject product to the importing country by taking advantage of the extra costs borne by cooperating exporters. Third, non-imposition of a residual duty rate would render *inutile* the provision of Article 9.5 of the Agreement regarding new shipper's reviews.

7.4.3.4 Evaluation by the Panel

7.120. The US claim before us has two aspects, namely a) the substantive aspect, under Article 6.8 and paragraph 1 of Annex II of the Anti-Dumping Agreement, concerning the use of facts available in the determination of the residual AD duty at issue, and b) the procedural aspect that alleges violations of Articles 6.9, 12.2 and 12.2.2 of the Anti-Dumping Agreement concerning disclosure and notice obligations in the process that lead to the imposition of the residual duty. We will first evaluate the substantive aspect of the claim, followed by the two procedural aspects.

7.4.3.4.1 Alleged violation of Article 6.8 and Annex II of the Anti-Dumping Agreement

7.121. Article 6.8 of the Anti-Dumping Agreement allows an IA to base its determinations regarding an interested party that refuses access to or otherwise fails to provide necessary information within a reasonable period or significantly impedes the investigation on facts available. It is clear from the text of this provision that unless the IA concludes that an interested party refused access to or otherwise did not provide necessary information within a reasonable period or significantly impeded the investigation, it cannot use facts available in its determinations concerning that party.

7.122. Paragraph 1 of Annex II to the Anti-Dumping Agreement establishes two important requirements with regard to the use of facts available. First, it requires that, after initiation, the IA specify *in detail* the information required of an interested party and the manner in which that information is to be structured. Second, it requires that the IA ensure that the interested party is aware of the fact that if the required information is not provided within a reasonable time, the IA may make its determinations on the basis of facts available. This ensures that a party is given the opportunity to submit the specific information required of it before the IA may resort to facts available.[212] The first aspect parallels the requirement set forth in Article 6.1 of the Anti-Dumping

[212] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 259.

Agreement that "[a]ll interested parties in an anti-dumping investigation shall be given notice of the information which the authorities require [. . .]," but is more specific and detailed.[213]

7.123. In our view, read together, these provisions make it clear that an IA cannot use facts available *unless* the interested party at issue has been informed of the specific information requested of it, and of the fact that failure to provide that information may lead to a determination based on facts available. However, there is nothing in the AD Agreement regarding how the IA is to fulfil these requirements. The United States asserts that MOFCOM acted inconsistently with Article 6.8 and paragraph 1 of Annex II by applying facts available in the determination of the residual AD duty rate without first giving unknown US exporters notice of the information required of them and of the fact that failure to provide that information may lead to a determination based on facts available. China, on the other hand, submits that MOFCOM adequately gave the required notice and that therefore MOFCOM was justified in using facts available in the determination of the residual AD duty.

7.124. The parties' disagreement is over whether MOFCOM's reliance on facts available in the determination of the residual duty rate was permissible. The United States argues that MOFCOM acted inconsistently with Article 6.8 and paragraph 1 of Annex II of the Anti-Dumping Agreement by resorting to facts available in the determination of the residual AD duty rate because it did not give the entities to which that rate would apply notice of (1) the information requested and (2) the fact that failure to provide the requested information could lead to a determination based on facts available. China disagrees and contends that given the multi-faceted approach taken by MOFCOM to notify foreign producers and exporters of the investigation and the registration requirement, it was reasonable for MOFCOM to consider as non-cooperative any US exporter that did not come forward and register as an interested party and to determine a residual duty for such exporters on the basis of facts available.

7.125. The facts in this case are undisputed. MOFCOM received an application for the initiation of AD and CVD investigations on 9 September 2009, which was amended on 19 October 2009. The application identified three US exporters of the subject automobiles, General Motors USA, Ford USA and Chrysler USA.[214] MOFCOM initiated the investigations by publishing notices of initiation on 6 November 2009. MOFCOM individually contacted the US exporters identified in the petition of the initiations, posted the notices of initiation on its website, and made them available in its public reading room. In addition, on the same day, MOFCOM sent the notices of initiation and the public version of the petition to the US Embassy in Beijing and requested that the US government provide copies of the notices to any interested parties. The notices of initiation set forth the procedures for registering for participation in the AD and CVD investigations, and indicated that MOFCOM had the right to "refuse to accept relevant materials" of interested parties that failed to register, and could "determine based on the existing materials available." Interested parties had until 26 November 2009 to register to participate in the investigation. The United States does not take issue with China's assertion that MOFCOM made efforts to reach out to all US exporters of the subject product[215], and that as a result of those efforts, four additional US exporters and exporters that were not identified in the application, Mercedes-Benz USA, BMW USA, Honda USA, and Mitsubishi USA, came forward and registered for participation in addition to the three companies, General Motors USA, Ford USA and Chrysler USA, named in the application.[216]

7.126. MOFCOM determined a residual AD duty rate for unknown US exporters on the basis of facts available. The record shows that MOFCOM calculated individual dumping margins for five US exporters and determined a residual AD duty rate for all other US exporters. Concerning the basis for the determination of the residual duty rate, the preliminary determination states that "[w]ith regard to all other American companies, in accordance with Article 21 of *Anti-dumping Regulation*, the investigating authority decides to adopt the facts already known and the best information

[213] We note that this additional requirement, that the IA specify in detail the information that is required before a resort to use of facts available may be justified, seems reasonable, as it helps ensure that a party of whom information is requested can make an informed decision as to its response to that request.

[214] Original petition, Exhibit USA-04, p. 15.

[215] US response to Panel question No. 7. Rather, the United States contends "that the exporters and producers subject to the all-others rates, including those who did not export subject product during the period of investigation, were not notified by MOFCOM of the information required of them. These parties cannot be said to have refused access to or failed to provide necessary information to the investigating authority, or significantly impeded the investigation."

[216] Final determination, Exhibit CHN-07, p. 8. Mitsubishi subsequently withdrew from the proceedings.

available, and applies the dumping margin claimed in the petition to them."[217] The final determination confirms the determination of the residual duty on the same basis.[218] Hence, it is clear, MOFCOM considered the dumping margin alleged in the petition to be facts available, and applied it as the residual AD duty rate for all other US exporters. MOFCOM did not itself make any calculation in determining the residual duty rate.

7.127. In order to resolve this aspect of the US claim, we need to determine whether MOFCOM, in using facts available in the determination of the residual AD duty, complied with the requirements set out in paragraph 1 of Annex II. That is, did MOFCOM specify in detail the information required of the US respondents and inform them that, if information was not supplied within a reasonable time, determinations could be made on the basis of facts available?

7.128. As noted, in this investigation, MOFCOM took steps to notify US respondents of the initiation of the investigation, and requested certain information of them as part of the process of registration. Following its publication, the notice of initiation was posted at MOFCOM's website and made available in its public reading room. Further, MOFCOM forwarded the notice to the US embassy in Beijing and asked that it be conveyed to the producers of the subject product in the United States. The notice of initiation, in a section entitled "Register to Respond" states that:

> [a]ny interested party involved in the anti-dumping investigation can apply to the Bureau of Fair Trade for Imports and Exports, MOFCOM for participating in the responding within twenty days since this Announcement is published. The respondent exporters or manufacturers shall provide the quantity and value of the Subject Product exported to China from September 1, 2008 to August 31, 2009.[219]

The notice then references the Registration Form[220] which requests the same information and, in the subsequent section entitled "Not Register to Respond", states:

> [i]f any interested party fails to register with the Ministry of Commerce for responding within the time stipulated in this Announcement, the Ministry of Commerce shall have the right to refuse to accept relevant materials it submitted, and shall have the right to determine based on the existing materials available.

7.129. The issue is whether the notice of initiation and the registration form sufficed for purposes of Article 6.8 and, in particular, paragraph 1 of Annex II, to specify in detail the information required of the US respondents such that a failure to provide the information requested in such notice could justify resorting to facts available in determining a margin of dumping for unknown exporters. We recall that the Agreement does not provide any guidance for how an IA is to "specify in detail" the information it requires. While sending questionnaires to known foreign producers will generally suffice in this regard, the situation is more complicated in the case of foreign producers that are unknown to the IA, or which do not exist at the time of the investigation, but for whom the IA may wish to determine a residual duty.

7.130. In our view, a residual duty rate may be determined on the basis of facts available if the record of the investigation shows that the IA took all reasonable steps that might be expected from an objective and unbiased IA to specify in detail the information requested from unknown producers.[221] We do not preclude that such specification may be made through a public notification.[222] Indeed, it seems to us that, public notice may be one of the ways, if not the only

[217] Preliminary determination, Exhibit CHN-05, p. 59.
[218] Final determination, Exhibit CHN-07, p. 83.
[219] AD notice of initiation, Exhibit USA-06, p. 2.
[220] AD registration form, Exhibit CHN-09.
[221] We note that although this case revolves around the question of the use of facts available to determine a residual duty rate, the Anti-Dumping Agreement does not set out any guidance for the determination of the amount or level of such duty, although as discussed above, we consider it clear that such a duty is permitted. There may be other ways to determine a residual duty rate. In our view, however, the IA must not act inconsistently with a relevant provision of the Anti-Dumping Agreement in making that determination.
[222] In this regard, we note that, in addressing a claim that was almost identical to the claim before us both factually and in terms of its legal basis, the panel in *China – GOES* refrained from discussing whether notice of the information required could be given publicly. Panel Report, *China – GOES*, para. 7.386.

way, in which an IA could specify to exporters unknown to it the information required of them, as well as inform them of the fact that if the information is not provided, determinations may be made on the basis of facts available.

7.131. It is undisputed that, following its publication, MOFCOM posted the notice of initiation on its website and placed it in its public reading room and sent the notice to the US embassy in Beijing to be forwarded to the US exporters of the subject product. In our view, the fact that four additional producers that were not identified in the application, Mercedes-Benz USA, BMW USA, Honda USA, and Mitsubishi USA, came forward and registered to participate in the investigation confirms that public notice can be effective in reaching exporters unknown to the IA. Indeed, we do not understand the United States to argue otherwise, as a general matter.

7.132. The United States cites the panel and Appellate Body reports in *Mexico – Anti-Dumping Measures on Rice* in support of its contention that MOFCOM failed to comply with the requirements of Article 6.8 and paragraph 1 of Annex II. In *Mexico – Anti-Dumping Measures on Rice*, the panel[223] and the Appellate Body[224] concluded that an IA could not resort to facts available in the calculation of a residual duty rate without having given unknown foreign producers notice of the information required and without giving them an opportunity to submit that information. We agree. However, neither the panel nor the Appellate Body in *Mexico – Anti-Dumping Measures on Rice* addressed the question we consider to be the crux of the issue before us – whether the steps taken by MOFCOM to notify unknown US exporters of the initiation of the investigation, and the information requested in that context, was sufficient for us to conclude that MOFCOM specified in detail the information required of foreign exporters who did not participate in the investigation, and thus did not provide the requested information, and therefore that a resort to facts available in determining a residual duty rate for such exporters was warranted pursuant to Article 6.8 and Annex II.

7.133. We consider that MOFCOM took the steps that could reasonably be expected from an IA to contact the unknown exporters. Indeed, the fact that four additional US exporters came forward in response to MOFCOM's effort suggests that the notice of initiation, together with MOFCOM's other efforts to contact US exporters, sufficed to ensure that potentially interested parties were made aware of the investigation and offered an opportunity to participate.[225] However, in our view, this alone is not necessarily sufficient to justify the subsequent use of facts available, as it does not satisfy the obligation set forth in paragraph 1 of Annex II. What matters for purposes of this obligation is that the IA specify in detail to the unknown exporters the information required from them for the determination of the residual AD rate.

7.134. In this regard, we consider that, read in light of the provisions of Annex II, in particular paragraph 1, Article 6.8 of the Anti-Dumping Agreement allows an IA to use facts available in order to be able to make a determination in a situation where information necessary for that determination was requested but was not provided. In our view, it is a matter of due process, and generally required under the Anti-Dumping Agreement, that a determination affecting an interested party should be made on the basis of information relevant to the issue and the party. In the case of dumping margin determinations, this means, preferably, information provided by the party in question. However, where a party does not provide information, the Agreement makes clear that the absence of information should not preclude the IA from making a determination. Thus, Article 6.8 permits the use of facts available in making the necessary determination.

On the other hand, the panel in *China – Broiler Products*, addressing the same issue, concluded that notice of the information required could be given publicly. Panel Report, *China – Broiler Products*, para. 7.303. That panel found that MOFCOM's efforts in that investigation provided adequate notice. However, the panel did not describe or discuss the contents of the notice it found sufficient in this regard. Panel Report, *China – Broiler Products*, paras. 7.300-7.306. As discussed above, in our view, it is critical to the resolution of this issue to consider the notification given to determine what specific information was requested in it, in light of the determination ultimately made on the basis of facts available.

[223] "[I]n case the authorities do not properly notify and inform the interested parties, it is not permitted to apply the facts available to make determinations with regard to these interested parties." Panel Report, *Mexico – Anti-Dumping Measures on Rice*, para. 7.200.

[224] "Accordingly, an IA 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 Anti-Dumping Agreement and, therefore, with Article 6.8 of that Agreement." Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 259.

[225] We note that there is no claim with respect to the notice of initiation in this dispute.

However, it seems self-evident to us that, as a matter of due process, and as paragraph 1 of Annex II provides, a party must first be given the opportunity to provide the necessary information, before a determination can be justifiably made on the basis of facts available. For us, this entails that, in principle, there is a parallel between the scope of the information requested and not provided by an interested party and the scope of facts available used by an IA in place of the missing information to make necessary determinations.[226]

7.135. In this investigation, the notice of initiation required the respondents "to provide the quantity and value of the Subject Product exported to China from September 1, 2008 to August 31, 2009".[227] The notice also referenced the registration form that foreign producers had to fill out in order to participate in the investigation, which was available from MOFCOM's website. Apart from general information about the company concerned, the registration form, like the notice of initiation, only asked respondents to provide information on the quantity and value of the subject product shipped to China during the POI.[228] Following the expiry of the deadline for registration, MOFCOM sent a full questionnaire to the seven US exporters that had registered to participate.[229] Those questionnaires, as is generally the case, requested comprehensive information concerning all aspects of the calculation of dumping margins from each respondent, including information relevant to the determination of normal value and export price, as well as any adjustments that might be appropriate. MOFCOM presumably used that information in calculating dumping margins for the individual respondents.[230]

7.136. However, for the residual duty rate, MOFCOM used the dumping margin alleged in the petition as facts available. That allegation must have been based on a comparison of some normal value with some export price, and may even have reflected some adjustments.[231] Thus, MOFCOM's use of the margin alleged in the petition as facts available to determine the residual duty rate necessarily encompassed the petition information on normal value, export price and possibly certain adjustments. In our view, this demonstrates that the scope of facts available used by MOFCOM was much wider than the scope of the information requested in the notice of initiation and/or the registration form. While it is true that the notice of initiation indicates that, in the event of non-registration, determinations might be made on facts available, in our view, a request for information concerning the identity, volume and value of exporters of the product is not a sufficiently specific request for information to justify the determination of a dumping margin on the basis of facts available for unknown or non-existent exporters. Such an approach in our view is inconsistent with Article 6.8 and paragraph 1 of Annex II of the Anti-Dumping Agreement. A disparity between the information requested from a producer and the determination ultimately made on the basis of facts available undermines the due process rights of the parties concerned.

7.137. China argues that the registration form and the subsequent dumping questionnaire serve a complementary purpose in China's anti-dumping system. A notice of initiation, which contains a link to the registration form, is designed to reach all potential interested producers, solicit from them certain data that is necessary for an orderly investigative process and notify them of the consequences of a failure to register. Once the universe of registered producers is ascertained, MOFCOM sends each of them a dumping questionnaire seeking data necessary for the calculation of dumping margins. In China's view, non-registration demonstrates a failure to cooperate, and determinations with respect to non-cooperating producers may be made on the basis of facts available.[232] We are not persuaded by this argument.

[226] However, we do not exclude the possibility that in some situations, the lack of certain information may have consequences with respect to the reliability of other information which has been submitted and which may therefore lead to the rejection of that information. This, however, would need to be explained clearly in the IA's determination. In this regard, we note that the panel in *Korea – Certain Paper* found that the Korean IA did not err in rejecting domestic sales data submitted by an Indonesian exporter involved in the relevant investigation given that the exporter had failed to submit financial statements and accounting records that the IA needed to verify the domestic sales data. Panel Report, *Korea – Certain Paper*, paras. 7.57-7.72.

[227] AD notice of initiation, Exhibit USA-06, p.2.

[228] AD registration form, Exhibit CHN-09, p.2.

[229] China's response to Panel question No. 29.

[230] In any event, there is no claim to the contrary in this dispute.

[231] We recall in this respect that Article 5.2(iii) of the Anti-Dumping Agreement requires that an application contain information on normal value and export price.

[232] China's response to Panel question No. 29.

7.138. First, we recall that Article 6.8 does not condition the use of facts available on a failure to cooperate by declining to participate in an investigation.[233] Rather, it establishes that determinations may be made based on facts available if an interested party (1) refuses access to necessary information within a reasonable period, (2) otherwise does not provide necessary information within a reasonable period, or (3) significantly impedes the investigation. We do not accept that a failure to register in response to a notice of initiation necessarily establishes that any one of these prerequisites is satisfied, unless that notice specifies in detail the information requested from the respondents and such information is not submitted. China's position would mean that the IA decides at the outset of the process, before dispatching dumping questionnaires or otherwise specifying the information that will be necessary to make the determinations required for the imposition of an AD duty, which foreign producers will be found to have refused access to or otherwise not provided necessary information within a reasonable time, all without those producers having been made aware of what the necessary information is.[234] Moreover, it results in certain producers being deprived of the opportunity to provide information very early in the investigation, without having been informed of the full extent of the information requested. In our view, this is not acceptable under Article 6.8 and Annex II.

7.139. We are cognizant that a registration process, such as the one used by MOFCOM in this investigation, may help ensure an orderly investigative process by allowing the IA to identify interested parties which will participate in the investigation. There is nothing in the Anti-Dumping Agreement that would preclude the use of such a tool to help manage the process of investigation. However, the use of such a tool does not relieve an IA of its obligation to comply with the requirements of Article 6.8 and Annex II of the Anti-Dumping Agreement. Similarly, we see nothing to preclude an IA from using a public notice mechanism to make potential interested parties aware of the information that will be necessary for the determinations the IA will have to make, and of the consequences of a failure to provide that information. However, we conclude that the notice of initiation and registration form relied upon by MOFCOM in this case were insufficient in this respect because they did not specify in detail the information requested from the US respondents.[235] As discussed above, the only information requested in the notice of initiation and the registration form concerned the identity of companies, and the volume and value of their exports to China of the subject products. This information is far from the type or scope of information necessary for purposes of determining dumping margins. We do not mean to suggest that an IA would necessarily have to publicly notify the dumping questionnaire in order to satisfy the requirements of Article 6.8 and paragraph 1 of Annex II, although such a step would obviously be sufficient. However, at a minimum a request for information in this context would have to be more specific as to the type and scope of the necessary information for purposes of determinations to be made by the IA. In addition, in our view, it would be preferable if the consequences of a

[233] We can easily envisage situations in which a party cooperates in an investigation in a general sense – registers to participate at the outset, responds to questionnaires, takes part in the proceedings, etc. – and nonetheless facts available are ultimately used in making determinations regarding such party. Indeed, this situation has been the case in several disputes concerning Article 6.8 and Annex II. See Panel Reports, *US – Hot-Rolled Steel*, paras. 7.53, 7.61; *US – Steel Plate*, para. 7.40. In this respect, we note that the concept of whether a party "cooperates" is only mentioned in the last sentence of paragraph 7 of Annex II, which states that: "if an interested party does not cooperate and thus relevant information is being withheld from the authorities, this situation could lead to a result which is less favourable to the party than if the party did cooperate." However, there is no claim under this provision in this dispute.

[234] Indeed, the notice of initiation specifies that if a party fails to register at the outset, MOFCOM has the right to refuse to accept materials that party might seek to submit at a later stage. This reinforces our view that the decisions made at the outset of the investigative process limit the rights of parties at subsequent stages of the process in ways that may not be justified.

[235] With respect to an identical issue, the panel in *China – GOES* also found that MOFCOM had acted inconsistently with Article 6.8 of the Agreement and paragraph 1 of its Annex II. Panel Report, *China – GOES*, para. 7.394. That panel stated: "[w]hile 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[.]" Panel Report, *China – GOES*, para. 7.386. By contrast, the panel in the subsequent *China – Broiler Products* dispute came to the opposite conclusion and reasoned: "[i]n our view, in the case of a failure by an interested party to provide some initial information necessary for the determination of a producer's margin of dumping, the authority is justified in replacing other information that it cannot collect as a result of that failure, even if it did not specifically request the other information. Such information initially required may include the producer's contact details and information necessary for the authority to decide on sampling." Panel Report, *China – Broiler Products*, fn. 501. For the reasons explained above, we disagree with the latter point of view.

failure to provide information were made known with more specificity, for instance, that AD duty rates may be determined based on facts available.

7.140. On the basis of the foregoing, we find that China acted inconsistently with its obligations under Article 6.8 and paragraph 1 of Annex II of the Anti-Dumping Agreement in its use of facts available in the determination of the residual AD duty rate in the automobiles investigation.

7.4.3.4.2 Alleged violation of Article 6.9 of the Anti-Dumping Agreement

7.141. We recall that Article 6.9 of the Anti-Dumping Agreement requires the disclosure of essential facts under consideration which form the basis for the decision on the application of definitive measures. This obligation applies to facts, as opposed to reasoning. Further, it only requires disclosure of facts that are "essential" and which are pertinent to the IA's consideration of whether or not definitive measures should be applied.[236] In this regard, "essential facts" are not limited to those that support the decision ultimately reached by the IA, but encompass all facts necessary to the process of analysis and decision-making by the IA.[237]

7.142. The United States claims that China failed to disclose the essential facts underlying MOFCOM's determination of the residual AD duty rate. Specifically, the United States submits that MOFCOM failed to disclose essential facts under consideration with regard to: (i) whether the US exporters refused access to necessary information or significantly impeded the investigation; (ii) why a 21.5% residual AD duty rate was deemed to be appropriate; and (iii) details of the calculation of the 21.5% residual duty rate. China contends that MOFCOM complied with the disclosure requirement of Article 6.9. According to China, all pertinent facts regarding the use of facts available in the calculation of the residual AD duty were laid out in MOFCOM's final disclosure.

7.143. In the investigation at issue, MOFCOM sent a final disclosure to the government of the United States, which states, in relevant part:

> 6. Other U.S. companies (All Others)
>
> For other U.S. companies, in accordance with Article 21 of the Antidumping Regulations of the P.R.C., the Investigating Authority decided to use the available facts and the best information available and to apply the dumping margin claimed in the petition.
>
> After the preliminary determination, the USG commented that in making its preliminary determination, the Investigating Authority adopted adverse data for determining the dumping margin for other U.S companies and failed to explain the reasoning behind its use of adverse inferences in calculating the rate for "all other" companies. Further, the Investigating Authority has not explained how other exporters that would be subject to this "all-others" rate have failed to cooperate in this investigation. The USG urges the Investigating Authority to apply the weighted average of the rates calculated for firms that have not expressly been un-cooperative in the investigation [.]
>
> The Investigating Authority believes that before initiation, the Investigating Authority notified relevant exporters and producers listed in the petition; also, it urged the USG to notify the relevant exporters or producers. The initiation notice was publicly available on the MOFCOM website. After initiation, the Investigating Authority set up the registration procedure; meanwhile, it issued questionnaires to registered respondents, which were also available on the MOFCOM website. The Investigating Authority believes that within the best of its ability, all exporters were given sufficient opportunities through the above mentioned procedures, and they could appropriately respond if they were willing to cooperate with the investigation. Regarding exporters that did not clearly respond to the investigation, the Investigating Authority could reasonably believe they had no intention to cooperate with the investigation, so the

[236] See paras. 7.69-7.71 of this Report.
[237] Panel Report, *EC – Salmon (Norway)*, para. 7.807.

> Investigation Authority decided their dumping margin based on best information available, not adverse information.[238]

7.144. The final disclosure clearly states that MOFCOM determined the residual AD duty rate for all other US exporters on the basis of facts available and that as facts available it used the margin claimed in the petition. The final disclosure also reflects that the US government objected to MOFCOM's use of facts available in this regard, arguing in particular that MOFCOM had not explained how the all other US exporters had failed to cooperate in the investigation. In response, MOFCOM explains the steps taken in giving notice of the initiation of the investigation and states that it was reasonable under these circumstances to deem the US exporters that had not made themselves known to be non-cooperating, and to determine the residual AD duty rate that would apply to their exports on the basis of facts available.

7.145. Before discussing the specific issues that, according to the United States, should have been but were not included in the final disclosure, we would like to underline that, in our view, the disclosure obligation under Article 6.9 applies to the facts underlying the findings actually made by an IA during an investigation. In other words, the maximum scope of this obligation is the facts on the record, and what is actually decided. Whether or not the IA should have made a different decision on a given issue, or should have made a finding on an issue but did not, is a matter that falls with the scope of the relevant substantive provisions of the Agreement establishing obligations on IAs in the course of investigations, and not under Article 6.9. With this in mind, we turn to the specific arguments presented by the United States in support of this claim.

7.146. First, the United States argues that the final disclosure fails to explain whether the US exporters refused access to necessary information or significantly impeded the investigation. We disagree. As noted above, the final disclosure explains the efforts made by MOFCOM following the initiation of the investigation to contact the US exporters, states that all producers were given an opportunity to participate in the investigation if they so wished and that therefore MOFCOM reasonably concluded that the producers that failed to respond to MOFCOM did not wish to cooperate in the investigation. In our view, the final disclosure explains the facts on the basis of which MOFCOM based its conclusion that unknown US exporters to have failed to cooperate in the investigation and therefore that it would resort to facts available. Whether those facts justified MOFCOM's decision is a substantive question we have already addressed above.

7.147. Second, the United States submits that the final disclosure does not explain why a 21.5% residual AD duty rate was deemed to be appropriate. However, as discussed above, the Article 6.9 disclosure obligation applies to facts, and not to explanations or reasoning for the decisions based on those facts. Whether or not a particular rate is appropriate as the level of a residual duty seems to us to be a matter of reasoning, not fact, and thus would not come within the scope of the obligation set forth in Article 6.9. Moreover, the United States has not argued or shown that there were any other relevant facts on this matter that were or should have been considered by MOFCOM in deciding the residual rate, but that were not included in the final disclosure.

7.148. Third, the United States refers to the details of the calculation of the 21.5% residual duty rate. We note, however, that the disclosure clearly states that this duty rate was based on the margin alleged in the petition. We asked the United States to specify what specific types of information on the record of the investigation at issue MOFCOM should have included in its final disclosure but did not do so. In response, the United States did not point to anything other than the three issues discussed above.[239] Moreover, it is not clear to us that the "details of the calculation" of a residual duty rate *per se* constitute facts, as opposed to reasoning or analysis, which as noted above, do not fall within the scope of the Article 6.9 disclosure obligation. As it is clear that MOFCOM made no calculation in this regard, simply applying the margin set out in the petition as the residual rate, we fail to see what other facts could possibly have been relevant in this regard and included in the final disclosure.

7.149. The United States also contends that MOFCOM's use of the margin claimed in the petition as facts available does not suffice to fulfil China's obligations under Article 6.9. Since this meant using information from a secondary source, argues the United States, the final disclosure should have explained whether MOFCOM used special circumspection in using that information, as

[238] Final disclosure (AD/CVD), Exhibit USA-11, p. 24.
[239] US response to Panel question No. 9.

required under paragraph 7 of Annex II of the Agreement.[240] However, whether or not MOFCOM respected the provisions of paragraph 7 of Annex II is a question regarding the substantive obligations for its determination, not the disclosure obligation under Article 6.9. In this regard, we also note that the United States has not made a claim under paragraph 7 of Annex II in these proceedings.

7.150. On this basis, we reject the US claim that MOFCOM acted inconsistently with the disclosure obligation under Article 6.9 of the Anti-Dumping Agreement in connection with the determination of the residual AD duty rate at issue.

7.4.3.4.3 Alleged violations of Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement

7.151. Article 12.2 of the Anti-Dumping Agreement sets forth the requirements regarding the contents of the required public notices of preliminary and final determinations in general. It provides that each such notice has to set forth in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the IA. Article 12.2.2 in turn sets out more specific requirements for the required public notice in the case of a final affirmative determination, reiterating that such a public notice should contain all the information required under Article 12.2, including all relevant information on the matters of fact and law and going on to require that it contain reasons which have led to the imposition of final measures as well as the reasons for the acceptance or rejection of arguments or claims made by exporters and importers.

7.152. Article 12.2.2 requires that the public notice of an affirmative final determination, or the separate report that may be provided instead, must contain "all relevant information" on "matters of fact and law and reasons which have led to the imposition of final measures". An IA is not required to set out in its determinations *all* the factual information that is before it, but rather those facts that allow an understanding of the factual basis that led to the imposition of final measures.[241] An IA must give a reasoned account of the factual support for the decision to impose final measures.

7.153. The United States contends that MOFCOM acted inconsistently with Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement by failing to explain in the final determination the factual and legal bases for its resort to facts available in the determination of the residual AD duty rate. China asserts that MOFCOM's final determination explains the basis on which the residual AD duty rate was determined. In this regard, China attaches importance to the fact that, unlike the investigation at issue in *China – GOES*, where it was unclear how MOFCOM had calculated the residual AD duty rate, in the investigation at issue here the final determination explains clearly that the residual AD duty rate applied was the margin claimed in the petition.[242]

7.154. In support of its position, China refers to MOFCOM's final determination, which states that, as in the preliminary determination, MOFCOM "applied the dumping margin claimed in the petition" to all other exporters, including unknown exporters.[243] The final determination also contains MOFCOM's explanations as to why it was justified to treat the unknown US exporters as non-cooperating and therefore to determine the residual duty rate using the margin alleged in the application as facts available, and MOFCOM's discussion of the arguments of parties in this regard.

7.155. As with the obligation under Article 6.9 of the Agreement, in our view, the notice obligations set out in Articles 12.2 and 12.2.2 apply to the issues of fact and law resolved by the IA and the underlying facts on the record of the investigation. Whether or not the IA should have resolved a particular issue of fact or law differently, or whether it failed to address a necessary issue, is a matter that arises under the relevant substantive provisions of the Agreement governing determinations, and not under Articles 12.2 and 12.2.2.

7.156. In this case, as the excerpt in paragraph 7.93 above shows, the final determination explains clearly the issues of fact and law considered by MOFCOM relating to the determination of the residual AD duty rate. It states that MOFCOM determined the residual duty rate on the basis of

[240] See for instance US second written submission, paras. 49-50.
[241] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 164 (addressing the corresponding provision of the SCM Agreement, Article 22.5).
[242] China's first written submission, para. 124.
[243] Final determination, Exhibit CHN-07, p. 83.

facts available and that as facts available it used the dumping margin claimed in the petition. The final determination also notes the US government's comments on the methodology used by MOFCOM and the latter's explanations in response. Specifically, it explains the steps taken by MOFCOM to contact the US exporters and states that all producers were given an opportunity to participate in the investigation. It says that the producers that did not indicate their willingness to participate were deemed to be non-cooperating and that a residual duty rate was determined for them on the basis of facts available.

7.157. We asked the United States which other types of information MOFCOM should have included in its public notice but failed to do so. In response, the United States referred to the fact that MOFCOM failed to explain its use of facts available to determine the residual duty rate and why the facts available were appropriate.[244] However, in our view, the final determination does explain the issues of fact and law underlying MOFCOM's use of facts available. As for the appropriateness of using facts available, the United States has not demonstrated that there were issues of fact and law concerning the appropriateness of relying on facts available which MOFCOM failed to address in its final determination.

7.158. Therefore, we reject the US claim that MOFCOM acted inconsistently with its obligations under Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement in connection with the imposition of the residual AD duty rate at issue.

7.4.4 Determination of the residual CVD rate: Alleged violations of Articles 12.7, 12.8, 22.3, and 22.5 of the SCM Agreement

7.4.4.1 Provisions at issue

7.159. Article 12.7 of the SCM Agreement sets forth the conditions under which an IA may apply facts available in a CVD investigation. It provides:

> [i]n 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.

7.160. Article 12.8 of the SCM Agreement requires that:

> [t]he 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 for the decision whether to apply definitive measures. Such disclosure should take place in sufficient time for the parties to defend their interests.

7.161. Articles 22.3 and 22.5 set forth the requirement to give public notice of certain actions or determinations in a CVD investigation as follows:

> 22.3. Public notice shall be given of any preliminary or final determination, whether affirmative or negative, of any decision to accept an undertaking pursuant to Article 18, of the termination of such an undertaking, and of the termination of a definitive countervailing duty. 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. All such notices and reports shall be forwarded to the Member or Members the products of which are subject to such determination or undertaking and to other interested parties known to have an interest therein. . .
>
> 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 or the acceptance of an 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 an

[244] US response to Panel question No. 10.a.

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 paragraph 4, as well as the reasons for the acceptance or rejection of relevant arguments or claims made by interested Members and by the exporters and importers.

7.4.4.2 Arguments of the parties

7.4.4.2.1 United States

7.162. The United States asserts that by using facts available in the calculation of the residual CVD rate in the investigation at issue here, without first informing the US exporters of the information required of them and of the fact that failure to provide that information could lead to a determination based on facts available, MOFCOM acted inconsistently with Article 12.7 of the SCM Agreement. The United States argues that MOFCOM sent anti-subsidy questionnaires only to US exporters identified in the petition, and that it did not attempt to identify other US exporters.[245] The United States notes that the circumstances under which an IA may resort to facts available in its determinations in a CVD investigation are cited in Article 12.7 as a) refusing access to necessary information within a reasonable period, b) otherwise failing to provide such information within a reasonable period, or c) significantly impeding the investigation. Since none of this was the case in the CVD investigation at issue, MOFCOM violated Article 12.7 of the SCM Agreement by resorting to facts available in the calculation of the residual CVD rate. According to the United States, since the US exporters other than those named in the petition were non-existent, it was logically impossible for them to have engaged in any of the acts set forth in Article 12.7.[246]

7.163. The United States also contends that MOFCOM violated two procedural obligations in the calculation of the contested residual CVD rate. First, the United States alleges that MOFCOM acted inconsistently with Article 12.8 of the SCM Agreement by failing to disclose to the US exporters essential facts under consideration concerning the calculation of the residual CVD rate. In the view of the United States, MOFCOM's explanation in the final disclosure, which repeated what was in the preliminary and final determinations, was cursory. It was limited to one sentence stating that, on the basis of facts available, the IA had decided to apply the *ad valorem* subsidy rate calculated for General Motors LLC to all other US exporters. Second, the United States alleges that MOFCOM failed to explain the factual and legal bases for the determination of the residual CVD rate and thus violated Articles 22.3 and 22.5 of the SCM Agreement. According to the United States, the factual and legal bases for MOFCOM's resort to facts available in the calculation of the residual CVD rate were relevant information on matters of fact and law within the meaning of Articles 22.3 and 22.5 and should have been explained.

7.4.4.2.2 China

7.164. China rejects the US arguments. In China's view, there is a gap in the SCM Agreement regarding the calculation of residual CVD rates. Given this gap, Article 12.7 of the Agreement provides a logical basis for such calculations and this is what MOFCOM did in this investigation. Contrary to the US assertion, China maintains that MOFCOM took several steps to reach all US exporters of automobiles. Specifically, MOFCOM posted the notice of initiation on its website and placed it in its public reading room. The notice of initiation was also sent to the US embassy in Beijing to be forwarded to all US exporters. The notice explained the procedure for registration to participate in the investigation and also warned that failure to participate could result in determinations based on facts available. These were the best efforts that MOFCOM could have taken. Four US exporters, in addition to the three identified in the petition, came forward to register following MOFCOM's notification efforts. In these circumstances, argues China, it was reasonable for MOFCOM, and consistent with Article 12.7 of the SCM Agreement, to consider all

[245] As it did with respect to the AD investigation at issue (see, footnote 200 above), initially, the United States argued that, in the CVD investigation at issue, MOFCOM had sent questionnaires only to the producers identified in the petition and that it had not attempted to identify whether any other US producer of the like product existed. It also argued that, as in the investigation underlying the *China – GOES* dispute, no other US exporters of automobiles existed at the time of the AD investigation at issue here. See for instance US first written submission, paras. 86-87. However, it did not pursue these arguments later in the proceedings, and the record of the investigation clearly shows that MOFCOM did attempt to identify other US exporters and that four additional producers registered to participate as a result.

[246] US first written submission, para. 87.

other US exporters as being non-cooperating and to calculate, on the basis of facts available, a residual CVD rate that would apply to their exports to China.[247]

7.165. China submits that MOFCOM's disclosure of essential facts conformed to the requirements of Article 12.8 of the SCM Agreement. It disclosed all the pertinent facts that were on the record. MOFCOM applied the 12.9% subsidy rate calculated for General Motors as the residual CVD rate, with no adjustments and this is clear from the final disclosure.[248] To the extent the United States argues that MOFCOM should also have disclosed its reasoning, China contends that Article 12.8 contains no such obligation.

7.166. Similarly, China contends that all the legal and factual bases for the residual CVD rate imposed by MOFCOM were clearly indicated on the record, consistently with Articles 22.3 and 22.5 of the SCM Agreement.[249] As explained in the final determination, MOFCOM determined the residual CVD rate on the basis of facts available, and used as facts available the subsidy rate calculated for General Motors which was the highest individual rate calculated.

7.4.4.3 Arguments of the third parties

7.167. The **European Union** argues that the status of the government of the exporting country as an interested party is different in AD investigations compared to CVD investigations because, unlike the Anti-Dumping Agreement which uses the term "interested parties" to refer to all interested parties including the government of the exporting country, the SCM Agreement refers to "interested Members" and "interested parties" as two different categories.

7.168. Further, the European Union notes that, unlike an AD investigation which concerns prices applied by private companies, in a CVD investigation the government of the exporting country is "directly implicated in the act of subsidisation". Therefore, the WTO jurisprudence on the issue of the determination of residual AD duties on the basis of facts available should not be directly transposed into the SCM Agreement. One implication of this would be the possibility of arguing that in the context of a CVD investigation notice to the government of the exporting country may serve as notice to the exporters from that country.

7.4.4.4 Evaluation by the Panel

7.169. The CVD investigation at issue was initiated and conducted simultaneously with the AD investigation on the same product. As noted above, the facts relevant to the US claims regarding the residual CVD rate are almost identical to the facts concerning the residual AD rate. So are the arguments presented by the parties. The legal provisions at issue, Articles 12.7, 12.8, 22.3, and 22.5 of the SCM Agreement are virtually identical to Articles 6.8, 6.9, 12.2 and 12.2.2 of the Anti-Dumping Agreement. Therefore, in order to avoid repetition, in our assessment of the US claims regarding the residual CVD rate at issue, we will refer to the reasoning set forth above in respect of the claims regarding the residual AD duty rate as appropriate.

7.4.4.4.1 Alleged violation of Article 12.7 of the SCM Agreement

7.170. This aspect of the US claim challenges the use of facts available in the determination of the residual CVD rate. The arguments presented by the United States, and China's counter-arguments, are substantively the same as those made in connection with the residual AD duty rate, which we discussed above. In short, the United States contends that MOFCOM erred by determining the residual CVD rate on the basis of facts available without first giving unknown US exporters notice of the information required of them and of the fact that failure to provide that information could lead to a determination based on facts available. China points to the efforts made by MOFCOM to contact the US exporters and argues that it was reasonable for MOFCOM to conclude that any US exporters that failed to register for participation were non-cooperating, and therefore to determine a residual CVD rate applicable to them on the basis of facts available. The US claim with respect to the CVD residual duty claim raises the same issue as the claim with respect to the AD residual duty: did MOFCOM, in using facts available in the determination of the residual CVD rate at issue, comply with the requirements set out in Article 12.7 of the SCM Agreement?

[247] China's first written submission, paras. 127-131.
[248] China's first written submission, para. 133.
[249] China's first written submission, para. 135.

7.171. There is one difference between this claim and the claim regarding the residual AD duty rate, in terms of the legal basis of the US claim. The SCM Agreement does not have a provision analogous to Annex II to the Anti-Dumping Agreement setting out additional requirements with respect to the use of facts available. Thus, the United States relies on Articles 12.1 and 12.7 of the SCM Agreement, the provisions corresponding to Articles 6.1 and 6.8 of the Anti-Dumping Agreement, to establish the existence of an obligation for MOFCOM to inform the interested parties of the information required from them, while in the AD context, the United States relied on paragraph 1 of Annex II, in addition to Articles 6.1 and 6.8 of the Anti-Dumping Agreement in this regard.

7.172. Previous panels and the Appellate Body have concluded that the SCM Agreement establishes the same general requirements regarding the use of facts available as the Anti-Dumping Agreement, despite the lack of an analogue to Annex II. Thus, in *Mexico – Anti-Dumping Measures on Rice*, the Appellate Body interpreted the provisions of the SCM Agreement regarding the use of facts available in conjunction with the corresponding provisions of the Anti-Dumping Agreement. In doing so, the Appellate Body noted that the SCM Agreement did not have an annex similar to Annex II of the Anti-Dumping Agreement, but concluded that this did not mean "that no such conditions exist[ed] in the SCM Agreement."[250] On this basis, the Appellate Body concluded 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."[251] We also note that the panels in *China – GOES*[252] and *China – Broiler Products*[253] took the same approach. Such an interpretation is also consistent with the *Ministerial 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*, in which Ministers underlined "the need for the consistent resolution of disputes arising from anti-dumping and countervailing duty measures."[254]

7.173. For the same reasons as set out in these reports, we consider it appropriate to interpret Article 12.7 of the SCM Agreement in harmony with the provisions of Article 6.8 and Annex II of the Anti-Dumping Agreement, and resolve the US claims under both Agreements in a consistent fashion. Therefore, as we did in respect of the US claim regarding the residual AD duty rate, with regard to the present claim, we will consider whether MOFCOM specified in detail the information required from the US exporters and informed them that, if information was not supplied within a reasonable time, determinations could be made on the basis of facts available. This requires us to assess whether MOFCOM took the steps necessary to contact the US exporters and whether it informed such producers of the information requested from them for the determinations it would make.

7.174. Given that the facts underlying the determination of the residual CVD rate, the US arguments in support of its claim regarding the residual CVD duty rate and China's counter-arguments are identical to the facts, arguments and counter-arguments addressed above in connection with the United States claim under Article 6.8 and paragraph 1 of Annex II of the Anti-Dumping Agreement, we consider it appropriate to apply the same legal reasoning, *mutatis mutandis*, in resolving the US claim under Article 12.7 of the SCM Agreement, and reach the same conclusions.[255]

7.175. On this basis, we find that the scope of facts available used by MOFCOM was greater than the scope of the information it requested from unknown US exporters through the notice of initiation and the CVD registration form. We therefore conclude that MOFCOM acted inconsistently with Article 12.7 of the SCM Agreement in determining the residual CVD rate on the basis of facts available.

[250] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 291.
[251] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 295.
[252] Panel Report, *China – GOES*, paras. 7.446-7.447.
[253] Panel Report, *China – Broiler Products*, para. 7.355.
[254] We also asked the parties their views on the implication of the absence of a corollary to Annex II in the SCM Agreement. While the parties' views in this regard in no way are determinative, both responded that, despite the absence of such an annex in the SCM Agreement, the same disciplines should apply to the use of facts available in CVD investigations as are set forth in Annex II of the Anti-Dumping Agreement. See China's and US responses to Panel question No. 13.
[255] See paras. 7.121–7.140 of this Report.

7.4.4.4.2 Alleged violation of Article 12.8 of the SCM Agreement

7.176. The United States asserts that MOFCOM acted inconsistently with Article 12.8 of the SCM Agreement by failing to disclose to the US exporters essential facts under consideration concerning the calculation of the residual CVD rate. China responds that MOFCOM's final disclosure conveyed all essential facts on the record regarding the contested residual CVD rate and was therefore consistent with Article 12.8.

7.177. The factual background of this claim is again generally identical to that of the claim under Article 6.9 of the Anti-Dumping Agreement discussed above. It is clear from the final disclosure sent to the US government that MOFCOM relied on facts available in determining the residual CVD rate, and used the 12.9% rate calculated for General Motors as facts available.[256] We asked the United States to identify any other essential facts on the record that MOFCOM should have disclosed which it failed to do so and the United States has not brought any to our attention.[257]

7.178. The arguments of the parties presented in respect of this claim are the same as they made in respect of the analogous claim under Article 6.9 of the Anti-Dumping Agreement. Therefore, we consider it appropriate to apply the same legal reasoning, *mutatis mutandis*, in resolving the US claim under Article 12.8 of the SCM Agreement, and reach the same conclusions.[258] On this basis, we reject the US claim that MOFCOM acted inconsistently with Article 12.8 of the SCM Agreement in connection with the determination of the residual CVD duty rate at issue.

7.4.4.4.3 Alleged violation of Articles 22.3 and 22.5 of the SCM Agreement

7.179. The United States claims that MOFCOM acted inconsistently with Articles 22.3 and 22.5 of the SCM Agreement by failing to explain the factual and legal bases for its determination of the residual CVD rate. China counters the US claim and submits that MOFCOM's notice conveyed all factual and legal bases of MOFCOM's determination of the residual CVD rate.

7.180. The factual background of this claim is the same as that of the US claim under Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement, which we discussed above. It is clear from the final determination that MOFCOM relied on facts available in the determination of the residual CVD rate and used the 12.9% rate calculated for General Motors as facts available.[259] We asked the United States to identify any other issues of fact or law on the record of which MOFCOM should have addressed in the final determination but which it failed to do so and the United States has not pointed to any.[260]

7.181. The arguments of the parties presented in respect of this claim are the same as they made in respect of the analogous claim under Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement. Therefore, we consider it appropriate to apply the same legal reasoning, *mutatis mutandis*, in resolving the US claim under Articles 22.3 and 22.5 of the SCM Agreement, and reach the same conclusions.[261] On this basis, we reject the US claim that MOFCOM acted inconsistently with Article 22.3 and 22.5 of the SCM Agreement in connection with the determination of the residual CVD duty rate at issue.

7.5 Whether MOFCOM properly defined the domestic industry for the purposes of its injury determination

7.5.1 Provisions at issue

7.182. Articles 3.1 of the Anti-Dumping Agreement and 15.1 of the SCM Agreement both provide, in nearly identical terms:

> [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

[256] Final disclosure, Exhibit USA-11, pp. 40-41.
[257] US response to Panel question No. 9.
[258] See paras. 7.141–7.150 of this Report.
[259] Final determination, Exhibit CHN-07, pp. 126-127.
[260] US response to Panel question No. 10.a.
[261] See paras. 7.151-7.158 of this Report.

> dumped [subsidized] imports and the effect of the dumped [subsidized] imports on prices in the domestic market for like products, and (b) the consequent impact of these imports on domestic producers of such products. (footnotes omitted)

7.183. Article 4.1 of the Anti-Dumping Agreement provides in pertinent part[262]:

> [f]or the purposes of this Agreement, the term "domestic industry" shall be interpreted as referring to the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products.

7.184. Article 16.1 of the SCM Agreement is substantively identical, albeit formatted differently, and provides in pertinent part:

> [f]or the purposes of this Agreement, the term "domestic industry" shall, except as provided in paragraph 2, be interpreted as referring to the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products.[263]

7.5.2 Factual background

7.185. MOFCOM published two sets of notices relating to its AD and CVD investigations on 6 November 2009, consisting of a notice of initiation and an injury registration notice for each investigation.[264] These four notices each set a 20-day deadline of 26 November 2009 for interested parties to register to participate in the respective investigations.[265] Both investigations were initiated upon the application of the same petitioner, the CAAM. MOFCOM determined that the petitioner had standing to file the petition on behalf of the domestic industry. MOFCOM stated in the notices of initiation that the companies represented by the petitioner produced more than 50% of the domestic like product throughout the POI.[266]

7.186. In its notices of initiation, MOFCOM stated:

> [f]or the industry injury investigation, interested parties and interested government can register with the Industry Injury Investigation Bureau of MOFCOM ("IBII") within 20 days of the release of this Notice. The registration form to the IBII shall contain the information of production capacity, output, inventory, and production capacity under construction/planed [*sic.*] production capacity, as well as volume and value of subject product exports to China during the POI. The "Application for Participating in the Industry Injury Investigation of Saloon Cars and Cross-country Cars (of a cylinder capacity ≥ 2000cc)" can be downloaded from http://www.cacs.gov.cn/cacs/anjian/anjianshow.aspx?str1=1&articleId=62087.[267]

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[262] Paragraphs (i) and (ii) of Article 4.1 are not at issue in this dispute.

[263] "Paragraph 2" in this provision refers to Article 16.2 of the SCM Agreement, which corresponds to Article 4.1(ii) of the Anti-Dumping Agreement, and is not at issue in this dispute.

[264] See AD notice of initiation, Exhibit USA-06; AD injury registration notice, Exhibit CHN-02; and CVD notice of initiation, Exhibit USA-07; CVD injury registration notice, Exhibit CHN-11.

[265] AD notice of initiation, Exhibit USA-06, p. 2; CVD notice of initiation, Exhibit USA-07, p. 4.

[266] AD notice of initiation, Exhibit USA-06, p. 1; CVD notice of initiation, Exhibit USA-07, p. 1.

[267] CVD notice of initiation, Exhibit USA-07, p.4. The wording of the AD notice of initiation is substantially the same:

> [a]ny interested party involved in the industry injury investigation can register with the Bureau of Industry Injury Investigation, MOFCOM for responding within twenty days since this Announcement is published, and provide materials describing the productivity, output, inventory, plans under construction and to be constructed, quantity and value of the Subject Product exported to China during the industry injury investigation period. The Form of Application for Participating in the Industry Injury Investigation of the Anti-dumping Investigation of Saloon Cars and Cross-country Cars (of a Cylinder Capacity ≥ 2000cc) is available for download in the "Register to Respond" column on the website of China Trade Remedy Information at http://www.cacs.gov.cn.

AD notice of initiation, Exhibit USA-06, p. 2.

7.187. The injury registration notices contained the "Application for Participating in the Industry Injury Investigation Saloon Cars and Cross-country Cars of a cylinder capacity ≥ 2000cc"[268]. These application forms required interested parties to supply contact details and company-specific data on capacity, production and trade performance during the POI.[269] The petitioner was the only domestic entity to register by the deadline of 26 November 2009.[270]

7.188. In its preliminary and final determinations, MOFCOM indicates that on 24 December 2009, MOFCOM distributed a domestic producer's questionnaire to the petitioner, acting on behalf of the domestic industry.[271] MOFCOM also indicates that, prior to limiting the scope of the investigation from the imports originally identified, certain US automobiles with engine displacements equal to or greater than 2000cc, to certain US automobiles with engine displacements equal to or greater than 2500cc, it verified that the CAAM continued to represent a major proportion of the total domestic production of the like product.[272]

7.189. MOFCOM determined that the aggregate annual output of the producers represented by the petitioner accounted for 54.16% (2006), 33.54% (2007), 33.75% (2008), 36.32% (interim 2008), and 41.94% (interim 2009) of total Chinese production of the domestic like product.[273] Accordingly, MOFCOM found that "the collective production of the like product of the aforesaid producers constitutes a major proportion of the total production of the domestic like product"[274].

7.5.3 Arguments of the parties

7.5.3.1 United States

7.190. The United States contends that MOFCOM's definition of the domestic industry in the investigations at issue failed to conform to the requirements of Article 4.1 of the Anti-Dumping Agreement and Article 16.1 of the SCM Agreement. The United States submits that the domestic industry as defined did not conform to these two definitional provisions because, first, it was distorted, and second, it failed to capture a major proportion of total production of the domestic like product. As a result of these two inconsistencies, the United States submits that MOFCOM's domestic industry definition was inconsistent with Article 3.1 of the Anti-Dumping Agreement and Article 15.1 of the SCM Agreement.[275]

7.191. The United States argues that MOFCOM's domestic industry definition was distorted in two respects. First, the United States argues that MOFCOM, in conditioning the inclusion of domestic producers in the domestic industry definition on a willingness to participate in MOFCOM's injury investigations, introduced a material risk of distortion in using a process capable of leading to self-selection among domestic producers.[276] In the US view, MOFCOM's registration requirement reduced the data coverage that could have served as the basis for its injury analysis, thereby creating a material risk of distorting MOFCOM's injury determination, which the United States asserts materialized in this case.[277] The United States adds in this regard that domestic producers posting the weakest performance would have the most to gain from a positive injury determination, and would therefore have a greater financial incentive to register and participate in MOFCOM's injury investigations.[278] Those domestic producers posting the strongest performance, conversely, would have less incentive to participate in the investigations. The United States contends that the withholding of the performance data of the stronger-performing producers would, in these circumstances, skew the economic data towards an affirmative finding of injury,

[268] AD injury registration form, Exhibit CHN-12; CVD injury registration form, Exhibit CHN-13.
[269] AD injury registration form, Exhibit CHN-12, p. 1; CVD injury registration form, Exhibit CHN-13, p. 1.
[270] Final determination, Exhibit CHN-07, p. 19.
[271] Preliminary determination, Exhibit CHN-05, pp. 20-21; final determination, Exhibit CHN-07, pp. 21-22.
[272] Preliminary determination, Exhibit CHN-05, p. 35; final determination, Exhibit CHN-07, pp. 48-49.
[273] Final determination, Exhibit CHN-07, p. 132; supplemental injury submission, Exhibit CHN-08.
[274] Final determination, Exhibit CHN-07, p. 48.
[275] The United States does not ask the Panel to find violations of Articles 4.1 of the Anti-Dumping Agreement and 16.1 of the SCM Agreement, which contain the definition of the domestic industry. See US response to Panel question No. 40.
[276] See for instance US comments on China's response to Panel question No. 36.c.
[277] See for instance US opening statement at the second Panel meeting, paras. 34-35.
[278] See for instance US comments on China's response to Panel question No. 35.

leading to the risk of higher duties on subject imports.[279] In allowing self-selection, the United States submits that MOFCOM effectively delegated its investigatory function to these domestic producers.[280]

7.192. The United States likens MOFCOM's actions in this regard to those at issue in the *EC – Fasteners (China)* dispute, insofar as both involved the conditioning of inclusion of domestic producers in the domestic industry definition on a willingness to cooperate with the IA. The United States submits that there is no substantive difference between conditioning inclusion in the domestic industry definition on the willingness of producers to be included in the sample of the domestic industry in *EC – Fasteners (China)*, and conditioning inclusion in the domestic industry definition on the willingness of producers in the investigations at issue to participate in MOFCOM's injury investigations.[281]

7.193. The second aspect of distortion in MOFCOM's domestic industry definition, in the US view, arises from the fact that only eight companies among the CAAM's allegedly broad membership provided data for MOFCOM's investigations.[282] The United States contends that this shows self-selection among CAAM members, resulting in a material distortion to MOFCOM's injury determination.[283]

7.194. Turning to the second alleged inconsistency, the United States contends that MOFCOM's domestic industry definition failed to capture a major proportion of total production of the domestic like product, in excluding 60% of domestic production from its investigations.[284] In the US view, MOFCOM should have obtained wide ranging information concerning "relevant economic factors in order to ensure the accuracy of an investigation concerning the state of the industry and the injury it has suffered" in order to define the domestic industry on the basis of a "relatively high proportion of the total domestic production." The United States contends that MOFCOM, in gathering data from a small portion of the CAAM's membership, failed to capture such a "relatively high" proportion in this dispute.[285] Under these circumstances, the United States considers that MOFCOM should have sought additional domestic industry data, or at least explained on the record why it could not collect additional data in light of the particular conditions of the automobile industry in China.[286]

7.195. As a result of these two alleged inconsistencies with Articles 4.1 and 16.1, the United States argues that MOFCOM's injury determination was inconsistent with the obligation set forth in Article 3.1 of the Anti-Dumping Agreement and Article 15.1 of the SCM Agreement that an IA make an injury determination based on an objective examination of positive evidence.[287]

7.5.3.2 China

7.196. China maintains that MOFCOM's definition of the domestic industry was not distorted, and captured sufficient domestic production to qualify as a major proportion of total domestic production within the meaning of Articles 4.1 of the Anti-Dumping Agreement and 16.1 of the SCM Agreement.[288] While China agrees with the United States that Article 3.1 of the Anti-Dumping Agreement and Article 15.1 of the SCM Agreement can inform an IA's definition of the domestic industry in the context of its injury determination, insofar as the United States argues for the introduction of a self-standing distortion test into Articles 4.1 and 16.1, China contends that such a test is unsupported by the language of these provisions.[289]

7.197. China contends that MOFCOM provided public notice inviting all domestic producers to register and participate in MOFCOM's injury investigations.[290] This notice contained a short form

[279] US first written submission, paras. 116-117.
[280] US comments on China's response to Panel question No. 36.c.
[281] See for instance US second written submission, paras. 61-62.
[282] US second written submission, para. 63.
[283] See for instance US comments on China's response to Panel question No. 36.c.
[284] See for instance US first written submission, para. 124.
[285] See for instance US comments on China's response to Panel question No. 36.c.
[286] See for instance US opening statement at the second Panel meeting, para. 40.
[287] See for instance US opening statement at the first Panel meeting, para. 69.
[288] See for instance China's first written submission, paras. 162, 169.
[289] China's second written submission, para. 73.
[290] China's first written submission, paras. 145-146.

that domestic producers willing to participate in the investigation had to fill out and return to MOFCOM. In China's view, MOFCOM's registration requirement was simply meant to ensure an orderly investigation process and did not create any disincentive for participation in the investigations, and was thus not capable of introducing any risk of distortion in the resulting domestic industry definition. China maintains that there is no provision in either the Anti-Dumping or the SCM Agreement that prohibits such a registration requirement.[291] China stresses that all Chinese domestic producers had the opportunity to register to participate in the investigations, and that the domestic industry as defined by MOFCOM accounted for a major proportion of total domestic production of the like product.[292] Insofar as no domestic producers other than those represented by the petitioner in fact registered, China contends that MOFCOM took no steps to prevent such parties from participating.[293] China adds in this regard that MOFCOM lacks legal authority to compel interested parties to provide data.[294] Further, China contends that the non-participation of domestic producers not members of the CAAM is not surprising, as the CAAM represents all producers of automobiles in China.[295]

7.198. China disagrees with the logic of the US contention that MOFCOM's registration requirement favoured the domestic producers posting the weakest performance and therefore more inclined to support the petition. China submits in this regard that it would have been equally plausible for domestic producers opposing the petition to participate in MOFCOM's injury investigations in order to provide data and arguments showing that subject imports did not cause injury to the domestic industry. Insofar as no domestic producer opposed the petition in the underlying investigations, China submits that this non-participation cannot be attributed to any action on MOFCOM's part, with the latter merely including data for all producers that chose to participate.[296] China adds in this regard that, contrary to the US assertion that MOFCOM remained passive in its investigations, the record supports China's contention that MOFCOM actively assessed and verified the data submitted to it by the CAAM.[297]

7.199. Regarding the US argument likening MOFCOM's actions to those at issue in the *EC – Fasteners (China)* dispute, China submits that the cases are different in two material respects. First, China contends that in *EC – Fasteners (China)*, the IA affirmatively excluded 25 domestic producers from its domestic industry definition out of a pool of 70 producers that had supplied some information to it on the basis that those 25 producers declined to participate in a sample. The Appellate Body found that the IA had narrowed the pool of producers whose data could have been used for its injury determination in that case. In the investigations at issue here, China argues that MOFCOM did not engage in such narrowing.[298] Second, the IA in *EC – Fasteners (China)* relied on a 25% benchmark in concluding that the 27% of total domestic production captured by the domestic industry it defined constituted a "major proportion" of total domestic production. The Appellate Body concluded that by so doing, the IA had reduced the data coverage on which it based its injury analysis, thereby introducing a material risk of distortion to its injury determination. In this case, China asserts that MOFCOM applied no benchmarks in the underlying investigations, and in fact the domestic industry it defined represented a larger percentage of total domestic production than was the case in the *EC – Fasteners (China)* domestic industry definition.[299] China submits that, by seeking to draw parallels between the issues in *EC – Fasteners (China)* and MOFCOM's actions in the investigations at issue, the United States would have the Panel apply a freestanding distortion test that is unsupported by Article 4.1 of the Anti-Dumping Agreement and Article 16.1 of the SCM Agreement.[300]

7.200. China contends that the US allegation that there was self-selection within the CAAM rests entirely on speculation.[301] China objects in this regard to the comments made by the United States on the CAAM's allegedly partial role in acting as conduit for the information submitted on behalf of its members to MOFCOM. China adds that MOFCOM's registration form was made available to all

[291] China's second written submission, para. 81.
[292] China's first written submission, para. 169.
[293] See for instance China's second written submission, para. 71.
[294] China's first written submission, para. 151.
[295] See for instance China's response to Panel questions Nos. 15.a and 15.b.
[296] China's second written submission, para. 69.
[297] China's response to Panel question No. 37.
[298] See for instance China's second written submission, para. 74.
[299] See for instance China's second written submission, para. 75.
[300] See for instance China's first written submission, paras. 164, 168.
[301] See for instance China's second written submission, para. 68.

CAAM members, who in turn were free to decide whether to participate.[302] China asserts that a third of the CAAM's membership consisted of joint ventures affiliated with the US respondents that chose as a group not to participate in these investigations.[303] China suggests that this may explain their non-participation in MOFCOM's investigations, and thus why only a subset of the CAAM's members participated.

7.201. Regarding the second aspect of the US argument, China asserts that MOFCOM's domestic industry definition, which included four national car makers and four joint ventures that requested confidential treatment of their identities[304], satisfies the major proportion basis for defining the domestic industry in the Anti-Dumping and SCM Agreements.[305] China adds in this regard that there is no specific quantitative threshold to satisfy in relation to the major proportion basis for defining the domestic industry.[306] China notes, further, that neither Article 4.1 of the Anti-Dumping Agreement nor Article 16.1 of the SCM Agreement express a preference between defining the domestic industry as producers as a whole, or those of them accounting for a major proportion of total domestic production.[307] Nor do these provisions require an IA to identify any practical constraints encountered in gathering data from domestic producers not included in its domestic industry definition, where the IA defines the domestic industry as accounting for an allegedly low proportion of total domestic production.[308]

7.202. China rejects the alleged consequential violations of Article 3.1 of the Anti-Dumping Agreement and Article 15.1 of the SCM Agreement put forward by the United States. China submits in this regard that each provision of the Anti-Dumping and SCM Agreements gives rise to distinct standards and obligations, requiring claims under each article to be assessed independently and separately.[309] China contends in this regard that the United States bears the initial burden of showing that MOFCOM's injury determination was inconsistent with Article 3 of the Anti-Dumping Agreement and Article 15 of the SCM Agreement.[310]

7.5.4 Arguments of the third parties

7.203. **Korea** argues that a domestic industry defined on the basis of a major proportion of total domestic production should encompass producers whose collective output represents "a relatively high proportion that substantially reflects the total domestic production".[311] In Korea's view, such "proportion" may be lower in investigations involving fragmented industries where collection of industry-wide information may cause practical constraints on the IA. Korea cites the Appellate Body report in *EC – Fasteners* in support of its arguments.[312]

7.204. **Saudi Arabia** submits that, given the close nexus between a domestic industry definition and an injury determination, the obligation to conduct an objective examination based on positive evidence under Article 3.1 of the Anti-Dumping Agreement and Article 15.1 of the SCM Agreement should also apply to the definition of the domestic industry under Article 4.1 of the Anti-Dumping Agreement and Article 16.1 of the SCM Agreement, respectively.[313] In Saudi Arabia's view, such an approach would ensure that the same analytical and evidentiary standards that apply to injury and causation analyses would also apply to the definition of the domestic industry. Noting previous Appellate Body decisions that support this proposition, Saudi Arabia invites the Panel to make an explicit finding to this effect.[314]

[302] China's response to Panel question No. 36.c.
[303] China's response to Panel question No. 36.a.
[304] China's response to Panel question No. 15.c.
[305] China's second written submission, para. 79.
[306] See for instance China's comments on the US response to Panel question No. 39.
[307] China's first written submission, para. 141.
[308] China's second written submission, para. 80.
[309] China's first written submission, para. 219.
[310] China's first written submission, para. 220.
[311] Korea's third party submission, paras. 6-7.
[312] Korea's third party submission, para. 8.
[313] Saudi Arabia's third party submission, paras. 33-34.
[314] Saudi Arabia's third party submission, para. 35.

7.5.5 Evaluation by the Panel

7.205. The US claim concerns two sets of provisions, Articles 4.1 of the Anti-Dumping Agreement and 16.1 of the SCM Agreement, which set forth the definition of domestic industry for purposes of AD and CVD investigations, and Articles 3.1 of the Anti-Dumping Agreement and 15.1 of the SCM Agreement, which require an IA to base its injury determination on an objective examination of positive evidence. The United States raises two distinct arguments under this claim: (i) MOFCOM, in conditioning the inclusion of domestic producers in the domestic industry on a willingness to participate in MOFCOM's injury investigations, introduced a material risk of distortion by using a process capable of leading to self-selection among domestic producers, and which in fact led to such self-selection among the members of the CAAM; and (ii) the domestic industry as defined by MOFCOM did not include producers accounting for a major proportion of total domestic production. China's position is that neither MOFCOM nor the CAAM took any measures to exclude domestic producers from the domestic industry as defined by MOFCOM or limit their participation, and the domestic industry defined by MOFCOM does in fact include domestic producers accounting for a major proportion of total domestic production of the domestic like product. We will address these arguments in turn.

7.206. Articles 4.1 and 16.1 define the domestic industry as either producers of the domestic like product "as a whole", or a subset of those producers, who collectively account for a "major proportion" of total domestic production. These provisions do not specify a hierarchy between these different bases for defining the domestic industry, and thus an IA may define the domestic industry in an investigation on either basis.[315] Neither do Articles 4.1 or 16.1 establish any procedures or methodology for the IA in defining the domestic industry. However, it is clear that an IA may not exclude a category of domestic producers of the like product from the definition of the domestic industry.[316] Articles 4.1 and 16.1 specify only two situations in which producers of the like product may be excluded from the domestic industry definition, namely, where these producers are importers, or are "related" to exporters or importers of the like product, or where a market is fragmented or divided into a series of distinct competitive markets by the IA and producers in each market are regarded as a separate industry. Neither of these situations is the case in the present dispute.

7.207. When an IA defines the domestic industry as producers of the like product accounting for a "major proportion" of total domestic production, it must ensure that the percentage of production covered is sufficiently large to qualify as an "important, serious or significant" proportion of total production.[317] That both the Anti-Dumping and SCM Agreements refer to "a" major proportion as opposed to "the" major proportion indicates that the percentage of production deemed a "major proportion" need not be greater than 50% of total production. We note in this respect that a panel previously accepted 46% of total production as sufficiently "important, serious or significant" to constitute a major proportion of total domestic production.[318] Further, the Appellate Body in another dispute did not *a priori* exclude the possibility that a figure as low as 27% of total domestic production might constitute a major proportion of total domestic production, depending on the circumstances.[319]

7.208. Moreover, we note that footnote 9 of the Anti-Dumping Agreement and footnote 45 of the SCM Agreement provide, in identical terms:

> [u]nder this Agreement the term "injury" shall, unless otherwise specified, be taken to mean material injury to a domestic industry, threat of material injury to a domestic industry or material retardation of the establishment of such an industry and shall be interpreted in accordance with the provisions of this Article.

Thus, it is clear that the "domestic industry" as defined under Articles 4.1 and 16.1 will form the basis of the injury determination, which must be made consistently with Articles 3 and 15, respectively.

[315] Panel Report, *China – Broiler Products*, paras. 7.415-7.420.
[316] Panel Report, *EC – Fasteners (China)*, para. 7.219.
[317] Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.341.
[318] Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.344.
[319] Appellate Body Report, *EC – Fasteners (China)*, para. 415.

7.209. The Appellate Body, in *China – GOES*, explained that Articles 3.1 and 15.1 set forth "the overarching obligations regarding the manner in which an investigating authority must conduct a determination of injury caused by subject imports to the domestic industry."[320] The Appellate Body considered that this general obligation informs the more detailed obligations in the remainder of Articles 3 and 15.[321] The Appellate Body in *China – GOES* stated that:

> the term "positive evidence" relates to the quality of the evidence that an investigating authority may rely upon in making a determination, and requires the evidence to be affirmative, objective, verifiable, and credible. Furthermore, the Appellate Body has found that the term "objective examination" requires that an investigating authority's examination "conform to the dictates of the basic principles of good faith and fundamental fairness", and be conducted "in an unbiased manner, without favouring the interests of any interested party, or group of interested parties, in the investigation".[322]

7.210. Finally, we recall that in *EC – Salmon (Norway)*, the panel considered the consequences for an injury determination of a definition of domestic industry which was inconsistent with the requirements of Article 4.1. The panel observed:

> [i]f the EC's approach to defining domestic industry in this case resulted in an investigation concerning a domestic industry that did not comport with the definition set forth in Article 4.1, then it seems clear to us the EC analyzed the wrong industry in determining the adequacy of support for the initiation of the investigation under Article 5.4 of the AD Agreement, and in considering injury and causation under Article 3, committing an error which is potentially fatal to the WTO-consistency of the investigating authority's determinations on those issues.[323]

The panel went on to conclude that:

> the EC's approach to defining the domestic industry in this case resulted in an investigation concerning a domestic industry that did not comport with the definition set forth in Article 4.1 of the AD Agreement. As a consequence, the EC's determination of support for the application under Article 5.4 was based on information relating to a wrongly-defined industry, and is therefore not consistent with the requirements of that Article. Furthermore, the EC's analyses of injury and causation were based on information relating to a wrongly-defined industry, and are therefore necessarily not consistent with the requirements of Articles 3.1, 3.4, and 3.5.[324]

We agree with this approach, and also consider that a wrongly-defined domestic industry necessarily leads to an injury determination that is inconsistent with the Agreements. While the panel's findings in *EC – Salmon (Norway)* were in the context of the Anti-Dumping Agreement, its reasoning is equally apposite to Articles 16.1 and 15 of the SCM Agreement because, as noted above, the texts of these provisions are identical.

7.5.5.1 Whether MOFCOM's domestic industry definition was distorted

7.211. Article 4.1 of the Anti-Dumping Agreement and Article 16.1 of the SCM Agreement require MOFCOM to define the domestic industry in relation to domestic producers "of the like product"[325]. Prior to limiting the like product scope by revising the engine capacity parameter to certain automobiles of a cylinder capacity equal to or greater than 2500cc, we recall that MOFCOM defined

[320] Appellate Body Report, *China - GOES*, para. 127.
[321] Appellate Body Report, *China – GOES*, para. 127.
[322] Appellate Body Report, *China - GOES*, para. 126.
[323] Panel Report, *EC – Salmon (Norway)*, para. 7.118.
[329] Panel Report, *EC – Salmon (Norway)*, para. 7.124.
[325] "Like product" is defined in Article 2.6 of the Anti-Dumping Agreement and footnote 46 to the SCM Agreement as:

> a product which is identical, i.e. alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration.

the like product as "Saloon cars and Cross-country cars (of a cylinder capacity ≥ 2000cc)".[326] MOFCOM concluded, in its determinations, that the Chinese saloon and cross-country cars included in its definition were "like" those exported by the US respondent companies, having regard to "physical and chemical characteristics", "use", "sales channels", and "prices, consumers, competitiveness or substitution".[327] It thus follows that the domestic industry in the underlying investigations was to be defined either as producers "as a whole" of saloon cars and cross-country cars of a cylinder capacity equal to or greater than 2500cc, or as those producers whose output of saloon cars and cross-country cars of a cylinder capacity equal to or greater than 2500cc constitutes a major proportion of total Chinese production of such automobiles. MOFCOM defined its domestic industry on the latter basis in this case. Once the domestic industry is defined, on either basis, Articles 4.1 and 16.1 allow for the exclusion of producers in only two situations, neither of which are of relevance to the present dispute. Beyond these two situations, Articles 4.1 and 16.1 do not allow MOFCOM to exclude categories or groups of producers[328] from its domestic industry definition.[329]

7.212. However, merely because certain producers were not included in the domestic industry as defined by MOFCOM in this dispute, it does not necessarily follow that such producers were thereby excluded from the domestic industry definition. Rather, we see an important distinction between the *a priori* exclusion of producers from the domestic industry, as defined pursuant to Articles 4.1 and 16.1, and data collection problems that an IA may encounter after defining the domestic industry.[330] While the latter scenario may raise concerns as to the consistency of the IA's injury determination with Article 3 of the Anti-Dumping Agreement and Article 15 of the SCM Agreement, unlike the former scenario, it would not necessarily bear upon Articles 4.1 and 16.1. We recall in this regard that Articles 4.1 and 16.1 do not establish any particular procedure or methodology for MOFCOM to follow in defining the domestic industry.[331] Nothing in these provisions thus precludes MOFCOM from establishing deadlines for producers to come forward to be considered for inclusion in the domestic industry, despite that such deadlines may ultimately prevent producers from participating in the investigations, where they fail to make themselves known in a timely manner.[332] In our view, further, the mere fact that the domestic industry as defined does not include a particular proportion of producers opposing the complaint, does not demonstrate that MOFCOM acted inconsistently with Articles 4.1 and 16.1. With this in mind, we turn to the specific arguments with respect to this claim.

7.213. The United States argues that MOFCOM, by requiring domestic producers to register in order to participate in the investigations, introduced a self-selection process that distorted its injury determination in two respects. First, the United States submits that MOFCOM, by conditioning the inclusion of domestic producers in the domestic industry definition on a willingness to participate in the injury investigations, introduced a material risk of distortion by using a process capable of leading to self-selection among domestic producers.[333] The United States contends that this process created an inherent bias towards weaker-performing domestic producers, and likens MOFCOM's actions in this regard to those at issue in the *EC – Fasteners (China)* dispute.[334] Second, the United States submits that there was such self-selection in this dispute, pursuant to which the CAAM ultimately provided data to MOFCOM from only eight of its member producers.[335] We will first turn to each alleged aspect of distortion.

[326] AD notice of initiation, Exhibit USA-06, p. 2; CVD notice of initiation, Exhibit USA-07, p. 2.

[327] Preliminary determination, Exhibit CHN-05, pp. 29-30. The United States does not challenge MOFCOM's like product determination, as such. The United States refers to MOFCOM's conclusion that Chinese automobiles and subject imports overlapped competitively in its causation analysis, and challenges MOFCOM's use of AUVs without adjustment in its price effects claim.

[328] Or forms of the like product.

[329] See para. 7.206 of this Report.

[330] Panel Report, *EC – Salmon (Norway)*, fn. 283.

[331] See para. 7.206 of this Report.

[332] We do not mean to suggest that such deadlines can be rigidly enforced in all instances, but in our view, at some point in the investigation it may well become unfeasible as a practical matter for an IA to include additional producers in the domestic industry, even if they seek to participate, and still finish the investigation within the time limits established in Article 5.10. See, in this regard, Appellate Body Report, *EC – Fasteners (China)*, paras. 460, 611, 613.

[333] See for instance US comments on China's response to Panel questions Nos. 35 and 36.c.

[334] See for instance US second written submission, paras. 61-62.

[335] See for instance US opening statement at the second Panel meeting, paras. 34-35.

7.214. We find the US contention that MOFCOM's registration requirement introduced a material risk of distortion, as a process capable of leading to self-selection among domestic producers in the definition of the domestic industry, to be unconvincing. We note that there are multiple steps that must be taken in AD and CVD investigations, and IAs face logistical constraints in this regard. In previous cases, panels and the Appellate Body have concluded that an IA must be allowed some flexibility in how it ensures an orderly conduct of its investigations, for instance by establishing deadlines for interested parties to come forward to be considered for inclusion in the domestic industry.[336] We consider that the same need for flexibility justifies the use of a registration process, which essentially requires interested parties to come forward by a deadline and make themselves known to the IA to be considered part of the domestic industry. The mere fact that some producers may choose not to do so, i.e., "self-select" out of coming forward, to use the US terminology, does not, in our view, introduce a material risk of distortion in the IA's process of defining the domestic industry. In our view, merely that domestic producers might choose not to participate does not mean that the registration requirement leads to a definition of domestic industry inconsistent with Articles 4.1 and 16.1. Provided a registration requirement strikes an appropriate balance between the right of interested parties to participate in an investigation, and administrative efficiency, we see nothing in the relevant provisions that would preclude it.

7.215. In determining whether or not MOFCOM's registration requirement struck an appropriate balance in this regard, we recall that MOFCOM issued two notices of initiation and two notices calling for interested parties to register in the injury investigations, to which the registration forms were appended. All four notices contained information about how to contact the responsible MOFCOM officials.[337] Further, MOFCOM placed these notices, information about the investigations, and the registration forms themselves on its website.[338] The registration forms consisted of a questionnaire inviting prospective registrants to submit contact details and company-specific information on capacity, production, inventory, construction and expansion plans, and export/import volumes and values during the POI.[339] MOFCOM, in these notices, specified a 20-day deadline for interested parties to register to participate in its investigations, expiring on 26 November 2009.[340] In our view, MOFCOM communicated its notices and forms in an open manner, and the possibility of participation in the investigations was equally available to any interested party.

7.216. We disagree with the US contention that MOFCOM's use of a registration requirement created an inherent bias towards weaker-performing domestic producers in the Chinese automobile market, thereby leading to the imposition of higher duties. The data requested by MOFCOM in the registration notices was directly related to the inquiries MOFCOM would have to undertake in defining the domestic industry and making a determination of injury. We see nothing in the neutral request for information that would cause domestic producers posting the strongest performance to be more reluctant to come forward, provide this information to MOFCOM, and register to participate. Moreover, even if such producers did choose not to participate, we do not see how this can be attributed to the IA or the registration process.

7.217. We make two final observations in this regard. First, we note that the United States does not assert, as a factual matter, that the eight CAAM members that provided information for MOFCOM's investigations were weaker-performing.[341] Thus, there is no basis on which we could conclude that the domestic industry consisting of these producers was, in fact, distorted as a result of the registration process. Second, in the event that stronger-performing producers did not participate in the investigations, we recall that such producers received the same notice of the investigations as the eight producers that did participate through the CAAM, and were equally aware of the need to register in order to participate.[342] Even assuming that these producers might have supplied information that would weigh against a finding of injury to the domestic industry, we

[336] Panel Reports, *EC – Fasteners (China)*, para. 7.219; *China – Broiler Products*, para. 7.428; Appellate Body Report, *EC – Fasteners (China)*, para. 460.

[337] See AD notice of initiation, Exhibit USA-06, p. 3; AD injury registration notice, Exhibit CHN-02, pp. 1-2; and CVD notice of initiation, Exhibit USA-07, p. 5; CVD injury registration notice, Exhibit CHN-11, pp. 1-2.

[338] China's response to Panel questions Nos. 34-35.

[339] See AD injury registration form, Exhibit CHN-12, p. 1; CVD injury registration form, Exhibit CHN-13, p. 1.

[340] See AD notice of initiation, Exhibit USA-06, p. 2; AD injury registration notice, Exhibit CHN-02, p. 1; and CVD notice of initiation, Exhibit USA-07, p. 4; CVD injury registration notice, Exhibit CHN-11, p. 1.

[341] See in this regard US comments on China's response to Panel question No. 35.

[342] China's response to Panel question No. 36.c.

find nothing on the record to suggest that their failure to do so was due to any action or inaction on MOFCOM's part. We thus conclude that the United States has not shown that the use of a registration requirement by MOFCOM introduced a material risk of distortion through the use of a process capable of leading to self-selection among domestic producers in MOFCOM's definition of the domestic industry.

7.218. Regarding the US contention that MOFCOM's actions in this case are analogous to those addressed in the *EC – Fasteners (China)* dispute[343], we find it useful to recall the facts in that dispute. In the underlying investigation, the IA, the EC Commission, considering it possible that it would investigate a sample of the domestic industry, requested domestic producers to make themselves known within a specified period and provide certain information concerning their production and sales which could be used to determine the intended sample. 114 companies came forward with relevant information, and the IA determined that 46 of those producers, collectively accounting for 27% of total domestic production, constituted the domestic industry. The IA concluded that those producers accounted for a "major proportion" of total domestic production. The IA then selected a sample of those 46 producers, based on production volumes, as the sample for purposes of the injury determination. The sampled producers accounted for 70% of the production of the 46 producers constituting the domestic industry defined by the IA.[344]

7.219. Before the Panel, China challenged the EC determination on several bases, arguing, *inter alia*, that the IA erred in excluding from the domestic industry producers that made themselves known after the deadline set out in the notice of initiation and those that did not support the petition and that 27% of total domestic production did not constitute a "major proportion" within the meaning of Article 4.1. The Panel rejected China's claim.

7.220. On appeal, China argued, *inter alia*, that the Panel erred in rejecting China's claim that the domestic industry as defined did not account for a "major proportion" of total domestic production. The Appellate Body upheld China's appeal with respect to the major proportion issue, but rejected the remainder of China's appeal. The Appellate Body found that the IA had relied on a 25% benchmark in concluding that 27% of total domestic production was a major proportion. The Appellate Body concluded that this benchmark, which was based on the standing requirement in Article 5.4 of the Anti-Dumping Agreement, was "wholly unrelated" to the proper interpretation of the term "major proportion", and thus, by applying that benchmark, the IA defined a domestic industry covering a low proportion of domestic production, significantly restricting the data coverage for an accurate and undistorted injury determination.[345] In addition, the Appellate Body concluded that, by defining the domestic industry on the basis of producers' willingness to be included in the sample, the IA's approach imposed a self-selection process among domestic producers that introduced a material risk of distortion. The Appellate Body observed that the sample was a subset of the domestic industry, and thus the Appellate Body failed to see why willingness to be included in the subset should affect inclusion in the wider universe of the domestic industry.[346] Moreover, the Appellate Body noted that the IA had, in fact, identified and obtained information from more producers than the 45 it ultimately included in the domestic industry. The Appellate Body concluded that by including in the domestic industry only those producers willing to be included in the sample, the IA's approach shrank the universe of producers whose data could have been used in making the injury determination.[347]

7.221. We find the comparison between MOFCOM's actions in this dispute and those of the EC Commission in *EC – Fasteners (China)* unconvincing. We see several pertinent distinctions between the two situations in question.[348] First, unlike the EC Commission in *EC – Fasteners*, MOFCOM did not apply an unrelated benchmark in determining whether the domestic industry it defined included domestic producers accounting for a major proportion of total domestic production. Rather, MOFCOM received information from domestic producers whose collective output ranged between 33.54% and 54.15% of total domestic production during the POI, and then determined

[343] See for instance US second written submission, paras. 61-62.
[344] Panel Report, *EC – Fasteners (China)*, paras. 7.213-7.216.
[345] Appellate Body Report, *EC – Fasteners (China)*, para. 425.
[346] Appellate Body Report, *EC – Fasteners (China)*, para. 427.
[347] Appellate Body Report, *EC – Fasteners (China)*, para. 429.
[348] See in this regard on a similar factual pattern, Panel Report, *China – Broiler Products*, paras. 7.427-7.430.

without reference to any benchmark that they accounted for a major proportion of that production.[349]

7.222. Second, MOFCOM did not define the domestic industry on the basis of willingness to be included in a sample. There was no sampling in the investigations at issue here, and thus no question of limiting the universe of producers eligible to be included in the domestic industry on the basis of their willingness to be included in a subset of the domestic industry. While MOFCOM did require producers to register and submit information within a 20-day deadline, it did not act in any way to exclude any of the producers providing that information from consideration in defining the domestic industry. In our view, this is, if anything analogous to the process of setting a deadline by which producers were required to make themselves known, which was accepted as reasonable by both the panel and the Appellate Body in *EC – Fasteners (China)*.[350]

7.223. Third, we recall our findings above that the United States has not shown that the process used by MOFCOM to define the domestic industry was biased towards a category of domestic producers.[351] We thus conclude that MOFCOM's registration requirement differs materially from the actions taken by the EC Commission in the *EC – Fasteners (China)* dispute.

7.224. Turning to the second alleged distortion in MOFCOM's domestic industry definition, the United States argues that there was self-selection in this case, as a result of which the CAAM ultimately provided data to MOFCOM from only eight of its member producers resulting in actual distortion of the injury determination. This argument rests on speculation. The United States has pointed to nothing on the record which suggests that the CAAM orchestrated its members' participation in MOFCOM's investigations in any way that would make an affirmative injury determination more likely. Moreover, while it is true that only a subset of CAAM members chose to participate in MOFCOM's investigations, there is simply no evidence to suggest that this was because those companies were the weakest, and that producers posting stronger results chose not to participate for that reason. There are equally plausible other reasons which might explain the decision of CAAM members to participate in the investigations or not.

7.225. We note that there is nothing in the text of the Anti-Dumping or SCM Agreements establishing a methodology for defining the domestic industry in an investigation. In our view, the possibility that weaker-performing producers in a given industry will more strongly support an AD or CVD investigation or be more likely to participate actively is simply a reflection of the realities of trade remedy actions. The possibility of imposition of definitive AD and/or CVD measures will afford all producers relief from lower-priced imports, but producers performing less well will tend to have a greater incentive to seek initiation of and participate in an investigation. We fail to see how this fact, which is beyond the control of an IA, is affected by the requirement that producers register and provide certain information in order to participate. In the same vein, the fact that producers may choose to request and take part in an investigation by coordinating their actions through a trade association, which can gather individual company data to send to the IA, does not necessarily mean that a domestic industry defined as those producers is inconsistent with the requirements of Articles 4.1 and 16.1. We recall that Articles 5.4 of the Anti-Dumping Agreement and 11.4 of the SCM Agreement provide that an AD or CVD investigation may only be initiated based on an application made "by or on behalf of" the domestic industry.[352] Further, Articles 5.4 of the Anti-Dumping Agreement and 11.4 of the SCM Agreement preclude the initiation of an investigation where producers expressly supporting the application account for less than 25% of total production, or where producers supporting the application account for less than 50% of production of those producers expressing an opinion. Thus, the possibility that a domestic industry could, by self-selecting participation in the investigation obtain an AD or CVD measure which is unjustified seems extremely unlikely. Certainly nothing in the circumstances of this case suggests that this happened in the investigations at issue.

[349] Final determination, Exhibit CHN-07, pp. 35, 48; supplemental injury submission, Exhibit CHN-08. We note that the actual percentages of total production are not themselves specified in either document.

[350] Panel Report, *EC – Fasteners (China)*, para. 7.219; Appellate Body Report, *EC – Fasteners (China)*, para. 460.

[351] See paras. 7.211–7.216 of this Report.

[352] Unless, of course, an investigation is self-initiated pursuant to either Article 5.6 of the Anti-Dumping Agreement or Article 11.6 of the SCM Agreement.

7.226. In light of the above, we conclude that the United States has not demonstrated that the domestic industry definition in the investigations at issue was distorted because of alleged self-selection resulting from MOFCOM's registration requirement for participation in the investigations. The United States has thus not established that MOFCOM's process resulted in a definition of domestic industry in these investigations inconsistent with Article 4.1 of the Anti-Dumping Agreement and Article 16.1 of the SCM Agreement. Consequently, the United States' claim that the injury determination was inconsistent with Articles 3.1 of the Anti-Dumping Agreement and 15.1 of the SCM Agreement as a result of having been based on a wrongly-defined domestic industry must be rejected.

7.5.5.2 Whether the domestic industry defined by MOFCOM included producers accounting for a major proportion of total domestic production

7.227. We note that United States does not argue that the actual percentages of total domestic production accounted for by producers included in the domestic industry defined by MOFCOM are insufficient on a mathematical or quantitative basis. Rather, the United States contends that that definition was not based on a major proportion of total domestic production, because of: a) MOFCOM's allegedly flawed process by which the domestic industry was defined, b) the relatively low percentages of total domestic production accounted for by producers included in the domestic industry definition, and c) MOFCOM's failure to justify defining the domestic industry as it did in light of the relatively low percentages in its final determination.[353]

7.228. We have already rejected the US arguments with respect to the process by which MOFCOM defined the domestic industry in the investigations at issue.[354] Accordingly, to the extent the United States contends that this allegedly flawed process also led to a domestic industry definition that was not based on a major proportion of total domestic production, we disagree.

7.229. We further consider that the United States has not substantiated its argument that the percentages of total domestic production accounted for over the POI by domestic producers included in the industry defined by MOFCOM were low and that MOFCOM should have explained its rationale for allowing such low percentages to reflect a major proportion of total domestic production. We recall that producers in the domestic industry accounted for no less than 33.54% of total domestic production during the period examined, and as much as 54.16%. In the absence of some further explanation, we fail to see why these percentages should be considered to be low, let alone why MOFCOM should have been required to show justification in this regard.

7.230. Before concluding, we wish to address the US reliance on *EC – Fasteners (China)* to contend that MOFCOM was obliged to obtain "wide ranging information concerning the relevant economic factors in order to ensure the accuracy of an investigation concerning the state of the industry and the injury it has suffered", and that in order to do so, MOFCOM was obliged to define the domestic industry so as to include domestic producers accounting for "a relatively high proportion of the total domestic production."[355] In our view, the US argument puts the cart before the horse. While an IA is certainly required to collect "wide ranging information concerning the relevant economic factors in order to ensure the accuracy of an investigation concerning the state of the industry and the injury it has suffered", before it can do so it must define the domestic industry from whose members that information will be obtained. We fail to understand how the need to gather such information can inform the process of defining the domestic industry, unless, as is not the case, there is a hierarchy between the two bases for defining the domestic industry set out in Articles 4.1 and 16.1. As discussed above, in *EC – Fasteners (China)* the Appellate Body found fault with the definition of the domestic industry because the IA *a priori* excluded without justification a category of domestic producers, those that did not express a willingness to be included in a sample, from the domestic industry it defined, and relied on an inappropriate benchmark in assessing major proportion. We do not read this decision as having implications for the process of obtaining information concerning the domestic industry after it has been defined. As we indicated above, while an injury determination may be found to be inconsistent with Articles 3.1 and 15.1 if it is found that there is an inadequate basis of evidence to support it, such inconsistency would not arise from failing to define the industry to include producers accounting for a sufficiently large proportion of domestic production. A lack of sufficient evidence to support

[353] US response to Panel question No. 39.
[354] See para. 7.226 of this Report.
[355] See for instance US response to Panel question No. 39.

an injury determination might arise as a result of data collection problems, but again, such problems would not arise from failing to define the industry to include producers accounting for a sufficiently large proportion of domestic production.[356] To the extent that the United States suggests that the Appellate Body report in *EC – Fasteners (China)* stands for the proposition that a domestic industry defined as producers accounting for a major proportion of total domestic production must, in order to be consistent with Articles 4.1 and 16.1, in addition, be representative of total domestic production, in the sense that a sample must be representative of the universe it represents, we cannot agree. In our view, requiring an industry defined as producers accounting for a major proportion of total domestic production to include a sufficiently large proportion to ensure that it is representative of total domestic production would subordinate the major proportion basis for defining the domestic industry to the total domestic production basis for defining the domestic industry. Such subordination is without any justification or support in the Anti-Dumping and SCM Agreements. Articles 4.1 and 16.1 establish two distinct bases for defining the domestic industry. Both are equally valid, and there is no hierarchy between them, as is clear from the use of the conjunction "or" in the text of these provisions.[357] As we understand these provisions, if a domestic industry is properly defined on the basis of producers accounting for a major proportion of total domestic production, those producers then constitute the entire domestic industry for purposes of the investigation.[358] We do not find it logical in such a situation to speak of total domestic production as an alternative or more appropriate benchmark.

7.5.6 Conclusion

7.231. On the basis of the foregoing, we dismiss the US claim that MOFCOM's domestic industry definition was distorted, and failed to include producers accounting for a major proportion of total domestic production of the domestic like product, inconsistently with Article 4.1 of the Anti-Dumping Agreement and Article 16.1 of the SCM Agreement. We therefore also reject the US claim that China acted inconsistently with Article 3.1 of the Anti-Dumping Agreement and Article 15.1 of the SCM Agreement by basing its injury determination in the investigations at issue on a wrongly defined domestic industry.

7.6 Whether MOFCOM's price effects analysis was consistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement and Articles 15.1 and 15.2 of the SCM Agreement

7.6.1 Provisions at issue

7.232. The texts of Articles 3.1 of the Anti-Dumping Agreement and 15.1 of the SCM Agreement are set out in paragraph 7.182 above.

7.233. Article 3.2 of the Anti-Dumping Agreement and Article 15.2 of the SCM Agreement provide as follows:

> [w]ith regard to the volume of the dumped imports, the investigating authorities shall consider whether there has been a significant increase in [dumped/subsidized] imports, either in absolute terms or relative to production or consumption in the importing Member. With regard to the effect of the [dumped/subsidized] imports on prices, the investigating authorities shall consider whether there has been a significant price undercutting by the [dumped/subsidized] 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.

[356] See para. 7.212 of this Report.
[357] Panel Report, *China – Broiler Products*, para. 7.416.
[358] We recall in this regard the views of the panel in *EC – Bed Linen*, which found that, having defined the domestic industry as a defined group of producers accounting for a major proportion of total domestic production of the like product, the IA in that case could not then take into account, in its injury analysis, the fact that additional domestic producers of the like product had gone out of business during the period of investigation, since these producers were not part of the industry defined in that case. See Panel Report, *EC – Bed Linen*, para. 6.182.

7.6.2 Factual background

7.234. MOFCOM evaluated the price effects of imports for purposes of the AD and CVD investigations in a single final determination.[359] The price effects analysis in the final determination was almost unchanged from the price effects analysis in the preliminary determination, which also considered the price effects for both investigations.[360] In both determinations, MOFCOM analysed trends in the average unit values ("AUVs") of subject imports and in the AUVs of the domestic like product, and then compared the trends on a yearly basis for 2006, 2007, 2008, interim 2008, and interim 2009.

7.235. The final determination concludes that, comparing the two AUVs on a yearly basis, the price of subject imports during the POI followed the same trend as the price of the domestic like product. MOFCOM concluded that this parallel pricing, coupled with increases in subject import volumes and market share, depressed domestic prices:

> [a]s mentioned above, during the POI, the movement of price trends of the product under investigation and domestic like product are consistent basically. Both of them increased in general from 2006 to 2008, and decreased in the first three quarters of 2009. The investigation evidence indicates that, the import price of the product under investigation decreased by 3.17% in the first three quarters of 2009 compared with the same period of 2008, which led to that the prices of domestic like products [*sic.*] in the first three quarters of 2009 decreased by 10.13% compared with the same period of 2008. It is clear that, the import prices of the product under investigation depressed the prices of Chinese domestic like product.
>
> In conclusion, the investigation evidence indicates that, during the POI, the import volume of the product under investigation as well as its market shares in Chinese domestic market increased continually. Especially at the end of the POI, the market share of the product under investigation significantly increased and its price decreased at the same time, which depressed the price of the domestic like product, and affected the profitability of the domestic industry.[361]

7.236. Chrysler USA submitted comments to MOFCOM in response to the almost identical price effects analysis contained in MOFCOM's preliminary determination.[362] Chrysler USA challenged MOFCOM's price effects analysis in light of the allegedly small market share held by subject imports in the Chinese automobile market, and the purportedly negligible competitive overlap between subject imports and the domestic like product. Chrysler's letter reads in relevant parts:

> [t]he fact is that compared to the very large investigation rises in (1) non-subject imports and (2) production of the types of vehicles under investigation by China's JVs, the presence of subject imports in the Chinese market has always been minor. Indeed, the data cited in the Preliminary Determination show that, throughout the period of review, sales of sedans and SUVs produced by Chinese manufacturers not included in the domestic industry and by producers in non-subject (or "third") countries have always accounted for at least 71 per cent of total apparent domestic consumption.
>
> [Table 3 omitted]
>
> More to the point, however, is the fact that MOFCOM's own data demonstrate that the overlap of competition between subject imports and the domestic like product is minuscule, if it exists at all. The data relied on by MOFCOM show that subject imports oversold the domestic like product during the period of investigation, and oversold to a far greater degree toward the end of the period of investigation.
>
> [Table 4 omitted]

[359] Final determination, Exhibit CHN-07, pp. 128-140.
[360] Preliminary determination, Exhibit CHN-05, pp. 89-101.
[361] Final determination, Exhibit CHN-07, pp. 130-131.
[362] Preliminary determination, Exhibit CHN-05, pp. 91-92.

> This rules out any possibility that the pricing of subject imports suppressed or depressed prices of the domestic like product. Indeed, this large a margin of overselling is evidence that there is no meaningful overlap of competition between subject imports and the domestic like product.
>
> Available information on the types of subject vehicles imported from the United States and the like product produced in China confirms the absence of meaningful competition between them. The automobile industry segments the subject sedans and SUVs sold in China during the period of investigation into the following categories: (1) Entry Level, (2) Mid Level, (3) Premium Level, and (4) Luxury Level. There were no, i.e., zero "Entry Level" vehicles among the subject imports at any time during the period of investigation, and most of them (i.e., 73.6 percent in 2006, 95.8 percent in 2007, 80.5 percent in 2008, 73.3 percent in 2009, and 78.7 percent in 2010) were "Luxury Class" vehicles. By contrast, almost all of the domestic like product saloon cars and cross-country cars produced and sold in China during the period of investigation – i.e., 98.7 per cent in 2006, 95.1 per cent in 2007, 96.6 per cent in 2008, 97.6 per cent in 2009 and 98.8 per cent in 2010 – were "Entry Level" vehicles. These data disprove any claim that subject imports could have had a material effect on sales of the much different class of sedans and SUVs produced by the domestic industry.[363] (italic in original, underline added)

7.237. MOFCOM noted Chrysler USA's arguments, and dismissed each of them in its discussion of causation in the final determination.[364]

7.6.3 Arguments of the parties

7.6.3.1 United States

7.238. The United States contends that MOFCOM's finding of price depression in the investigations at issue 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 in five respects.

7.239. First, the United States argues that MOFCOM's finding of parallel pricing is invalidated by the record. Specifically, the United States notes that the prices of subject imports and the domestic like product moved in opposite directions in the 2006-2007 period.[365] Further, in those periods of the POI where the two prices moved in parallel, the rates of change in the prices of subject imports and the domestic like product differed.[366] In the US view, these trends suggest that the prices of subject imports and the domestic like product were not parallel at any point of the POI.[367] The United States submits that even if MOFCOM's finding of parallel pricing had a basis in the record, MOFCOM in any event failed to explain how such parallel pricing caused price depression. The United States submits that the qualifying language used by MOFCOM in its final determination, that subject import and domestic like product prices were "consistent basically" and increased "in general" falls short of such an explanation, being at a level of generality that is not permitted by Articles 3.1 of the Anti-Dumping Agreement and 15.1 of the SCM Agreement.[368]

7.240. Second, the United States argues that MOFCOM's price depression analysis is undermined by the fact that prices of subject imports were higher than those of the domestic industry, that is, showed overselling, through most of the POI.[369] According to the United States, MOFCOM's conclusion that a 3% decline in subject import prices caused a 10% drop in domestic prices becomes untenable in light of the fact that subject imports at that time were overselling the domestic like product by wide margins.[370]

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[363] US respondent comments on the preliminary determination, Exhibit USA-12, pp. 26-28.
[364] Final determination, Exhibit CHN-07, pp. 155-162. We discuss causation below at section 7.7 of this Report.
[365] See for instance US first written submission, para. 135.
[366] US second written submission, para. 78.
[367] US opening statement at the second Panel meeting, para. 51.
[368] US opening statement at the first Panel meeting, para. 77.
[369] See for instance US opening statement at the first Panel meeting, paras. 71-72.
[370] US opening statement at the first Panel meeting, para. 72.

7.241. Third, the United States submits that MOFCOM erred in using annual AUVs without adjustments in its price effects analysis. Given record evidence that "certain automobiles" is not a homogeneous product[371], MOFCOM should have made adjustments to reflect the different grades of subject imports and the domestic like product, or at least explained why such adjustments were not necessary in this case.[372] In this regard, the United States draws the Panel's attention to sales data submitted by Chrysler USA to MOFCOM which shows that sales of subject imports occurred mostly in higher-value market segments than those of the domestic like product.[373]

7.242. Fourth, the United States contends that MOFCOM's reliance on an increase in the market share of subject imports as depressing prices of the domestic industry is undermined by evidence on the record that Chinese producers made equivalent gains in market share during the same period.[374] In this regard, the United States notes that subject imports gained 4.68 percentage points of market share from interim 2008 to interim 2009, and the domestic industry also gained 4.51 percentage points of market share during that same period.[375] The United States submits that MOFCOM failed to address this evidence, which undercuts its price depression determination.[376] The United States contends that a review of market share data for subject imports, the domestic industry, Chinese producers not part of the domestic industry as defined by MOFCOM, and third country imports clearly shows that the domestic industry lost market share to a combination of Chinese producers not part of the domestic industry and third country imports, as opposed to subject imports.[377] In the US view, this indicates that the market share gains of subject imports lacked "explanatory force" for the decline in domestic industry prices in this period.[378]

7.243. Last, the United States argues that MOFCOM's domestic industry definition compromised its price effects analysis, insofar as MOFCOM wrongly defined the domestic industry, which consequently resulted in a distorted injury determination.[379] The United States contends in this regard that the pricing data obtained from a limited segment of the domestic industry could not provide an understanding of the explanatory force of subject imports for the price of the domestic like product.[380]

7.6.3.2 China

7.244. China asserts that MOFCOM's price depression analysis entailed a review of price trends through the entirety of the POI. Pursuant to this review, MOFCOM found that prices for the domestic like product decreased as a result of a combination of increases in subject import volumes and in market share, coupled with parallel price trends for subject imports and the domestic like product. In China's view, the US challenge to MOFCOM's price depression determination is largely focused on trends for one year out of a nearly four-year long POI.[381]

7.245. Replying to the specific arguments raised by the United States, China first argues that MOFCOM correctly found parallel pricing between subject imports and the domestic like product, and based this finding on trends observed throughout the POI.[382] China acknowledges that the prices of subject imports and the domestic industry moved in opposite directions from 2006 to 2007. In China's view, an IA is not required to show a "perfect correlation in prices" to support a finding of parallel pricing. China contends that MOFCOM fully took into account differences in price trends between subject imports and the domestic like product during the POI, as reflected by the use, in the final determination, of the qualifiers, when it stated that prices for both baskets of goods were "consistent basically", and had "increased in general" from 2006 to 2008.[383] China also

[371] US first written submission, para. 141.
[372] See for instance US first written submission, para. 144.
[373] US first written submission, para. 142, referring to the US respondent comments on the preliminary determination, Exhibit USA-12, Table 6, pp. 50-51.
[374] See for instance US opening statement at the second Panel meeting, paras. 63-70.
[375] US first written submission, para. 145, referring to the final determination, p. 62 in Exhibit USA-02 (pp. 129-130 in Exhibit CHN-07).
[376] US first written submission, para. 147.
[377] US opening statement at the second Panel meeting, paras. 66-69.
[378] See for instance US second written submission, para. 85.
[379] See for instance US first written submission, para. 148.
[380] US second written submission, para. 92.
[381] See for instance China's second written submission, para. 83.
[382] See for instance China's opening statement at the first Panel meeting, paras. 49-51.
[383] See for instance China's opening statement at the second Panel meeting, para. 54.

argues that the rate of change in prices were similar for subject imports and the domestic like product in those parts of the POI where they moved in the same direction, particularly in the interim 2009 period.[384] China also submits that MOFCOM's final determination adequately addressed the role that parallel pricing played in MOFCOM's overall price effects analysis.[385]

7.246. Second, in China's view, logic dictates that higher-priced imports may depress the prices of lower-priced domestic goods.[386] China submits in this regard that if the existence of overselling fatally undercut a price depression or suppression analysis pursuant to the Anti-Dumping and/or SCM Agreement, price depression or suppression could never occur without price undercutting being present which, in China's view, reflects an incorrect interpretation of Article 3.2 of the Anti-Dumping Agreement and Article 15.2 of the SCM Agreement.[387]

7.247. Third, regarding the use of AUVs, China notes that neither Article 3.2 of the Anti-Dumping Agreement nor Article 15.2 of the SCM Agreement specifies a particular methodology for comparing prices of subject imports and the domestic like product.[388] China contends that the need to adjust AUVs in a price comparison is more appropriate in the context of a price undercutting analysis, where an IA must compare absolute price levels to determine whether subject import prices in fact undercut the domestic like product prices. As MOFCOM was comparing relative price movements over time in its price depression analysis, China submits that such adjustments were unnecessary in this case.[389] China contends in this regard that neither the Anti-Dumping Agreement nor the SCM Agreement requires an IA to establish a 100% overlap between subject imports and the domestic like product in a price effects analysis.[390] China submits that MOFCOM, in the investigations at issue, performed a detailed analysis of the competitive relationship between subject imports and the domestic like product, pursuant to which it determined that the use of unadjusted AUVs was appropriate.[391] In China's view, MOFCOM gave due consideration to the sales data submitted by Chrysler USA, and correctly determined that this data was unreliable in two respects. First, China contends that the four market segments into which data was separated, entry, mid, luxury, and premium, were undefined. Second, China submits that the data for total import volumes did not correspond to the data collected by MOFCOM.[392]

7.248. Fourth, China argues that the market share gained by the domestic industry in the interim 2009 period did not affect MOFCOM's analysis of market shares, which was based on trends over the whole of the POI.[393] China submits that from 2006 to interim 2009, subject import market share increased by 3.5 percentage points, while the market share of the domestic industry decreased by roughly the same margin. In China's view, this shows that subject imports took market share from the domestic industry.[394] China thus disagrees with the US contention that the domestic industry lost market share to Chinese producers not part of the domestic industry and third country imports. China submits in this regard that the market shares for these categories of producers remained relatively stable throughout the POI.[395] In response to the US assertion that MOFCOM failed to explain how market share increases of subject imports had "explanatory force" for the decline in domestic industry prices in this period, China contends that MOFCOM explained in its final determination that domestic producers only managed to gain market share by lowering their prices in order to compete with a surge in subject imports.[396]

7.249. China also points to the fact that no US respondents objected to MOFCOM's reliance on the market share gains of subject imports when evaluating this aspect of the US claim. In China's view, that no party raised objection to MOFCOM's findings on market shares in the course of its investigation undercuts the importance and significance that the United States now purports to

[384] China's second written submission, para. 106.
[385] See for instance China's second written submission, para. 105.
[386] See for instance China's first written submission, para. 189.
[387] China's response to Panel question No. 18.
[388] China's first written submission, para. 201.
[389] China's second written submission, paras. 116-120.
[390] China's second written submission, para. 131.
[391] See for instance China's response to Panel question No. 41.
[392] See for instance China's response to Panel question No. 19.
[393] See for instance China's first written submission, paras. 214-215.
[394] China's second written submission, para. 114.
[395] See for instance China's second written submission, paras. 111-112.
[396] See for instance China's second written submission, para. 110.

attribute to it before the Panel.[397] China asks the Panel to consider this lack of objection in its decision.

7.250. Last, China states that it has already shown in response to the US claim regarding MOFCOM's domestic industry definition that such definition was consistent with Article 4.1 of the Anti-Dumping Agreement and Article 16.1 of the SCM Agreement.[398] Thus, this aspect of the US claim on price effects has no basis. China in any event contends that each provision of the Anti-Dumping and SCM Agreements must be examined on its own, to determine whether the rights and obligations contained therein have been violated in light of the particular facts and arguments put forward by the parties in a given case. China thus disagrees with the US contention that a finding of a violation of Articles 4.1 and 16.1 automatically leads to a violation of Articles 3.2 of the Anti-Dumping Agreement and 15.2 of the SCM Agreement.[399]

7.6.4 Arguments of the third parties

7.251. **Japan** emphasizes the importance of evaluating the explanatory force of subject imports on the prices of the domestic industry in the context of a price effects analysis.[400] Noting an IA's obligation to ensure price comparability when comparing import and domestic like product prices in a price effects analysis, Japan submits that not all types of vehicles in a "basket" of subject imports would necessarily be "like" all types of vehicles in a basket of domestically produced vehicles, absent further investigation by an IA.[401] The use of AUVs to compare prices for these two baskets, according to Japan, risks ignoring price differences, and differences stemming from physical characteristics, usage and market perception.[402]

7.252. The **European Union** makes arguments on two aspects of MOFCOM's price effects analysis. First, it supports the US contention that a finding of parallel pricing, without more, is insufficient to demonstrate the existence or direction of any causal relationship between prices of imports and of the domestic like product.[403] The European Union emphasizes the importance of an in-depth and fact-intensive examination of the reasons for such parallel pricing, particularly in situations where there are breaks in the patterns of parallel pricing.[404] The European Union adds in this regard that the record in this dispute belies MOFCOM's finding of continuous parallel pricing in the underlying investigations.[405] Second, it considers that AUVs are appropriate in investigations involving products that are relatively homogeneous and sufficiently comparable.[406] The European Union argues that the way MOFCOM used AUVs in its price effects analysis in this case worked to the advantage of the US exporters, insofar as MOFCOM's price effects analysis revealed a discernible price gap between the high-end (subject imports) and low-end (domestic like product) segments at issue, thus giving weight to US arguments on overselling. Adjustments to these AUVs, according to the European Union, would close this price gap and downplay the presence of overselling.[407]

7.253. **Saudi Arabia** makes three observations on MOFCOM's price effects analysis. First, it emphasizes the importance of evaluating the explanatory force of subject imports on the prices of the domestic industry in the context of a price effects analysis.[408] Second, Saudi Arabia submits that an IA's evaluation of such explanatory force must conform to the overarching principles contained in Article 3.1 of the Anti-Dumping Agreement and Article 15.1 of the SCM Agreement, which require an IA to rigorously "consider" the relationship between subject import prices on price effects felt by the domestic industry.[409] Third, Saudi Arabia observes that an IA must document

[397] US first written submission, para. 217.
[398] China's first written submission, paras. 172-174.
[399] China's first written submission, para. 173.
[400] Japan's third party submission, paras. 25, 29.
[401] Japan's third party submission, para. 27.
[402] Japan's third party submission, para. 28.
[403] EU third party submission, para. 47.
[404] EU third party submission, para. 48.
[405] EU third party submission, para. 49.
[406] EU third party submission, para. 59.
[407] EU third party submission, para. 62.
[408] Saudi Arabia's third party submission, para. 37.
[409] Saudi Arabia's third party submission, paras. 38-39.

key steps in its "consideration[s]" on the record, failing which interested parties would be unable to verify whether the IA indeed "considered" material factors.[410]

7.6.5 Evaluation by the Panel

7.254. The principal issue that this claim raises is whether MOFCOM's finding of price depression finds sufficient basis in the information on the record to satisfy the requirements of Articles 3.1 and 3.2 of the Anti-Dumping Agreement and Articles 15.1 and 15.2 of the SCM Agreement.

7.255. We note that neither Article 3.2 nor Article 15.2 impose a specific methodology on an IA in analysing the effects of subject imports on domestic industry prices. Panels and the Appellate Body have previously recognized the margin of discretion that an IA has in choosing a methodology for such an analysis. However, these reports underline that this discretion is not unlimited. Articles 3.2 and 15.2 are informed by the overarching obligation of Articles 3.1 and 15.1 that an IA undertake an "objective examination" based on "positive evidence".[411] Further, the Appellate Body stated, in *China – GOES*, that in addition to a "consideration" of the existence of a type of price effect on domestic prices, an IA's price effects analysis requires an IA to determine whether subject imports have an "explanatory force" for such price effect(s).[412] This calls upon an IA to examine the relationship between subject imports and domestic prices, which cannot be done properly if the IA confines its analysis to what is happening to domestic prices, without consideration of subject imports and their prices. The Appellate Body observed that elements relevant to a consideration of price undercutting may differ from those relevant to a consideration of price depression or price suppression, such that subject imports may still have a price depressing effect, even if they do not significantly undercut domestic prices.[413] In all cases, however, the IA may not disregard evidence that calls into question the explanatory force of subject imports on alleged price effects to domestic industry prices.[414]

7.256. In price comparisons between groups of subject imports and the like domestic goods further, an IA must ensure price comparability between the goods whose prices are compared. A failure to ensure price comparability is inconsistent with the requirement under Articles 3.1 and 15.1 that a determination of injury be based on positive evidence and involve an objective examination of, *inter alia,* the effect of subject imports on the prices of domestic like products.[415] Thus, an IA must ensure that whatever price differentials arise from a comparison of domestic and imported goods in "baskets" of products or sales transactions result from a type of price effects, and not merely from differences in the composition of the two baskets being compared, absent adjustments by the IA to control and adjust for relevant differences in product characteristics.[416]

7.257. With these considerations in mind, let us now turn to the specific arguments presented by the United States in support of this claim.

7.6.5.1 Whether MOFCOM's findings on parallel pricing were supported by the evidence

7.258. The United States contends that MOFCOM's finding of parallel pricing has no basis in the evidence on the record before the IA. Further, the United States argues that MOFCOM failed to demonstrate the explanatory force of the purported parallel pricing on the price depression found. China argues that the record supports MOFCOM's finding of parallel pricing, and that MOFCOM also showed the explanatory force of such parallel pricing on the depression of domestic industry prices.

7.259. The final determination contains the following data with respect to yearly changes in the prices of subject imports and the domestic like product:

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[410] Saudi Arabia's third party submission, para. 40.

[411] Panel Reports, *China – X-Ray Equipment*, para. 7.41; *China – Broiler Products*, para. 7.474; Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 113 (discussing the related issue of the IA's examination of the volume of imports).

[412] Appellate Body Report, *China – GOES*, para. 136.

[413] Appellate Body Report, *China – GOES*, para. 137.

[414] Appellate Body Report, *China – GOES*, para. 154.

[415] In the Appellate Body's view, the obligations to ensure price comparability "must be met by every investigating authority in every injury determination". Appellate Body Report, *China – GOES*, paras. 200-201.

[416] Panel Reports, *China – X-Ray Equipment*, para. 7.65; *China – Broiler Products*, para. 7.483.

Table 3: Changes in AUVs (in %)[417]

Year	2006-2007	2007-2008	1Q-3Q 2008 – 1Q-3Q 2009
Subject imports	-8.47	39.6	-3.17
Domestic like product	11.08	16.82	-10.13

7.260. MOFCOM concluded in its final determination that these changes in AUVs demonstrated the existence of parallel pricing in the following terms:

> [a]s mentioned above, during the POI, the movement of price trends of the product under investigation and domestic like product are consistent basically. Both of them increased in general from 2006 to 2008, and decreased in the first three quarters of 2009. The investigation evidence indicates that, the import price of the product under investigation decreased by 3.17% in the first three quarters of 2009 compared with the same period of 2008, which led to that the prices of domestic like products [*sic*.] in the first three quarters of 2009 decreased by 10.13% compared with the same period of 2008. It is clear that, the import prices of the product under investigation depressed the prices of Chinese domestic like product.[418] (emphasis added)

7.261. While we agree that an IA need not find a perfect correlation in prices to establish the existence of parallel pricing between subject imports and the domestic like product, we find that MOFCOM's analysis of the purported existence of parallel pricing fails to reflect an objective examination based on positive evidence of the prices of subject imports and the domestic like product.

7.262. The record clearly shows that from 2006 to 2007, the average unit values of subject imports and of the domestic like product moved in different directions: the AUV of subject imports decreased by 8.47%, while the AUV of the domestic like product rose by 11.08%.[419] This is not discussed in the final determination at all. In our view, however, such a fact, which seems to undermine the factual conclusion reached by the IA, should have been addressed in the IA's determination. In the absence of any explanation as to why the divergence in AUVs observed in the 2006-2007 period did not affect MOFCOM's final conclusion that there was a parallelism between the prices of subject imports and the domestic industry during the POI, we cannot conclude that MOFCOM even considered this matter, much less how it was resolved. While we do not mean to suggest that diverging price movements between subject imports and the domestic like product necessarily preclude a finding of parallel pricing in general, we consider that any such finding would require some indication of the IA's reasoning in support of a conclusion of parallel pricing in this situation. In our view, MOFCOM's use of qualifiers in the portion of its final determination quoted above[420], upon which China relies to argue that MOFCOM took into account the divergent trends, fails to explain how MOFCOM arrived at the conclusion that parallel pricing existed in spite of the diverging movements in the 2006-2007 period. We consider that interpreting these qualifiers to mean that MOFCOM took into account these diverging movements would amount to our reading into the determination explanations that the IA did not provide.

7.263. We note that for the remainder of the POI, AUVs for subject imports and the domestic like product moved in the same direction. AUVs for both increased from 2007 to 2008 and then dropped from interim 2008 to interim 2009. However, while the general direction of change was the same, the rate of change of the two AUVs was considerably different. From 2007 to 2008, the AUVs of the domestic like product increased less than half as much as the AUVs of subject imports (16.82% compared to 39.6%). From interim 2008 to interim 2009, the AUVs of the domestic like product decreased almost three times as much as the AUVs of subject imports (10.17% compared to 3.17%).[421]

[417] Final determination, Exhibit CHN-07, pp. 129-130.
[418] Final determination, Exhibit CHN-07, p. 130.
[419] Final determination, Exhibit CHN-07, pp. 129-130.
[420] Statements that prices of subject imports and the domestic like product were "consistent basically" throughout the POI and "increased in general" from 2006 and 2008. See para. 7.260 of this Report.
[421] Final determination, Exhibit CHN-07, pp. 129-130.

7.264. While it may not necessarily be erroneous to consider these movements to be parallel in a general sense, Article 3.1 of the Anti-Dumping Agreement and Article 15.1 of the SCM Agreement, in our view, would have required a more detailed explanation of such a finding in the circumstances of this case. We note in this respect that the definition of "parallel" generally suggests not only movement in the same direction, but also equivalent changes;

> Of lines (esp. straight ones), planes, surfaces, or concrete things, or of one in relation to another: lying or extending alongside each other or the other and always at the same distance apart; continuously equidistant. . . Having the same or a like course, tendency, or purport: running on the same or similar lines: resembling something else, or each other, throughout the whole extent: precisely similar, analogous, or corresponding.[422]

This reinforces our view that a situation of diverging trends during a part of the period examined requires explanation before those trends can be characterized as "parallel". The evaluation of the price effects of dumped or subsidized imports is an important aspect of an injury determination and must be explained as clearly as possible in light of the facts before the IA. We would have expected an objective and unbiased IA to take these two issues, the divergence in trends, and the different rates of changes in AUVs, into account and explained why they did not affect the conclusion reached.

7.265. In addition to the lack of supporting explanation for MOFCOM's conclusion that there was parallel pricing, we note that the determination and underlying record contain no explanation of the connection between the purported existence of parallel pricing and the price depression found to affect domestic industry prices. Although parallel pricing may form a basis for a determination that subject imports depressed domestic like product prices[423], such a determination must explain the role of parallel pricing in the price depression found. In the investigations at issue, MOFCOM limited itself merely to finding the existence of parallel pricing in its final determination.[424] We thus find that MOFCOM failed to adequately explain the role of subject imports in the price depression found to exist on the domestic market.[425]

7.266. Finally, we note China's argument that MOFCOM based its price depression determination on a combination of parallel pricing, volumes and market share gains.[426] Insofar as China suggests that MOFCOM's findings on subject import volumes should stand, absent an explicit challenge by the United States, and are alone sufficient to support its price effects determination[427], we disagree. In this regard, we recall the Appellate Body's conclusion in *China – GOES*, that where an IA relies on both subject import prices and volumes in its price effects analysis but provides no explanation or reasoning as to whether or how the prices and volumes of subject imports interacted to produce an effect on domestic prices, a panel may find itself unable to disentangle the relative contribution of these price and volume effects in the IA's final determination, without risking that it substitute its judgment for that of the IA.[428] As we are similarly unable to disentangle the relative contributions of MOFCOM's findings on import volumes from its findings on parallel pricing and market share gains, we find that we cannot uphold MOFCOM's price depression determination on the basis of its findings on subject import volumes alone.

7.267. On the basis of the foregoing, we conclude that MOFCOM's determination that there was price parallelism and its failure to adequately examine and explain the consequences for its finding of price depression, fell short of the requirements of Articles 3.2 and 15.2 of the Agreements read in light of the general obligation set forth in Articles 3.1 and 15.1 of the Anti-Dumping and SCM Agreements, respectively.

[422] New Shorter Oxford English Dictionary, Clarendon Press 1993.
[423] See for instance Appellate Body Report, *China – GOES*, para. 210.
[424] Final determination, Exhibit CHN-07, pp. 130-131.
[425] Appellate Body Report, *China – GOES*, para. 136.
[426] See for instance China's second written submission, para. 83.
[427] China's first written submission, paras. 178-179.
[428] Appellate Body Report, *China – GOES*, paras. 220-221.

7.6.5.2 Whether MOFCOM's finding of price depression was warranted in light of evidence of overselling by subject imports

7.268. The United States asserts that MOFCOM erred in finding price depression in light of overselling by subject imports during most of the POI.[429] The United States contends that overselling by subject imports casts doubts on MOFCOM's price depression determinations. China disagrees that overselling margins preclude an IA from finding price depression.

7.269. MOFCOM's final determination contains the following data with respect to the yearly average prices of subject imports and the domestic like product:

Table 4: AUVs (in CNY/Unit)[430]

Year	2006	2007	2008	1Q-3Q 2009
Subject imports	315,467	288,749	403,089	411,382
Domestic like product	280,596	311,698	364,122	315,535

7.270. We observe that, with the exception of the 2007 period, the average price of subject imports was higher than that of the domestic like product by significant margins. In 2007, subject imports undersold the domestic like product by an average of CNY 22,949 per unit.[431] For the rest of the POI, subject imports oversold the domestic like product, and by larger margins, in each period: CNY 34,871 per unit in 2006, CNY 38,967 per unit in 2008 and CNY 95,847 per unit in the interim 2009 period. The arguments by the United States and US respondents that subject imports oversold the domestic like product during the POI thus are supported by the evidence on the record before the IA. Indeed, China does not dispute the fact that there was overselling by subject imports except in 2007.

7.271. We recall that the issue of overselling was brought to MOFCOM's attention by Chrysler USA in a submission to MOFCOM following its preliminary determination.[432] MOFCOM addressed Chrysler USA's comments in its final determination as follows:

> [p]rice depression and price suppression do not require that the import price of the product under investigation be lower than the price of the domestic like product. The evidence indicates that since 2009, the decrease of the import price of the product under investigation depressed the price of the domestic like product.[433]

7.272. In our view, MOFCOM's final determination fails to reflect an objective examination of the evidence of overselling by the subject imports in finding price depression. Moreover, it entirely fails to explain how MOFCOM considered that evidence, and what, if any, impact it had on MOFCOM's reasoning. Subject imports oversold the domestic product during most of the POI. The margin of overselling was not insignificant at any time during the POI, and in interim 2009 it was greater than 30%. In our view, these facts do not, on their face, support a conclusion that the effect of subject imports was price depression, and as a general matter, would tend to undermine such a finding. We do not preclude the possibility that price depression may be found to exist in a case where there is overselling by subject imports. However, absent analysis and explanation by the IA, it is difficult to understand how a conclusion of price depression was reached in a situation where prices of imports were, for the most part, significantly higher than those of the domestic like product whose prices were purportedly being depressed during the POI.

7.273. We find that MOFCOM's assessment of the fact of overselling, brought to its attention specifically in Chrysler USA's submission, falls short of the necessary analysis and explanation.

[429] We do not understand the United States to be arguing that the existence of overselling by subject imports precludes a finding of price depression in general.

[430] Final determination, Exhibit CHN-07, pp. 129-130. We note that these are not transaction prices, but as discussed elsewhere in this Report, AUVs for the goods in question.

[431] We recall that the price comparison is based on AUVs, which represent average prices.

[432] See para. 7.236 of this Report.

[433] Final determination, Exhibit CHN-07, p. 157.

MOFCOM failed to engage with the evidence of overselling or the margins of overselling themselves.[434]

7.274. As noted, we do not exclude the possibility that an IA may find the existence of price depression in spite of overselling by subject imports during all or part of the POI. We do not therefore disagree with MOFCOM's statement in the final determination that price depression is not, as a matter of law, contingent on a finding of price undercutting. Nevertheless, we find this statement to be at a level of generality that fails to explain why the overselling by subject imports through most of the POI in the circumstances of the Chinese automobile market and industry did not undermine MOFCOM's finding of price depression in the investigations at issue here.

7.275. On the basis of the foregoing, we find that this aspect of MOFCOM's price depression analysis failed to reflect an objective examination based on positive evidence within the meaning of Articles 3.1 and 15.1. This resulted in a price depression analysis inconsistent with Articles 3.2 and 15.2 of the Anti-Dumping and SCM Agreements, respectively.

7.6.5.3 Whether MOFCOM's reliance on unadjusted AUVs in its price effects analysis was justified

7.276. The United States argues that MOFCOM acted inconsistently with Article 3.2 by using AUVs[435] in its price effects analysis without making the adjustments necessary to account for the differences between the imported and domestic products. China is of the view that the domestic and imported product groups were sufficiently similar, and that therefore the use of AUVs without adjustments was justified.

7.277. We note that neither Article 3.2 of the Anti-Dumping Agreement nor Article 15.2 of the SCM Agreement explicitly require an IA to ensure price comparability between subject imports and the domestic like product when considering price effects. Nevertheless, the duty of an IA to conduct an objective examination based on positive evidence pursuant to Article 3.1 of the Anti-Dumping Agreement and Article 15.1 of the SCM Agreement would, in our view, generally require an IA to compare like with like in comparing prices. Indeed, this was the conclusion of both the panel and the Appellate Body in *China – GOES.*[436] Insofar as China contends that the Appellate Body's findings on the importance of ensuring price comparability are confined to situations in which an analysis of price undercutting is undertaken[437], we disagree. In our view, the importance of ensuring that the prices of domestic and imported products are comparable is the same regardless of the type of price effects being considered. The Appellate Body's findings in *China – GOES*, a case involving consideration of price undercutting in the context of a determination of price depression and price suppression, support our view that the need to consider comparable prices in order to undertake an objective examination of positive evidence is not limited to cases in which a comparison of actual prices is undertaken, but applies to the consideration of price effects in general.[438] We thus find that the an IA's obligation to ensure price comparability between subject imports and the domestic like product is not affected by the type of price effects being considered or found to affect domestic industry prices. In our view, this obligation arises whenever

[434] Further, we cannot understand the reference to "evidence" in the last sentence quoted above as indicating that MOFCOM took into account the overselling margins, as it is entirely unclear what MOFCOM is referring to in this regard, and we cannot read into the determination explanations that that do not seem to be there.

[435] These AUVs are set out in Table 4 above.

[436] Panel Report, *China – GOES*, para. 7.530; Appellate Body Report, *China – GOES*, para. 200.

[437] China's second written submission, paras. 116-120.

[438] Appellate Body Report, *China – GOES*, para. 200. China contends that the Appellate Body's findings should be interpreted narrowly owing to the pervasive role of price undercutting in the investigations at issue in that dispute. However, the Appellate Body Report does not, explicitly or otherwise, limit the scope of its findings to price undercutting. Moreover, we find the Appellate Body's reference to Article 2.4 of the Anti-Dumping Agreement in fn. 331 revealing. Article 2.4 requires a "fair comparison" in the context of dumping margin calculations, with due allowance "for differences which affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability." The Appellate Body's reference to the fair comparison principles of Article 2.4, combined with the general nature of its findings in *China – GOES*, in our view, support the conclusion that an IA's obligation to ensure meaningful price comparability also applies in the context of a price depression or suppression analysis that is not primarily based on price undercutting.

an IA examines price effects within the meaning of Article 3.2 of the Anti-Dumping Agreement and Article 15.2 of the SCM Agreement.[439]

7.278. In the investigations at issue, MOFCOM rejected arguments concerning the comparability of prices on the basis of its like product determination. In our view, merely finding that Chinese automobiles are "like" the subject imported automobiles for purposes of Article 2.6 of the Anti-Dumping Agreement and footnote 46 to the SCM Agreement[440], does not necessarily mean that the AUVs of the Chinese automobiles can be appropriately compared with the AUVs of the imported automobiles.[441] We recall in this regard that, as several panels have observed in the context of like product, a broad basket of domestic goods may be found to be "like" a broad basket of imported goods despite that each of the goods included in the basket of domestic goods is not "like" each of the goods included within the scope of the product under consideration.[442] Even granting that a like product determination may be relevant as the starting point of an assessment of price comparability, in our view it will not always be determinative.

7.279. In this case, the record suggests that MOFCOM's like product determination was an inadequate basis on which to conclude that the AUVs for the imported and domestic products were comparable for two reasons. First, there was evidence before MOFCOM suggesting that the mix of products differed between the subject imports and the domestic like product. Three US respondents, Chrysler USA, General Motors USA and Mercedes-Benz USA, made submissions to MOFCOM in the course of its investigations that called into question assumptions on the homogeneity of US and Chinese automobiles.[443] Chrysler USA's submission to MOFCOM following the preliminary determination contained sales data showing that subject imports and Chinese automobiles occupied different segments of the Chinese market, which Chrysler divided into four categories: entry, mid, premium, and luxury automobiles.[444] While MOFCOM did not accept the substance of Chrysler USA's argument, that there was limited competitive overlap between the imported US and Chinese automobiles and therefore the imports had no effect on prices of the domestic product, MOFCOM did not reject as a factual matter the market segmentation on which Chrysler's argument rested.[445]

7.280. Second, MOFCOM's like product determination itself acknowledges some lack of competitive overlap between subject imports and the domestic like product. In its preliminary determination, MOFCOM evaluated similarities between both baskets of goods on the basis of "physical and chemical characteristics", "use", "sales channels", and "prices, consumers, competitiveness or substitution", concluding as follows:

> [a]ll in all, the investigating authority considers that, although the product under investigation and the domestic products are different to some extent, but their physical and chemical characteristics, use and sales channels are generally the same or similar, and their prices and end users overlap partially, while perception of consumers is usually reflected in prices. So the product under investigation and the

[439] Panel Report, *China – X-Ray Equipment*, para. 7.49; Appellate Body Report, *China – GOES*, para. 200.

[440] We note that the United States does not challenge MOFCOM's like product determination.

[441] We note that these issues arise at and relate to different stages of an investigation. Further, while a less than complete overlap of imported and domestic goods may not preclude a like product determination, it may nonetheless have implications for the objectivity and reasonableness of a price effects analysis based on AUVs for baskets of goods.

[442] Panel Report, *China – Broiler Products*, para. 7.475.

[443] Preliminary determination, Exhibit CHN-05, p. 33; final determination, Exhibit CHN-07, pp. 41-44.

[444] US respondent comments on the preliminary determination, Exhibit USA-12, Table 6, pp. 50-51.

[445] Indeed, MOFCOM concluded that Chrysler USA's data reinforced its like product determination, stating:

> Table 6 of the Evidence 1 supplied by Chrysler Group LLC indicates that, both the domestic industry (including "Chinese domestic manufacturers" and "Chinese international manufacturers") and "the product under investigation imported from the United States" cover the products of four categories, i.e. "entry level", "mid-level", "high level" and "the luxury level", which further indicates that the products of the domestic industry and the product under investigation compete with each other.

See final determination, Exhibit CHN-07, p. 158.

> domestic products may substitute for each other and they are competing with each other.[446] (emphasis added)

MOFCOM reached the same conclusion in its final determination, with some additional discussion of the revised product scope.[447]

7.281. In our view, the arguments by US respondents, coupled with MOFCOM's own analysis, demonstrate that MOFCOM was or should have been aware that all subject automobiles imported from the United States were not identical to all Chinese automobiles constituting the domestic like product. In our view, the differences between the two baskets of goods should have prompted an objective decision-maker to make further inquiries into those differences to determine whether they affected prices, before proceeding to undertake a price effects analysis on the basis of AUVs for the two baskets of goods.[448] Yet, MOFCOM's final determination contains no further discussion of differences between subject imports and the domestic like product for the purposes of a price comparison in the context of MOFCOM's price depression analysis.

7.282. China seeks to draw a distinction between the purportedly trends-focused nature of a price depression analysis, and the analysis of absolute values in a price undercutting analysis.[449] It is true that the absolute levels of prices may not be compared in an analysis of price depression in the same way as they are likely to be in the context of price undercutting.[450] It may thus be the case that price comparability is in some instances less directly relevant in an analysis of price depression than it is in an analysis of price undercutting. However, it seems obvious to us that differences in the actual prices of the subject imports and the domestic like product will be reflected in their AUVs, and may therefore affect the direction and rate of changes in those AUVs over the POI. In this sense, the comparability of prices for subject imports and the domestic like product may well have an impact on an analysis of price depression even when absolute values or actual prices are not directly considered. This is likely to be the case in situations where the imported and domestic goods are differentiated, such that the subject imports and domestic like product are baskets of non-homogenous, albeit like, goods. In such situations, differences in AUVs may reflect differences in the product mix, as opposed to differences in pricing, irrespective of whether the analysis is based on trends or absolute values. Particularly in a case such as the present one, where interested parties have drawn the IA's attention to this possibility in asserting a lack of competitive overlap between subject imports and the domestic like product, we consider that an IA fails to undertake an objective evaluation of the evidence if it does not address the issue.

7.283. On the basis of the foregoing, we find that this aspect of MOFCOM's price depression analysis failed to reflect an objective examination based on positive evidence within the meaning of Articles 3.1 and 15.1. This resulted in a price depression analysis inconsistent with the requirements of Articles 3.2 and 15.2 of the Anti-Dumping and SCM Agreements, respectively.

7.6.5.4 Whether MOFCOM's findings on market share supported its finding of price depression

7.284. One of the bases for MOFCOM's finding of price depression in the investigations at issue was market share gains by subject imports at the expense of the domestic industry. The United States disagrees with MOFCOM's conclusion that subject imports took market share from the domestic industry, whereas China maintains that this conclusion finds a basis on the record.

7.285. MOFCOM's final determination contains the following data with respect to the market shares of subject imports and the domestic like product:

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[446] Preliminary determination, Exhibit CHN-05, pp. 29-30.

[447] Final determination, Exhibit CHN-07, pp. 44-47.

[448] By this, we are not saying that price adjustments are needed in every case where there are differences between the subject imports and the domestic like product. Adjustments may not be required where the subject product and the domestic like product are identical or where the IA concludes that any differences between the two baskets of goods do not justify such adjustments. However, where there are differences between the subject imports and the domestic like product it cannot simply be presumed that prices are comparable without consideration of the specific facts and circumstances.

[449] China's second written submission, paras. 116-120.

[450] Although, of course, a price depression analysis may be based on actual price levels, which would reflect absolute values.

Table 5: Market Shares (in %)[451]

Year	2006	2007	2008	1Q-3Q 2008	1Q-3Q 2009
Subject imports	9.97	10.72	10.74	8.80	13.49
Domestic like product	18.69	10.52	9.59	10.14	14.65

7.286. MOFCOM concluded in its final determination that the development of the market shares of subject imports and the domestic industry indicated that subject imports were depressing domestic industry prices as follows:

> [i]n conclusion, the investigation evidence indicates that, during the POI, the import volume of the product under investigation as well as its market shares in Chinese domestic market increased continually. Especially at the end of the POI, the market share of the product under investigation significantly increased and its price decreased at the same time, which depressed the price of the domestic like product, and affected the profitability of the domestic industry.[452]

7.287. The data on the record shows that the market share of the domestic industry declined through the POI, from a high of 18.69% in 2006, to 10.52% in 2007, to a low of 9.59% in 2008, before rising to 14.65% in the interim 2009 period. The market share of subject imports, in contrast, grew from 9.97% of the market in 2006, to 10.72% in 2007, showing a low of 8.8% in the interim 2008 period, before rising to a high of 13.49% in the interim 2009 period. Overall, the domestic industry lost 4.04 percentage points from the start to the end of the POI. Subject imports, in contrast, gained 3.52 percentage points during this period. MOFCOM's finding that subject imports gained, while the domestic industry lost, market share during the POI thus finds a basis on the record. However, an increase in import market share while domestic industry market share declines is not necessarily sufficient to demonstrate that this situation caused price depression in the domestic industry.

7.288. In our view, MOFCOM failed to adequately explain the linkage between subject import market share gains and its finding of price depression for two reasons. First, MOFCOM's comparison of market shares of subject imports and the domestic industry at the beginning and the end of the POI ignored important trends during the POI, and the role of other actors in the Chinese market for automobiles, specifically, Chinese producers not part of the domestic industry as defined by MOFCOM, and third country imports. It is not clear to us how MOFCOM linked the decrease in the market share of the domestic industry to the increase in the market share of subject imports to price depression. MOFCOM's conclusion seems to rest on the premise that if import market share increased, it must have done so at the expense of the domestic industry, which reacted to the loss of market share by reducing prices. While this is not an implausible scenario in the abstract, in this case it fails to account for the information in the record before MOFCOM concerning other participants in the market, Chinese producers outside the domestic industry and third country imports. The market share of these two groups did not remain static during the POI, although MOFCOM makes a statement to this effect in the final determination.[453] Arguments by the United States based on record data indicate that subject imports gained little of the market share lost by the domestic industry in 2007, but rather, that the domestic industry's lost market share was gained mainly by Chinese producers not part of the domestic industry and third country imports, as shown in the table below.

[451] Final determination, Exhibit CHN-07, pp. 128-129, 133.
[452] Final determination, Exhibit CHN-07, pp. 130-131.
[453] Final determination, Exhibit CHN-07, pp. 160-162.

Table 6: Changes in Market Shares (in %)[454]

Year	2006	2007	2008	1Q-3Q 2008	1Q-3Q 2009
Domestic like product	18.69	10.52	9.59	10.14	14.65
Chinese producers not part of the domestic industry	14.19	21.03	15.79	15.61	14.46
Subject imports	9.97	10.72	10.74	8.80	13.49
Third country imports	57.15	57.74	63.88	65.45	57.40

7.289. Looking at this table, we observe that the domestic industry incurred its biggest market share loss, 8.17 percentage points, from 2006 to 2007. It is clear that in the same period, Chinese producers outside the domestic industry registered their biggest market share gain, 6.84 percentage points. In this period, both subject imports and third country imports registered minor market share gains. On the other hand, third country imports registered their largest market share gains from 2007 to interim 2008, 7.71 percentage points. In this period, both Chinese producers outside the domestic industry and subject imports lost market share, while the domestic industry more or less maintained its share of the market. It is true, as MOFCOM also observes in its final determination, that from interim 2008 to interim 2009 subject imports increased their market share. However, the domestic industry's market share also increased, and at a similar pace, during this same period. Therefore, in the circumstances of these investigations, where market share levels and movements of the participants in the market varied significantly during the course of the POI, the obligation to conduct an objective examination, set forth in Articles 3.1 and 15.1 of the Agreements, should, in our view, have led an objective decision maker to consider and address these variations and changes, and the role and impact of the other participants in the market, before reaching its conclusions. MOFCOM failed to do this.

7.290. Second, the finding in the final determination that the domestic industry had to reduce prices in order to recover market share in the interim 2009 period does not seem to be linked to the market share gains of subject imports and therefore we do not see how market share changes support the finding of price depression. MOFCOM discussed the domestic industry's market share gain in the interim 2009 period in the following terms:

> [i]n the first three quarters of 2009, although the apparent consumption of the domestic market decreased, the domestic industry still kept increasing production and sales, as well as the market share by improving production and operation levels and product competitiveness. However, since the sales prices of domestic like product decreased, the increase margin of sales revenues, the pre-tax profits and the rate of return on investment of the domestic industry all fell sharply, and the profitability of the domestic industry was affected badly; the investment plans and new projects of certain domestic producers were forced to be laid aside, delayed or cancelled. In summary, the investigating authority concludes that the domestic industry suffered material injury.[455] (emphasis added)

7.291. In our view, this discussion does not explain the connection between the market share gains of subject imports and the depression of domestic prices. Insofar as MOFCOM emphasises that the market share gains of subject imports caused a downward pressure on domestic prices "[i]n the first three quarters of 2009", this assessment fails to address the domestic industry's equivalent market share gains in this period. Under such circumstances, an objective decision

[454] Based on figures contained in changes in market share, Exhibit USA-19. We note that this data is calculated using the method indicated in fn. 182 of China's second written submission, which uses data contained in the final determination, Exhibit CHN-07, pp. 128-129, 133, and the supplemental injury submission, Exhibit CHN-08, p. 4.

[455] Final determination, Exhibit CHN-07, pp. 138-139.

maker should, in our view, have explained how the market share increase of subject imports exerted downward pressure on the domestic industry's prices at a time when the domestic industry's market share was also increasing.[456]

7.292. Finally in this regard, we disagree with China's argument that a lack of objection on this matter by US respondents during the investigations at issue should affect our evaluation of the US claim. We reject China's argument here on the basis of the same reasons for which we dismissed a similar argument in relation to the US claim regarding the non-confidential version of the petition.[457]

7.293. On the basis of the foregoing, we conclude that MOFCOM's failure to undertake an objective examination based on positive evidence within the meaning of Articles 3.1 and 15.1 of the increase in subject imports' market share in finding price depression was inconsistent with Articles 3.1 and 15.1, and therefore resulted in a price depression analysis inconsistent with the requirements of Articles 3.2 and 15.2 of the Anti-Dumping and SCM Agreements, respectively.

7.6.5.5 Whether MOFCOM's domestic industry definition resulted in a flawed price effects analysis

7.294. The United States contends that MOFCOM's allegedly flawed domestic industry definition also rendered its price effects analysis inconsistent with the Anti-Dumping and SCM Agreements. China rejects the US claim regarding consequential violations stemming from the allegedly inconsistent domestic industry definition.

7.295. We have already rejected the US claim that MOFCOM's domestic industry definition failed to conform to Article 4.1 of the Anti-Dumping Agreement and Article 16.1 of the SCM Agreement, and thus resulted in a determination inconsistent with Article 3.1 of the Anti-Dumping Agreement and Article 15.1 of the SCM Agreement.[458] Accordingly, we also reject the argument that the domestic industry definition resulted in a price effects assessment inconsistent with the requirements of Articles 3.1 and 3.2 of the Anti-Dumping Agreement and 15.1 and 15.2 of the SCM Agreement.

7.6.6 Conclusion

7.296. On the basis of our assessment of the parties' arguments regarding this claim, we find that China acted inconsistently with Articles 3.1 and 3.2 of the Anti-Dumping Agreement and Articles 15.1 and 15.2 of the SCM Agreement as a result of MOFCOM's price effects analysis and consequent finding of price depression in its final determination.

7.7 Whether MOFCOM's causation determination was consistent with Articles 3.1 and 3.5 of the Anti-Dumping Agreement and Articles 15.1 and 15.5 of the SCM Agreement

7.7.1 Provisions at issue

7.297. The texts of Articles 3.1 of the Anti-Dumping Agreement and 15.1 of the SCM Agreement are set out in paragraph 7.182 above.

7.298. Article 3.5 of the Anti-Dumping Agreement and Article 15.5 of the SCM Agreement provide as follows:

> [i]t must be demonstrated that the [dumped/subsidized] imports are, through the effects of [dumping/subsidization], as set forth in paragraphs 2 and 4, causing injury within the meaning of this Agreement. The demonstration of a causal relationship between the [dumped/subsidized] 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/subsidized]

[456] We note in this regard also the potential relevance of the information on overselling by subject imports during this period, which is not addressed by MOFCOM.
[457] See para. 7.30 of this Report.
[458] See para. 7.231 of this Report.

> 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/subsidized] imports. Factors which may be relevant in this respect include, *inter alia*, the volume and prices of [non-subsidized imports of the product in question/ imports not sold at dumping prices], contraction in demand or changes in the patterns of consumption, trade restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry.

7.7.2 Factual background

7.299. MOFCOM's final determination concluded that there was a causal relationship between subject dumped and subsidized imports and the injury suffered by the domestic industry. In the final determination, MOFCOM stated that the volume and market share of subject imports "increased continuously", and particularly in the interim 2009 period, when imports from third countries decreased by 33.63%. MOFCOM considered that, although apparent consumption declined in the interim 2009 period, the domestic industry overcame this decline to maintain production, sales and market share figures by "continually improving production and operation levels as well as the product competitiveness." However, MOFCOM concluded that, in spite of these improvements, subject imports adversely impacted the sales prices of the domestic like product, sales revenues, pre-tax profits, and the rate of return on investment.

7.300. MOFCOM concluded its causation analysis as follows:

> [t]he investigation evidence indicates that, the United States is one of the major sources of imports of saloon cars and cross-country cars of a cylinder capacity >2500cc. During the POI, the import volume of the product under investigation accounts for a relatively large proportion of the total import volume to China. Both the import volume and the market share in China of the subject products increased continuously; the price change of the subject imports has an important impact on the prices of Chinese domestic like product.
>
> In the first three quarters of 2009, contrary to the substantial drop by 32.63% of import volume of other countries (region), the import volume of the product under investigation increased significantly by 20.12% and its share in Chinese domestic market increased by 4.69 percentage points, while the import price decreased by 3.17% in the same time. The import price of the product under investigation depressed the prices of Chinese domestic like product. As a result, the prices of Chinese domestic like product decreased by 10.13% in the same time.
>
> In the first three quarters of 2009, the domestic industry overcame the impact of the decrease in apparent consumption of the domestic market and maintained the increase of production, sales and market share by continually improving production and operation levels as well as the product competitiveness. However, because of the effects that the import volume of the product under investigation increased and the import prices decreased, the sales price of domestic like product, the increase margin of the sales revenue, pre-tax profits and the rate on return of investment of the domestic industry all fell sharply; the profitability of the domestic industry was badly affected; the investment plan and new projects of certain domestic manufacturers were forced to be laid aside, delayed or cancelled. The domestic industry was materially injured.[459]

7.7.3 Arguments of the parties

7.7.3.1 United States

7.301. The United States contends that MOFCOM's causation analysis in the investigations at issue failed to conform to the requirements of Articles 3.1 and 3.5 of the Anti-Dumping Agreement and Articles 15.1 and 15.5 of the SCM Agreement in seven respects.

[459] Final determination, Exhibit CHN-07, pp. 140-142.

7.302. First, the United States argues that errors in MOFCOM's domestic industry definition and price effects analysis also compromised its causation analysis.[460] The United States contends that MOFCOM's erroneous definition of the domestic industry resulted in a narrow pool of domestic enterprises to be examined in determining whether subject imports were causing injury to the domestic industry. The United States adds that since MOFCOM relied heavily upon its price effects analysis to underpin its causation analysis, it follows that flaws in the price effects analysis also tainted MOFCOM's causation analysis.[461]

7.303. Second, the United States argues that MOFCOM failed to take into account evidence on the record that subject imports took market share away from a combination of Chinese producers not part of the domestic industry and third country imports, as opposed to the domestic industry.[462] The United States contends that this is clear from the record, particularly in the interim 2009 period when the market share of the domestic industry increased nearly as sharply as that of subject imports.[463] The United States points out that prior to this period, the market share of subject imports remained relatively stable, rising from 9.97% to 10.74% in the 2006-2008 period. The United States points out that the domestic industry lost half of its market share in this period, from 18.69% to 9.59%, and draws attention to the market share of non-subject imports and producers not part of the domestic industry, which increased from 71.34% to 79.67% during this same period. This, for the United States, indicates that the market share of subject imports did not explain the injury experienced by the domestic industry.[464]

7.304. Third, the United States argues that MOFCOM failed to address the role of a sharp decline in industry productivity coupled with an increase in labor costs throughout the POI.[465] In this regard, the United States submits that productivity fell by 25% in the 2006-2008 period, and by 33.24% in the interim 2008-interim 2009 period. Given the significance of this decline in productivity, the United States contends that MOFCOM should have inquired into the effect of this decline in the domestic industry's financial performance.[466]

7.305. Fourth, the United States submits that MOFCOM failed to take into account arguments by certain US respondents and evidence on the record substantiating a lack of competition between subject imports and the domestic like product. In the US view, MOFCOM's failure to address the lack of competitive overlap between these two baskets of goods undermines its causation analysis.[467] The United States contends in this regard that MOFCOM erred in dismissing evidence and arguments put forward by Chrysler USA to substantiate that there was little competitive overlap between subject imports and the domestic like product, including sales data showing that subject imports oversold the domestic like product throughout most of the POI, during which subject imports and the domestic like product generally occupied different segments of the Chinese automobile market.[468]

7.306. Fifth, the United States contends that a sharp decline (21.65%) in apparent consumption was the likely cause of injury suffered by the domestic industry in the interim 2009 period. For the United States, this decline in apparent consumption coincides with the only part of the POI in which the domestic industry's prices actually declined. The United States contends that the domestic industry ramped up production in the interim 2009 period just as demand fell sharply, prompting it to decrease prices in order to move its excess production. In the US view, these actions cannot be attributed to subject imports.[469] While China contends that the domestic industry's production was a function of anticipated sales, and this sales model insulated the domestic industry from injury caused by the decline in apparent consumption, the United States doubts that the sudden decline in apparent consumption was in any way "anticipated" by the

[460] US second written submission, paras. 100-101.
[461] US first written submission, paras. 156-157.
[462] See for instance US comments on China's response to Panel question No. 45.
[463] US first written submission, para. 159.
[464] US opening statement at the first Panel meeting, paras. 92-94.
[465] See for instance US response to Panel question No. 21.a.
[466] US comments on China's response to Panel question No. 43.
[467] See for instance US opening statement at the first Panel meeting, paras. 97-98.
[468] US first written submission, paras. 165-167.
[469] US opening statement, para. 100.

domestic industry.[470] In the view of the United States, a decline in apparent consumption would typically be expected to have an adverse impact on pricing in an affected market.

7.307. Sixth, the United States notes that the decline in productivity towards the end of the POI occurred at the same time as average wages in the domestic industry increased. In the US view, MOFCOM failed to ensure that injury to the domestic industry caused by these developments was not attributed to subject imports.[471] The United States notes that "productivity of the domestic industry" is expressly listed as a possible "other factor" causing injury to the domestic industry in Articles 3.5 and 15.5.[472] The United States points out that MOFCOM examined certain "other known factors" causing injury on its own initiative but failed to address this issue. While the United States acknowledges that these factors were not specifically raised by US respondents during the investigations, it maintains that MOFCOM's failure to consider the matter in its causation analysis cannot be excused on that basis. The United States notes that the information on the decline in productivity was before MOFCOM, and aggregate yearly labor productivity figures were reported in the final determination. The United States contends that MOFCOM should have inquired further into the decline in productivity of its own volition, referring in this regard to the panel's findings in *Mexico – Steel Pipes and Tubes*.[473] In the US view, MOFCOM's failure to address the domestic industry's declining productivity and increasing labor costs demonstrates a lack of objectivity on MOFCOM's part in the choices it made of what data to examine in its causation analysis.[474]

7.308. Last, the United States argues that MOFCOM failed to take into account the impact of an increased sales tax on larger engine vehicles on the domestic industry. The United States contends that the increased sales tax likely caused the decline in apparent consumption for the domestic like product, given that the tax measure also reduced taxes for automobiles with smaller engines. In the US view, MOFCOM failed to ensure that injury to the domestic industry caused by the changing consumption patterns prompted by the tax measure was not attributed to subject imports. The United States points in this regard to arguments submitted by Chrysler USA to MOFCOM, which noted the regulatory aim of the increased tax – to discourage the production and sale of less fuel-efficient and larger-engine cars. The United States argues that this should have alerted MOFCOM to the demand-related implications of the tax measure.[475]

7.7.3.2 China

7.309. China argues that by focusing on "isolated" elements of MOFCOM's causation analysis, the US arguments on causation run counter to the requirements of Article 3.5 of the Anti-Dumping Agreement and Article 15.5 of the SCM Agreement.[476] China maintains that these provisions require MOFCOM only to establish that subject imports were "a cause", as opposed to "the cause" of material injury to the domestic industry. Pursuant to this standard, MOFCOM was obligated to show that subject imports "contributed" to such material injury, which China asserts it did.[477] Further, China contends that the United States calls for an impermissible *de novo* review by the Panel.[478]

7.310. Replying to the specific arguments raised by the United States, China first maintains that MOFCOM's domestic industry definition and price effects analysis were consistent with Articles 3.1, 3.2 and 4.1 of the Anti-Dumping Agreement, and Articles 15.1, 15.2 and 16.1 of the SCM Agreement. Thus, China contends that there is no factual premise for the US arguments.[479] China in any event asserts that each provision of the Anti-Dumping and SCM Agreements must be examined on its own, to determine whether the obligations contained therein have been violated in light of the particular facts and arguments put forward by the parties in a given case. Accordingly,

[470] US opening statement at the second Panel meeting, para. 79.
[471] See for instance US response to Panel questions Nos. 21.a and 21.b.
[472] US response to Panel questions Nos. 21.b and 22.a.
[473] US response to Panel question No. 21.b.
[474] US comments on China's response to Panel questions Nos. 44.a, 44.b and 44.c.
[475] US response to Panel questions Nos. 22.a and 22.b.
[476] See for instance China's first written submission, para. 221.
[477] China's first written submission, para. 224.
[478] China's first written submission, para. 226.
[479] China's first written submission, para. 263.

China submits that it is for the United States to make a *prima facie* case that China breached Articles 3.5 and 15.5.[480]

7.311. Second, China contends that MOFCOM considered the market share developments of Chinese producers not part of the domestic industry and third country imports, and determined that they did not affect its finding of a causal relationship between subject imports and injury to the domestic industry.[481] China submits, with respect to the market share of Chinese producers not part of the domestic industry, that this did not change in a meaningful way during the POI, increasing by only 1.3 percentage points from 2006 to the interim 2009 period.[482] With respect to the market share of third country imports, China contends that MOFCOM found it to have remained "relatively stable" throughout the POI, decreasing by less than 1 percentage point from 2006 to the interim 2009 period. China contrasts these developments with that of the market share of subject imports, which increased by 3.5 percentage points from 2006 to the interim 2009 period.[483]

7.312. Third, China submits that MOFCOM evaluated labor productivity alongside 15 other industry indicators over the POI, and determined that low labor costs in China were such that a decline in labor productivity could not have played a key role in the industry's declining performance during the POI.[484] Further, China submits that labor costs only accounted for between 4 and 9% of total costs throughout the POI.[485] In China's view, the US argument that labor costs accounted for a large portion of the domestic industry's decline in pre-tax profits is misleading in referring to pre-tax profit figures that had already been crippled by competition from subject imports towards the end of the POI. China also points to the fact that per unit costs declined in the interim 2009 period from interim 2008 levels. This, for China, indicates that the decline in pre-tax profits was caused by subject imports, and not rising labor costs.[486]

7.313. Fourth, China contends that MOFCOM evaluated the degree of competitive overlap between subject imports and the domestic like product. China submits that MOFCOM engaged in a comprehensive investigation into both the subject imports and the domestic product in coming to its conclusion that the products at issue were similar, comparable and substitutable.[487] China also recalls its arguments that MOFCOM had deemed evidence submitted by Chrysler USA on product grades to be unreliable, as it lacked any definitions for the four market segments into which Chrysler USA segregated the data, and differences between total import volume data presented by Chrysler USA, and import volume data gathered by MOFCOM.[488]

7.314. Fifth, China submits that MOFCOM fully evaluated the decline in apparent consumption in the interim 2009 period and determined, in spite of this negative development, that domestic producers had managed to increase production and sales in this period. China characterises the US argument that the domestic industry found itself caught by an unanticipated decline in apparent consumption in the interim 2009 period as speculative and unsupported by record evidence.[489] China contends that the US arguments are based on a misunderstanding of the domestic industry's sales model, which is premised on the production of automobiles in anticipation of sales levels, and not the other way around. This, for China, invalidates the US contention that the domestic industry was "ramping up" production.[490]

7.315. Sixth, China submits that an IA need not examine every possible factor that may cause injury to the domestic industry, particularly those factors that interested parties fail to raise in the underlying investigations.[491] China notes in this regard that the list of "other known factors" contained in Articles 3.5 and 15.5 is indicative.[492] China asks the Panel to consider the fact that no

[480] China's first written submission, para. 264.
[481] See for instance China's second written submission, paras. 135, 139.
[482] China's second written submission, para. 139.
[483] See for instance China's second written submission, para. 135.
[484] China's first written submission, paras. 237-238.
[485] See for instance China's first written submission, fn. 256.
[486] China's second written submission, paras. 146-147.
[487] China's first written submission, paras. 243-244.
[488] China's second written submission, para. 140.
[489] China's second written submission, para. 142.
[490] China's second written submission, paras. 142-143.
[491] See for instance China's response to Panel question No. 22.c.
[492] China's opening statement at the second Panel meeting, para. 68.

US respondents raised the decline in productivity in the course of MOFCOM's investigations, asserting that this fact is relevant to the Panel's assessment of the merit of the US arguments.[493] In China's view, this precludes a finding by the Panel that the decline in productivity was "known" to MOFCOM. China considers that the panel's report in *Mexico – Steel Pipes and Tubes* has no bearing on whether or to what extent an "other factor" becomes "known" for the purposes of Articles 3.5 and 15.5 and therefore does not support the US contention that MOFCOM should have inquired further into the decline in productivity.[494] Moreover, China asserts that since MOFCOM concluded that labor costs in the Chinese automobile market reflected a relatively small portion of total costs, it correctly exercised its discretion not to address this particular factor. In China's view, MOFCOM correctly found that trends in labor productivity were not significant to its analysis of causation.[495]

7.316. Last, China characterises the US argument that MOFCOM should have evaluated the impact of the increased sales tax on demand as a recasting of Chrysler USA's argument during the investigation. China maintains that MOFCOM was under no obligation to anticipate the US arguments, which are different from those that Chrysler USA actually made in the course of MOFCOM's investigations.[496] In China's view, MOFCOM paid due attention to Chrysler USA's arguments on the increased sales tax, which was premised on the predicate that "[t]o the extent" MOFCOM found a decline in production and sales of the domestic like product after introduction of the tax, it had an affirmative obligation to explain why this decline was caused by subject imports over and above the tax.[497] China argues that MOFCOM correctly determined that, as production and sales increased after the tax increase came into effect, the tax did not cause injury to the domestic industry.

7.7.4 Arguments of the third parties

7.317. The **European Union** makes three arguments regarding MOFCOM's causation analysis. First, the European Union contends that MOFCOM's determination that subject imports and the domestic like product were in competition consists of "broad and abstract statements", and does not reflect an objective examination based on positive evidence.[498] Second, the European Union questions the relevance of the US assertion that subject imports took market share from non-subject imports and not from the domestic producers. The European Union observes in this respect that a finding of diminished profitability by MOFCOM is not necessarily in contradiction with a simultaneous increase in the market share of domestic producers.[499] Third, the European Union contends that MOFCOM should have attributed more weight to the non-attribution factors of declining domestic productivity and the decline in apparent consumption, particularly as the injury suffered by the domestic industry took the form of decreasing prices and profitability, as opposed to lost sales.[500]

7.318. **Japan** submits that causation within the meaning of Article 3.5 of the Anti-Dumping Agreement must be demonstrated through the effects of dumping as set forth in Article 3.2 of the Anti-Dumping Agreement. Japan submits that where an IA relies upon a flawed price effects analysis in its causation analysis, such flaws will necessarily undermine that IA's causation analysis.[501] With respect to the non-attribution component of Article 3.5, Japan submits that an IA must pay particular attention to separating and distinguishing the effects of other factors from the effects of dumped or subsidized imports.[502]

7.319. Noting the "necessary linkage" between an IA's analysis of price effects, volume effects and the state of the domestic industry, **Saudi Arabia** argues that an IA's obligation to "demonstrate" causation calls upon the IA to conduct a causation analysis for each factor discussed in the injury analysis. In so doing, the IA may not rely upon "quick and overly simplistic

[493] See for instance China's second written submission, para. 148.
[494] China's second written submission, para. 151.
[495] China's response to Panel question No. 44.c.
[496] See for instance China's second written submission, para. 155.
[497] China's second written submission, para. 154.
[498] EU third party submission, paras. 68, 72-77.
[499] EU third party submission, paras. 78-80.
[500] EU third party submission, paras. 86, 91.
[501] Japan's third party submission, para. 32.
[502] Japan's third party submission, para. 34.

conclusions", as these are inconsistent with the language of the Agreements.[503] Saudi Arabia otherwise submits that an IA must pay particular attention to separating and distinguishing the effects of other factors from the effects of dumped or subsidized imports. In doing this, the IA must issue a satisfactory explanation of the nature and extent of the injurious effects of such other factors.[504] In this regard, "other factors" include those factors clearly raised by interested parties in the course of the underlying investigations, as well as those that the IA has otherwise become aware of during the investigations.[505]

7.7.5 Evaluation by the Panel

7.320. The principal question before us is whether MOFCOM's finding of a causal link between subject imports and injury to the domestic industry has a sufficient basis of evidence on the record and reflects an objective examination of the evidence, as called for in Articles 3.1 and 3.5 of the Anti-Dumping Agreement and 15.1 and 15.5 of the SCM Agreement.

7.321. Articles 3.5 and 15.5 require that an IA demonstrate that dumped or subsidized imports are causing injury to the domestic industry producing the like product. Further, these provisions require an IA to examine any "known factors" other than subject imports causing injury to the domestic industry at the same time, and ensure that any injury caused by such other factors is not attributed to subject imports. This is often referred to as the "non-attribution" obligation. Articles 3.5 and 15.5 set out a non-exhaustive list of five factors that may be relevant in this context. While these provisions are silent on the methods by which an IA is to demonstrate a causal relationship or conduct a non-attribution analysis, such methods must comport with the overarching obligation, in Articles 3.1 and 15.1, to make a determination of injury based on an "objective examination" of "positive evidence".

7.322. An IA's determination of the causal relationship between subject imports and injury to the domestic industry must be "reasoned and adequate".[506] In making such a determination, the IA must demonstrate a relationship of cause and effect, such that subject imports are shown to have contributed to the injury to the domestic industry. That other factors may also have caused injury to the domestic industry is no bar to establishing this causal relationship, provided that subject imports have contributed to the injury. In other words, subject imports need not be "the" cause of the injury suffered by the domestic industry, provided they are "a" cause of such injury.[507]

7.323. Regarding non-attribution, whether an "other factor" was "known" to an IA will normally turn on an evaluation of the extent to which that factor was "clearly raised" before the IA by interested parties in the course of an investigation. An IA is under no obligation to seek out and identify all possible other factors causing injury to the domestic industry in a given investigation.[508] Moreover, the factors listed in Articles 3.5 and 15.5 do not constitute a mandatory list of factors that must be examined by an IA in every case.[509] However, once a factor is known, the IA must explicitly address whether that factor was a cause of injury to the domestic industry.[510] If the IA finds it was not, it need not consider it further. However, should the IA conclude that such a known "other factor" was causing injury, the IA must then "separate and distinguish" the injurious effects of each other factor from those of the subject imports.[511]

7.324. With these considerations in mind, we turn to the specific arguments presented by the United States in support of this claim.

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[503] Saudi Arabia's third party submission, paras. 42-44.
[504] Saudi Arabia's third party submission, para. 47.
[505] Saudi Arabia's third party submission, para. 45.
[506] Panel Report, *China – X-Ray Equipment*, para. 7.244 (citing Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 - Canada)*, para. 93).
[507] Appellate Body Report, *US – Wheat Gluten*, para. 67.
[508] See Panel Reports, *Thailand – H-Beams*, para. 7.273; *EU – Footwear (China)*, para. 7.484.
[509] See Panel Reports, *Thailand – H-Beams*, para. 7.274; *Egypt – Steel Rebar*, para. 7.115.
[510] Panel Report, *EC – Salmon (Norway)*, para. 7.660.
[511] Appellate Body Report, *US – Hot-Rolled Steel*, paras. 233-236.

7.7.5.1 Whether MOFCOM's domestic industry definition and price effects analysis resulted in a flawed causation determination

7.325. The United States contends that MOFCOM's allegedly flawed domestic industry definition and price effects analysis also rendered its causation analysis inconsistent with the Anti-Dumping Agreement and the SCM Agreement. China rejects the US assertion of consequential violations stemming from the allegedly inconsistent domestic industry definition and price effects analysis.

7.326. We have rejected the US claim that MOFCOM's domestic industry definition was inconsistent with Article 4.1 of the Anti-Dumping Agreement and Article 16.1 of the SCM Agreement.[512] Accordingly, we reject the US argument that an erroneous domestic injury definition led to MOFCOM's causation analysis being inconsistent with Articles 3.5 of the Anti-Dumping Agreement and 15.5 of the SCM Agreement.

7.327. However, we have concluded 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.[513] The price effects analysis represents an important element of the injury determination in this case. In our view, it would be difficult, if not impossible, to make a determination of causation consistent with the requirements of the Articles 3 and 15 of the Anti-Dumping and SCM Agreements, respectively, in a situation where an important element of that determination, the underlying price effects analysis, is itself inconsistent with the provisions of those Agreements. Nothing in MOFCOM's determination or China's arguments in this dispute suggests that the causation determination we are considering would stand on its own, without consideration of the price effects of the subject imports.

7.328. Thus, having found violations of Articles 3.1 and 3.2 of the Anti-Dumping Agreement and Articles 15.1 and 15.2 of the SCM Agreement concerning MOFCOM's price effects analysis, we conclude that MOFCOM's causation analysis 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.

7.329. In light of this conclusion, it might be considered unnecessary to make findings on the remaining aspects of the US causation claim. However, we consider that these arguments relate to elements of the IA's analysis and determination that are capable of being assessed independently, and we will therefore consider them.[514]

7.7.5.2 Whether MOFCOM erred in failing to consider the market share of Chinese producers not part of the domestic industry and third country imports in its causation analysis

7.330. The United States contends that MOFCOM had no basis to conclude that the market share gains of subject imports injured the domestic industry. China disagrees, and points to the fact that the market share gained by subject imports from 2006 to the interim 2009 period corresponds to the market share lost by the domestic industry over this period.

7.331. We found above, in considering the US price effects claim, that the record shows that the domestic industry lost market share in 2007 mostly to Chinese producers not part of the domestic industry. This data also indicates that subject imports and the domestic like product gained market share mostly from third country imports in the interim 2009 period.[515] Thus, in our view, the evidence before MOFCOM clearly shows that the market shares of Chinese producers not part of

[512] See para. 7.231 of this Report.
[513] See para. 7.296 of this Report.
[514] See Panel Report, *EC – Salmon (Norway)*, paras. 7.620, 7.654. Like that panel, we recall that, in addition to making findings necessary to resolve the matter before it, a panel is required to "make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements" (Article 11 of the DSU), and that "[s]uch "other findings" could, for instance, relate to implementation, to the extent that such findings "will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements". Appellate Body Report, *EC – Export Subsidies on Sugar*, para. 331.
[515] See Table 6, at p. 87 of this Report.

the domestic industry and third country imports during the POI were relevant to MOFCOM's analysis of causation.

7.332. Yet, the final determination contains no discussion of the role of Chinese producers not part of the domestic industry or their market share in connection with the analysis of causation. In our view, the absence of such a discussion requires us to conclude that MOFCOM's analysis of the causal relationship between subject imports and injury to the domestic industry was not reasoned and adequate.

7.333. Regarding third country imports, we note MOFCOM's statement in the final determination that the market share of third country imports did not affect its finding of a causal relationship between subject imports and injury to the domestic industry:

> [b]esides the subject country, during the POI, the countries (regions) that exported saloon cars and cross-country cars of a cylinder capacity > 2500cc to China include also the European Union, South Korea and Japan, etc.
>
> According to the statistical data of the Customs of the People's Republic of China, during the POI, the export volumes to China from other countries (regions) and their market shares in Chinese domestic market both initially increased and then decreased. But the volume of the subject imports to China and its market share in Chinese domestic market grew continually. Especially in the first three quarters of 2009, the volume of subject imports to China significantly increased by 20.12%, of which the ratio in the total import volume to China and the market share in China both increased. However the import volume to China from other countries (regions) decreased sharply by 32.63% at the same time, of which the ratio in the total import volume to China and the market share in Chinese market both decreased. Imports from other countries (regions) do not affect the finding of causal link in this case.[516] (emphasis added)

7.334. We recall our finding that, in circumstances where market shares varied significantly during the POI, an IA should analyse developments throughout the entire POI. An analysis of market share limited to consideration of starting and ending levels, would not, in our view, constitute an objective examination of the evidence.[517] The concerns we expressed regarding failure to objectively examine the market share evidence in MOFCOM's price effects analysis apply equally to MOFCOM's causation analysis. While MOFCOM concluded that the changes in the market share of third country imports had no bearing on its finding of causation, in our view, this conclusion reflects only consideration of the starting and ending figures, as third country imports accounted for 57.15% of the Chinese automobile market in 2006 and 57.40% in the interim 2009 period. For this reason, we conclude that MOFCOM's finding that third country imports had no bearing on MOFCOM's causation analysis lacks an adequate basis on the record and is not based on an objective examination of positive evidence.

7.335. On the basis of the foregoing, we consider that MOFCOM's finding of the causal relationship between subject imports and injury to the domestic industry was not reasoned and adequate.

7.7.5.3 Whether MOFCOM erred in failing to consider industry productivity and labor costs in its causation analysis

7.336. The United States puts forward two lines of argument concerning declining productivity and increasing labor costs. The United States clarified in its responses to Panel questions that the first line of argument focuses on MOFCOM's causation analysis, while the second line of argument focuses on MOFCOM's failure to conduct a proper non-attribution analysis.[518] We address the first here, and the second later in this report, at section 7.7.5.5.2 below.

7.337. The United States contends that MOFCOM erred in failing to inquire into the impact of the decline in labor productivity on the state of the domestic industry. China contends that MOFCOM

[516] Final determination, Exhibit CHN-07, pp. 142-143.
[517] See para. 7.288 of this Report.
[518] US response to Panel question No. 21.a.

correctly dismissed the relevance of productivity trends, given the fact that labor costs were an insignificant factor in the Chinese automobile industry.

7.338. The parties' arguments relate to information concerning the domestic industry's sales volume, sales revenue, pre-tax profits, number of employees, average wages, and labor productivity, which MOFCOM reported in the price effects chapter of its final determination. We have reproduced this data in table format below.

Table 7: Labor Costs as a percentage of Total Costs[519]

Indicator	2006	2007	2008	1Q-3Q 2008	1Q-3Q 2009
Employment (number of persons)	10,143	9,110	11,063	10,584	17,857
Multiplied by Average Wage (CNY/person)	44,664	48,215	56,028	39,023	45,805
Equals total Labor Cost (million CNY)	453	439	620	413	818
Sales Revenue (million CNY)	11072	10005	12082	9556	9717
Less Pre-Tax Profit (million CNY)	830	1134	1721	1523	1030
Equals Total Cost (million CNY)	10242	8871	10361	8033	8687
Divided by Sales Volume	39458	32098	33181	26749	30796
Equals per unit costs (CNY)	259,567	276,372	312,257	300,310	282,082
Labor Cost as % of Total Costs	4	5	6	5	9

7.339. We have several observations concerning this data. First, labor costs as a percentage of total costs more than doubled throughout the POI, from 4% in 2006 to 9% in the interim 2009 period. Second, labor costs almost doubled from interim 2008 to interim 2009. Third, per unit costs declined from a high of CNY 312,257 in 2008 to CNY 282,082 in the interim 2009 period. Fourth, pre-tax profit fell from a peak of CNY 1.721 billion in 2008 to CNY 1.03 billion in the interim 2009 period. Last, the amount of the increase in labor costs from interim 2008 to interim 2009 (405 million CNY) largely corresponds to the amount of decline in pre-tax profits in this period (493 million CNY).[520]

7.340. It seems clear to us that this data show that the domestic industry experienced increased labor costs and decreased pre-tax profits towards the end of the POI. This coincides with the 33.24% decline in productivity reported by MOFCOM for the interim 2009 period. Under circumstances where productivity declines sharply at the same time as labor costs almost double, we consider that an objective and unbiased IA should have inquired further into the extent to which the decline in productivity throughout the POI affected the domestic industry's financial indicators. Therefore, in our view, MOFCOM should have assessed the impact of the decline in labor productivity on the state of the domestic industry. This assessment could have resulted in a conclusion that the decline in labor productivity was insignificant, having regard to other factors. However, in the absence of any discussion in the final determination, or elsewhere in the record, we cannot assume that any assessment of this matter in fact occurred.

7.341. In the absence of any such assessment, we find that MOFCOM's dismissal of the relevance of productivity trends in finding a causal relationship between subject imports and injury to the domestic industry was not reasoned and adequate.

[519] These figures are drawn from the price effects section of MOFCOM's final determination. Final determination, Exhibit CHN-07, pp. 133-135, 136. Labor productivity figures are reported at pp. 136-137.

[520] We calculate a difference of 88 million CNY.

7.7.5.4 Whether MOFCOM erred in failing to consider the alleged lack of competitive overlap between domestic and imported automobiles in its causation analysis

7.342. The United States contends that a lack of competitive overlap between subject imports and the domestic like product compromises MOFCOM's finding of a causal relationship. China disagrees, and submits that MOFCOM correctly dismissed arguments in this regard, having concluded that domestic and imported automobiles were similar, comparable and substitutable in its determination of the like product.

7.343. We found above, in relation to the US price effects claim, that data on the record, notably submissions by certain US respondents and MOFCOM's own like product determination, suggest a lack of competitive overlap between subject imports and the domestic like product.[521] On this basis, we consider that MOFCOM should have been aware of the need to address this issue in its analysis of causation. The finding of like product does not alone suffice to fulfil the obligation to make a reasoned determination of causation. We can readily envisage a scenario where domestic and imported goods are found to be "like" within the meaning of Article 2.6 of the Anti-Dumping Agreement and/or footnote 46 to the SCM Agreement, but differentiation of goods within those two categories affects the competition between them in ways that have an impact on the assessment of causation.

7.344. We recall that Chrysler USA submitted comments to MOFCOM following its preliminary determination, in which Chrysler challenged MOFCOM's preliminary price effects analysis in light of the purportedly negligible competitive overlap between subject imports and the domestic like product. In its assessment of Chrysler USA's arguments, MOFCOM stated the following in its final determination:

> (1) In the comments on the preliminary determination, American Government, Chrysler Group LLC and General Motors LLC all alleged that, within the POI, the import prices of the product under investigation are much higher than that of the domestic like product, which indicates that the import prices of the product under investigation did not depress or undercut the price of the domestic like product.
>
> Both Chrysler Group LLC and General Motors LLC alleged that, there is a great difference between the price of the product under investigation and the price of the domestic like product, so there is no competition between them. They argued that the product under investigation mainly competes with the products manufactured by joint ventures in China and "the domestic industry" which is Chinese "local automobile companies", is injured by the products manufactured by the joint ventures in China. Chrysler Group LLC also argued that, "the domestic industry" mainly produces and sells the products of "the entry level", while the overwhelming majority of the product under investigation is the products of "the luxury level", so there is no competition.
>
> . . .
>
> (3) The Investigating Authority Found that:
>
> . . .
>
> ② Price is not the single criteria of finding the competition relationship between the product under investigation and the domestic like product, and the competition relationship between them cannot be denied just due to the price difference. The investigating authority has conducted a comprehensive investigation on the product under investigation and the like product manufactured in China in terms of physical characteristics, performance, production process, product use, product substitution, perception of consumers and producers, sales channels, prices and so on. The investigation indicates that the two are similar and comparable, which can substitute for and compete with each other.
>
> . . .

[521] See para. 7.281 of this Report.

> ④ Table 6 of the Evidence 1 supplied by Chrysler Group LLC indicates that, both the domestic industry (including "Chinese domestic manufacturers" and "Chinese international manufacturers") and "the product under investigation imported from the United States" cover the products of four categories, i.e. "entry level", "mid-level", "high level" and "the luxury level", which further indicates that the products of the domestic industry and the product under investigation compete with each other.[522] (emphasis added)

7.345. In our view, MOFCOM's assessment of Chrysler's arguments does not reflect an objective examination of the evidence. MOFCOM characterises Chrysler's argument as being that there was "no competition" between subject imports and the domestic like product, and then dismisses the argument on the basis of Chrysler's own data, which shows that there was some competition. In our view, MOFCOM misconstrued Chrysler's argument. To us, Chrysler's argument seems to be more nuanced than an assertion that there was no competition between domestic and imported goods. We understand Chrysler to have argued that domestic and imported US automobiles occupied largely different market segments, and thus that it was unlikely that subject imports had "a material effect" on the state of the domestic industry.[523] Chrysler relied on sales data showing that between 73.6 and 95.8% of subject imports sales during the POI were in the highest market segment, while between 96.6 and 98.8% of domestic like product sales were in the lowest market segment, a segment in which there were no sales of subject imports during the POI. In our view, by misconstruing Chrysler's argument, MOFCOM failed to objectively examine the evidence presented by Chrysler, and failed to provide a reasoned explanation for MOFCOM's decision to disregard it.[524]

7.346. On the basis of the above, we find that MOFCOM's dismissal of the evidence presented by Chrysler in finding a causal relationship between subject imports and injury to the domestic industry was not reasoned and adequate.

7.7.5.5 Whether MOFCOM erred in failing to properly examine known factors other than subject imports causing injury to the domestic industry, and failed to ensure that the injuries caused by these other factors were not attributed to subject imports

7.7.5.5.1 Decline in apparent consumption

7.347. The United States contends that a sharp decline in apparent consumption was the likely cause of injury to the domestic industry in the interim 2009 period, and submits that MOFCOM erred in downplaying the relevance of this decline. China disagrees and contends that MOFCOM's conclusion finds a basis in the evidence of an increase in production and sales.

7.348. There is no dispute that the decline in apparent consumption was an "other factor" causing injury.[525] MOFCOM discussed the decline in apparent consumption in its final determination as follows:

> [t]he investigation evidence indicates that, during the POI, the market demand of saloon cars and cross-country cars of a cylinder capacity > 2500cc in China presented an increasing trend in general. The apparent consumption increased by 44.54% from 2006 to 2007 and increased by 13.39 from 2007 to 2008. Although it decreased by 21.65% in the first three quarters of 2009 compared with the same period of last year, the apparent consumption of 9 months has already been close to the apparent consumption for the whole year of 2006. Moreover, in the first three quarters of 2009, both the production and sales of the domestic industry increased. The change of the apparent consumption did not cause adverse impact on the domestic industry. All in

[522] Final determination, Exhibit CHN-07, pp. 155-158.
[523] See para. 7.236 of this Report.
[524] Moreover, we find it contradictory for MOFCOM to both dismiss as unreliable the evidence submitted by Chrysler USA, and conclude that the same evidence supports MOFCOM's conclusion that the domestic like product and the subject imports compete. Further, we are not convinced that Chrysler USA's sales data actually supports MOFCOM's finding of a competitive overlap between subject imports and the domestic like product.
[525] MOFCOM lists "Changes in Market Demand and Consumption Model, and Substitute Products" as an "Other Factor" in the causation chapter of its final determination. See Final determination, Exhibit CHN-07, p. 143.

> all, the investigating authority does not find that the change of the market demand, the change of consumption model or other substitute products has caused the injury to the domestic industry.[526] (emphasis added)

MOFCOM thus determined that although apparent consumption fell by 21.65% from interim 2008 to interim 2009, consumption figures in this period were nevertheless close to the 2006 level. This, coupled with positive trends for production and sales, led MOFCOM to dismiss the decline in apparent consumption as a factor injuring the domestic industry.

7.349. In our view, MOFCOM's discussion of the purportedly limited impact of apparent consumption does not follow from the evidence on the record before it, and does not present a reasoned evaluation of that evidence. MOFCOM confined its assessment to two indicators, production and sales, in finding that trends in apparent consumption did not cause injury to the domestic industry. However, a decline in apparent consumption will normally lead to decreased sales, increased inventories, and possibly lower prices, with resulting negative consequences for the state of the domestic industry. Yet, MOFCOM did not address any of these elements, in determining that the decline in apparent consumption was immaterial to its causation analysis.

7.350. China argues that the domestic industry's sales model insulated it from injury caused by the decline in apparent consumption. We fail to see how the fact that the industry bases production on anticipated sales supports the conclusion that a sharp and significant drop in apparent consumption did not cause the domestic industry injury. In our view, the fact that prices declined in the interim 2009 period by 10.13% while production increased by 12.63% in the same period, suggests that the sales model failed to provide the posited insulation from declining consumption argued by China.

7.351. On this basis, we find that MOFCOM failed to properly examine whether the decline in apparent consumption was causing injury to the domestic industry, and failed to ensure that any injury caused by that decline was not attributed to subject imports.

7.7.5.5.2 Increase in average wages coupled with the decline in industry productivity

7.352. The United States contends that MOFCOM failed to ensure that injury to the domestic industry caused by the combination of an increase in average wages and decline in industry productivity was not attributed to subject imports. China asserts that developments in these two factors were not a "known" other factor causing injury to the domestic industry, and therefore MOFCOM was under no obligation to conduct a non-attribution analysis in this regard.

7.353. The United States makes two arguments. First, the United States argues that MOFCOM should have undertaken a non-attribution analysis of the increase in average wages coupled with the decline in productivity of its own volition. The United States points out that MOFCOM did consider other factors causing injury, and that "productivity of the domestic industry" is listed in Article 3.5 of the Anti-Dumping Agreement and Article 15.5 of the SCM Agreement as a possibly relevant factor in this regard. The United States asserts that MOFCOM's failure to consider the decline in industry productivity in relation to other factors it did examine demonstrates a lack of objectivity in MOFCOM's choices of what data to examine in its causation analysis.

7.354. In our view, this argument rests on speculation. We recall that Articles 3.5 and 15.5 only require an analysis of "known" other factors causing injury to the domestic industry at the same time as imports, and makes clear that the factors listed in those provisions "may be relevant in this respect".[527] The fact that MOFCOM may have considered other factors listed in Articles 3.5 and 15.5 as "known" other factors causing injury is immaterial to the question of whether the combination of increase in average wages and decline in productivity was "known" to MOFCOM as a factor causing injury. The fact that, as we have concluded above, MOFCOM should have addressed industry productivity in its finding of a causal relationship between subject imports and injury to the domestic industry does not demonstrate that MOFCOM knew or should have known that productivity and wages together were an "other factor" causing injury to the domestic industry. The United States has not demonstrated to us that any party made arguments before

[526] Final determination, Exhibit CHN-07, pp. 143-144.
[527] See para. 7.323 of this Report.

MOFCOM in this respect, or shown any other basis on which we could conclude that this was a factor known to MOFCOM, and therefore should have been addressed in this context.

7.355. Second, the United States contends that the fact that no interested party drew MOFCOM's attention to the interplay between increasing wages and declining productivity in the course of its investigations is immaterial to the Panel's evaluation, as this was otherwise known to MOFCOM. In the US view, MOFCOM's failure to examine wages and productivity in these circumstances is inconsistent with Article 3.1 of the Anti-Dumping Agreement and Article 15.1 of the SCM Agreement. The United States cites the panel report in *Mexico – Steel Pipes and Tubes* to support this argument.[528] In that dispute, the panel held that the fact that no interested party raised a challenge to the IA's use of a particular POI was immaterial to the IA's obligation under Article 3.1 to make an objective examination on the basis of positive evidence in reaching an affirmative injury determination.

7.356. We find that this argument lacks a legal basis in the Agreements. In our view, *Mexico – Steel Pipes and Tubes* concerned a situation that is entirely different to the present situation. While the panel in *Mexico – Steel Pipes and Tubes* considered that an IA could not be passive in the manner by which it gathers data in the course of its investigations, we see nothing in this report which addresses how a factor becomes "known" in the context of a non-attribution analysis. Nor do we consider that this report suggests that an IA has to evaluate factors that are not known other factors. While this dispute is relevant to the broad scope of Article 3.1 (and thus Article 15.1), it seems clear to us that this dispute has no bearing upon an IA's evaluation of the universe of "known" factors within the meaning of Article 3.5 (and Article 15.5).

7.357. On this basis, we find that the United States has not shown that MOFCOM failed to properly examine whether the increase in labor costs coupled with the decline in industry productivity was causing injury to the domestic industry and to ensure that any injury caused by that decline was not attributed to subject imports.

7.7.5.5.3 Increase in sales tax

7.358. The United States asserts that MOFCOM failed to assess the impact on domestic consumption patterns of an increased sales tax on larger engine vehicles. In China's view, MOFCOM was under no duty to undertake such an assessment, in replying to the specific concerns raised by Chrysler USA in this regard.

7.359. The record shows that the increased sales tax was brought to MOFCOM's attention by Chrysler USA as a factor potentially causing injury to the domestic industry.[529] Chrysler made the following argument in this respect:

> [o]n January 20, 2009, China lowered the vehicle tax on cars with engines up to 1.6 litres from 10 percent to 5 percent as part of a deliberate effort to encourage the production and sales of more fuel efficient smaller engine passenger cars. The previous September, China had sought to discourage the production and sale of less fuel efficient larger engine cars by raising the tax on sales of such cars from 15 percent to 25 percent for vehicles with engines over three litres, but less than four litres, and from 20 percent to 40 percent for vehicles with engines over four litres. To the extent MOFCOM finds a decline in the production and sales of the domestic like product between 2008 to 2009, it has an affirmative obligation to explain why the drop was caused by subject imports rather than the change in China's tax policies.[530] (emphasis added)

In our view, this submission argues that *if* the evidence shows a decline in domestic industry production and sales between 2008 and 2009, MOFCOM should explain why such declines in sales were caused by subject imports, and not by the tax measure.

[528] US response to Panel question 21.b.

[529] MOFCOM lists "Impact of Policies Such as Consumption Tax, Purchase Tax and so on" as an "Other Issue[. . .] in the Investigation of Industry Injury" in the causation chapter of its final determination. See Final determination, Exhibit CHN-07, pp. 162-164.

[530] US respondent comments on the preliminary determination, Exhibit USA-12, pp. 22-23.

7.360. MOFCOM rejected Chrysler's argument as inconsistent with the facts:

> (3) The Investigating Authority Found that:
>
> ① In the preliminary determination, the investigating authority found that "in the first three quarters of 2009, although the apparent consumption of the domestic market decreased, the domestic industry still maintained the increase of production and sales through continually improving production and operation level as well as product competitiveness". The argument of American party, that "the production and sale of the domestic industry decreased" in its comments on the preliminary determination, is not consistent with the facts.
>
> ② The change of two tax policies concerning domestic automobile products mentioned in the comments of American party on the preliminary determination, entered into force respectively in September 2008 and January 2009. And the effects of the policies started mainly since 2009. As mentioned above, in the first three quarters of 2009, the production and sales of domestic industry were not affected by the aforesaid tax policies, which still maintained growth. Meanwhile, the investigating authority notices that, in the first three quarters of 2009, the apparent consumption of the domestic market decreased, while the import volume of the product under investigation increased with decreased price, which aggravated the competition in the domestic market. The data indicate that, in the first three quarters of 2009, the import volume of the product under investigation increased greatly by 20.12% meanwhile the price decreased by 3.17%, which caused that the sales prices of the domestic like product decreased. The increase margin of sales revenue, the pre-tax profits and the rate of return on investment of the domestic industry fell sharply, the profitability of the domestic industry was badly affected, and the investment plan and new projects of some domestic producers were forced to be laid aside, delayed or cancelled.[531] (emphasis added)

MOFCOM seems to have construed Chrysler's argument as contingent on a factual finding that production and sales declined following the introduction of the tax measure at the beginning of 2009. Since MOFCOM did not find declines in domestic production and sales in interim 2009, it dismissed Chrysler's conditional argument.[532]

7.361. Thus, it is clear that MOFCOM did address the argument raised by Chrysler USA in relation to the increased sales tax.[533] Having found that the factual predicate for the analysis proposed by Chrysler, a decline in production and sales, was not in fact the case, there was nothing for MOFCOM to explain. We see no reason for MOFCOM to have gone on to consider the impact of the increase in the sales tax, in light of its conclusion that production and sales of the domestic industry did not decline from interim 2008 to interim 2009.

7.362. On this basis, we find that United States has not shown that MOFCOM failed to properly examine whether the increased sales tax was causing injury to the domestic industry and failed to ensure that any injury caused by that increased tax was not attributed to subject imports.

7.7.6 Conclusion

7.363. On the basis of our assessment of the parties' arguments regarding this claim, we find that China acted inconsistently with Articles 3.1 and 3.5 of the Anti-Dumping Agreement and Articles 15.1 and 15.5 of the SCM Agreement as a result of MOFCOM's causation determination in the two investigations at issue.

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[531] Final determination, Exhibit CHN-07, pp. 163-164.

[532] We find this characterisation of Chrysler's argument to be of no import to the resolution of the US claim.

[533] Insofar as the United States suggests that MOFCOM should have inquired into whether the increased sales taxes caused changes in consumption, it has failed to bring to our attention anything in the record which would suggest a link between the decline in apparent consumption and the tax measure, such that it should have been found to be a known other factor causing injury.

7.8 Consequential violations

7.8.1 Provisions at issue

7.364. Article 1 of the Anti-Dumping Agreement reads in relevant part:

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

7.365. Similarly, Article 10 of the SCM Agreement provides that:

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

7.8.2 Arguments of the parties

7.366. The **United States** claims that China's actions are inconsistent with Article 1 of the Anti-Dumping Agreement and Article 10 of the SCM Agreement.[534] The United States submits that, insofar as the Panel finds that China acted inconsistently with any provision of the Anti-Dumping Agreement cited in its claims above, the Panel should also find that, as a consequence of imposing an AD measure not "in accordance with" the Anti-Dumping Agreement, China has breached Article 1 of the Anti-Dumping Agreement.[535] The United States likewise contends that insofar as the Panel finds that China violated any provision of the SCM Agreement in this dispute, the Panel should also find a violation of Article 10 of the SCM Agreement.[536]

7.367. **China** argues that while the United States claims that MOFCOM acted inconsistently with Article 1 of the Anti-Dumping Agreement and Article 10 of the SCM Agreement, the United States does not cite any specific evidence or legal argument in support of its claim. In China's view, the United States has thus failed to make out a *prima facie* case regarding these consequential claims.[537]

7.8.3 Evaluation by the Panel

7.368. To succeed in a claim under Article 1 of the Anti-Dumping Agreement or Article 10 of the SCM Agreement, a complaining Member need only establish that AD or CVD measures were imposed, and the imposing Member acted inconsistently with one of its obligations under the relevant Agreement.[538] We have found that MOFCOM acted inconsistently with several provisions of the Anti-Dumping and SCM Agreements, with respect to the requirement for non-confidential summaries of confidential information, the disclosure of essential facts, the determination of the residual AD and CVD rates, the determination of price effects, and the determination of causation. Therefore, we also find that China has, as a consequence of these inconsistencies, acted inconsistently with Article 1 of the Anti-Dumping Agreement and Article 10 of the SCM Agreement.

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[534] US first written submission, paras. 176-177. The United States also argued, in its first written submission, that MOFCOM acted inconsistently with Article VI of the GATT 1994. However, the United States dropped this argument in its second written submission. See US second written submission, fn. 153.

[535] US second written submission, para. 120.

[536] US second written submission, paras. 120-121.

[537] China's first written submission, para. 266.

[538] Appellate Body Reports, *US – Anti-Dumping and Countervailing Duties (China)*, para. 358; *US – Softwood Lumber IV*, para. 143.

8 CONCLUSIONS AND RECOMMENDATION

8.1. For the reasons set forth in this Report, the Panel concludes as follows:

i. China acted inconsistently with Articles 6.5.1 of the Anti-Dumping Agreement and 12.4.1 of the SCM Agreement in failing to require the submission of adequate non-confidential summaries of confidential information contained in the petition;

ii. China acted inconsistently with Article 6.9 of the Anti-Dumping Agreement because MOFCOM failed to disclose the essential facts under consideration which formed the basis of its decision to impose the AD duties;

iii. China acted inconsistently with Article 6.8 and paragraph 1 of Annex II of the Anti-Dumping Agreement with respect to the determination of the residual AD duty rate for unknown US exporters;

iv. China acted inconsistently with Article 12.7 of the SCM Agreement with respect to the determination of the residual CVD rate for unknown US exporters;

v. China acted inconsistently with Articles 3.1 and 3.2 of the Anti-Dumping Agreement and Articles 15.1 and 15.2 of the SCM Agreement in connection with MOFCOM's analysis of price effects;

vi. China acted inconsistently with Articles 3.1 and 3.5 of the Anti-Dumping Agreement and Articles 15.1 and 15.5 of the SCM Agreement in connection with MOFCOM's causation determination; and

vii. China acted inconsistently with Article 1 of the Anti-Dumping Agreement and Article 10 of the SCM Agreement as a consequence of the foregoing violations of these Agreements.

8.2. For the reasons set forth in this Report, the Panel further concludes as follows:

i. The United States has not established that China acted inconsistently with Articles 6.9, 12.2 and 12.2.2 of the Anti-Dumping Agreement with respect to the disclosure of the essential facts and public notice regarding MOFCOM's determination of the residual AD duty rate for unknown US exporters;

ii. The United States has not established that China acted inconsistently with Articles 12.8, 22.3 and 22.5 of the SCM Agreement with respect to the disclosure of the essential facts and public notice regarding MOFCOM's determination the residual CVD rate for unknown US exporters; and

iii. The United States has not established that China acted inconsistently with Articles 3.1 and 4.1 of the Anti-Dumping Agreement and Articles 15.1 and 16.1 of the SCM Agreement in connection with MOFCOM's definition of the domestic industry.

8.3. Under Article 3.8 of the DSU, in cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment. Thus, we conclude that, to the extent that the measures at issue are inconsistent with the Anti-Dumping and SCM Agreements, they have nullified or impaired benefits accruing to the United States under those Agreements. On this basis, pursuant to Article 19.1 of the DSU, we recommend that China bring its measures into conformity with its obligations under the Anti-Dumping and SCM Agreements.

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WORLD TRADE ORGANIZATION

WT/DS440/R/Add.1

23 May 2014

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CHINA - ANTI-DUMPING AND COUNTERVAILING DUTIES ON CERTAIN AUTOMOBILES FROM THE UNITED STATES

REPORT OF THE PANEL

Addendum

This *addendum* contains Annexes A to D to the Report of the Panel to be found in document WT/DS440/R.

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WORKING PROCEDURES OF THE PANEL

ANNEX A-1

WORKING PROCEDURES OF THE PANEL

1. In its proceedings, the Panel shall follow the relevant provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). In addition, the following Working Procedures shall apply.

General

2. The deliberations of the Panel and the documents submitted to it shall be kept confidential. Nothing in the DSU or in these Working Procedures shall preclude a party to the dispute (hereafter "party") from disclosing statements of its own positions to the public. Members shall treat as confidential information submitted to the Panel by another Member which the submitting Member has designated as confidential. Where a party submits a confidential version of its written submissions to the Panel, it shall also, upon request of a Member, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public.

3. The Panel shall meet in closed session. The parties, and Members having notified their interest in the dispute to the Dispute Settlement Body in accordance with Article 10 of the DSU (hereafter "third parties"), shall be present at the meetings only when invited by the Panel to appear before it.

4. Each party and third party has the right to determine the composition of its own delegation when meeting with the Panel. Each party and third party shall have the responsibility for all members of its own delegation and shall ensure that each member of such delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceedings.

5. The parties shall treat business confidential information in accordance with the procedures set forth in the Additional Working Procedures of the Panel Concerning Business Confidential Information, found in Annex 1 to these Working Procedures.

Submissions

6. Before the first substantive meeting of the Panel with the parties, each party shall submit a written submission in which it presents the facts of the case and its arguments, in accordance with the timetable adopted by the Panel. Each party shall also submit to the Panel, prior to second substantive meeting of the Panel, a written rebuttal, in accordance with the timetable adopted by the Panel.

7. A party shall submit any request for a preliminary ruling at the earliest possible opportunity and in any event no later than in its first written submission to the Panel. If the United States requests such a ruling, China shall submit its response to the request in its first written submission. If China requests such a ruling, the United States shall submit its response to the request prior to the first substantive meeting of the Panel, at a time to be determined by the Panel in light of the request. Exceptions to this procedure shall be granted upon a showing of good cause.

8. Each party shall submit all factual evidence to the Panel no later than during the first substantive meeting, except with respect to evidence necessary for purposes of rebuttal, answers to questions or comments on answers provided by the other party. Exceptions to this procedure shall be granted upon a showing of good cause. Where such exception has been granted, the Panel shall accord the other party a period of time for comment, as appropriate, on any new factual evidence submitted after the first substantive meeting.

9. Where the original language of exhibits is not a WTO working language, the submitting party or third party shall submit a translation into the WTO working language of the submission at the same time. The Panel may grant reasonable extensions of time for the translation of such exhibits

upon a showing of good cause. Any objection as to the accuracy of a translation should be raised in writing as promptly as possible, and in any case not later than **by the date of the written submission of the objecting Party due following the** submission of the translation. **In exceptional circumstances, the Panel may grant an extension to this deadline upon good cause shown.** Any objection shall be accompanied by a detailed explanation of the grounds of objection and an alternative translation.

10. To facilitate the maintenance of the record of the dispute and maximize the clarity of submissions, each party and third party shall sequentially number its exhibits throughout the course of the dispute. For example, exhibits submitted by the United States could be numbered USA-1, USA-2, etc. If the last exhibit in connection with the first submission was numbered USA-5, the first exhibit of the next submission thus would be numbered USA-6. China's exhibits could be numbered CHN-1, CHN-2, etc.

Questions

11. The Panel may at any time pose questions to the parties and third parties, orally in the course of a meeting or in writing.

Substantive meetings

12. Each party shall provide to the Panel the list of members of its delegation in advance of each meeting with the Panel and no later than 5.30 p.m. the previous working day.

13. The first substantive meeting of the Panel with the parties shall be conducted as follows:

a. The Panel shall invite the United States to make an opening statement to present its case first. Subsequently, the Panel shall invite China to present its point of view. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. In the event that interpretation is needed, each party shall provide additional copies to the interpreters. Each party shall make available to the Panel and the other party the final version of its statement, preferably at the end of the meeting, and in any event no later than 5.30 p.m. on the first working day following the meeting.

b. After the conclusion of the statements, the Panel shall give each party the opportunity to ask questions or make comments, through the Panel. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to the other party to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the other party's questions within a deadline to be determined by the Panel.

c. The Panel may subsequently pose questions to the parties. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

d. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with the United States presenting its statement first.

14. The second substantive meeting of the Panel with the parties shall be conducted as follows:

a. The Panel shall ask China if it wishes to avail itself of the right to present its case first. If so, the Panel shall invite China to present its opening statement, followed by the United States. If China chooses not to avail itself of that right, the Panel shall invite the United States to present its opening statement first. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. In the event that interpretation is needed, each party shall provide additional copies to the interpreters. Each party shall make available to the Panel and the other party the final version of its statement, preferably at the end of the meeting, and in any event no later than 5.30 p.m. of the first working day following the meeting.

b. After the conclusion of the statements, the Panel shall give each party the opportunity to ask questions or make comments, through the Panel. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to the other party to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the other party's questions within a deadline to be determined by the Panel.

c. The Panel may subsequently pose questions to the parties. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

d. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with the party that presented its opening statement first, presenting its closing statement first.

Third parties

15. The Panel shall invite each third party to transmit to the Panel a written submission prior to the first substantive meeting of the Panel with the parties, in accordance with the timetable adopted by the Panel.

16. Each third party shall also be invited to present its views orally during a session of this first substantive meeting, set aside for that purpose. Each third party shall provide to the Panel the list of members of its delegation in advance of this session and no later than 5.30 p.m. the previous working day.

17. The third-party session shall be conducted as follows:

a. All third parties may be present during the entirety of this session.

b. The Panel shall first hear the arguments of the third parties in alphabetical order. Third parties present at the third-party session and intending to present their views orally at that session, shall provide the Panel, the parties and other third-parties with provisional written versions of their statements before they take the floor. Third parties shall make available to the Panel, the parties and other third parties the final versions of their statements, preferably at the end of the session, and in any event no later than 5.30 p.m. of the first working day following the session.

c. After the third parties have made their statements, the parties may be given the opportunity, through the Panel, to ask the third parties questions for clarification on any matter raised in the third parties' submissions or statements. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to a third party to which it wishes to receive a response in writing.

d. The Panel may subsequently pose questions to the third parties. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the third parties to which it wishes to receive a response in writing. Each third party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

Descriptive part

18. The parties and third parties shall provide the Panel with executive summaries of the facts and arguments as presented to the Panel in each of their written submissions and in their oral presentations, within one week following the delivery to the Panel of the written version of the submission or oral statement concerned. Each executive summary of the parties shall be limited to no more than ten (10) pages. The executive summaries shall not serve in any way as a substitute for the submissions of the parties in the Panel's examination of the case. Third parties are requested to provide the Panel with executive summaries of their written submissions and oral statements of no more than five (5) pages each, within one week following the delivery to the Panel of the written version of the relevant submission. Paragraph 23 shall apply to the service of executive summaries.

19. The descriptive part of the Panel's report will include the procedural and factual background to the present dispute. Description of the main arguments of the parties and third parties will consist of the executive summaries referred to in paragraph 18, and these will be annexed as addenda to the report.

Interim review

20. Following issuance of the interim report, each party may submit a written request to review precise aspects of the interim report and request a further meeting with the Panel, in accordance with the timetable adopted by the Panel. The right to request such a meeting shall be exercised no later than at the time the written request for review is submitted.

21. In the event that no further meeting with the Panel is requested, each party may submit written comments on the other party's written request for review, in accordance with the timetable adopted by the Panel. Such comments shall be limited to commenting on the other party's written request for review.

22. The interim report shall be kept strictly confidential and shall not be disclosed.

Service of documents

23. The following procedures regarding service of documents shall apply:

a. Each party and third party shall submit all documents to the Panel by filing them with the DS Registry (office No. 2047).

b. Each party and third party shall file 8 paper copies of all documents it submits to the Panel. However, when exhibits are provided on CD-ROMS/DVDs, 5 CD-ROMS/DVDs and 5 paper copies of those exhibits shall be filed. The DS Registrar shall stamp the documents with the date and time of the filing. The paper version shall constitute the official version for the purposes of the record of the dispute.

c. Each party and third party shall also provide an electronic copy of all documents it submits to the Panel at the same time as the paper versions, preferably in Microsoft Word format, either on a CD-ROM, a DVD or as an e-mail attachment. If the electronic copy is provided by e-mail, it should be addressed to DSRegistry@wto.org, and cc'd to xxxxxxxxxx@wto.org and xxxxxxxxxx@wto.org. If a CD-ROM or DVD is provided, it shall be filed with the DS Registry.

d. Each party shall serve any document submitted to the Panel directly on the other party. Each party shall, in addition, serve on all third parties its written submissions in advance of the first substantive meeting with the Panel. Each third party shall serve any document submitted to the Panel directly on the parties and all other third parties. Service may take place in electronic format (CD-ROM, DVD, or e-mail attachment), if the party receiving service consents to such format. Each party and third party shall confirm, in writing, that copies have been served as required at the time it provides each document to the Panel.

e. Each party and third party shall file its documents with the DS Registry and serve copies on the other party (and third parties where appropriate) by 5.30 p.m. (Geneva time) on the due dates established by the Panel.

f. The Panel shall provide the parties with an electronic version of the descriptive part, the interim report and the final report, as well as of other documents as appropriate. When the Panel transmits to the parties or third parties both paper and electronic versions of a document, the paper version shall constitute the official version for the purposes of the record of the dispute.

ANNEX A-2

ADDITIONAL WORKING PROCEDURES ON BUSINESS CONFIDENTIAL INFORMATION

1. These procedures apply to any business confidential information (BCI) that a party wishes to submit to the Panel. For the purposes of these procedures, BCI is defined as any information that has been designated as such by the Party submitting the information, that is not available in the public domain, and the release of which would seriously prejudice an essential interest of the person or entity that supplied the information to the Party. In this regard, BCI shall include information that was previously submitted to China's Ministry of Commerce ("MOFCOM") as BCI in the anti-dumping and countervailing duty investigations at issue in this dispute. However, these procedures do not apply to information that is available in the public domain. In addition, these procedures do not apply to any BCI if the person who provided the information in the course of the aforementioned investigations agrees in writing to make the information publicly available.

2. The first time that a party submits to the Panel BCI as defined above from an entity that submitted that information in one of the investigations at issue, the party shall also provide, with a copy to the other party, an authorizing letter from the entity. That letter shall authorize both the United States and China to submit in this dispute, in accordance with these procedures, the confidential information submitted by that entity in the course of those investigations.

3. If an entity refuses to grant the authorization referred to in paragraph 2, a party may bring the situation to the attention of the Panel. The Panel shall consider what steps to take, which may include requesting information pursuant to Article 13 of the DSU.

4. No person may have access to BCI except a member of the Secretariat or the Panel, an employee of a party or third party, and an outside advisor for the purposes of this dispute to a party or third party. However, an outside advisor is not permitted access to BCI if that advisor is an officer or employee of an enterprise engaged in the production, export, or import of the products that were the subject of the investigations at issue in this dispute.

5. A party or third party having access to BCI shall treat it as confidential, i.e. shall not disclose that information other than to those persons authorized to receive it pursuant to these procedures. Each party and third party shall have responsibility in this regard for its employees as well as any outside advisors used for the purposes of this dispute. BCI obtained under these procedures may be used only for the purpose of providing information and argumentation in this dispute and for no other purpose.

6. The party submitting BCI shall mark the cover and/or first page of the document containing BCI, and each page of the document, to indicate the presence of such information. The specific information in question shall be placed between double brackets, as follows: [[xx,xxx.xx]]. The first page or cover of the document shall state "Contains business confidential information on pages xxxxxx", and each page of the document shall contain the notice "Contains Business Confidential Information" at the top of the page. In case of exhibits, the party submitting BCI in the form of an Exhibit shall mark it as (BCI) next to the exhibit number (e.g. Exhibit EU-1 (BCI)). Should the party submit specific BCI within a document which is considered to be public, the specific information in question shall be placed between double brackets, as follows: [[xx,xxx.xx]]."

7. Where a party submits a document containing BCI to the Panel, the other party or any third party referring to that BCI in its documents, including written submissions and oral statements, shall clearly identify all such information in those documents. All such documents shall be marked as described in paragraph 4. In the case of an oral statement containing BCI, the party or third party making such a statement shall inform the Panel before making it that the statement will contain BCI, and the Panel will ensure that only persons authorized to have access to BCI pursuant to these procedures are in the room to hear that statement.

8. The Panel will not disclose BCI, in its report or in any other way, to persons not authorized under these procedures to have access to BCI. The Panel may, however, make statements of conclusion drawn from such information. Before the Panel circulates its final report to the Members, the Panel will give each party an opportunity to review the report to ensure that it does not contain any information that the party has designated as BCI.

9. Submissions containing BCI will be included in the record forwarded to the Appellate Body in the event of an appeal of the Panel's Report.

ANNEX B

ARGUMENTS OF THE UNITED STATES

ANNEX B-1

EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION OF THE UNITED STATES

I. INTRODUCTION

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

II. STANDARD OF REVIEW

2. The applicable standard of review in this dispute is that stated in Article 11 of the DSU and Article 17.6 of the AD Agreement. Per these provisions, the Panel must examine whether MOFCOM's conclusions are "reasoned and adequate" in "light of the evidence." The standard of review recognizes that investigating authorities in anti-dumping and countervailing duty investigations may have to consider conflicting arguments and evidence and that they will need to exercise discretion. However, it does not entitle an investigating authority to automatic deference regarding the exercise of that discretion. To the contrary, the investigating authority is responsible for ensuring that its explanations reflect that conflicting evidence was considered.

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

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

3. In this case, China acted inconsistently with its obligations under Article 6.5.1 of the AD Agreement and Article 12.4.1 of the SCM Agreement.

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

4. An investigating authority that accepts confidential information from an interested party must also require that party to provide a non-confidential summary of such information.

2. The Non-Confidential Summaries Are Inadequate

5. In the investigations at issue, the petitioner did not present to MOFCOM any particular circumstances, let alone exceptional ones, that explained why the information in question was not susceptible to non-confidential summary. Yet MOFCOM failed to require the petitioner to prepare non-confidential summaries of information it submitted.

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

6. For several categories of information, the petitioner simply redacted the information contained in the application, preventing the respondents from reviewing the data and leaving them in the dark about the substance of the information provided.

b. Other Economic Indicators

7. For a number of other data categories, the application indicates year-on-year percentage changes for the POI, but it does not provide a non-confidential summary of the actual values associated with the percentage changes. Due to the petitioner's extensive reliance on what it characterized as confidential information, the fact that MOFCOM did not require non-confidential summaries of the information that was capable of summary was a significant failure, which seriously compromised the ability of the United States and U.S. companies to respond to the petitioners' allegations.

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

8. China breached Article 6.9 of the AD Agreement by failing to disclose to interested parties the "essential facts" forming the basis of MOFCOM's decision to apply antidumping duties.

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

9. The calculations relied on by an investigating authority to determine the normal value and export price – as well as the data underlying those calculations – constitute "essential facts" forming the basis of the investigating authority's imposition of final measures within the meaning of Article 6.9. These data are "facts" because they are things "known for certain to have occurred." The investigating authority aggregates, disaggregates or otherwise mathematically manipulates this adjusted data to calculate the normal value and export price. These calculations similarly are "facts" because they also represent things known to have occurred, as distinct from the investigating authority's reasoning or legal interpretation of those data.

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

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

11. MOFCOM's failure to make available the calculation data prevented the respondents from knowing basic information about how the dumping margins to which they would be subject had been determined. Without the actual calculations performed by the investigating authority, it is not possible to check the calculations against the methodological explanations given, to ensure the completeness and accuracy of the investigating authority's calculations.

IV. MOFCOM'S FLAWED ALL OTHERS DUMPING DETERMINATION

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

12. In the final determination, MOFCOM applied the all others dumping margin of 21.5 per cent to unexamined U.S. producers/exporters. It did so despite the fact that the dumping margin for the respondents ranged from 2 per cent to 8.9 per cent. MOFCOM's explanation for its all others

dumping margin was that, pursuant to Article 21 of its Anti-Dumping Regulation, it relied on "the best information available and facts that were adopted in the PD, and appl[ied] the dumping margin claimed in the petition" for all other U.S. companies.

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

13. China acted inconsistently with Article 6.8 of the AD Agreement and paragraph 1 of Annex II because MOFCOM applied (apparently adverse) facts available, despite the fact that it did not notify the relevant producers of the information required of them, and the producers did not refuse to provide necessary information or otherwise impede the dumping investigation. Indeed, MOFCOM had no evidence that any interested party "refused access to" or otherwise "did not provide" information that was "necessary" to the antidumping investigation, or otherwise "significantly impeded" the antidumping investigation. As was the case in *China – GOES*, other exporters of subject merchandise were non-existent: no other U.S. exporters of automobiles existed at the time of the antidumping investigation of certain automobiles from the United States.

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

14. MOFCOM failed to inform the United States and other interested parties "of the essential facts under consideration" which formed the basis for this calculation in time for the United States and other interested parties to defend their interests.

a. MOFCOM's Determinations and Disclosures

15. In the preliminary determination, MOFCOM established an all others dumping rate of 21.5 per cent. MOFCOM explained its determination in a single sentence: "For other U.S. companies, in accordance with Article 21 of the AD regulations, the Investigating Authority decided, using available facts and the best information available, to apply the dumping margin claimed in the petition to these companies." Article 21 of China's Anti-Dumping Regulation pertains to the use of facts available. In the final determination, MOFCOM established a final all others dumping rate of 21.5 per cent. It did so despite the fact that the dumping rates for the other respondents ranged from 2 per cent to 8.9 per cent.

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

16. MOFCOM did not identify the essential facts that formed the basis for its imposition of a 21.5 per cent all others dumping rate. As described above, its disclosure consisted of a single sentence. Noticeably absent from its determination are the following types of facts that would be necessary to MOFCOM's decision to apply facts available: facts relating to whether or not the U.S. companies refused access to necessary information or significantly impeded the antidumping investigation; facts that led MOFCOM to conclude that a 21.5 per cent all others dumping rate was an appropriate rate applicable to all other companies; and facts underpinning the calculation of the 21.5 per cent rate, and the details of the calculation itself.

17. These facts are essential because they form the basis for MOFCOM's decision to apply a facts available all others dumping rate. Because MOFCOM did not disclose these essential facts, the United States and other interested parties were not able to understand, much less evaluate and, if necessary, rebut, MOFCOM's assessment or calculation of the all others dumping margin. Likewise, because MOFCOM did not adequately disclose the factual information used to calculate the 21.5 per cent all others rate, the United States and interested U.S. companies were not able to argue that this rate was inappropriate. Given the significant disparity between the "all others" rate and the rates calculated for the known exporters – the "all others" rate was more than twice as high as the margin for any of the investigated companies – a more detailed disclosure of the "essential facts" under consideration leading to the "all others" rate was required to allow the United States to defend its interests and those of potential future exporters.

3. MOFCOM Failed to Explain Its Determination

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

V. MOFCOM'S FLAWED ALL OTHERS SUBSIDY RATE DETERMINATION

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

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

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

20. China acted inconsistently with Article 12.7 of the SCM Agreement because MOFCOM applied facts available to producers that MOFCOM did not notify of the information required of them, and that did not refuse to provide necessary information or otherwise impede the countervailing duty investigation. Indeed, MOFCOM had no evidence that any interested party "refused access to" or otherwise "did not provide" information that was "necessary" to the investigation, or otherwise "significantly impeded" the investigation. As was the case in the investigation that was the subject of *China – GOES*, exporters of subject merchandise other than the named respondents did not exist at the time of the countervailing duty investigation. Therefore, China's application of facts available was improper, as it is logically impossible for a non-existent exporter to fail to cooperate.

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

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

a. MOFCOM's Determinations and Disclosures

22. In the preliminary determination, MOFCOM established an all others subsidy rate of 12.9 per cent. MOFCOM explained its determination in one single sentence: "For all other U.S. companies, in accordance with Article 21 of the CVD regulations, the Investigating Authority decided, by adopting facts available, to apply the *ad valorem* subsidy rate of General Motors LLC to these companies." Article 21 of China's CVD Regulation pertains to the use of facts available. However, MOFCOM provided no further explanation of its calculation of the all others subsidy rate. In the final determination, MOFCOM applied the all others subsidy rate of 12.9 per cent. MOFCOM's cursory explanation repeated that of its preliminary determination and final disclosure.

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

23. As in the AD proceeding, MOFCOM did not identify the essential facts that formed the basis for its imposition of a 12.9 per cent all others subsidy rate. As described above, its disclosure consisted of a single sentence. Noticeably absent from this disclosure are the facts that serve as the basis for MOFCOM's decision regarding the application of facts available, and in particular the facts that led MOFCOM to conclude that resorting to the use of the facts available was appropriate. These facts are essential because they form the basis for any investigating authority's determination to apply a facts available subsidy rate. Without disclosure of the facts underlying MOFCOM's decision to apply facts available, the United States and interested U.S. companies were

unaware of the factual basis for MOFCOM's determination and therefore could not adequately defend their interests.

3. MOFCOM Failed to Explain Its Determination

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

VI. MOFCOM'S FLAWED INJURY DETERMINATION

25. MOFCOM's injury determination is inconsistent with Articles 3.1, 3.2, 3.5, and 4.1 of the AD Agreement and Articles 15.1, 15.2, 15.5, and 16.4 of the SCM Agreement.

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

26. MOFCOM narrowly defined the domestic industry for the purpose of its injury investigation, such that the domestic industry that MOFCOM examined included only a fraction of domestic producers, limited to members of CAAM, the petitioner in the AD and CVD investigations. MOFCOM's determination to limit the definition of the "domestic industry" only to the petitioners "reduced the data coverage that could have served as a basis for its injury analysis and introduced a material risk of distorting the injury determination." Furthermore, MOFCOM excluded "a whole category of producers of the like product," (i.e. domestic producers that did not express support for the petition) and likely also joint ventures between international and Chinese-owned companies ("JVs"). This gave rise to "a material risk of distortion."

27. In addition to the skewing of the data inherent in MOFCOM's limitation of the domestic industry definition to those enterprises that were members of the group supporting the petition, the evidence suggests that the collective output of those enterprises represented a relatively small percentage of total domestic production in China. Under the circumstances of these investigations, where there has been no indication by MOFCOM that the domestic industry is fragmented or is so large that sampling would be necessary, MOFCOM's exclusion from the definition of the domestic industry of enterprises accounting for more than 60 per cent of domestic production resulted in a definition of the domestic industry that did not include a "major proportion" within the meaning of Article 4.1 of the AD Agreement and Article 16.1 of the SCM Agreement. The Appellate Body has explained that a "major proportion" means a "relatively high proportion of the total domestic production."

28. MOFCOM's definition of the domestic industry is inconsistent with the definition set out in Article 4.1 of the AD Agreement and Article 16.1 of the SCM Agreement, because it does not include enterprises that represent "a major proportion of the total domestic production" of automobiles. As a result, MOFCOM's injury determination, which was based on its flawed definition of the domestic industry, is inconsistent with Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement because it was neither objective nor based on "positive evidence."

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

29. Analyzing the effect of subject imports on the price of the domestic like product, MOFCOM found only price depression at the end of the period of investigation, i.e. interim 2009; MOFCOM did not find price suppression or price undercutting. MOFCOM's finding of price depression during interim 2009 is plainly contradicted by the evidence on the administrative record, and its consideration of price effects is neither objective nor based on "positive evidence."

30. In support of its price depression finding, MOFCOM asserted that "the average sales price of domestic like products varied the same as the import price of Subject products." However, MOFCOM's assertion that parallel pricing existed between the domestic like products and subject imports is plainly contradicted by the evidence on the administrative record. Additionally, merely

identifying parallel pricing would do nothing to explain how the effect of subject imports was to significantly depress prices for the domestic like products. MOFCOM did not provide sufficient reasoning and, in fact, said nothing in the final determination to explain how parallel pricing caused the depression of domestic prices.

31. MOFCOM failed to address evidence that subject imports oversold the domestic like products during the period in which MOFCOM identified price depression. Absent further explanation, the fact that subject imports were overselling the domestic like products calls into question MOFCOM's conclusion that the price depression observed was the effect of subject imports.

32. MOFCOM failed to make needed adjustments to the average unit values ("AUVs") used in its price effects analysis. The only "pricing" information MOFCOM referenced anywhere in its injury determination consists of AUVs for the imports under investigation and for the domestic like product. Indeed, MOFCOM used a single, annual AUV for each year of the period of investigation and a single AUV for interim 2009. While in certain circumstances, AUV data may serve as a reliable proxy for pricing information, for that to be the case, each group of products being compared should be relatively similar. Otherwise, differences in AUVs may reflect changes or variations in product mix, not differences in pricing. Here, the record evidence unequivocally indicates that "certain automobiles" is not a homogenous product and that the subject automobiles imported from the United States primarily fell into a different grade from those primarily sold by the Chinese domestic producers. MOFCOM's failure to make necessary adjustments to ensure price comparability, or, at the very least, explain why such adjustments were not necessary in this case, undercuts its conclusion that the price depression observed was the effect of subject imports.

33. MOFCOM failed to consider or address evidence that the market share of the domestic like products increased along with that of subject imports during the period in which MOFCOM found price depression. This undercuts its conclusion that the price decline of domestic like products observed was the effect of subject imports.

34. Finally, MOFCOM's price effects analysis, necessarily, is founded upon and constrained by its narrow definition of the domestic industry, which is itself inconsistent with Articles 3.1 and 4.1 of the AD Agreement and Articles 15.1 and 16.1 of the SCM Agreement. The flaws in MOFCOM's domestic industry definition also compromised MOFCOM's price effects analysis.

35. For these reasons, MOFCOM's price effects analysis was not based on positive evidence, nor did it involve an objective examination of the evidence, as required by Articles 3.1 and 3.2 of the AD Agreement and Articles 15.1 and 15.2 of the SCM Agreement.

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

36. MOFCOM's causation analysis includes and relies upon a number of findings that are contradicted by the evidence on the administrative record before MOFCOM, and MOFCOM's determination is neither objective nor based on "positive evidence." Additionally, MOFCOM failed to base its determination on an examination of all relevant evidence before it and to examine any known factors other than dumped and subsidized imports that were injuring the domestic industry.

37. As an initial matter, MOFCOM's causation analysis is founded upon its faulty, narrow domestic industry definition, and relies heavily on MOFCOM's flawed price effects analysis. The flaws in MOFCOM's domestic industry definition and its price effects analysis taint the causation analysis. It follows that, if the bases upon which MOFCOM's causation analysis is founded are flawed, then the causation analysis is also flawed.

38. MOFCOM failed to address evidence that subject imports took market share from non-subject imports and not from the domestic like products. Evidence that subject imports did not take market share from the domestic like products undercuts MOFCOM's conclusion that subject imports were a cause of material injury to the domestic industry.

39. MOFCOM failed to account for the sharp decline in the Chinese industry's productivity throughout the period of investigation. The "productivity of the domestic industry" is expressly identified in Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement as a factor

that "may be relevant" to the causation analysis. MOFCOM's failure to address this factor in its analysis is plainly inconsistent with these provisions.

40. MOFCOM failed to recognize the lack of competition between subject imports and the domestic like product. The record evidence of limited competition between subject imports and the domestic like products is a further indication that subject imports were not a cause of the economic difficulties experienced by the domestic industry.

41. MOFCOM failed to take into account the sharp drop in demand in interim 2009. Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement expressly identify "contraction in demand or changes in the patterns of consumption" as a factor that "may be relevant" to the causation analysis. While MOFCOM discussed demand, its findings with respect to the impact of demand on its causation determination are not consistent with the evidence on the administrative record. The only part of the period of investigation in which MOFCOM found injury to have occurred coincided with the only instance of demand *contraction* during the period of investigation. Given that a contraction in demand would typically be expected to have an adverse effect on pricing in the market, MOFCOM's summary dismissal of this factor as having no injurious impact on the industry was deeply flawed.

42. MOFCOM failed to address other factors that may have caused injury to the domestic industry. First, MOFCOM ignored a decision by China to increase the sales tax on larger engine vehicles, and reduce the sales tax on smaller engine vehicles, and failed to consider the effect this may have had on the domestic industry. Second, MOFCOM failed to address the effect of increases in average wages and employment over the POI, coupled with decreases in productivity, on the domestic industry's pre-tax profits. These other known factors, which MOFCOM itself presented elsewhere in the final determination, were likely the cause of the decline in the domestic industry's pre-tax profits.

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

VII. CONSEQUENTIAL CLAIMS

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

VIII. CONCLUSION

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

ANNEX B-2

EXECUTIVE SUMMARY OF THE OPENING STATEMENT OF THE UNITED STATES AT THE FIRST PANEL MEETING

Mr. Chairperson, members of the Panel:

1. This is the third dispute settlement proceeding the United States has commenced against China concerning antidumping and countervailing duty measures targeting U.S. exports. Each of the disputes we have brought addresses similar problems under the same substantive provisions of the covered agreements, and we are concerned by China's repeated failure to abide by fundamental commitments that it made in the trade remedies area when it joined the WTO.

2. China, through its investigating authority, MOFCOM, has acted inconsistently with its obligations under the AD Agreement, the SCM Agreement, and Article VI of the GATT 1994. In particular, MOFCOM failed to adhere to a range of key WTO obligations relating to transparency and procedural fairness, and it once again went forward with final affirmative determinations in the face of wholly inadequate evidence of material injury that should have led to the termination of the investigations, not the imposition of duties.

3. China's responses to the U.S. claims are unpersuasive. China seeks to counter arguments the United States does not make; to divert attention from the claims the United States is actually pursuing; to minimize MOFCOM's numerous procedural failures; and to assert without any factual basis that MOFCOM engaged in a searching and critical evaluation of the facts and evidence before it. However, as the United States has shown, the conclusions that MOFCOM reached simply do not meet the standard, as described by a recent panel, of being "such reasonable conclusions as could be reached by an unbiased and objective investigating authority in light of the facts and arguments before it and the explanations given." Contrary to China's charge, it is not the case that the United States is seeking to "impose its mode of implementing the AD and SCM Agreements on other WTO Members." Rather, it is just that, when subjected to scrutiny, MOFCOM's investigations and determinations fail to meet the requirements of the AD and SCM Agreements and Article VI of the GATT 1994.

I. CHINA FAILED TO REQUIRE ADEQUATE NON-CONFIDENTIAL SUMMARIES OF CONFIDENTIAL INFORMATION

4. Under Article 12.4.1 of the SCM Agreement and Article 6.5.1 of the AD Agreement, when an interested party claims that certain information must be treated as confidential, an investigating authority must require the party to provide sufficiently detailed non-confidential summaries of the confidential information. In exceptional circumstances, if an interested party believes the confidential information is not susceptible of summary, an explanation of why must be provided to the investigating authority. We demonstrated in our first written submission that China failed to meet these requirements.

5. China argues that the respondents never objected to the sufficiency of the non-confidential summaries. However, there is nothing in the text of Articles 12.4.1 or 6.5.1 that relieves China of its obligations under those provisions in the absence of an "objection" from respondents. China made this same exact argument in *China – GOES*, and the panel there rejected it.

6. China also argues that the petitioner did in fact prepare adequate summaries, even though they were not labeled as such. However, for the categories of confidential information identified, China points to general statements in the petition addressing topics related to the confidential information, but these general statements are insufficient. The recent panel report in *China – GOES* makes clear that interested parties do not have "to infer, derive and piece together a possible summary of confidential information."

7. Two examples cited by China illustrate why China's approach is misguided. Table 19 from the petition, which we have reproduced as Exhibit USA-14, and Table 27 from the petition, which we have reproduced as Exhibit USA-15. In both of these tables, China points to a trend line that is

not labeled to indicate scale, and it relies on discussion where the key information is simply redacted.

8. China's approach to summaries would require interested parties to "infer, derive and piece together a possible summary of confidential information," contrary to the requirements of Articles 12.4.1 and 6.5.1. Because of these redactions and other shortcomings in summarization, in this case the respondents could not discern the substance of the information provided.

9. Additionally, we note that 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.

10. Accordingly, China breached Article 6.5.1 of the AD Agreement and Article 12.4.1 of the SCM Agreement.

II. MOFCOM'S USE OF FACTS AVAILABLE TO DETERMINE THE "ALL OTHERS" CVD RATE IS INCONSISTENT WITH ITS OBLIGATIONS UNDER ARTICLE 12.7 OF THE SCM AGREEMENT

11. We turn now to MOFCOM's determination of the "all others" CVD rate. In the autos proceeding, the following U.S. exporters/producers of automobiles registered for the investigation: General Motors, Chrysler, Mercedes-Benz and its affiliated company Daimler, BMW, Honda, Mitsubishi, and Ford. Notwithstanding the fact that neither the petitioner nor MOFCOM identified any other U.S. producers or exporters of automobiles, China not only established an "all others" subsidy rate for unknown or unidentified producers, but applied facts available to arrive at this rate based on the purported lack of cooperation by these unknown or unidentified companies.

12. China claims that any unknown or unidentified companies were properly notified by virtue of the fact that MOFCOM placed a copy of the public version of the petition in a reading room in Beijing, published the notice of initiation, and notified the U.S. government.

13. This is not an adequate basis to resort to facts available. Under Article 12.1 of the SCM Agreement, all interested parties "shall be given notice of the information which the authorities require and ample opportunity to present in writing all evidence which they consider relevant." In that regard, an interested party cannot "refuse[] access to, or otherwise … not provide, *necessary* information" if it has not been given notice of "the information which the authorities *require*." As the Appellate Body has made clear, an exporter must be given the opportunity to provide information required by an investigating authority before the investigating authority resorts to facts available that can be adverse to the exporter's interests. By definition, 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.

14. The panel in *China – GOES* reviewed facts that are similar to the facts in this dispute. The *China – GOES* panel found that China acted inconsistently with Article 12.7 of the SCM Agreement, noting that "in the absence of being notified of the 'necessary information' in the context of a particular investigation, it is difficult to conclude that unknown exporters refused access to or failed to provide necessary information or otherwise impeded the investigation." The panel also observed that "a conclusion that non-existent exporters refused to provide information or impeded the investigation seems illogical."

15. As in *China – GOES*, in the absence of being notified of the "necessary information" in the autos proceeding, it is illogical to conclude that unknown exporters refused access to or failed to provide necessary information or otherwise impeded the investigation. And similar to *China – GOES*, no other exporters existed at the time of the autos investigation; it is logically impossible to argue in this dispute that a non-existent exporter failed to cooperate.

16. 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 or unknown exporter cannot be said to have failed to cooperate by not having located the petition or the notice of initiation in this case. Thus, by applying facts available to non-existent, unknown, or unidentified firms, China breached Article 12.7 of the SCM Agreement.

III. CHINA'S DETERMINATION OF THE "ALL OTHERS" RATE IN THE FINAL ANTIDUMPING DUTY DETERMINATION IS INCONSISTENT WITH ARTICLE 6.8 AND PARAGRAPH 1 OF ANNEX II OF THE AD AGREEMENT

17. For the "all others" dumping rate, as with the "all others" subsidy rate, notwithstanding the fact that neither the petitioner nor MOFCOM identified any other U.S. producers or exporters of autos, China applied a facts available dumping rate to unknown or unidentified exporters of autos. Notably, this "all others" dumping rate was more than twice as high as the highest rate calculated for an investigated company.

18. China again claims that it was permitted to apply facts available because it placed the petition in a reading room in Beijing and published the notice of initiation on its website. For the reasons described earlier, this is not a sufficient basis to deem unknown or unidentified producers or exporters uncooperative.

19. China further claims that, while the AD Agreement limits the antidumping rate that can be applied to known producers or exporters that are not individually examined, there are no such limits placed on unknown producers/exporters. Therefore, according to China, MOFCOM was within its rights to base the "all others" dumping rate on facts available. This argument, however, overlooks the clear direction in Article 6.1 and paragraph 1 of Annex II to notify all interested parties of the information that is required of them and to provide them with ample opportunity to provide all relevant information.

20. Understood in light of the obligation to notify interested parties of the information required of them, Article 6.8 and Annex II are intended to address situations where an interested party does not provide such information to or cooperate with the investigating authority. A failure to provide necessary information or a failure to cooperate cannot be found to have existed where no other producer or exporter was made aware of the information which the authorities require of it for purposes of that investigation. And where there was no other producer or exporter, they of course could not be aware of the investigation, much less the information required.

21. In *China – GOES*, the panel found that China acted inconsistently with Article 6.8 of the AD Agreement, and paragraph 1 of Annex II, for reasons similar to those provided in its findings under Article 12.7 of the SCM Agreement. The facts of the *China – GOES* dispute are similar to the facts of this dispute. The panel in this dispute should similarly find that China acted inconsistently with Article 6.8 and paragraph 1 of Annex II of the AD Agreement.

IV. CHINA BREACHED ARTICLE 12.8 BY FAILING TO DISCLOSE THE ESSENTIAL FACTS REGARDING THE CALCULATION OF THE "ALL OTHERS" SUBSIDY RATE

22. During the autos investigation, MOFCOM calculated the all others subsidy rate by applying "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. These essential facts included the facts that led MOFCOM to conclude that "facts available" was warranted. In *China – GOES*, the panel found that China acted inconsistently with the disclosure obligations under Article 12.8 of the SCM Agreement by not disclosing facts leading to the conclusion that applying "facts available" to calculate the "all others rate" was warranted. Accordingly, the panel in this dispute should find that China acted inconsistently with Article 12.8 of the SCM Agreement by not disclosing the essential facts forming the basis for its decision regarding final measures for "all other" U.S. companies.

V. CHINA FAILED TO DISCLOSE THE ESSENTIAL FACTS REGARDING THE CALCULATION OF THE "ALL OTHERS" DUMPING RATE, CONTRARY TO ARTICLE 6.9 OF THE AD AGREEMENT

23. China also acted inconsistently with Article 6.9 of the AD Agreement by failing to disclose the essential facts forming the basis of the "all others" dumping rate. MOFCOM's "all others" dumping rate was twice as high as the highest calculated rate. China justified its choice of this final rate as reliance on the "facts available."

24. However, prior to the final determination, China did not disclose the essential facts forming the basis for its decision. In response, China argues that it applied the AD rate alleged in the petition, and there were no adjustments or calculations that could have been disclosed. This

argument is inadequate. It ignores that an "essential fact" when an investigating authority seeks to resort to facts available would be the facts identified in Article 6.8 – that is, the facts that demonstrate an interested party has "refuse[d] access to, or otherwise d[id] not provide, necessary information … or significantly impede[d] the investigation." Further, MOFCOM also did not disclose any of the facts it employed to corroborate the margin information provided in the petition, or to decide that it was an appropriate margin for the "all others" rate.

25. In *China – GOES*, the panel found that China acted inconsistently with the disclosure obligations under Article 6.9 of the AD Agreement by not disclosing facts leading to the conclusion that applying "facts available" to calculate the "all others rate" was warranted.

26. By failing to disclose these essential facts in the autos proceeding, China acted inconsistently with Article 6.9 of the AD Agreement.

VI. CHINA FAILED TO DISCLOSE THE DATA AND CALCULATIONS UNDERLYING ITS DETERMINATION OF THE DUMPING MARGIN, CONTRARY TO ARTICLE 6.9 OF THE AD AGREEMENT

27. China also breached Article 6.9 of the AD Agreement because MOFCOM failed to disclose the data and calculations it performed to determine the existence and margin of dumping, including the calculation of the normal value and the export price for the respondents.

28. As just discussed, Article 6.9 of the AD Agreement requires the investigating authority to disclose the essential facts "under consideration which form the basis for the decision whether to apply definitive measures." Definitive measures are only applied if the normal value exceeds the export price, and the margin of dumping is based on the extent to which it does so. Therefore, the data and calculations used to determine the normal value and export price constitute "essential" facts. Without those facts, no affirmative dumping determination could be made, and no definitive duties could be imposed.

29. China asserts that the U.S. reading of Article 6.9 creates a disclosure requirement without limit. To the contrary, the first sentence of Article 6.9 has at least three limitations – it applies to *facts*, as opposed to other matters ; it concerns only the *essential* facts, as opposed to any and all facts; and it is limited to those essential facts that *form the basis of the decision to apply definitive measures*. The United States claim under Article 6.9 is firmly based on this text, and respects these limitations. Additionally, the first sentence of Article 6.9 must be read in context of the second sentence, which provides that that the aim of the requirement is "to permit parties to defend their interests." As the panel in *EC – Salmon* explained, the purpose of Article 6.9 is to "provide the interested parties with the necessary information to enable them to comment on the completeness and correctness of the facts being considered by the investigating authority" and "provide additional information or correct perceived errors."

30. China responds by arguing that it did disclose the essential facts. In doing so, China cites a passage of the final determination that merely states that China disclosed the essential facts. This is not enough. China does not cite any evidence showing that it disclosed the actual essential facts – the data and calculations – underlying the dumping margin determination. Thus, by failing to disclose the data and calculations it performed to determine the existence and margin of dumping, including the calculation of the normal value and the export price for the respondents, China has breached Article 6.9 of the AD Agreement.

VII. MOFCOM'S INJURY DETERMINATION IS INCONSISTENT WITH CHINA'S WTO OBLIGATIONS

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

31. The petition in these cases was filed by the China Association of Automobile Manufacturers or "CAAM." We do not know who CAAM's members are – they were never identified. After initiating its investigations, MOFCOM published "Notifications for Registration to Participate" in the injury investigations. CAAM was the only domestic producer or association of domestic producers to respond to MOFCOM's notices. CAAM was then the only such domestic entity to which MOFCOM

issued the injury questionnaire, and CAAM was the only domestic entity that provided a response to the injury questionnaire. MOFCOM based its injury determination on data submitted only by CAAM. However, the producers for which CAAM provided data accounted for only about one-third of total domestic production for most of the period of investigation. It simply cannot be the case that MOFCOM had "ample data" with which to make an accurate injury determination when the domestic industry – as MOFCOM defined it – was limited only to enterprises that supported the petition and excluded more than 60 percent of total domestic production.

32. Article 4.1 of the AD Agreement and Article 16.1 of the SCM Agreement establish that the term "domestic industry shall be interpreted as referring to the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products." Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement require that a determination of injury be based on "positive evidence" and involve an "objective examination" of, *inter alia*, the impact of imports on the domestic producers of such products.

33. In *EC – Fasteners*, the Appellate Body explained that "to ensure the accuracy of an injury determination, an investigating authority must not act so as to give rise to a material risk of distortion in defining the domestic industry, for example, by excluding a whole category of producers of the like product." The Appellate Body also explained that there is a relationship between the proportion of domestic production included in the domestic industry definition and the likelihood that the injury determination will be distorted. In other words, in cases such as this, where the industry "coverage" is low, there is a heightened risk that the injury determination will be distorted.

34. In these investigations, the definition of the domestic industry was distorted because it was limited to entities that were willing to register to participate in the injury investigations, that is, domestic producers that supported the petition. This is similar to the situation in *EC – Fasteners*, where the domestic industry was defined on the basis of a willingness to be included in a sample. China attempts to distinguish the facts of the *EC – Fasteners* dispute, but, in fact, the situations are quite similar. In each case, the investigative procedure introduced a material risk of distortion, which was inconsistent with the obligation to conduct an objective examination.

35. China claims that it conducted "an open, inclusive, and transparent" investigation. In reality, MOFCOM's investigation bore none of these attributes, and the standard to which MOFCOM's investigation must be held is not whether it was "open, inclusive, and transparent;" the relevant question is whether it met the specific requirements of the AD and SCM Agreements. It did not.

36. China tries to refute an argument that the United States did not make; namely that MOFCOM categorically excluded data from joint ventures between international and Chinese-owned companies. What the United States argued is that MOFCOM's definition of the domestic industry was distorted because it included only those producers that supported the petition, namely CAAM's member companies (*i.e.*, the petitioners) or some subset thereof.

37. China disputes that MOFCOM defined the domestic industry as the petitioner CAAM's member companies. The final determination provides two strong indications that the domestic industry was indeed defined to encompass CAAM member companies or some subset thereof. First, the final determination makes clear that the only questionnaire response that MOFCOM received from domestic producers was from CAAM. There is no indication in the final determination that CAAM was reporting data for any company other than its member companies in that questionnaire response. Second, in discussing the definition of the domestic industry, MOFCOM stated that "there is evidence showing that the total production of like products from domestic industry represented by China Association of Automobile Manufacturers accounts for the main part of that of domestic like products," and that the "domestic enterprises mentioned above can represent the Chinese domestic industry." The unavoidable implication of this statement is that the domestic industry was defined as the CAAM member companies or some subset thereof.

38. China argues that no "freestanding distortion test" can be read into Article 4.1 of the AD Agreement and Article 16.1 of the SCM Agreement. The obligation to avoid distortion stems from Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement, which are overarching obligations that inform the rest of the injury determination. MOFCOM's definition of the domestic industry was distorted because it included only producers that supported the petition.

39. China's first written submission makes clear that only about one third of domestic production was included in MOFCOM's definition of the domestic industry for most of the period of investigation. While the AD and SCM Agreements do not provide a definition of "a major proportion," that does not mean that there are no limitations on how an investigating authority may define the domestic industry. As the Appellate Body explained in *EC – Fasteners*, a proper interpretation of the term "a major proportion" "requires that the domestic industry defined on this basis encompass producers whose collective output represents a relatively high proportion that substantially reflects the total domestic production."

40. The Appellate Body further explained that *in certain circumstances* it might be appropriate for investigating authorities to have some flexibility in interpreting "major proportion." However, in this investigation, MOFCOM neither described the domestic industry as fragmented nor identified any practical constraints on its ability to obtain information. Further, nothing in the final determination suggests that MOFCOM's investigation of automobiles involved any such special market situations that would warrant a lower threshold for defining "major proportion."

41. China seeks to excuse MOFCOM's failure to collect data covering a larger proportion of domestic production by noting that MOFCOM does not have the authority to compel interested parties to provide data for its investigations. However, there is no evidence that MOFCOM even made *any effort* to obtain information from additional producers on a voluntary basis. In fact, MOFCOM created a disincentive by requiring that producers apply to participate in the injury investigation as a prerequisite to submitting information.

42. MOFCOM stated in its final determination that it issued its injury questionnaire to "known" domestic producers. This is certainly not true. CAAM was not the only domestic producer or association of domestic producers that could have been "known" to MOFCOM. Indeed, MOFCOM by law would have approved all of the Sino-foreign joint ventures in the auto sector. It therefore would appear that MOFCOM simply closed its eyes to the existence of about two-thirds of the industry producing the domestic like product in China.

43. For these reasons, MOFCOM's definition of the domestic industry does not constitute "a major proportion of domestic production," within the meaning of Article 4.1 of the AD Agreement and Article 16.1 of the SCM Agreement. MOFCOM failed to ensure that the "domestic industry" was capable of providing "ample data" that would "ensure an accurate injury analysis." MOFCOM's injury determination, which was based on its definition of the domestic industry, was neither objective nor based on "positive evidence," as required by Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement.

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

44. Contrary to China's assertion, the United States does not merely challenge "certain narrow elements of MOFCOM's analysis" and ignore the big picture. The problem is that MOFCOM ignored the big picture, and the overall factual situation presented in the final determination simply does not support MOFCOM's conclusion with respect to price effects.

45. MOFCOM found that subject imports depressed prices for the domestic like product at the end of the period of investigation, in interim 2009, the first nine months of that year. That is the only adverse price effect that MOFCOM identified. MOFCOM made this finding despite the fact that subject imports were selling at much higher prices than the domestic like product. The average unit price of subject imports in interim 2009 was about RMB 411,000, while the average unit price of the domestic like product was about RMB 316,000. Moreover, the decline in the price of subject imports in interim 2009, as compared with interim 2008, was only 3.17 percent, compared to a decline for the domestic product of 10.13 percent.

46. This scenario presents a difficult question for China: how is it that a 3 percent decline in the price of the subject imports could have caused a 10 percent decline in the price of the domestic like product, when the imports were *overselling* the domestic product by such a wide margin? MOFCOM's explanation is cursory in the extreme and implausible on its face.

47. As an initial matter, we are puzzled by China's argument that MOFCOM was not required to make a finding of price undercutting. The United States did not argue in its first written submission that MOFCOM was required to make such a finding. The United States merely observed that MOFCOM did not make a finding of price undercutting, in order to identify with precision the type of price effects finding that MOFCOM *did* make.

48. MOFCOM gave two reasons for its conclusion that subject imports had depressed domestic prices in interim 2009: (1) "parallel pricing," and (2) the rising market share of subject imports, especially at the end of the period of investigation. Neither of these is sufficient to explain MOFCOM's price depression finding.

49. With respect to parallel pricing, MOFCOM's conclusion that the prices of the domestic like product and subject imports were moving in tandem is belied by the relevant data, which showed that these prices diverged significantly in 2007. The data on the record before MOFCOM plainly show that there was no price parallelism.

50. China takes issue with the U.S. argument that, because of a sharp divergence in prices in the 2006-2007 period, the record did not show parallel pricing. However, China's argument actually shows that MOFCOM's parallel pricing finding was at such a level of generality as to be virtually meaningless. According to China's preferred translation, the final determination states that "change trends of the price of product under investigation and the price of the domestic like product were *consistent basically*," and that they increased from 2006 to 2008 "*in general*." Observations at this level of generality are simply not enough for an investigating authority to, in the Appellate Body's words, "understand whether subject imports have explanatory force for the occurrence of significant depression . . . of domestic prices."

51. Furthermore, even if there had been parallel pricing, merely identifying the existence of such a price trend does nothing to explain how the effect of subject imports was to significantly depress prices for the domestic like products. MOFCOM said nothing in the final determination to explain how parallel pricing caused the depression of domestic prices.

52. MOFCOM's second reason for finding price depression in interim 2009 is equally unconvincing. MOFCOM found that the rising market share of subject imports, especially at the end of the period of investigation, resulted in price depression for the domestic like product. However, MOFCOM failed to explain this conclusion, which was, in fact, contradicted by other evidence. MOFCOM's final determination shows that the market share of the domestic like product *also increased* from interim 2008 to interim 2009, nearly as "sharply" as that of subject imports. In other words, subject imports were not taking market share from the domestic like product. Rather, both subject imports and the domestic like product took market share from Chinese producers not included in MOFCOM's definition of the domestic industry and from non-subject imports during this period. Under these circumstances, it is hard to see how the increase in market share of subject imports could have depressed the price of the domestic like product, and MOFCOM's determination gives no indication of how it considered these facts.

53. China argues that MOFCOM's finding of price depression in interim 2009 was explained by the increase in the volume or market share of subject imports, both throughout the period of investigation and in interim 2009. This is unpersuasive. The increases in the volume of subject imports in the 2006-2008 period were commensurate with rising consumption of the subject merchandise in the Chinese market. These increases resulted in only a very slight rise in the market share of subject imports, from 9.97 percent in 2006 to 10.74 percent in 2008. It is true that the domestic industry as defined by MOFCOM lost market share in the 2006-2008 period, but this was almost entirely because of gains made by Chinese producers not included in MOFCOM's definition of the domestic industry and third-country imports, not the subject imports.

54. The integrity of MOFCOM's finding that subject imports were responsible for price depression is also undercut by MOFCOM's use of average unit values or "AUVs." In light of the varying grades of the automobiles MOFCOM was comparing, MOFCOM should have made necessary adjustments to ensure price comparability, or, at the very least, it should have explained why such adjustments were not necessary. China argues that the relevant WTO agreement provisions do not require any specific methodology when examining price trends. But, as the Appellate Body recognized in *China – GOES*, although Articles 3.2 and 15.2 do not specify a particular methodology for evaluating price effects, a failure to ensure price comparability would not be consistent with the requirements

under Articles 3.1 and 15.1 that a determination of injury be based on "positive evidence" and involve an "objective examination" of the effect of subject imports on the prices of domestic like products.

55. China also maintains that MOFCOM established that there was a sufficient competitive overlap between subject imports and the domestic product to warrant the use of AUVs in the price effects analysis. The United States submits that MOFCOM's analysis (much of which occurred in the context of MOFCOM's discussion of the scope of the investigation and the definition of the domestic like product, and not in the context of a discussion of price effects) was at such a level of generality that it failed to establish the degree of competitive overlap that would make an analysis of price effects meaningful.

56. In sum, MOFCOM's finding of price depression during interim 2009 is not supported by the evidence on the record, and its consideration of price effects is not based on "positive evidence" and did not "involve an objective examination." Consequently, MOFCOM acted inconsistently with Articles 3.1 and 3.2 of the AD Agreement, and Articles 15.1 and 15.2 of the SCM Agreement, in conducting its price effects analysis.

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

57. Not only is MOFCOM's causation analysis compromised by its flawed definition of the domestic industry and price effects analysis, but it also suffers from a number of other defects.

58. China suggests that the United States "selectively cit[ed] isolated data and ignor[ed] the complete picture," but it is MOFCOM that selectively cited the few elements of data that may have lent some support to its conclusion while ignoring the bulk of information on the record tending to suggest that no relationship of cause and effect existed between the subject imports and any difficulties experienced by the Chinese domestic industry.

59. China also argues that "[s]ubject imports need only be a 'cause,' not the sole or significant cause, and may be one of many causes and still satisfy Articles 3.5 and 15.5." While China's position is unobjectionable in this regard, it is also beside the point. Taking the evidence on the record before MOFCOM as a whole, *i.e.*, looking at the complete picture, there simply is no support for MOFCOM's conclusion that subject imports were in any way a cause of material injury to the Chinese domestic industry. When MOFCOM's causation analysis is subjected to scrutiny, it becomes clear that the evidence on which MOFCOM relied does not support the conclusion that MOFCOM reached, and the evidence that MOFCOM ignored provides further confirmation of MOFCOM's error.

60. MOFCOM relied on the increase in the volume and market share of subject imports to support its causation analysis, but again it failed to take into account that the market share of the Chinese domestic industry also increased, nearly as sharply as that of the subject imports, in interim 2009. China responds that MOFCOM fully examined the role of third country imports and found that they did not affect the causal link in this case. China misses the point. The question is not whether third-country imports injured the domestic industry in interim 2009, but whether the increase in the market share of subject imports in interim 2009 was at the expense of the domestic industry or of third country imports. China also argues that the United States should not have focused on interim 2009, but the development of subject imports prior to interim 2009 provided no basis for attributing injury to the domestic industry in interim 2009 to subject imports in prior years.

61. MOFCOM also failed to account for the significant decline in the domestic industry's productivity throughout the period of investigation. China argues that productivity was not a meaningful or significant factor to be examined when considering the causal link between subject imports and material injury because labor costs are a relatively insignificant part of the cost of manufacturing a vehicle in China. However, most of the decline in the domestic industry's pre-tax profits from interim 2008 to interim 2009 (a decline of RMB 493 million) can be attributed to the near-doubling of labor costs over this period (an increase of RMB 406 million).

62. MOFCOM also failed in its causation analysis to recognize the lack of competition between subject imports and the domestic like product. China attempts to rebut the U.S. arguments

concerning the lack of competition between subject imports and the domestic like product by pointing to the fact that subject imports undersold the domestic like product in one year of the period of investigation, in 2007. In fact, China's argument only serves to underscore the competitive disconnect between subject imports and the domestic product. This is because the underselling in 2007 had absolutely no effect on domestic prices, which rose in both 2007 (by 11 percent) and 2008 (by 17 percent).

63. Another defect in MOFCOM's causation analysis is that MOFCOM failed to take into account the sharp drop in demand in the Chinese market in interim 2009. China points to portions of the final determination in which MOFCOM dismissed declining demand as a cause of injury because the domestic industry "still kept increasing production and sales." It appears from the evidence on the administrative record that the domestic industry found itself in the unfortunate position of ramping up production just as demand fell sharply, and that it had to decrease its prices in interim 2009 in order to move its excess production. These actions are not properly attributable to subject imports, but rather to ill-considered decisions made by the domestic industry. It appears that MOFCOM did indeed attribute the injury from declining demand to the subject imports, contrary to the prohibition on doing so in Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement.

64. MOFCOM also failed adequately to address other factors that likely accounted for the challenges experienced by the Chinese domestic industry in interim 2009, such as the increase in the sales tax in China on larger engine vehicles, and the sharp increases in wages and employment, coupled with the decline in productivity, in the Chinese domestic industry in interim 2009.

65. In short, MOFCOM did not fulfil its obligations under the Agreements to establish a causal link between the imports under investigation and the injury sustained by the domestic industry, and its causation determination was not based on positive evidence and did not involve an objective examination. Consequently, China acted inconsistently with Articles 3.1 and 3.5 of the AD Agreement and Articles 15.1 and 15.5 of the SCM Agreement.

ANNEX B-3

CLOSING STATEMENT OF THE UNITED STATES AT THE FIRST PANEL MEETING

Mr. Chairman, Members of the Panel.

1. The United States would like to begin by thanking the Panel and the Secretariat staff for your efforts in the preparation for and conduct of this hearing. We hope that the discussion held here yesterday and today has been of use to the Panel as you grapple with the issues in this dispute.

2. As we noted in our opening statement, this is the third dispute that the United States has brought concerning China's application of trade remedy measures, and each of these disputes addresses similar problems under the same substantive provisions of the covered agreements. Indeed, a review of the panel report in *China – GOES* shows that China is making some of the same exact arguments here that it made in that dispute. For example, at paragraph 7.378 of that report, the panel writes: "China's position is that exporters or producers that did not register for the investigation were 'non cooperating' and therefore the application of facts available . . . was warranted." The *China – GOES* panel rejected that argument and many of China's other arguments. We believe the Panel here should find that panel's reasoning persuasive, and should likewise reject China's arguments in this dispute.

3. At times, listening to China's interventions during this meeting, it appeared that China was arguing that because MOFCOM followed its own procedures and exercised its seemingly boundless discretion, everything MOFCOM did in the autos investigations was consistent with China's WTO obligations. However, the fact that MOFCOM took certain steps and followed its own procedures is irrelevant to the issue of the WTO-consistency of its actions.

4. As we have shown, and as the third parties all seem to agree, the AD and SCM Agreements impose detailed procedural obligations and require a rigorous examination by investigating authorities so that the due process rights of interested parties are assured and so that when trade remedy measures are imposed, they are founded on positive evidence and an objective examination. The test is whether MOFCOM met the specific standards in the agreements, and in the autos investigations, MOFCOM's efforts fell far short.

5. The United States recognizes that the Panel is only at the beginning of its work, and we hope that our first written submission and our presentation over these past two days have been helpful for the Panel. We look forward to receiving the Panel's written questions and we will endeavor to provide responses that bring further clarity and understanding to the issues in this dispute.

6. The United States would like to conclude by again thanking the Panel and Secretariat for your time and attention to this matter.

ANNEX B-4

EXECUTIVE SUMMARY OF THE SECOND WRITTEN SUBMISSION OF THE UNITED STATES

I. INTRODUCTION

1. The U.S. first written submission demonstrated that China's investigating authority, the Ministry of Commerce for the People's Republic of China ("MOFCOM"), acted inconsistently with China's obligations under the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("AD Agreement") and the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement") when it investigated and imposed antidumping and countervailing duty measures on certain automobiles from the United States.

2. China responds with distraction, avoidance, and unsubstantiated assertion. China appears to argue that because MOFCOM followed its own procedures and exercised its seemingly boundless discretion, everything MOFCOM did in the investigations of certain automobiles was consistent with China's WTO obligations. However, the fact that MOFCOM took certain steps and followed its own procedures is irrelevant to the issue of the WTO-consistency of its actions. MOFCOM failed to meet many of the specific procedural and substantive requirements of the AD and SCM Agreements, and MOFCOM's conclusions fail to meet the standard, as described by a recent panel, of being "such reasonable conclusions as could be reached by an unbiased and objective investigating authority in light of the facts and arguments before it and the explanations given."

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

A. China Breached Article 12.4.1 of the SCM Agreement and Article 6.5.1 of the AD Agreement Through MOFCOM's Failure to Require Non-Confidential Summaries

3. As the United States has explained, China failed to require adequate non-confidential summaries, breaching Article 12.4.1 of the SCM Agreement and Article 6.5.1 of the AD Agreement. China responds by asserting that, *inter alia,* the respondents never objected to the purported non-confidential summaries, thus relieving China of its obligation to require adequate non-confidential summaries; and that general statements in the petition addressing topics related to the confidential information are, in fact, adequate. In doing so, China disregards the obligations contained in Article 12.4.1 of the SCM Agreement and Article 6.5.1 of the AD Agreement.

4. Relying on an improper interpretation of the SCM Agreement and AD Agreement, China argues that the purported non-confidential summaries are in fact contained in the petition. But a party submitting confidential information is required to provide a non-confidential summary of that information. If that party fails to submit the information, it is not sufficient to have a Member subsequently point to previously unspecified information elsewhere on the record that is not a summary of the specific confidential information at issue and claim that it serves as that non-confidential summary. Moreover, the purported non-confidential summaries in the petition are not, in fact, summaries. Instead, the petition only provides simple redactions, general statements that do not shed light on the redacted information's contents, unlabeled trend lines that provide no context that would allow respondents to provide meaningful comments, and year-over-year percentage changes that could have been adequately summarized without implicating confidentiality concerns. MOFCOM failed to require summaries of this information in a manner permitting a reasonable understanding of the substance of the data and information treated as confidential. Therefore, China breached Article 12.4.1 of the SCM Agreement and Article 6.5.1 of the AD Agreement.

B. China Breached Article 6.9 of the AD Agreement through MOFCOM's Failure to Disclose the Calculations and Data Used to Determine the Existence of Dumping and to Calculate Dumping Margins

5. As the United States has demonstrated, MOFCOM acted inconsistently with Article 6.9 of the AD Agreement by failing to disclose to interested parties the "essential facts" forming the basis of MOFCOM's decision to apply anti-dumping duties. This included a failure by MOFCOM to make available the data and calculations used to determine the existence and margins of dumping. China denies that MOFCOM failed to provide the actual data and calculations that formed the basis of its dumping determinations.

6. The United States has shown that the calculations relied on by an investigating authority to determine the normal value and export price, as well as the data underlying those calculations (such as various production costs and sales data), constitute "essential facts" forming the basis of the investigating authority's imposition of final measures within the meaning of Article 6.9. The calculations and data are "essential facts" because they are the "indispensable and necessary" facts considered by the investigating authority in determining whether definitive measures are warranted, *i.e.*: whether dumping has occurred and, if so, the magnitude of such dumping. In other words, without the calculations and data, no affirmative determination could be made and no definitive duties could be imposed. And, without disclosure of the actual calculations and data used, the interested parties cannot check the investigating authority's math for errors or whether the authority did what it purported to do.

7. None of the documents on the record support China's contention that it disclosed the margin calculations and underlying data. In response, China asserts that MOFCOM complied with Article 6.9 because it disclosed the essential facts. China cites the final determination, which only states that China disclosed the essential facts. China also asserts that it sent disclosure documents to the U.S. companies; however, China failed to submit these documents as exhibits in this dispute. China's statements are insufficient to establish as a fact that it did disclose the essential facts to interested parties. Rather, China, asserting as a fact that it did disclose essential facts regarding margin data and calculations to the U.S. companies, must offer evidence proving the fact that it has asserted. China does not, because it cannot, present any evidence showing that it disclosed the actual essential facts – the data and calculations – underlying the dumping margin determination.

C. MOFCOM's Determinations of the "All Others" Rates are Inconsistent with Articles 12.7 of the SCM Agreement, and Article 6.8 and Annex II of the AD Agreement

8. The United States has demonstrated that MOFCOM applied facts available to calculate, based on adverse facts available, an "all others" dumping margin and subsidy rate for unknown producers or exporters, which were not notified of the investigations, of the information that would be required of them in those investigations, or of the fact that failure to participate and provide certain information in those investigations would result in a determination based on facts available. By applying facts available with an adverse inference to these unknown producers or exporters, including those that did not export subject product during the investigation period, MOFCOM acted inconsistent with China's obligations under Article 6.8 and Annex II of the AD Agreement and Article 12.7 of the SCM Agreement.

9. In response, China argues that MOFCOM attempted to notify all producers or exporters by (1) posting a public notice on MOFCOM's website, (2) placing a copy of the initiation notices in a reading room in Beijing, (3) sending questionnaires to registered companies, and (4) requesting the U.S. Embassy to notify any other producers or exporters.

10. The fact that MOFCOM made certain notification attempts, however, is irrelevant to the WTO-consistency of China's applying adverse facts available to companies subject to "all others" rates in this dispute. As a matter of logic, the unknown (and even non-existent) "other" U.S. producers or exporters were not notified of the information required, and thus cannot be said to have (1) refused access to the necessary information, or (2) otherwise failed to provide access to the necessary information within a reasonable period as required under Articles 12.7 of the SCM Agreement and 6.8 of the AD Agreement.

11. Nor can an exporter that does not exist be said to have (3) significantly impeded an investigation. In response to the U.S. claim that no other exporters existed at the time of the investigation, China asserts that it "does not know if the other U.S. exporters and producers to which the all others rates apply are non-existent." This statement is not credible, and is belied by China's first written submission, in which China exhibits knowledge of the U.S. industry in describing it as "a mature industry with a relatively settled and small number of U.S. exporters and producers." China, thus, fails to rebut the U.S. argument that no other exporters existed at the time of the investigation. China has no basis to apply adverse facts available to nonexistent entities for significantly impeding an investigation.

12. Nor is it possible for unknown producers or exporters, or those that did not ship subject product during the investigation period, to significantly impede an investigation that they did not know about or could not participate in. These parties cannot be said to have refused or failed to provide necessary information to the investigating authority. As the Appellate Body has noted, an exporter must be given the opportunity to provide information required by an investigating authority before the latter resorts to facts available. An exporter that is unknown to the investigating authority is not notified of the information required, and thus is denied an opportunity to provide the required information.

13. China's own arguments demonstrate that its use of adverse facts available to calculate the "all others" AD rate is particularly unjustifiable. For example, MOFCOM applied the "all others" AD rate to Ford "since Ford did not have any exports during the POI, there was no export price." So, despite never indicating how Ford refused access to or failed to provide necessary information, or significantly impeded the investigation, MOFCOM applied the "all others" AD rate to Ford. Indeed, MOFCOM denied Ford's request for establishing an individual dumping margin in recognition of its cooperation in the investigation, since Ford did not have any exports during the investigation period. Thus, MOFCOM applied the adverse all others rate to Ford, even though MOFCOM acknowledged that it could not have participated in the antidumping investigation.

14. The U.S. first written submission noted that the panel in *China – GOES*, in regard to factual circumstances nearly identical to this dispute, found that China's attempts to notify the "all other" exporters of the necessary information required of them did not satisfy the precondition for resorting to facts available found in paragraph 1 of Annex II of the AD Agreement and, as a result, China acted inconsistently with Article 6.8 of the AD Agreement. The panel reached a similar conclusion with regard to Article 12.7 of the SCM Agreement. In dismissing China's arguments, the panel also rejected the same "policy" arguments that China is now offering in this dispute as insufficient for satisfying the preconditions for resorting to facts available.

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

16. In addition to not being relevant for the application of adverse facts available, MOFCOM's notification attempts are insufficient to justify its use of facts available to calculate the "all others" rates for four reasons. First, posting a public notice on MOFCOM's website is unlikely to provide sufficient notice to an exporter or producer unless that exporter or producer was actively reviewing MOFCOM's website. Also, China's description of posting its notice on a website as "wide dissemination" is inaccurate. China is using the phrase "wide dissemination" to characterize its mere placement of the notice on MOFCOM's website, as opposed to some other action, such as emailing the notice to potential exporters or producers.

17. Second, placing the initiation notices in a reading room is arguably even less likely to ensure an exporter or producer is notified of the investigations than placing it on MOFCOM's website. Both actions presuppose that the exporter or producer will be aware that there is a reason to check either the website or reading room with some frequency. With the reading room, it is unreasonable to expect an exporter or producer to be provided notice of an investigation by virtue of placing the document in a room, possibly thousands of miles away, with no additional targeted communication indicating that such an action by the investigating authority has taken place.

18. Third, China suggests that requesting the Embassy to contact any other exporters or producers also served to notify "all other" exporters or producers. But the obligation to notify

exporters or producers is on the investigating authority – not the Member where those exporters or producers might be located.

19. The United States considers that Article 6.8 of the AD Agreement and Article 12.7 of the SCM Agreement provide for similar conditions on the use of facts available and, therefore, Annex II may provide relevant context for the purpose of interpreting Article 12.7 of the SCM Agreement. The Appellate Body has previously rejected arguments similar to those China presents here, finding that no obligation exists for an Embassy to make its exporters or producers aware of the investigation.

20. Fourth, China argues that "MOFCOM's above-described notification efforts must have been effective, because additional U.S. producers and exporters beyond those identified in the petition registered for participation in the investigation and received questionnaires." China's assertion is beside the point. China's "all other" rates applies to companies that did not register or were otherwise unknown to MOFCOM, such as exporters and producers that began shipping after MOFCOM initiated or even concluded the investigation. These exporters or producers could not have failed to provide information or impeded MOFCOM's investigations. Nonetheless, under MOFCOM's calculations, they would still be subject to an all others rate based on adverse facts available. Such a calculation is inconsistent with the requirements of Article 6.8 of the AD Agreement and Article 12.7 of the SCM Agreement.

D. MOFCOM Acted Inconsistently with Article 6.9 of the AD Agreement and Article 12.8 of the SCM Agreement by Failing to Inform Interested Parties of the Essential Facts Under Consideration in Calculating the "All Others" Dumping Margin and Subsidy Rate

21. The United States demonstrated that China breached Article 6.9 of the AD Agreement and Article 12.8 of the SCM Agreement because MOFCOM failed to inform the interested parties of the "essential facts under consideration" that formed the basis for its calculation of the "all others" dumping margin and subsidy rate. Regarding the "all others" dumping and subsidy rates, MOFCOM failed to disclose the "essential facts under consideration" that formed the basis for its use of facts available in calculating the "all others" rates. MOFCOM also failed to disclose the "essential facts under consideration" that formed the basis for applying a 21.5 percent "all others" dumping rate, and a 12.9 percent all others" subsidy rate.

22. In response, China claims that "all pertinent facts contributing to MOFCOM's decision to apply facts available are laid out" by MOFCOM. China then rehashes the same arguments it uses to justify its use of facts available, and argues that these points comprise the essential facts under consideration in calculating the "all others" dumping margin and subsidy rate.

23. China's arguments miss the point. The purported facts offered by China are not facts – only conclusions unsupported by the record. Also, China does not provide any facts relating to how unknown U.S. companies, in fact, refused access to or failed to provide necessary information, or significantly impeded the investigation. Reviewing a similar set of facts, the panel in *China – GOES* found that China acted inconsistently with the covered agreements.

24. China's assertions that it disclosed, or that it was under no obligation to disclose, the essential facts relating to the calculation of the "all others" dumping margin are not persuasive. In the case of the "all others" antidumping rate, China simply states that it applied the margin alleged in the petition. That is not enough. Once an authority has determined that use of facts available is necessary in an investigation, further specific conditions are imposed on an authority's use of secondary sources (such as information supplied in an application or petition for initiation of an investigation).

25. Where a petition rate is used as facts available, an investigating authority, where practicable, should use special circumspection, checking the petition rate with other facts in order to ensure that it is appropriate to apply as facts available to the respondents in a given investigation. China did not disclose anywhere on the record the special circumspection applied by MOFCOM in its consideration of the petition rate in this dispute. China did not indicate any effort that it undertook to check against independent sources the accuracy of the information supplied by the petitioner in the reaching the petition rate. In its first written submission, China contends that because it based the "all others" dumping rate on the dumping margin alleged in the petition, the

calculation of the "all others" rate is somehow immune from disclosure and scrutiny. Exactly the opposite is true. A factual description of the steps MOFCOM took to check the accuracy of the petition rate is essential to MOFCOM's use of the petition rate.

26. Also, the antidumping rate, as described in the petition, is incomplete and does not provide a full understanding of how that rate was determined. The record does not reflect any efforts by MOFCOM to identify the missing information and verify the validity or reasonableness of the petition rate.

27. As in the AD proceeding, MOFCOM did not identify the essential facts that formed the basis for its imposition of a 12.9 percent all others subsidy rate. MOFCOM's disclosure of the all others subsidy rate consisted of a single sentence: "For all other U.S. companies, in accordance with Article 21 of the CVD regulations, the Investigating Authority decided, by adopting facts available, to apply the ad valorem subsidy rate of General Motors, LLC to these companies." Noticeably absent from MOFCOM's disclosure are the facts that serve as the basis for MOFCOM's decision regarding the application of the facts available, and in particular, that resorting to the use of General Motors' rate, the highest of the individual company rates, was appropriate.

E. MOFCOM Acted Inconsistently with Articles 12.2 and 12.2.2 of the AD Agreement, and Articles 22.3 and 22.5 of the SCM Agreement, by Failing to Explain its Determinations

28. The United States also demonstrated that China breached Articles 12.2 and 12.2.2 by failing to explain the "all others" dumping margin in the AD determinations, as well as Articles 22.3 and 22.5 of the SCM Agreement by failing to explain the "all others" subsidy rate in the CVD determinations. China has failed to rebut the United States arguments because it cannot cite to any explanation contained in the record that would be sufficient to satisfy the obligations contained in those articles.

29. Regarding the "all others" dumping margin, China cites to a passage of the final determination, which mirrors the statements contained in MOFCOM's Final AD Disclosure. In other words, MOFCOM did not provide any additional explanation in its final determination. Nowhere does China explain how a non-exporting producer refused to provide necessary information in the investigation. The United States has already explained why this statement fails to provide in sufficient detail the findings and conclusions that led to the application of facts available.

30. For the "all others" subsidy rate, China cites the following statement: "Regarding other companies, in accordance with Article 21 of *Countervailing Regulation*, the investigating authority decided to adopt facts available and applied the *ad valorem* subsidy rate of General Motors to them." This single, conclusory sentence echoes the abbreviated statement contained in MOFCOM's final disclosure. As above, MOFCOM did not provide any additional explanation in its final determination, and nowhere does China explain how a non-exporting producer refused to provide necessary information in the investigation. The United States has explained why this statement fails to provide in sufficient detail the findings and conclusions that led to the application of facts available, thus falling short of the requirements of Articles 22.3 and 22.5 of the SCM Agreement.

31. In *China – GOES*, the panel faulted China for failing to explain its use of facts available to calculate the "all others" rates. In particular, the panel stated that a failure to explain how unknown or non-existent exporters failed to cooperate is inconsistent with the covered agreements. These findings apply equally to the U.S. claims under Article 12 of the AD Agreement and Article 22 of the SCM Agreement. And, because of the similarity of the facts with the instant dispute, these findings are persuasive. Because MOFCOM failed to explain its use of adverse facts available in calculating the "all others" rates, China breached Articles 12.2 and 12.2.2 of the AD Agreement, and Articles 22.3 and 22.5 of the SCM Agreement.

III. MOFCOM'S FLAWED INJURY DETERMINATION

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

32. MOFCOM's domestic industry definition in the antidumping and countervailing duty investigations of certain automobiles from the United States suffered from two principal flaws. First, it resulted in a definition of the domestic industry that was distorted because it included only producers that supported the petition. Second, it resulted in a definition of the domestic industry that did not include a major proportion of the total production of certain automobiles.

33. China responds to the U.S. claim that MOFCOM's definition of the domestic industry was distorted by arguing that the domestic industry as MOFCOM defined it included some joint ventures between international and Chinese-owned companies ("JVs") and MOFCOM did not "exclude," by which China means MOFCOM did not receive and reject any data from any domestic producer. China's responses are beside the point. The basis of the U.S. claim is *not* that MOFCOM excluded all JVs from its definition of the domestic industry or that it rejected data from any particular domestic producer that sought to provide it. The problem is that MOFCOM utilized a process that was likely to, and in fact did result in, a material risk of distortion in defining the domestic industry.

34. MOFCOM's decision to define the domestic industry as including only producers who voluntarily registered for participation in the injury investigations was similar to the approach in *EC – Fasteners (China)*, with which the Appellate Body found fault. MOFCOM created the very same kind of self-selection process, which introduced a material risk of distortion. There is no substantive difference between the willingness of producers to be included in a sample in *EC – Fasteners (China)* and the willingness of producers to respond to MOFCOM's notice and register to participate in the injury investigation here.

35. China's attempt to distinguish the facts of *EC – Fasteners (China)* fails. There was exactly the same kind of self-selection process among domestic producers here. CAAM, the petitioner, was the only domestic entity that responded to MOFCOM's notice, it was the only entity that registered to participate in the injury investigation, and it was the only entity that provided domestic industry data to MOFCOM. Beyond this, and more importantly still, China has belatedly explained in response to a question from the Panel that CAAM, in fact, self-selected from among its own members, providing to MOFCOM domestic industry data from *only eight of its member companies.*

36. It is highly unlikely that data from just eight companies, handpicked from among the domestic producers that comprise the membership of the petitioner, CAAM, could provide MOFCOM with "ample data" sufficient for an "accurate injury analysis" of the domestic industry. Given that MOFCOM had data from only eight companies that were handpicked by the petitioner, CAAM, and which represented only about 40 percent or less of domestic production for most of the period of investigation, MOFCOM was obligated to seek additional data on the condition of the domestic industry, or, at the very least, explain why it considered that more data was not necessary in light of the particular situation of the auto industry in China. MOFCOM failed to do so.

37. China suggests that "[a]nother critical distinction" between this dispute and *EC – Fasteners (China)* is that, in *EC – Fasteners (China)*, "the Appellate Body confronted the investigating authority's application of a 25% minimum benchmark, derived from the AD Agreement's standing provisions, for determining the existence of a 'major proportion.'" China is conflating two distinct lines of reasoning. The distinction that China attempts to draw between the situation in *EC – Fasteners (China)* and the situation in the underlying investigations is not relevant.

38. In addition to the skewing of the data inherent in MOFCOM's limitation of the domestic industry definition to eight of CAAM's member companies that supported the petition, the collective output of those eight companies represented a relatively small percentage of total domestic production of the like product. As China explained in its first written submission, "the percentages of total domestic production represented by MOFCOM's definition of the domestic industry for the period of investigation" were "54% in 2006, 34% in 2007, 34% in 2008, and 42% in Interim 2009."

39. Assuming these numbers to be correct, and in light of statements by the Appellate Body, relevant questions for the Panel to consider here include: Did MOFCOM have before it "wide-ranging information concerning the relevant economic factors"? Was MOFCOM's definition of the domestic industry "capable of providing ample data that ensure an accurate injury analysis"? Did the domestic producers MOFCOM examined represent "a relatively high proportion of the total domestic production"? The answer to all of these questions is no.

40. MOFCOM's exclusion from the definition of the domestic industry – or its failure to include in the definition of the domestic industry – enterprises accounting for more than 60 percent of domestic production for most of the period of investigation resulted in a definition of the domestic industry that did not include a "major proportion of the total production" within the meaning of Article 4.1 of the AD Agreement and Article 16.1 of the SCM Agreement. Accordingly, MOFCOM's injury determination, which was based on its definition of the domestic industry, was neither objective nor based on "positive evidence," as required by Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement.

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

41. In considering the effect of subject imports on the price of the domestic like product, MOFCOM concluded that, due to parallel pricing and the rising market share of subject imports, especially at the end of the period of investigation, subject imports depressed prices for the domestic like product in interim 2009. However, there was no parallel pricing, and any increase in market share of the subject products was not at the expense of the domestic like product, which also increased its market share at the same time. So, there simply is no support for MOFCOM's price depression finding.

42. China explains that MOFCOM found parallel pricing because the price movements of subject imports and the domestic like product were "consistent basically" and both increased from 2006 to 2008 "in general." China describes the price increase from 2006 to 2008 as "remarkably similar," noting that the "prices for subject imports increased approximately 88,000 RMB while prices for domestic like product increased approximately 84,000 RMB over that same time period." Finally, China suggests that the price declines from interim 2008 to interim 2009 were "comparable." The evidence on the administrative record does not support China's arguments. There was no price parallelism.

43. Ultimately, because MOFCOM requested data only for full-year 2006, 2007, and 2008, and the full interim periods for 2008 and 2009, there are only three data points on the record that one can look at to assess whether price parallelism existed. Specifically, there is the change from 2006 to 2007, the change from 2007 to 2008, and the change from interim 2008 to interim 2009. Even with just these three data points, though, the inescapable conclusion is that no price parallelism existed between subject imports and the domestic like product, both because prices did not consistently move in the same direction, and because when they did move together, the magnitude of the changes was significantly different. In light of the data, MOFCOM's conclusion that price parallelism existed was not, in the words of a recent panel, such a "reasonable conclusion[] as could be reached by an unbiased and objective investigating authority in light of the facts and arguments before it and the explanations given."

44. Furthermore, the situation here is identical to that described by the Appellate Body in *China – GOES*. MOFCOM and China have done nothing to elucidate "what explanatory force parallel price trends had for the depression . . . of domestic prices." Accordingly, because no price parallelism existed and, even if it had, MOFCOM did nothing to explain the relevance of parallel pricing in this case, MOFCOM's reliance on parallel pricing was unfounded and provided no support whatsoever for its price depression finding.

45. MOFCOM's reliance on the increasing market share of subject imports during interim 2009 likewise provided no support for its price depression finding. China argues that MOFCOM's finding of price depression in interim 2009 was explained by the increase in the volume or market share of subject imports, both throughout the period of investigation and in interim 2009. China's argument is unpersuasive.

46. The increases in the volume of subject imports in the 2006-2008 period were commensurate with rising consumption of the subject merchandise in the Chinese market. While the domestic industry as defined by MOFCOM lost market share in the 2006-2008 period, this was almost entirely because of gains made by Chinese producers not included in MOFCOM's definition of the domestic industry and third-country imports, not gains by subject imports. The domestic industry may have been lowering its prices in interim 2009 to recapture lost market share, as China suggests, but it was, for the most part, not market share that the domestic industry had lost to subject imports. Even if no party had raised this issue during the investigation, this would not excuse MOFCOM's failure to consider the volume and market share data and ensure that its determination was based on positive evidence and involved an objective examination.

47. An additional problem with MOFCOM's price effects analysis was its use of full-year or full-period average unit values ("AUVs"). China defends MOFCOM's use of AUVs in its price effects analysis by arguing that the relevant WTO agreement provisions do not require any specific methodology when examining price trends. China also argues that because MOFCOM was examining price trends over time and was not comparing absolute prices, adjustments to price to ensure price comparability were not necessary.

48. As the Appellate Body recognized in *China – GOES*, however, while Articles 3.2 and 15.2 do not specify a particular methodology for evaluating price effects, a failure to ensure price comparability would not be consistent with the requirements under Articles 3.1 and 15.1 that a determination of injury be based on "positive evidence" and involve an "objective examination" of the effect of subject imports on the prices of domestic like products. Contrary to China's view, the Appellate Body's emphasis on the importance of price comparability was not limited to an examination of price undercutting.

49. China argues that MOFCOM established that there was a sufficient competitive overlap between subject imports and the domestic like product to warrant the use of AUVs in the price effects analysis. The United States submits that MOFCOM's analysis (much of which occurred in the context of MOFCOM's discussion of the scope of the investigation and the definition of the domestic like product, and not in the context of a discussion of price effects) was at such a level of generality that it failed to establish the degree of competitive overlap that would make an analysis of price effects meaningful.

50. MOFCOM's flawed definition of the domestic industry compromised its analysis of price effects because pricing data from the limited part of the domestic industry from which MOFCOM obtained information cannot provide an understanding of the explanatory force of subject imports on the price of the domestic like product. China characterizes this argument as a "consequential claim" and argues that it must fail because each WTO provision must be examined on its own to determine whether a Member has acted inconsistently with the requirements of that provision.

51. China is mistaken. The United States does not merely rely on MOFCOM's flawed domestic industry definition to establish its claim that China has breached Articles 3.2 and 15.2. The United States has given a number of reasons in support of its claims, one of which is that the price effects analysis was premised on a flawed domestic industry definition. Taken together, the problems the United States has identified provide ample support for the conclusion that China has breached Articles 3.2 and 15.2.

52. In sum, MOFCOM's finding of price depression during interim 2009 is contradicted by the evidence on the record, and its consideration of price effects is not based on "positive evidence" and it did not "involve an objective assessment." Accordingly, MOFCOM acted inconsistently with Articles 3.1 and 3.2 of the AD Agreement, and Articles 15.1 and 15.2 of the SCM Agreement, in conducting its price effects analysis.

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

53. MOFCOM's causation determination in the antidumping and countervailing duty investigations of certain automobiles from the United States is inconsistent with Articles 3.1 and 3.5 of the AD Agreement and Articles 15.1 and 15.5 of the SCM Agreement. China responds to the U.S. claims by arguing that the focus should not be on interim 2009, though that is the only time in the period of investigation during which MOFCOM found that injury occurred, and that the

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

54. The first sentence of Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement provides that "[i]t must be demonstrated that the [dumped or subsidized] imports are, through the effects of [dumping or subsidization] . . . causing injury" to the domestic industry. Pursuant to Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement, this demonstration must be based on positive evidence and involve an objective examination.

55. The causal chain identified by MOFCOM has subject imports, with increased volume and decreased price, causing the price of the domestic like product to decrease, which then caused various economic injuries to the domestic industry, including decreased profits and rate of return on investment. In fact, as we have shown, MOFCOM has failed to establish the requisite causal connection between subject imports and injury to the domestic industry.

56. All of the arguments we have made relating to MOFCOM's analysis of price effects apply with equal force to our claims relating to MOFCOM's causation determination. MOFCOM's finding that subject imports depressed domestic prices is without any foundation and cannot serve as a basis for MOFCOM's conclusion that subject imports caused injury to the domestic industry.

57. In its causation analysis, MOFCOM reasoned that, because domestic prices declined, so did "the increase margin of the sales revenue, pre-tax profits and the rate on return of investment of the domestic industry." The economic indicators showing that the domestic industry was suffering injury are all related to the industry's profits declining. Although declining profits can be correlated to declining prices, it seems much more likely that the injury experienced by the domestic industry was caused by the continuous decline in in the domestic industry's productivity and the near doubling of wages from interim 2008 to interim 2009, but MOFCOM simply ignored the role that the sharp drop in the domestic industry's productivity played in its financial performance.

58. The second sentence of Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement provides that "[t]he demonstration of a causal relationship between the dumped imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities." MOFCOM failed to examine all relevant evidence before it. Specifically, MOFCOM did not address evidence that subject imports took market share from non-subject imports and not from the domestic like product, and that the sharp decline in the industry's productivity and a near-doubling of wages from interim 2008 to interim 2009 hurt the domestic industry's profitability. While MOFCOM may have reported this evidence or noted the arguments of the parties in its final determination, MOFCOM failed to grapple with this evidence with any seriousness, and cannot be said to have based its causation determination on an "examination" of it within the meaning of Articles 3.5 and 15.5.

59. The third sentence of Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement provides that "[t]he authorities shall also examine any known factors other than the [subject] imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the [subject] imports." We have demonstrated that other known factors likely were the cause of the economic difficulties experience by the domestic industry. Specifically, declining productivity coupled with increasing wages and a decision by China to increase the sales tax on larger engine vehicles while reducing the sales tax on smaller engine vehicles were known factors. Each of these factors was reported in MOFCOM's final determination and they likely were causes of the injury to the domestic industry. Yet, MOFCOM failed to examine them in connection with its causation analysis and failed to meet its obligation not to attribute injuries caused by those other factors to subject imports.

IV. CONSEQUENTIAL CLAIMS

60. The U.S. first written submission explains that, in view of the claims we have set forth, the United States considers that China has also acted inconsistently with Article 1 of the AD Agreement and Article 10 of the SCM Agreement, which only permit antidumping or countervailing duty measures to be applied in accordance with the AD Agreement and the SCM Agreement. China argues that the United States has failed to make out a *prima facie* case for these consequential claims. China is incorrect.

61. Since it is impermissible to impose an antidumping measure except "in accordance with" the AD Agreement, if the Panel finds that China has breached any provision of the AD Agreement cited in the U.S. claims, then the Panel should also find that, as a consequence of imposing an antidumping measure not "in accordance with" the AD Agreement, China has also breached Article 1 of the AD Agreement. The same is true if the Panel finds that China has breached any provision of the SCM Agreement cited in the U.S. claims. The Appellate Body has explained that the complaining Member is "not required to advance further arguments to establish a consequential violation of Articles 10 and 32.1" of the SCM Agreement.

V. CONCLUSION

62. For the reasons set forth in the U.S. second written submission, along with those set forth in the other U.S. written filings and oral statements, the United States respectfully requests that the Panel find that China's measures are inconsistent with China's obligations under the AD Agreement and the SCM Agreement. The United States further requests, pursuant to Article 19.1 of the DSU, that the Panel recommend that China bring its measures into conformity with the AD Agreement and the SCM Agreement.

ANNEX B-5

EXECUTIVE SUMMARY OF THE OPENING STATEMENT OF THE UNITED STATES AT THE SECOND PANEL MEETING

Mr. Chairperson, members of the Panel:

1. The United States appreciates this opportunity to appear again before the Panel to provide further views on the reasons why China's anti-dumping ("AD") and countervailing duty ("CVD") measures on U.S. exports of certain automobiles 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, and we continue to rely on the arguments we have presented before. 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.

I. CHINA CANNOT DEFEND MOFCOM'S FLAWED PROCEDURES

2. We will first turn to the U.S. claims with respect to MOFCOM's failure to follow procedural obligations under the AD and SCM Agreements. We have demonstrated that MOFCOM's actions are inconsistent with Articles 6.5.1, 6.8, 6.9, 12.2, 12.2.2, and paragraph 1 of Annex II of the AD Agreement; and Articles 12.4.1, 12.7, 12.8, 22.3, and 22.5 of the SCM Agreement.

3. In its second written submission, China appears to repeat many of the same arguments it made in prior submissions. Its oral statement today also appears to repeat many of the same arguments it made in prior submissions. We will use our time today to respond to some of the points China emphasizes in its second written submission.

A. China Cannot Defend MOFCOM's Failure to Require Non-Confidential Summaries

4. First, I will discuss China's failure to require adequate non-confidential summaries of confidential information. This failure impaired the ability of the United States and other interested parties to defend their interests throughout the course of the investigation.

5. The United States demonstrated in our submissions that 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 we have explained, MOFCOM 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.

6. In its second written submission and today, China disregards the obligations contained in the covered agreements. China also fails to justify the inadequate non-confidential summaries contained in the petition.

7. The United States has detailed various instances where China's interpretation of the covered agreements is flawed. For instance, China continues to insist that a party needs to dispute the non-confidential summaries provided before China would review the non-confidential summaries for adequacy.

8. As we have explained, however, China has no legal basis for this position. To the contrary, whether an interested party objects to summaries during the underlying proceeding is irrelevant to the question of whether the investigating authority has required summaries that are adequate. As the Panel found in *Mexico – Anti-Dumping Measures on Rice*, "The investigating authority is not allowed to rely on the initiative of the interested parties for the fulfilment of obligations which are really its own." The *China – GOES* panel reached the same conclusion. The United States further refers the Panel to the reasoning used in these reports.

9. China also asserts that whether it has complied with the obligations contained in the covered agreements must be assessed in light of factors as set out in other Articles. As we have explained, this line of reasoning is incorrect. The text of the agreements does not support China's argument.

The obligation to provide adequate non-confidential summaries is an independent obligation not limited by other provisions of the covered agreements. Another recent panel – also reviewing a Chinese petition and China's obligation to require non-confidential summaries – came to the same conclusion.

10. The United States has also detailed the flaws in the purported non-confidential summaries offered by China. Not only is China wrong on the law; it is also wrong on the facts. The United States will not at this time review each individual category of confidential information contained in the petition to demonstrate the shortcomings in China's approach. Rather, at this time the United States will respond to a general assertion that China has made. China contends that the unlabeled trend lines contained in the petition are accompanied with percent changes, and that taken together, this information suffices for a non-confidential summary. For instance, this argument is reflected in paragraphs 10-12 of its oral statement delivered today.

11. China's argument has no merit. As the United States has explained, the unlabeled trend lines are inadequate because without a sense of scale, it is impossible to obtain a reasonable understanding of the substance of the confidential information. The United States has also noted that the percentage changes are flawed because they do not reveal the significance in the absolute changes. The same recent panel reviewing China's obligation to require non-confidential summaries agreed on both points.

12. Thus, China is asking the Panel to take inadequate trend lines, add them to defective percent changes – and then somehow the two in combination make China's actions consistent with the covered agreements. China's argument simply doesn't add up. The "very exercise of calculating an approximate figure... through a series of operations" suggests that the purported summaries are inadequate.

13. China's approach to summaries would require interested parties to "infer, derive and piece together a possible summary of confidential information," contrary to the requirements of the covered agreements. For these reasons, China breached Article 6.5.1 of the AD Agreement and Article 12.4.1 of the SCM Agreement.

B. China Cannot Defend MOFCOM's Failure to Disclose the Calculations and Data Used to Determine the Existence of Dumping and to Calculate the Dumping Margins

14. The United States will now turn to MOFCOM's failure to disclose the essential facts underlying its dumping margin calculation. In its previous submissions, the United States showed that China breached Article 6.9 of the AD Agreement because MOFCOM failed to disclose the "essential facts" forming the basis of its decision to apply anti-dumping duties, including the data and calculations it performed to determine the existence and margins of dumping.

15. China offers no new arguments. Rather, China continues to assert that the United States has not established a *prima facie* case solely because the United States has not submitted as exhibits the company-specific disclosure documents. It also asserts that it sent disclosure documents to the U.S. companies, and that these documents contain the essential facts. Despite acknowledging that the documents are in its possession, China failed to submit these documents as exhibits in this dispute. As noted, China highlights that these documents contain BCI, but it fails to indicate why the Panel's agreed-upon BCI procedures are insufficient to allow China to submit these documents for panel review.

16. China argues that "the United States has deprived the Panel of any ability to assess the adequacy of the disclosure letters under Article 6.9." Yet, it is China that is depriving the Panel of any ability to assess the adequacy of its disclosure letters because of its steadfast refusal to submit the documents as exhibits.

17. Now should the Panel wish to test the veracity of China's assertion relating to the content of its disclosure letters, it may exercise its authority under Article 13 of the DSU to request that China present the company disclosure letters that China has – up to this point – refused to submit. China acknowledges that the documents are in its possession; and the Panel's BCI procedures ensure that no party would be prejudiced if China submitted the documents. Furthermore, the reason why China possesses these documents, and that the United States does not, follows from the normal course of an anti-dumping proceeding. MOFCOM itself prepared and issued the

disclosures, and provided them directly to the private sector respondents. And, MOFCOM has never provided copies to the United States.

18. China refuses to submit the documents for panel review because MOFCOM failed to make available the dumping calculation, and data underlying those calculations, depriving the interested parties of their ability to defend their interests. At least one private sector respondent noted China's failure to provide the data and calculations underlying the dumping margin in its comments on MOFCOM's final disclosure. This is contained in Exhibit USA-20, which is attached to this statement. Specifically this respondent indicated that "MOFCOM did not provide sufficient information in the final disclosure…MOFCOM failed to explain in detail how the data came from in the final determination without calculation steps, detailed description, formula and program language, nor provided relevant calculation steps in the final disclosure." China's failure to disclose the essential facts is inconsistent with Article 6.9 of the AD Agreement.

C. China Breached its WTO Obligations in Using Facts Available to Determine All Others Rates

19. The United States has also demonstrated that China breached Article 6.8 and Annex II of the AD Agreement and Article 12.7 of the SCM Agreement by applying "facts available" to calculate an adverse dumping margin and subsidy rate for unknown producers or exporters that received no notice. In particular, these parties did not: (1) refuse access to necessary information within a reasonable period; (2) otherwise fail to provide such information within a reasonable period; or (3) significantly impede the investigation. As explained, the unknown (and even non-existent) "other" U.S. producers or exporters could not have been made aware of the information required as a matter of logic, and thus, cannot be said to have failed to cooperate under the covered agreements.

20. In its second written submission and today, China continues to assert that the actions taken by MOFCOM constitute sufficient notice to justify MOFCOM's resort to facts available. The United States has explained why these actions did not provide a reasonable basis for resorting to adverse facts available. It is telling that China does not argue that unknown producers or exporters were made aware of the information required, and thus met the notification requirement for resorting to facts available. And nowhere does China demonstrate with evidence that unknown producers or exporters refused access to or otherwise failed to provide necessary information within a reasonable period or significantly impeded the investigation. For instance, at paragraph 23 of its oral statement today, China states that "it would be futile for an investigating authority to continue to seek information from a party that has decided not to cooperate." But this is an unsubstantiated conclusion. China provides no evidence that unknown parties refused access to information, or significantly impeded the investigation, or otherwise decided not to cooperate.

21. Instead of applying the text of the relevant provisions, China makes a "policy" argument to justify its use of facts available for unknown exporters, stating that it was merely exercising its discretion, and that "it does not matter if the unknown exporters and producers do not exist or have chosen not to make themselves known."

22. China cannot brush off its responsibility to comply with the covered agreements. The United States agrees that investigating authorities may exercise discretion in calculating all others rates for unknown exporters, but as stated by the *China – GOES* panel, "this discretion should not extend to acting inconsistently with the express terms of" the covered agreements.

23. In our submissions, the United States has argued that China inappropriately applied facts available with an adverse inference to unknown producers or exporters. Specifically, China concluded that any company that did not register to participate in the investigation failed to cooperate. Based upon that unsubstantiated conclusion, China applied an adverse dumping margin and subsidy rate to these "other" U.S. companies. This approach is flawed.

24. Moreover, China's attempt to distinguish *China – GOES* from this dispute is unavailing because, contrary to China's suggestions, this dispute is not fundamentally different from *China – GOES.* China asserts that "in *China – GOES*, a key question before the panel was how MOFCOM derived the AD all others rate of 64.8 percent applied in that case." Here, China states, "there is no mystery about MOFCOM's derivation of this rate." China forgets to mention that a key question before the panel in *China – GOES* was whether MOFCOM applied facts available to calculate the all

others rates for unknown exporters in a manner consistent with the covered agreements. The identical question is before this Panel.

25. As explained, the *China – GOES* panel rejected the same arguments that China is now offering in this dispute as insufficient for satisfying the preconditions for resorting to facts available. The panel in *China –GOES* analyzed whether there is an obligation on unknown exporters to come forward after a general public notice of initiation. It also analyzed whether evidence existed of unknown exporters refusing access to or failing to provide information, or impeding the investigation. A recent panel reviewing China's use of facts available to calculate the all others rate for unknown exporters took a different approach, as China has noted, but it nonetheless concluded that China acted inconsistently with the covered agreements. Given the soundness of the *China – GOES* panel's reasoning, and the similar underlying facts and legal arguments in *China – GOES* and this dispute, the United States considers the panel's reasoning in *China – GOES* should be considered highly persuasive here.

26. The United States also demonstrated that China breached Article 6.9 of the AD Agreement and Article 12.8 of the SCM Agreement because MOFCOM failed to inform the interested parties of the essential facts under consideration that formed the basis of its calculation of the "all others" dumping margin and subsidy rate.

27. China argues that it disclosed the essential facts by largely repeating the arguments it makes in conjunction with its facts available argument, and then asserts that it disclosed "the totality of the facts on which MOFCOM based its all others rates decisions, and there are no other pertinent facts that MOFCOM could have disclosed."

28. As explained, China has failed to disclose any facts relating to how unknown or non-exporting U.S. companies, in fact, refused access to or failed to provide necessary information, or significantly impeded the investigation. Instead, China states that "MOFCOM found that all exporters and producers – including any not known to MOFCOM – were notified of its information requirements." China also states that "for any other exporters and producers that did not respond to MOFCOM's registration notices, MOFCOM found that they did not intend to cooperate." Yet, these are unsupported conclusions – they are not facts.

29. China also argues that "concerning MOFCOM's selection of the all others rates, all findings as well as conclusions, as well as supporting relevant information, are readily apparent from the record." As noted, in the case of the "all others" anti-dumping rate, China asserts that it applied the margin alleged in the petition. That is not enough. China did not indicate any facts regarding the steps it undertook to check against independent sources the accuracy of the information supplied by the petitioner in the reaching the petition rate. China simply accepted and then applied petitioner's alleged rate. And, as in the AD proceeding, MOFCOM did not identify the essential facts that formed the basis for its imposition of a 12.9 percent all others subsidy rate.

30. China also fails to rebut the U.S. demonstration that China breached its WTO obligations by failing to explain the all others dumping margin and subsidy rates. Rather, as above, China repeats its flawed attempt to distinguish this dispute from the *China – GOES* dispute. And the "straightforward rationale" that China asserts does nothing to explain how unknown exporters could have possibly (1) refused access to necessary information within a reasonable period, (2) otherwise failed to provide such information within a reasonable period, or (3) significantly impeded the investigation.

II. CHINA CANNOT DEFEND MOFCOM'S FLAWED INJURY DETERMINATION

31. The United States has demonstrated that MOFCOM's injury determination is inconsistent with Articles 3.1, 3.2, 3.5, and 4.1 of the AD Agreement and Articles 15.1, 15.2, 15.5, and 16.1 of the SCM Agreement. China has failed to offer the Panel anything that would explain or excuse the shortcomings of MOFCOM's injury determination.

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

32. MOFCOM's domestic industry definition suffered from two principal flaws. First, it resulted in a definition of the domestic industry that was distorted because it included only producers that

supported the petition. Second, it resulted in a definition of the domestic industry that did not include a major proportion of the total production of certain automobiles. This has been our argument from the outset, and that is reflected in the U.S. first written submission.

33. China is mistaken when it asserts that the United States has "shifted its focus" away from joint ventures ("JVs"). In fact, throughout this dispute, only China has "focused" on JVs, in an effort to misrepresent the U.S. argument. The United States drew the Panel's attention to a U.S. respondent's argument that MOFCOM had "apparently" excluded JVs, and we pointed to other data on the record that "cast doubt on MOFCOM's assertion that it included JV producers in the industry." We raised that concern because the proportion of the domestic industry included in MOFCOM's definition was so low. At that point, due to China's lack of transparency, we did not know which companies were included in MOFCOM's domestic industry definition. We still do not know which companies were included, because China has concealed that information. But China now has told the Panel that the domestic industry, as MOFCOM defined it, included four JVs and four domestically owned enterprises. That may resolve the question of whether or not MOFCOM's definition of the domestic industry did or did not include JVs, but it does not get MOFCOM off the hook for defining the domestic industry inconsistently with the definition in Articles 4.1 and 16.1 and for failing to base its injury determination on positive evidence and an objective examination, as required by Articles 3.1 and 15.1.

34. It remains the case that MOFCOM utilized a process that was likely to, and in fact did, result in a material risk of distortion in defining the domestic industry. In *EC – Fasteners (China)*, the Appellate Body said that "to ensure the accuracy of an injury determination, an investigating authority must not act so as to give rise to a material risk of distortion in defining the domestic industry . . . ." China argues that "MOFCOM took no affirmative action to invite a material risk of distortion . . . ." However, a corollary to the Appellate Body's observation is that an investigating authority must not *fail to act* if doing so would give rise to a material risk of distortion. In this case, "MOFCOM took no affirmative action," and that itself is the problem.

35. MOFCOM's decision to define the domestic industry as including only producers who voluntarily registered for participation in the injury investigations created the very same kind of self-selection process about which the Appellate Body expressed concern in *EC – Fasteners (China)*. That introduced a material risk of distortion, and, despite China's protestations to the contrary, there was indeed a self-selection process. CAAM, the petitioner, was the only domestic entity that responded to MOFCOM's notice, CAAM was the only entity that registered to participate in the injury investigation, CAAM was the only entity that provided domestic industry data to MOFCOM, and, most importantly, CAAM, in fact, self-selected from among its own members, providing to MOFCOM domestic industry data from *only eight of its member companies.* On its website, CAAM identifies *dozens* of companies as being among its members. Yet, CAAM provided data from only eight of those members. "MOFCOM took no affirmative action" in response to CAAM's *self-selection* of data from just those eight companies.

36. The Appellate Body's specific concern in *EC – Fasteners* was that, "by defining the domestic industry on the basis of willingness to be included in the sample, the [investigating authority's] approach imposed a self-selection process among the domestic producers that introduced a material risk of distortion." There is no substantive distinction between what happened in *Fasteners* and what happened in this case.

37. The Appellate Body has also said that "'a major proportion of the total domestic production should be determined so as to ensure that the domestic industry defined on this basis is capable of providing ample data that ensure an accurate injury analysis." Data from just eight companies, handpicked by CAAM from among its members, did not provide MOFCOM with "ample data" sufficient for an "accurate injury analysis." It is very likely that the data selected by CAAM was from domestic producers posting the weakest performance, which would distort the injury analysis. MOFCOM did not even ask CAAM why it provided data only for these particular companies.

38. The Appellate Body has explained that investigating authorities "must actively seek out pertinent information" and may not "remain[] passive in the face of possible shortcomings in the evidence submitted. . . ." The domestic industry definition is central to the price, impact, and causation analyses required under Articles 3.2, 3.4, and 3.5 of the AD Agreement and Articles 15.2, 15.4, and 15.5 of the SCM Agreement, and it is potentially determinative of the

injury analysis. It is important that investigating authorities make active efforts to collect the information necessary to define the domestic industry in a comprehensive and objective manner.

39. When MOFCOM received data from only eight companies that were handpicked by the petitioner, CAAM, and which represented less than 40 percent of domestic production for most of the period of investigation, MOFCOM was obligated to seek additional data on the condition of the domestic industry, or, at the very least, explain why it considered that more data was not necessary in light of the particular situation of the auto industry in China. MOFCOM failed to do so.

40. China suggests that the United States argued for the first time at the first panel meeting that "the percentage of domestic production included in MOFCOM's definition of the domestic industry is too low on its face." China is mistaken. This is not a "new argument." It has been our argument from the beginning.

41. What is new is China's confirmation of "the percentages of total domestic production," which were "54% in 2006, 34% in 2007, 34% in 2008, and 42% in Interim 2009." Also new is China's revelation that the domestic industry examined by MOFCOM consisted of only eight of CAAM's member companies. The question is whether the proportion of total domestic production represented by these eight companies meets the definition of "a major proportion" in Article 4.1 of the AD Agreement and Article 16.1 of the SCM Agreement.

42. China argues that "the AD and SCM Agreements nowhere define a specific quantitative threshold required to satisfy the 'major proportion' test . . . ." That is correct, but it is beside the point. The proper inquiry should take into account the percentages in light of the process MOFCOM employed, which resulted in MOFCOM having before it data from only eight domestic producers, themselves just a small part of the membership of the petitioner, CAAM. The inquiry should also consider the absence of any discussion by MOFCOM in the final determination of the nature and composition of the auto industry in China or why MOFCOM could not seek additional information.

43. China maintains that investigating authorities should have "some latitude to adapt their injury analysis to the unique facts of each case." We do not dispute this, but there were no "unique facts" in this case to justify MOFCOM's low level of domestic industry coverage. MOFCOM did not even attempt to suggest that there were.

44. China's explanation that "MOFCOM lacks the authority to compel additional domestic producers to participate in the injury investigation" rings hollow. MOFCOM did not even attempt to collect additional information. Simply posting the questionnaire on a website is precisely the type of "passive" response to "possible shortcomings in the evidence submitted. . ." that panels and the Appellate Body have in the past said is not consistent with the obligation to investigate.

45. The Panel should ask: Did MOFCOM have before it "wide-ranging information concerning the relevant economic factors"? The answer is no. Was MOFCOM's definition of the domestic industry "capable of providing ample data that ensure an accurate injury analysis"? The answer is no. Did the domestic producers MOFCOM examined represent "a relatively high proportion of the total domestic production"? Once again, the answer is no.

46. Thus, the Panel should conclude that MOFCOM's exclusion from the definition of the domestic industry – or its failure to include in the definition of the domestic industry – enterprises accounting for more than 60 percent of domestic production resulted in a definition of the domestic industry that did not include a "major proportion of the total domestic production" within the meaning of Article 4.1 of the AD Agreement and Article 16.1 of the SCM Agreement. Accordingly, MOFCOM's injury determination, which was based on its definition of the domestic industry, was neither objective nor based on "positive evidence," as required by Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement.

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

47. We have demonstrated that there is no support for MOFCOM's price depression finding. There was no price parallelism. Even if there had been price parallelism, there is no evidence showing that the price of subject imports drove the price of the domestic like product. With respect to market share, MOFCOM's original explanation of the relevance of the market share data does

not hold up to scrutiny. China has now offered a *post hoc* rationalization, to which the Panel should give no credit, and even this new explanation does not accord with the evidence.

48. China continues to insist that the prices of subject imports and the domestic like product moved in parallel. However, the evidence on the administrative record does not support MOFCOM's conclusions or China's arguments. There was no price parallelism – not "basically," not "in general," not at all. During every time period during the period of investigation, the price of subject imports and the price of the domestic like product were moving in opposite directions or at very different rates in the same direction.

49. China criticizes the chart we presented in the U.S. opening statement at the first panel meeting as being "distorted." But China's own chart tells the same tale. We refer the Panel to exhibit USA-18, which we have passed out today. In this exhibit, we have placed the U.S. chart above China's chart on the same page. Unmistakably, in both graphs, the trend line for the price of subject imports crosses the trend line for the price of the domestic like product twice. That alone demonstrates that, by definition, the lines are not parallel. Indeed, during none of the three time periods for which MOFCOM presented data do the trend lines even approach being parallel. China's own graph confirms the non-existence of price parallelism.

50. It is not the United States, but MOFCOM and China that seek to look at "isolated" data points. China is not looking at the "whole POI;" it is just looking at the beginning and the end. China argues that "[p]erfect correlation in prices is not needed." As we have shown, though, there was no correlation at all. Accordingly, MOFCOM's conclusion that price parallelism existed was not, in the words of a recent panel, a "reasonable conclusion[] [that] could be reached by an unbiased and objective investigating authority in light of the facts and arguments before it and the explanations given."

51. Furthermore, and this may be an even more important point, neither MOFCOM in its final determination nor China in its submissions and statements to the Panel even attempts to explain *how* parallel pricing – even if there had been any – caused the depression of domestic prices. China has steadfastly refused even to address this issue. Neither MOFCOM in its final determination nor China here before the Panel has done anything to describe "what explanatory force parallel price trends had for the depression . . . of domestic prices."

52. Accordingly, because no price parallelism existed and, even if it had, MOFCOM did nothing to explain the relevance of parallel pricing in this case, MOFCOM's reliance on parallel pricing was unfounded and provided no support whatsoever for its price depression finding.

53. The volume and market share data on the administrative record likewise provide no support for MOFCOM's price depression finding. MOFCOM found price depression only during interim 2009. MOFCOM clearly could not have found any price depression for any period *prior* to interim 2009, because the price of the domestic like product was increasing during all of the rest of the period of investigation.

54. Left unanswered in MOFCOM's final determination, though, is the question: *how* did subject imports depress the price of the domestic like product? China suggests that the volume and market share data could explain how subject imports depressed the price of the domestic like product. To show why this is *not* the case, however, we have compiled the volume and market share data on the administrative record into charts in exhibit USA-19.

55. One possibility, since MOFCOM refers to increases in the volume of subject imports, is that, at an "economics 101" level, the market was flooded with volume in interim 2009, and that flood of volume drove down prices. The evidence does not support this theory. In fact, both total domestic production and total import volume were down in interim 2009, as compared to interim 2008. There was no flood of volume, and that cannot explain the price depression.

56. As another possibility, MOFCOM points in the final determination to the "significantly increased" market share of the subject imports "[e]specially at the end of the POI," that is, in interim 2009. As shown in the third chart in exhibit USA-19, though, entitled "Changes in Market Share," the market share of the domestic industry as defined by MOFCOM increased just as significantly as the market share of subject imports. Indeed, the domestic industry and subject imports nearly split in half a market share increase that came at the expense of market share ceded by third country imports and other domestic producers not included in the domestic

industry. It is implausible, then, that the increasing market share of subject imports could explain the price depression of the domestic like product in interim 2009.

57. China's new explanation offered during this dispute is not one that MOFCOM presented in its final determination, and the Panel should give China's *post hoc* rationalization no weight. It also lacks any support in the evidence.

58. In its second written submission, China highlights selected data from the 2006 to 2008 period and posits that "[t]he domestic producers' prices went up, and as a result, they lost market share *to surging subject imports*." China goes on to argue that, "[i]n effect, the domestic industry was forced to fight back against the increase in market share of subject imports by decreasing prices at the expense of profits." So, U.S. imports are the villain in China's story. The problem for China, though, is that there is no truth to this whatsoever. As the data show, the domestic industry lost market share to other domestic producers and to third country imports. It never lost any significant amount of market share to subject imports.

59. China argues that "domestic producers faced crippling loss of market share unless they likewise reduced prices in the face of massive import competition." The only massive import competition to which the domestic industry ever lost market share during the period of investigation was competition from third country imports. In interim 2009, the domestic industry took back market share from those third country imports. So, to the extent that there is any truth to China's new explanation that domestic producers lowered their prices in response to import competition over the entire period of investigation, that would establish that third country imports – not subject imports – were the cause of the price depression observed.

60. In its second written submission, China goes on at some length defending MOFCOM's use of average unit values ("AUVs") and MOFCOM's purportedly thorough examination of the issue of competitive overlap. We have shown previously why MOFCOM's use of AUVs was problematic, particularly in light of evidence on the record indicating that the subject imports and the domestic like product were sold in different grades. Despite China's forceful assertions to the contrary, the Appellate Body's emphasis on the importance of price comparability in *China – GOES* was not limited to an examination of price undercutting.

61. China's argument that the sales data submitted by a U.S. respondent was "unreliable" is not a finding MOFCOM made, and this *post hoc* rationalization deserves no credit. The data was provided to the U.S. respondent by CAAM, and MOFCOM itself relied on the sales data as support for its conclusion, so China cannot now ask the Panel to dismiss the data as unreliable.

62. China's insistence that MOFCOM "thoroughly examined the issue of competitive overlap" between the subject imports and the domestic like product does not withstand scrutiny. MOFCOM's mention of competitive overlap in the final determination was at such a level of generality that it failed to establish a degree of competitive overlap that would make an analysis of price effects meaningful.

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

63. Finally, we have demonstrated that MOFCOM's causation determination in these investigations is inconsistent with Articles 3.1 and 3.5 of the AD Agreement and Articles 15.1 and 15.5 of the SCM Agreement.

64. Fundamentally, the evidence simply does not support MOFCOM's conclusion that subject imports caused injury to the domestic industry. There was no basis for MOFCOM's finding that the price of the domestic like product was depressed by subject imports. All of the arguments we have made relating to MOFCOM's analysis of price effects apply with equal force to our claims relating to MOFCOM's causation determination. MOFCOM's finding that subject imports depressed domestic prices simply is without any foundation and thus cannot serve as a basis for MOFCOM's conclusion that subject imports caused injury to the domestic industry. For that reason alone, the Panel should find that China has breached Articles 3.1 and 3.5 of the AD Agreement and Articles 15.1 and 15.5 of the SCM Agreement.

65. Furthermore, as we have shown, there are still other problems with MOFCOM's causation determination. For example, MOFCOM dismissed without explanation the decline in apparent

consumption in interim 2009 as possibly causing injury to the domestic industry. Yet, this was the only instance of demand contraction during the entire period of investigation, and it coincided with the only part of the period of investigation during which the price of the domestic like product dropped. China argues that "Chinese automobile manufacturers produced vehicles in anticipation of sales levels, and did not simply build up production independently." It appears that the domestic industry was taken by surprise when demand contracted and it was forced to lower prices.

66. Similarly, MOFCOM failed to consider the domestic industry's declining productivity and increasing labor cost. An examination of the relevant data shows a nearly one-to-one correspondence between the decline in the domestic industry's pre-tax profits from interim 2008 to interim 2009 and the near-doubling of labor costs over the same period. The domestic industry's sagging productivity cannot simply be dismissed as insignificant without any explanation. Indeed, it is specifically identified in Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement as a factor that "may be relevant" to the causation analysis.

67. The explanations China offers now are not the explanations on which MOFCOM relied in its final determination. Moreover, China's arguments are not convincing. China argues that the domestic industry's profits were "very small" anyway. China cannot have it both ways. MOFCOM relied on its findings that pre-tax profit "fell sharply" and the "profitability of the domestic industry was badly affected" in interim 2009. China cannot now dismiss the declines in pre-tax profits and profitability as unimportant.

68. China also contends that the increase in labor costs in interim 2009 was not significant because overall unit costs declined in interim 2009. The answer to this, which MOFCOM also failed to examine or appreciate, is that overall costs would have declined even more, with a beneficial effect on the industry's profitability, were it not for the sharp increase in labor costs.

69. Lastly, as we have explained, MOFCOM failed to examine a sales tax change and failed to avoid attributing the injury caused by it to the subject imports. MOFCOM merely summarized the positions of the interested parties and then asserted, without explanation, that "Chinese tax policy is not the factor causing material injury to the domestic industry." MOFCOM was obligated to undertake an objective examination of any known factors and ensure that any injury caused by those factors was not attributed to subject imports. MOFCOM failed to do so.

ANNEX B-6

CLOSING STATEMENT OF THE UNITED STATES AT THE SECOND PANEL MEETING

Mr. Chairman, Members of the Panel:

1. The United States would again like to thank the Panel and the Secretariat staff for your efforts during this meeting and throughout the dispute. In light of the extensive submissions and statements that the parties have made already, we only have a few brief comments to make in closing.

2. This is the third time that the United States has brought a dispute concerning China's application of trade remedy measures. This dispute addresses problems that are similar to those addressed in the *China – GOES* and *China – Broiler Products* disputes, and this dispute concerns inconsistencies with the same substantive provisions of the covered agreements. As the panels did in *China – GOES* and *China – Broiler Products*, and as the Appellate Body did in *China – GOES*, the Panel here should find that China has yet again breached its WTO obligations.

3. Yet again, China has denied U.S. companies the opportunity to fully defend their interests by failing to require the petitioners to provide adequate non-confidential summaries of confidential information, and by failing to disclose the calculations and data used to determine the existence of dumping and calculate dumping margins.

4. Yet again, China has imposed "all others" anti-dumping and countervailing duty rates determined using adverse facts available, despite the absence of any non-cooperation by any U.S. companies.

5. Yet again, China has found material injury based on information provided by a small, self-selected subset of domestic producers, and has done so despite the absence of any causal connection between subject imports and the economic difficulties experienced by domestic producers.

6. In sum, the United States has established that China breached the procedural and substantive obligations set forth in the AD and SCM Agreements, and China failed to make an objective examination and determinations based on positive evidence. In its submissions and statements to the Panel, China has failed to rebut the U.S. case. Accordingly, for the reasons we have given throughout this dispute, the United States renews its request that the Panel find that China has acted inconsistently with its WTO obligations.

7. The United States would like to conclude by again thanking the Panel and Secretariat for your time and attention to this matter, and we likewise thank China for its participation in this proceeding. We look forward to responding to the Panel's written questions and providing further comments, which we hope will further clarify the issues in this dispute.

ANNEX C

ARGUMENTS OF CHINA

ANNEX C-1

EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION OF CHINA

I. Introduction

1. In this dispute, the United States claims that China's antidumping and countervailing duty investigations of certain automobiles from the United States were tainted by a number of procedural and substantive flaws. According to the United States, China's choices and determinations in carrying out its investigations resulted in final determinations that violate China's obligations under the AD Agreement and the SCM Agreement. The AD and SCM Agreements, however, provide considerable latitude to investigating authorities in conducting antidumping and countervailing investigations, permitting different approaches and findings by WTO Members that may nevertheless all be in compliance with these Agreements. Further, many of the U.S. claims in this proceeding represent an effort by the United States to impose *its* mode of implementing the AD and SCM Agreements on other WTO Members.

II. Factual Background

2. On November 6, 2009, MOFCOM initiated antidumping and countervailing duty investigations on certain automobiles from the United States with engine displacement equal to or greater than 2 liters (the scope was later amended to exclude automobiles with an engine displacement equal to or less than 2.5 liters). To ensure the broadest possible dissemination of its initiation notices, MOFCOM posted them on its Internet site and placed them in its public reading room. Additionally, MOFCOM requested that the U.S. Government provide its notices of initiation to any interested parties. The notices of initiation invited all interested parties to register for participation in MOFCOM's injury investigation, and also explained that MOFCOM "shall have the right to refuse to accept relevant materials" of interested parties that fail to register, "and shall have the right to determine based on the existing materials available."

3. On April 2, 2011, after gathering and evaluating information from interested parties, MOFCOM issued its Preliminary Determination, in which it calculated preliminary dumping margins and rates of subsidization for all known U.S. exporters and producers participating in its investigations, and preliminarily found that imports of the product under investigation caused material injury to the domestic industry. MOFCOM explained that it applied, as facts available, the alleged petition rate for the AD all others rate, and applied, as facts available, the highest calculated subsidy rate for the CVD all others rate.

4. On April 15, 2011, MOFCOM issued its pre-final injury determination disclosure letter to all interested parties. On April 18, 2011, prior to issuance of its final determinations, MOFCOM also sent letters to the U.S. Government and all U.S. exporters and producers participating in its antidumping and countervailing duty investigations, disclosing the basic facts on which MOFCOM based its dumping margin and subsidy rate calculations.

5. MOFCOM's Final Determination, issued on May 5, 2011 follows the same basic structure as the Preliminary Determination, but discusses additional information gathered by MOFCOM in its investigations and provides MOFCOM's responses to comments from interested parties. As in the Preliminary Determination, MOFCOM calculated dumping margins and rates of subsidization for all known U.S. exporters and producers participating in its investigations.

III. Standard of Review

6. Article 17.6(i) of the AD Agreement states the standard of review to be applied by panels with respect to challenges of domestic anti-dumping measures. Article 17.6(i) requires panels to determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. As long as the panel finds this to be so, the panel may not overturn the authorities' determination even if it would have reached a different conclusion. The same standard of review should be employed in challenges of the SCM Agreement.

IV. Arguments

A. 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

7. The first claim of the United States is that the non-confidential summaries in MOFCOM's petition were inadequate. Article 6.5.1 does not require any specific type or specific level of detail or format for the non-confidential summaries to be provided. Rather, it must permit "a reasonable understanding of the substance of the information withheld in order to allow the other parties to the investigation an opportunity to respond and defend their interests." The non-confidential summaries in MOFCOM's petition were adequate to meet this standard.

8. In particular, the United States alleges that MOFCOM simply redacted the information contained in the application and that no non-confidential summary was provided. However, the U.S. arguments ignore significant portions of the non-confidential summaries provided. The United States' arguments fail to take into account the percentage changes depicted in the charts, the significant text providing additional information directly below each of the tables provided in the petition, as well as trend lines accompanying the charts showing changes in the indices over the period of investigation. Furthermore, it is important to note that no party objected to the adequacy of any of the non-confidential summaries provided in the petition during the course of investigations, indicating that the parties to the investigation did not believe that the non-confidential summaries had failed to provide "an opportunity to respond and defend their interests."

B. The United States Failed to Make a *Prima facie* Case with Respect to its Claims under Article 6.9 of the AD Agreement

9. As an initial matter, the United States proposes an interpretation of Article 6.9 that goes far beyond its literal bounds. Article 6.9 does not mandate the disclosure of *all* facts before an investigation authority, but only the "essential facts under consideration" underlying a decision to apply definitive AD measures.

10. The United States has failed to establish a *prima facie* case under Article 6.9, because the United States misconstrues the disclosure requirement of Article 6.9. On its face, Article 6.9 requires disclosure if essential facts to interested parties only before a final determination is made. It does not require disclosure during any other phase of an antidumping investigation, or in the actual final determination of an investigating authority to apply (or not apply) definitive duties. The United States, however, ignores the plain language of Article 6.9, alleging as inadequate MOFCOM's descriptions of its antidumping calculations in its preliminary and final determinations. However, because final determination logically cannot occur "before a final determination is made" for purposes of Article 6.9, the United States cannot substantiate its claim by alleging any deficiencies in that determination. Furthermore, MOFCOM issued a disclosure to all interested parties prior to its Final Determination, yet the United States omits *any* mention of MOFCOM's actual disclosure documents.

11. The United States confuses the requirements for a preliminary and final determination under Article 12.2 of the AD Agreement with those of a pre-final determination disclosure, as required under Article 6.9. To cite one key difference, Article 12.2 requires the provision by investigating authorities of "public notice" of preliminary and final determinations. Pre-final determination disclosure, on the other hand, typically – and often necessarily – entails the disclosure to individual interested parties of business confidential information. The conflation by the United States of the requirements for public notice of determinations with the requirements for disclosure of data underlying margin calculations constitute a fatal flaw under the standards for a *prima facie* case. For these reasons, the United States has failed to uphold its burden of articulating an adequate legal claim and establish a *prima facie* case.

C. MOFCOM's Determination of the AD All Others Rate was Permissible under the AD Agreement

12. The United States contends that China violated Articles 6.8, 6.9, 12.2, and 12.2.2 of the AD Agreement in its determination of the AD all others rate. However, MOFCOM lawfully determined to

apply, as facts available, the margin of dumping alleged in the petition. While the AD Agreement does not prescribe a particular methodology for the calculation of an all others rate, Article 6.8 of the AD Agreement and Annex II provides guidelines for filling gaps in the administrative record with facts available drawn from the petition.

13. China complied with Article 6.8 and Annex II of the AD Agreement. Contrary to the United States' assertion that MOFCOM did not provide the requisite level or type of notification of the investigation, China went to great lengths to ensure that all producers and exporters would be aware of its investigation. Specifically: (1) MOFCOM sought to ensure wide dissemination of its initiation notice by posting it on its website and placing it in MOFCOM's public reading room; (2) MOFCOM requested the U.S. government to inform all U.S. producers and exporters of its investigation; (3) MOFCOM sent its questionnaire to all U.S. producers and exporters identified in the petition, as well as to *additional four* U.S. producers and exporters that voluntarily registered for participation in the investigation. This level of notification represents the best effort that MOFCOM could reasonably be expected to undertake. Further, the United States does not explain what additional type of notification to potential interested parties MOFCOM could have offered in the circumstances of this case. In light of MOFCOM's broad notification of its investigation, MOFCOM could reasonably conclude that any unknown U.S. exporters and producers that did not register for participation in the investigation were aware of the initiation notice, and that any U.S. exporters and producers not responding had "refused" to participate in the investigation.

14. China's disclosure associated with its AD all others rate also complied with Article 6.9 of the AD Agreement. All of the pertinent facts contributing to MOFCOM's decision to apply facts available were laid out in MOFCOM's pre-final determination disclosure to the U.S. Government. MOFCOM was under no obligation to disclose its *reasoning* for its selection of the 21.5% all others rate. Nonetheless, even if MOFCOM were required to disclose the reasoning underlying its selection, MOFCOM's pre-final determination disclosure lays out the entire predicate for MOFCOM's application of the 21.5% rate as the AD all others rate. Finally, MOFCOM was under no obligation under Article 6.9 to disclose as essential facts any calculations underlying its selection of the AD all others rate. As MOFCOM explained in its pre-final determination disclosure to the United States, it applied the AD margin alleged in the petition. Meanwhile, the petition, which is outside the scope of the Article 6.9 disclosure obligation, clearly and fully lays out the data underlying the alleged margin of dumping. Because MOFCOM disclosed all pertinent facts, there were no additional facts that, if disclosed, might have permitted the United States to better defend its interests prior to the final determination.

15. Furthermore, China adequately explained its determinations for purposes of Article 12.2 and 12.2.2 of the AD Agreement, as the legal and factual bases for MOFCOM's determination of the all others rate are perfectly clear and straightforward from the administrative record.

D. MOFCOM's Determination of the CVD All Others Rate was Permissible under the SCM Agreement

16. The United States contends that China violated Articles 12.7, 12.8, 22.3, and 22.5 of the SCM Agreement in its determination of the all others rate. However, MOFCOM lawfully determined to apply, as facts available, the highest rate calculated for an individually investigated producer and exporter. MOFCOM also fully explained its reasoning, and disclosed all pertinent facts, in doing so. The SCM Agreement – like the AD Agreement – is silent with respect to the determination of all others, or residual, rates applicable to non-investigated respondents. Given the gap in the SCM Agreement, Article 12.7 provides guidelines for filling gaps in the administrative record with facts available drawn from the petition.

17. China complied with Article 12.7 of the SCM Agreement. China's arguments presented above with respect to China's efforts to ensure that all producers and exports were aware of the investigation apply equally with respect to the SCM Agreement. As explained above, this level of notification represents the best effort that MOFCOM could reasonably be expected to undertake. Further, the United States does not explain what additional type of notification to potential interested parties MOFCOM could have offered in the circumstances of this case. The SCM Agreement, like the AD Agreement, does not require China to continue pursuing the cooperation of interested parties that MOFCOM could reasonably assume, through non-responsiveness to a widely disseminated initiation notice, would not participate in its investigation.

18. Furthermore, China's disclosure associated with its all others rate complied with Article 12.8 of the SCM Agreement. China's arguments presented above with respect to selection of the AD all others rate apply equally to calculation of the CVD all others rate. China also adequately explained its determinations for purposes of Article 22.3 and 22.5 of the SCM Agreement, as the legal and factual bases for MOFCOM's determination of the all others rate are perfectly clear and straightforward from the administrative record.

E. China's Definition of the Domestic Industry was Fully Consistent with Articles 3.1 and 4.1 of the AD Agreement, and 15.1 and 16.1 of the SCM Agreement.

19. The United States alleges that MOFCOM improperly defined the domestic industry by excluding foreign joint ventures ("JVs"), and that the resulting group of domestic producers did not represent a "major proportion" of the total producers of the domestic like product for purposes of the AD and SCM Agreements.

20. Article 4.1 of the AD Agreement and Article 16.1 of the SCM Agreement provide considerable discretion to investigating authorities in defining a domestic industry. An investigating authority may lawfully define the domestic industry as all producers of the domestic like product, or as those producers comprising a "major proportion" of production of the domestic like product. The AD and SCM Agreements provide no definition of "major proportion," and panels have explained that the level of domestic production constituting a "major proportion" may be a level less than 50 per cent.

21. Furthermore, MOFCOM did not exclude JVs from the investigation. MOFCOM provided public notice inviting *all* domestic producers to participate in its injury investigation. MOFCOM also examined and included in its analysis data from *all* domestic producers that supplied injury data. MOFCOM's injury investigation neither contains nor implies an exclusion of any subset of the domestic industry. By its plain terms, the invitation to participate in the injury investigation was open to "any" domestic producer. It was also available, through placement in MOFCOM's public reading room, to any domestic producer that might have wished to participate in the investigation. Further, the Preliminary and Final Determinations are devoid of any statement or implication that MOFCOM excluded from its injury investigation data from any domestic producer. MOFCOM's above-described open process for gathering data on domestic production is confirmed by its April 15, 2011 Letter of Disclosure of Essential Facts.

22. MOFCOM explained in its Final Determination, in response to comments from interested parties, that it did not limit its definition of the domestic industry to Chinese-owned companies, and that it did not exclude JVs. Data in the public record of the investigation also demonstrates that MOFCOM, in its definition of the domestic industry, included production data for a greater extent of domestic production than represented by Chinese-owned producers, showing that the data captured by MOFCOM's definition of the domestic industry *did* include some amount of production by JVs.

23. Because MOFCOM did not exclude from the definition of the domestic industry a subset of Chinese production, it follows that the U.S. claim that MOFCOM failed the "distortion test" contained in Article 4.1 of the AD Agreement and Article 16.1 of the SCM Agreement as elucidated by the Appellate Body in *EC – Fasteners (China)* fails as a factual matter. Aside from the mistaken factual premise underlying the U.S. argument, the U.S. argument also fails as a matter of law because there is no freestanding distortion test contained in Article 4.1 of the AD Agreement and Article 16.1 of the SCM Agreement. The term "distortion" appears nowhere in these provisions, and the relevant text provides only that investigating authorities must base the definition of the domestic industry on a "major proportion" of domestic production. Further, the facts before the Appellate Body in *EC – Fasteners (China)* are distinguishable with the present case, as, unlike the investigating authority in *EC – Fasteners (China)*, MOFCOM did not engage in a self-selection process that affirmatively excluded certain producers from its definition of the domestic industry.

24. MOFCOM did, however, satisfy the "major proportion" test of Article 4.1 of the AD Agreement and Article 16.1 of the SCM Agreement. As explained above, MOFCOM did not exclude JVs or any other sector of the domestic industry in defining the domestic industry. In defining the domestic industry, MOFCOM conducted an open data-gathering process and included production data from all domestic producers that supplied such data. The record of the investigation also

plainly shows the percentages of total domestic production represented by MOFCOM's definition of the domestic industry for the period of investigation – i.e., 54% in 2006, 34% in 2007, 34% in 2008, and 42% in Interim 2009. MOFCOM reasonably concluded, based on an objective examination of the evidence supplied to it, that these percentages constituted a "major proportion" of domestic production for purposes of Article 4.1 of the AD Agreement and Article 16.1 of the SCM Agreement.

25. Finally, the Panel should reject the United States' claims that China's alleged violations of Article 4.1 of the AD Agreement and Article 16.1 of the SCM Agreement necessarily result in an injury determination for purposes of Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement. As an initial matter, the Panel should reject the U.S. allegation of a consequential violation because, for the reasons set forth above, China did not breach Article 4.1 of the AD Agreement and Article 16.1 of the SCM Agreement. Moreover, each article of the AD and SCM Agreements set forth distinct standards and obligations, and claims with respect to each article must be assessed independently and separately.

F. MOFCOM's Price Effects Analysis was Fully Consistent with Articles 3.1 and 3.2 of the AD Agreement, and 15.1 and 15.2 of the SCM Agreement

26. The United States claims that: (1) the record before MOFCOM did not show evidence of price undercutting; (2) subject imports and the domestic like product did not exhibit parallel pricing trends during the period of investigation; (3) MOFCOM erroneously relied on average values for purposes of its price analysis; and (4) MOFCOM failed to account for the fact that the market share of the domestic like product increased over the period of investigation. As discussed below, each of the United States' claims fail.

27. First, the plain text of Article 3.2 of the AD Agreement and Article 15.2 of the SCM Agreement states only that the investigating authorities "shall consider whether there has been a significant price cutting…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." Thus, the text in the relevant articles, along with prior panel determinations, makes clear that a price undercutting analysis is optional and that no specific methodology is required. MOFCOM based its price effects analysis on price depression. As a matter of logic, price depression or suppression can occur without price undercutting being present. Prices of domestic like products can be pushed down and depressed by competition with subject imports, even if those subject imports are priced higher at any single point in time than are the prices for the domestic like product. MOFCOM's Final Determination discusses in detail the evidence on which MOFCOM relied and its reasoning when reaching its price effects determination.

28. Second, the United States' claim that MOFCOM's finding of parallel pricing was not supported by the record and was based on an analysis of comparable prices over only an isolated period of time is simply incorrect. MOFCOM reviewed price trends based upon an analysis over the entire period of investigation, as supported by the record evidence. In addition, the argument of the United States relies in part on an incorrect translation of MOFCOM's reasoning in the Final Determination. The fact that MOFCOM did not rely solely on a single time period is in fact supported by the correct translation of the Final Determination, which states that "*{e}specially* at the end of the POI…its price decreased at the same time…" (emphasis added). MOFCOM's use of the term "especially" demonstrates that MOFCOM did not rely solely on the interim 2009 period, but rather was basing its parallel price analysis upon an examination of price trends over the entire period of investigation.

29. Third, the record evidence supports MOFCOM's finding that there was sufficient competitive overlap between subject imports and the domestic like product that use of average unit values was not inappropriate. Articles 3.2 of the AD Agreement and 15.2 of the SCM Agreement do not require an investigating authority to use model or category-specific prices rather than average unit values when conducting a price effects analysis, and in fact require no specific or particular methodology. The plain text of those Articles states only that an investigating authority "shall consider…whether the effect of such imports is otherwise to depress prices to a significant degree…" MOFCOM examined the issue of competitive overlap between subject imports and the domestic like product in both its Preliminary and Final Determinations. Thus, MOFCOM conducted an objective examination based on positive evidence of the competitive overlap between subject imports and the domestic like product.

30. In addition, the mere fact that there may be price differences between the various products included in the averages is not an indication of bias or lack of objectivity in the pricing analysis. MOFCOM's use of average prices is also supported by other factors: there is no evidence that the product mix changed substantially over time; MOFCOM did not manipulate the data it obtained in any way, nor did MOFCOM exclude any of the pricing data it examined; MOFCOM used the same methodology for examining both domestic and import prices, and was thus even handed and objective when analyzing price trends.

31. Fourth, the claim of the United States that MOFCOM failed to consider that the market share of the domestic like product increased at the same time as the market share of subject imports increased looks at just one isolated piece of data, and does not undercut MOFCOM's price depression finding. Over the entire period of investigation, the market share for imports from third countries was relatively stable, while the market share of subject imports increased by about 3.5 per cent. In addition, over the entire period of investigation, the market share of the domestic industry decreased while the market share of subject imports increased significantly.

32. As MOFCOM's domestic industry definition was not flawed, the United States' argument that MOFCOM's price effects analysis is necessarily compromised fails as a factual matter. In addition, the United States in effect argues that any violation of Article 4.1 of the AD Agreement and 15.1 of the SCM Agreement as a matter of law results in a violation of a Member's price effects analysis under Articles 3.2 of the AD Agreement and 15.2 of the SCM Agreement. As noted earlier, however, such "consequential" claims must fail.

G. MOFCOM's Causation Analysis was Fully Consistent with Articles 3.1, 3.4 and 3.5 of the AD Agreement, and 15.1, 15.4 and 15.5 of the SCM Agreement.

33. The United States focuses solely on certain isolated factors in MOFCOM's overall causation analysis in its effort to claim that MOFCOM failed to establish a causal link between subject imports and material injury to the domestic industry. The United States argues that: (1) MOFCOM failed to consider the fact that the domestic industry's market share increased in interim 2009; (2) MOFCOM failed to take into account a decline in the domestic industry's labor productivity over the period of investigation; (3) MOFCOM "failed to recognize" the alleged lack of competition between subject imports and the domestic like product; and (4) MOFCOM failed to address certain "other factors" that "may" have caused injury, including a change in China's tax policy. The United States' arguments, by selectively citing isolated data and ignoring the complete picture, run afoul of the applicable standards under Article 3.5 of the AD Agreement and 15.5 of the SCM Agreement. Subject imports need only be *a* "cause," and not the sole or significant cause, to satisfy Articles 3.5 and 15.5. Furthermore, when determining whether other facts might have been the cause of injury to the domestic industry, previous panel and Appellate Body reports make clear that there is no required method of analysis undertaking that examination.

34. First, MOFCOM fully accounted for the role of third country imports. In its arguments, the United States focuses entirely on a single period of time, interim 2009. However, in the Final Determination, MOFCOM examined statistical data for imports from all sources and specifically addressed the role of third country imports. MOFCOM found that, over the entire period of investigation, the market share of third country imports was relatively stable, while the market share of subject imports increased. Moreover, the volume of imports from third countries dropped more than did imports from the United States, further confirming that third country imports were not the cause of material injury. Thus, the record demonstrates that there was substantial competition between subject imports and domestic like products.

35. Second, MOFCOM did not fail to account for the drop in labor productivity. MOFCOM's causation analysis was based upon an overall review of the entire record. In the Final Determination, MOFCOM analyzed *sixteen* different indicia of the financial industry's health and performance over the period of investigation. The United States focuses solely on one piece of information, concerning labor productivity, and ignores the other fifteen indicia of the industry's health and performance over the period of investigation and their relationship to the causation analysis. Furthermore, an investigating authority is not required to examine in depth every possible issue. Given the low labor costs in China, a decline in labor productivity in the Chinese industry is not a key indicia of the health of the industry nor is it a significant or telling indicator

for MOFCOM's causation analysis. Nonetheless, contrary to the U.S. claims, MOFCOM did in fact examine labor costs. Specifically, in its Final Determination, MOFCOM noted in its analysis of the various factors it reviewed that "employment and average annual salaries increased…"

36. Third, MOFCOM fully examined the record evidence concerning competition between subject imports and the domestic like product, and fully accounted for that competition in its causation analysis. MOFCOM's Final Determination shows that the investigating authority conducted a comprehensive investigation on the product under investigation and the domestic like product in terms of "physical characteristics, performance, production process, product use, product substitution, perception of consumers and producers, sales channels, prices and so on." The investigation indicated that the two are similar and comparable, and compete with each other.

37. The United States also argues that the fact that subject imports oversold the domestic like products for part of the period of investigation undercuts MOFCOM's conclusion that subject imports and domestic producers competed with each other. But the fact that subject imports during some periods in the period of investigation oversold the domestic like product does not indicate that there was no competition between them. The finding of price undercutting is only *one* of the three possible findings that need to be found to support an adverse price effects finding. In any case, the U.S. argument ignores the fact that in 2007, subject imports were priced *lower* than was the domestic like product.

38. MOFCOM also fully accounted for the decline in apparent consumption in interim 2009. MOFCOM's Final Determination notes that even though apparent consumption declined in interim 2009 from the same period in 2008, sales of the domestic like product and the domestic industry's market share were able to increase over the same period. Thus, the fall in apparent consumption did not cause material injury.

39. The United States claim that MOFCOM ignored other possible causes of injury rests on a mistaken assumption concerning the appropriate application of the non-attribution standard. Article 3.5 and Article 15.5 do not specify any particular methodology that an investigation authority must follow when analyzing the role of other known factors. Furthermore, MOFCOM is not required to disprove a possible cause of injury. The burden is on the United States to establish the *prima facie* case that the effects of another factor broke the causal link. The United States has not met that burden. Moreover, MOFCOM examined and discussed a number of "other causes" so as to ensure that it was properly attributing material injury to the subject imports, including: the role of imports from third countries; the change in market demand; exports of the domestic like product; whether events of force majeure caused negative effects to the normal operation of the domestic industry; the role of changes in the consumption tax policy and purchase tax policy over the period of investigation.

40. Finally, MOFCOM's causation analysis is not compromised by its definition of the domestic industry and its price effects analysis. As explained above, the factual premise of the United States' argument is incorrect, as China's domestic industry definition and its price effects analysis were fully consistent with its obligations under the AD and SCM Agreements. In addition, the U.S. argument incorrectly presumes a direct, *per se* link between the obligations contained in Article 3.1 and 3.2 of the AD Agreement and 15.1 and 15.2 of the SCM Agreement with the obligations of causation set out in Articles 3.4 and 3.5 of the AD Agreement and 15.4 and 15.5 of the SCM Agreement. There is no such *per se* link. The United States bears the independent burden of establishing a *prima facie* case that the causation analysis failed to meet the standards set out in Articles 3.5 and 15.5, regardless of the Panel's findings on the definition of the domestic industry and MOFCOM's price effects analysis made under different Articles.

H. The United States Failed to Make a Prime Facie Case with Respect to its Consequential Claims

41. The Panel should reject the consequential claims of the United States for failure to make a *prima facie* case. To make a *prima facie* case of breach of a WTO agreement, the complaining party must provide both evidence *and* legal argument tying the alleged facts to *each* of the elements of a legal claim. Where there is a disconnect between the alleged facts and the legal claim, or no proper legal claim can be made out, a panel must conclude that the complaining party has not satisfied its burden to make out a *prima facie* case. While the United States claims that China has acted inconsistently with Article VI of the GATT 1994, Article 1 of the AD Agreement,

and Article 10 of the SCM Agreement, it does not specify any specific evidence or legal argument in making these claims, and instead relies on a blanket reference to "the claims set forth above," to support its claims. As such, the United States has failed to make out a *prima facie* case regarding these consequential claims

V. Conclusion

42. For the reasons set forth in this submission, China requests that the Panel find that MOFCOM's determinations in the underlying investigations were fully consistent with China's WTO rights and obligations.

ANNEX C-2

EXECUTIVE SUMMARY OF THE OPENING STATEMENT OF CHINA AT THE FIRST PANEL MEETING

I. Introduction

1. This dispute is the latest in a series of U.S. challenges to China's trade remedy procedures. As the Panel considers the specific claims before it, China asks the Panel to bear in mind one important overarching consideration: China's trade remedy procedures are different from U.S. procedures, and this is acceptable under the AD and SCM Agreements. The Agreements provide considerable latitude to investigating authorities to adopt different procedures. China may legitimately adopt different trade remedy procedures from the United States, and these procedures may lead to different results than what the United States is used to under its own procedures. This does not mean that China is wrong.

II. MOFCOM Appropriately Required Adequate Non-Confidential Summaries

2. The first claim of the United States is that MOFCOM failed to require adequate non-confidential summaries of confidential information in the petition. The U.S.'s argument appears to rest on the mistaken premise that total disclosure is required. But Article 6.5.1 of the AD Agreement and Article 12.4.1 of the SCM Agreement only require that a non-confidential summary be in "sufficient detail" to permit a "reasonable understanding" of the "substance" of the information.

3. The use of the term "substance" is important, because it signals that each individual number or all aspects of the confidential information need not be summarized publicly, but rather that the non-confidential summary must be sufficient to allow an understanding of the overall "substance" of the information.

4. The New Shorter Oxford Dictionary defines the term "substance" as "the theme or subject of an artwork, and argument, etc., esp. as opposed to form or expression; the gist or essential meaning of an account, matter." The Dictionary further defines substance as "[t]he essential nature or part of a thing."

5. Article 31(1) of the Vienna Convention requires a provision to be interpreted "in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose." The "substance" of the confidential information at issue therefore should not be determined in isolation, but rather within its larger context. The non-confidential summaries at issue concern certain aspects of the petition's claims concerning injury, as defined in the AD and SCM Agreements. The "substance" of the particular information at issue, therefore, needs to be evaluated in the context of the substantive obligations set out in Articles 3.4 of the AD Agreement and 15.4 of the SCM Agreement.

6. Article 3.4 requires an investigating authority to determine injury through an evaluation of all relevant economic factors and indices that have a bearing on the industry, including actual or potential decline in certain factors, and actual or potential negative effects on various other factors. The petition focuses its injury allegations on the trends in the movements of various factors rather than the underlying absolute numbers themselves. This is demonstrated in the petitioner's summary injury paragraph, which argues that all the injury factors show "an adverse trend." Therefore, the "substance" that must be ascertainable pertains to the movement – or trends – of certain factors, and the relationship between the foreign and domestic products, rather than the absolute numbers that form the basis of determining such trends and relationships. As long as the non-confidential summaries are sufficient to allow a reasonable understanding of these trends – rather than the absolute numbers themselves – then the obligations of Articles 6.5.1 and 12.4.1 are satisfied.

7. Furthermore, the provisions of the relevant Articles do not require any specific type, or level of detail, or format, for the non-confidential summaries. In addition, as we noted above, the determination as to whether the non-confidential summaries permit a reasonable understanding of the "substance" of the information, must be evaluated in light of the relevant context that the confidential information at issue pertains to trend lines and movements over time of injury data.

The use of trend lines or percentage changes in these circumstances is appropriate to permit a reasonable understanding of the substance of the information at issue.

8. Also, the United States complains in a single conclusory sentence of its First Written Submission that, for certain data, only percentage changes were provided. Providing percentage changes is a common approach for non-confidential summaries. By showing year-to-year percentage changes, the summary provides a "reasonable understanding" of trends over time. While the United States seems to imply that using percentage changes is insufficient, the United States in *China – GOES* concedes that the use of percentage indices is sufficient.

9. The U.S. First Written Submission overlooks these principles and merely asserts that certain isolated tables contained in the petition were not adequately summarized. However, the U.S. arguments fail to take into account additional text provided below each of the tables, as well as additional tables contained in the non-confidential version of the petition that provide trend lines for the data in the tables. The non-confidential summary of the tables, the additional text below the tables, and the additional tables providing trend lines – taken together – more than adequately allow for a "reasonable understanding" of the "substance" of the information submitted.

10. China's First Written Submission explains why each of the U.S. claims concerning the public summaries is not correct. For example, concerning the sales-to-production ratio information in Table 19 of the petition, the U.S.'s assertion that "no non-confidential summary was provided" ignores the additional text directly below Table 19, which provided further information and context for the redacted information. Specifically, the additional text explains that while "foreign producers' production and sales increased and domestic apparent consumption grew, the proportion of products sold of domestic industry did not increase accordingly." The United States also ignores the related trend line showing changes in the sales-production ratio over the period of investigation. The trend line provided with the table showed the ratio increasing from 2006 to 2007 and generally decreasing from 2007 through the end of the period of investigation. As noted previously, Article 3.4 refers to actual and potential "decline" in sales, or in other words, the trend of sales over time. Taken together, this information in its proper context provides a "reasonable understanding" of the "substance" of the information at issue, particularly when examined in terms of its relationship with other public data such as apparent consumption and inventory shifts.

11. Finally, it is important to note that no party objected to the adequacy of any of the non-confidential summaries at issue. If interested parties felt that the non-confidential summaries had prejudiced their interests, then MOFCOM could have reviewed the situation and determined how to proceed. China is not arguing that there is an exhaustion requirement and that the failure to raise this issue during the course of the proceeding waives the U.S.'s right to raise it now, but the failure to do so does go to the merits of the underlying argument.

III. The United States Has Failed To Meet its Burden with Respect to its Claim under Article 6.9 of the AD Agreement

12. Rather than reiterating the elements of a *prima facie* case, China focuses its statements on why the United States failed to make out a *prima facie* case with respect to its claim under Article 6.9. Article 6.9 addresses a specific phase in an antidumping investigation – requiring disclosure of essential facts "before a final determination is made." Requiring disclosure at this specific point is logical in light of the stated purpose of Article 6.9, which is to provide interested parties with an adequate opportunity to defend their interests. Logically, the appropriate time to provide such disclosure is late in the investigation, when the investigating authority has gathered and verified relevant facts, but before reaching its final conclusions with respect to those facts. That is precisely what MOFCOM did in this case, when it provided letters of disclosure to all interested parties.

13. The U.S. First Written Submission, however, does not address any aspect of MOFCOM's pre-final determination disclosure letters, but only addresses MOFCOM's preliminary and final determinations. Specifically, the United States provides a long list of "calculations and related information" that it believes MOFCOM should have included in its determinations. The United States also complains of supposed "vague descriptions" of the establishment of normal value, and the export price provided in MOFCOM's determinations.

14. However, it is Article 12.2 of the AD Agreement, and not Article 6.9, that imposes requirements with respect to an investigating authority's public notices. In most cases, a pre-final determination disclosure will include business confidential information, requiring separate confidential disclosures to each interested party. Public determinations, in contrast, must not disclose any business confidential information. China thus cautions against the conflation of

Articles 6.9 and 12.2, which set forth distinct requirements for separate aspects of an antidumping investigation. The panel in *China – GOES* confirmed that Articles 6.9 and 12 serve fundamentally different purposes.

15. Thus, it appears the United States has alleged facts that do not "relate" to its legal arguments, failing to establish its *prima facie* case with regard to this claim. While the United States claims that China has violated Article 6.9, it points to evidence of alleged deficiencies in MOFCOM's public determinations, which are governed by a different article.

IV. MOFCOM's Determination of the AD and CVD All Others Rates was Permissible under the AD and SCM Agreements

16. At the core of the U.S. argument regarding MOFCOM's determination of the AD and CVD all others rate is the notion that MOFCOM did not do enough to alert all possible U.S. exporters and producers of its information requirements for the investigations. However, contrary to the U.S. claim that "MOFCOM made no attempt to even identify whether any other U.S. exporters/products might exist," MOFCOM took multiple steps in this respect: (1) MOFCOM posted its initiation notices on its website and placed them in its public reading room; (2) MOFCOM requested the U.S. government to inform all U.S. producers and exporters of its investigations; and (3) MOFCOM sent its questionnaires to all U.S. producers and exporters identified in the petition, as well as to a number of additional U.S. companies that voluntarily registered for participation in the investigations.

17. Together, these steps constituted a reasonable and comprehensive notification effort. Indeed, while the United States complains that MOFCOM should have done more, the United States does not explain what additional steps MOFCOM might have taken. Under these circumstances, it does not seem reasonable to conclude, as the United States implies, that MOFCOM should have gone to unspecified greater lengths to publicize the fact of its investigation and its information requirements.

18. Furthermore, MOFCOM made clear from the outset that the consequence of a decision not to register for participation in the investigations could be the application of facts available. Thus, China believes that any U.S. producers and exporters that did not register for participation must have known of the investigations, and decided not to participate. Accordingly, MOFCOM reasonably concluded that such U.S. producers and exporters "refused" to provide the necessary information, and thereby lawfully resorted to facts available. China submits that the *China – GOES* panel did not take into account MOFCOM's reasonable conclusion that any producers and exporters not responding to the initiation notices had decided to refuse to participate in the investigations. Following the logic of the *China – GOES* panel, MOFCOM would have been required to supply full questionnaires to unknown parties that had already decided not to participate in the investigations.

19. For the same reasons, China also disagrees with Japan's comment in its Third Party Submission that the AD Agreement "requires that authorities give notice of specific information to an interested party from which the specific information is needed." This comment correctly interprets the AD Agreement as to known interested parties. However, this logic does not extend to scenarios in which the interested party is unknown and has decided not to cooperate.

20. The United States' reliance on *Mexico – Rice* is also misguided. In that case, the Appellate Body found that the investigating authority improperly applied facts available before providing all exporters with the opportunity to provide the information required to calculate AD rates. In the present case, MOFCOM pursued a multi-faceted notification approach that *did* provide the required opportunity. China believes it is reasonable, in the circumstances of this case, to conclude that any other unknown U.S. producers and exporters knew of MOFCOM's investigations, and could have registered and obtained the full questionnaires. Indeed, the Appellate Body in *Mexico – Rice* emphasized that, what is reasonable to expect of an investigating authority, as far as notification of foreign producers and exporters is concerned, "will depend on the circumstances of each case."

21. As for MOFCOM's disclosure of its all others rate methodologies under Article 6.9 of the AD Agreement and Article 12.8 of the SCM Agreement, the United States is attempting to stretch the obligations to mandate a breadth and depth of disclosure that is not required. MOFCOM fully disclosed the facts underlying its determination that unknown U.S. producers and exporters refused to participate in the investigations, including its finding that unknown producers and exporters were aware of MOFCOM's investigations, but decided not to participate anyway. There were no other facts that could have been disclosed.

22. With respect to MOFCOM's *choice* of rates, the United States' belief that MOFCOM should have disclosed the reasoning behind its 21.5% AD all others rate and 12.9% CVD all others rate must fail, because the requirement to disclose "essential facts" does not extend to the disclosure of reasoning. As for the claim that MOFCOM was required to disclose factual details underpinning the calculation of the all others rates, there was nothing more China could have disclosed. In the case of the AD all others rate, MOFCOM simply applied the rate alleged in the petition; in the case of the CVD all others rate, MOFCOM simply applied the highest calculated rate.

23. Finally, the United States challenges the adequacy of MOFCOM's determinations for purposes of AD Agreement Articles 12.2 and 12.2.2, and SCM Agreement Articles 22.3 and 22.5. Simply put, the legal and factual bases for MOFCOM's all others rates are clear and straightforward from the administrative record. Also, this case is fundamentally different from *China – GOES*. In that case, the question before the panel was how MOFCOM derived an AD all others rate that differed from any other alleged or calculated rate. In this case, there is no such question: It is clear that MOFCOM applied the alleged petition rate as the AD all others rate, and the highest calculated CVD rate as the CVD all others rate.

V. MOFCOM Properly Defined the Domestic Industry

24. As explained in its First Written Submission, China's definition of the domestic industry was consistent with the requirements of Article 4.1 of the AD Agreement and Article 16.1 of the SCM Agreement.

25. First, both the AD and SCM Agreements provide considerable discretion to investigating authorities in defining a domestic industry. The Agreements present an investigating authority with a choice to define a domestic industry as *all* producers of the domestic like product, or as those producers accounting for a "major proportion" of domestic production of the like product. Indeed, the United States does not appear to challenge China's choice to define the domestic industry in this case based on the "major proportion" option of the AD and SCM Agreements.

26. Second, the United States is wrong in claiming that MOFCOM categorically excluded joint ventures from its definition of the domestic industry. As China explained in its First Written Submission, MOFCOM provided public notices inviting *all* domestic producers to participate in its injury investigation. Also, MOFCOM's Final Determination made clear that it included information from *all* domestic producers that supplied injury data, and did not exclude joint ventures of foreign automobile companies and Chinese automobile enterprises.

27. Third, Table 1 of China's First Written Submission refutes the U.S. theory that MOFCOM excluded joint ventures from its definition of the domestic industry. Table 1 shows that during 2006 and Interim 2009, the total number of autos produced by those in the domestic industry who chose to participate in MOFCOM's investigation exceeded the number of autos produced during the same periods by the domestically owned Chinese producers. The included production volume demonstrates that MOFCOM included some production of joint ventures in its definition of the domestic industry.

28. Given the available data on the actual volume of production covered by MOFCOM's definition of the domestic industry, there is no need to evaluate the U.S. claim that market share data demonstrates MOFCOM's exclusion of joint venture production from the definition of the domestic like product. As explained in China's First Written Submission, market share data, under these circumstances, are a poor proxy for actual production data.

29. The AD and SCM Agreements do not define "major proportion." Therefore, as noted by the Appellate Body in *EC – Fasteners*, an investigating authority is granted some flexibility to adjust "major proportion" to what is reasonable.

30. Table 1 in China's First Written Submission sets forth the percentages of total domestic production captured in MOFCOM's definition of the domestic industry, for each year of the period of investigation. The percentages varied during this period, ranging from 54 percent in 2006 to 42 percent in Interim 2009. These percentages are comparable to those at issue in *Argentina – Poultry*, in which the panel agreed that the investigating authority had satisfied the "major proportion" test. In the absence of any specific quantitative threshold, and because MOFCOM included all data supplied by domestic producers, MOFCOM has satisfied the "major proportion" test in this case.

31. Finally, the United States relies on the Appellate Body in *EC – Fasteners* to read a freestanding distortion test into Article 4.1 of the AD Agreement and Article 16.1 of the SCM Agreement. However, the AD and SCM Agreements contain no freestanding distortion test.

Additionally, *EC – Fasteners* is not directly analogous for several reasons. For one, in that case the EU engaged in what the Appellate Body described as a "self-selection process," affirmatively excluding several domestic producers that had supplied production information. Also, the EU erroneously related its definition of the domestic industry to the 25 percent standing threshold, artificially suppressing the volume of domestic production incorporated into its definition of the domestic industry. MOFCOM did not do this here.

VI. MOFCOM's Price Effects Analysis was Consistent with WTO Obligations

32. Next, the United States claims that MOFCOM's price effects analysis was not consistent with Articles 3.1 and 3.2 of the AD Agreement, and Articles 15.1 and 15.2 of the SCM Agreement. While the United States seems to assert that there is only one way to conduct a price effects analysis, and because China did not follow this method, its findings are wrong. However, the relevant Articles provide discretion to investigating authorities, so long as they undertake an objective examination based on positive evidence. Such discretion is appropriate because, by its very nature, a price effects analysis is highly fact-specific and dependent on the particular circumstances of each case.

33. Moreover, unlike the circumstances in *China – GOES* and *China – X-Ray Equipment*, MOFCOM did not make a price undercutting finding. This is important because in a price undercutting analysis, a comparison of absolute price levels is more critical to the ultimate finding as to whether the subject imports were priced above or below the price for the domestic like product. Thus, in a price undercutting analysis, adjustments to absolute price levels might be necessary in some circumstances. In contrast, MOFCOM made a finding of price depression in this case. In a price depression analysis, an investigating authority is determining whether prices for the subject imports push down in relative terms prices for the domestic like product, examining price trends over time rather than comparing absolute price levels. For these reasons, adjustments to price to ensure comparability are not needed to the extent required in an undercutting analysis.

A. MOFCOM Was Not Required To Make a Finding of Price Undercutting

34. In this case, MOFCOM did not make a price undercutting finding, and the United States does not claim that MOFCOM did. Much of the U.S. argument rests on its mistaken assumption that a finding of price undercutting must be made to support an adverse price effects analysis. However, Articles 3.2 of the AD Agreement and 15.2 of the SCM Agreement allow a Member to base an adverse price effects finding on price undercutting "or" price depression "or" price suppression. The text thus makes clear that any one of these three possible findings is sufficient to support an adverse price effects finding. As the Final Determination clearly demonstrates, MOFCOM found price depression in this case.

B. MOFCOM's Finding of Parallel Price Trends Was Supported by the Record

35. The United States claims that MOFCOM's finding of parallel pricing was based on an analysis of comparable price levels only in interim 2009, rather than over the entire period of investigation. MOFCOM's Final Determination, however, shows a clear relationship between prices for subject imports and domestic like products throughout the full period of investigation. As the Final Determination explains, prices for subject imports and domestic like products increased substantially from 2006 through 2008, but then fell in tandem in interim 2009 relative to prices in interim 2008, showing parallel movements. The existence of parallel pricing helped to confirm that the declining prices for subject imports acted to depress prices for the domestic like product. The Appellate Body in *China – GOES* has confirmed that parallel price trends can support a price depression analysis.

36. Finally, the United States relies on the fact that from 2006 to 2007, the price of subject imports decreased by about eight percent, but prices for the domestic like product increased. But the United States fails to account for the fact that the period 2006 through 2007 was when subject import volumes skyrocketed, and domestic producers lost significant market share. While the United States is correct that prices did not move in parallel in this isolated one year time period, the fact that domestic producers in 2007 lost massive market share to subject imports when domestic producers' prices went up, demonstrates the debilitating competition they faced with unfairly priced subject imports.

C. MOFCOM Reasonably Used Average Prices

37. When conducting its adverse price effects analysis, MOFCOM used average prices. The United States argues that MOFCOM should have used some unidentified assortment of individual models when conducting its price analysis. However, Articles 3.2 of the AD Agreement and 15.2 of

the SCM Agreement do not require an investigating authority to use model or category-specific prices when conducting a price effects analysis. Indeed, they require no specific methodology at all, but rather leave that to the discretion of the investigating authority based on the particular facts of each case.

38. The U.S. reliance on the decisions in *China – GOES* is misplaced. As explained above, the panel and Appellate Body in that case were looking at the use of average prices in the context of price *undercutting*, not price depression. This same reasoning distinguishes the more recent panel decision in *X-Ray Equipment*.

39. In addition, the use of averages has some advantages because it allows MOFCOM and other investigating authorities to examine prices for all sales, not just some sales. Here the fact that there is no evidence that the product mix changed over time further supports the use of average prices when looking at relative price trends. Also, MOFCOM did not exclude any of the pricing data it received, nor did it manipulate the data in any way. MOFCOM used the same methodology for examining both domestic and import prices, and was thus even-handed and objective when analyzing price trends.

40. The United States relies entirely on a single chart submitted by one U.S. respondent. As discussed further below, however, MOFCOM examined the issue of competitive overlap between subject imports and the domestic like product in detail, and concluded that there was meaningful competitive overlap and substitutability, further justifying the use of average prices here when making a price depression finding.

D. MOFCOM Appropriately Considered the Fact That the Market Share for the Domestic Like Product Increased In Interim 2009

41. The United States also claims that MOFCOM's price depression finding is contradicted by the fact that the market share of domestic like products increased from interim 2008 to interim 2009, at the same time that the market share of subject imports also increased. The United States seems to rely on the fact that third-country imports lost market share in interim 2009 from interim 2008 levels. However, over the entire period of investigation, the market share for imports from third countries was relatively stable, while the market share of subject imports increased by about 3.5 percent. Moreover, over the entire period of investigation, the market share of the domestic industry decreased while the market share of subject imports increased significantly. The domestic producers were only able to increase market share in interim 2009 to the extent that they were forced by subject imports to decrease prices in order to try to gain back lost market share.

VII. MOFCOM Sufficiently Established a Causal Link Between Subject Imports and Material Injury To The Domestic Industry

42. To support its claim that MOFCOM's causation analysis was not consistent with Articles 3.1 and 3.5 of the AD Agreement, and Articles 15.1 and 15.5 of the SCM Agreement, the United States picks certain isolated factors, and argues that MOFCOM's failure to consider them renders its causation analysis invalid. Thus, the United States seems to argue that if it can show any other factor that might have contributed in some way to the material injury suffered by the domestic industry, MOFCOM's causation analysis must fail. However, it is clear under the applicable text that subject imports need only be a cause, not the sole cause, of material injury, in order to satisfy Articles 3.5 and 15.5. The Appellate Body has also stated that an investigating authority need only to show that subject imports contributed in some manner, even though other factors also contribute to the situation of the domestic industry.

43. Here, MOFCOM thoroughly reviewed the record and reached its causation determination on the basis of positive evidence. The Final Determination spends 25 pages discussing the causal link between subject imports and the material injury suffered by the domestic industry. MOFCOM found that the volume of subject imports increased dramatically and prices declined, resulting in depressed prices for the domestic like products. Also, prices for subject imports and the domestic like product exhibited similar trends, and were consistent from 2006 to 2008 in general, and both decreased in interim 2009 from interim 2008 levels. While it is true that apparent consumption in the domestic market declined in interim 2009, the domestic industry's production and sales did not suffer proportionately. MOFCOM also carefully examined the role of other factors that might have contributed to injury. MOFCOM's thorough review of the causal link more than satisfies the standards under the relevant AD and SCM Agreement articles.

A. MOFCOM Appropriately Accounted For the Role of Third Country Imports

44. The United States argues that MOFCOM "failed to take into account" the fact that in a single isolated time period during the period of investigation – interim 2009 – the market share of the domestic like product increased at the same time that the market share of subject imports increased. The United States implies that subject imports took market share only at the expense of third country imports, and that MOFCOM "failed to address" the role of third country imports. The record shows, however, that MOFCOM fully examined and addressed this issue. MOFCOM examined data for imports from all sources and noted that the volume of third country imports decreased sharply by 32 percent in interim 2009, and that "imports from other countries (regions) do not affect the finding of the causal link in this case." Over the entire period of investigation, the record shows that the market share for third country imports was relatively stable, decreasing by less than one percent. In contrast, the market share of subject imports increased by about 3.5 percent.

B. MOFCOM Accounted For the Drop in Labor Productivity

45. The United States focuses on the fact that labor productivity declined to conclude that MOFCOM failed to account for the drop in labor productivity, despite the fact that MOFCOM examine 16 different indicia of the financial industry's health and performance over the period of investigation. An investigating authority is not required to examine in depth every possible issue. The U.S. argument ignores the fact that the Chinese industry has low labor costs, and therefore the decline in labor productivity in the Chinese industry is not a key indicia of the health of the industry or a significant factor in a causation analysis in these circumstances. Furthermore, the fact that no party raised this issue before MOFCOM during the course of investigation indicates that this is not a critical issue.

C. MOFCOM Reasonably Examined the Degree of Competitive Overlap Between Subject Imports and the Domestic Like Product

46. The United States argues that MOFCOM failed to recognize the alleged lack of competition between subject imports and the domestic like product. However, MOFCOM's Final Determination specifically examined the degree of competitive overlap, making it clear that the investigating authority conducted a comprehensive investigation of the product under review, considered various physical and market-related factors, and determined that the products were competitive.

47. The United States alleges that MOFCOM failed to address Table 6, which was submitted by Chrysler showing sales in four alleged categories of vehicles. The Final Determination, however, examines the contents of the chart and explains why the chart does not contradict MOFCOM's determination that products of the domestic industry and the product under investigation compete with each other.

48. In addition, the record shows that Chrysler's Table 6 is not reliable on its face. First, the four categories of vehicles it uses – "entry, mid, luxury, premium" – are nowhere defined. It is not clear if those categories relate to the size of the vehicle, their prices, consumer perceptions, or something else. Second, the data in Table 6 are incomplete. For example, the total volume of subject imports shown in Chrysler's Table 6 for each year is far less than the actual volume of subject imports shown in the Final Determination. Third, the record shows there are no dividing lines between these alleged categories. With respect to price, for example, the four categories identified in the Chrysler Table do not correspond strictly with discrete price segments.

49. In addition, even to the extent it can be relied upon, the Chrysler Table shows direct competition in 3 of the 4 product categories it identified, which on its face represents significant competitive overlap. There is no requirement that there be perfect, 100 percent overlap in light of MOFCOM's findings that subject imports are competitive with and substitutable for the domestic like product.

50. Moreover, the United States argues that the fact that subject imports oversold the domestic like product for part of the period of investigation undercuts MOFCOM's conclusion that subject imports and the domestic producers competed with each other. Again, the United States here seems to rely on the premise that a causation finding cannot be made in the absence of price undercutting. The fact that subject imports may have oversold the domestic like product for parts of the period of investigation does not mean that there was no competition between them. If that were true, then a causal link could not be found in any case where price undertaking was not present. Rapidly falling prices for subject imports can still depress or suppress prices for domestic

like products, and support an adverse price effects finding, even if those subject imports do not, over any given period of time, undersell the domestic like products.

51. Furthermore, the United States ignores the fact that in 2007, subject imports were priced lower than the domestic like product, which further supports MOFCOM's conclusion of competition between subject imports and the domestic like product.

D. MOFCOM Properly Accounted for the Decline in Apparent Consumption in Interim 2009

52. Again attempting to focus solely on isolated data point rather than examine the totality of MOFCOM's causation finding, the United States argues that MOFCOM "failed to take into account" the decline in apparent consumption in interim 2009. The U.S. claim is simply not correct, because MOFCOM in fact examined the role of the decline in consumption in interim 2009. The Final Determination beginning at page 138 addresses the decline in apparent consumption in interim 2009, and notes that "the domestic industry still kept increasing production and sales, as well as market share by improving production and operation levels and product competitiveness." Because the domestic industry was able to increase sales and production in interim 2009, it was insulated somewhat from the fall in apparent consumption over that period. The U.S. argument that MOFCOM "without explanation" rejected the fall in apparent consumption as a causal factor is therefore contradicted by the record.

E. MOFCOM Reasonably Addressed Other Possible Causes of Injury

53. Finally, the United States claims that MOFCOM failed to address other factors that "may" have caused injury, specifically, an increase in sales taxes on larger engine vehicles, and the impact of effective increases in average wages and employment, coupled with decreases in productivity. Both U.S. arguments should be dismissed. Concerning the sales tax issue, MOFCOM's Final Determination specifically explains that the respondent's argument raised in the underlying investigation was based on incorrect facts, because the domestic industry's production and sales in fact increased in interim 2009 from interim 2008. Regarding the impact of average wages and productivity, we noted above that labor costs are not a critical causal factor when examining the financial health of the domestic Chinese auto industry, and could not have been a likely cause of the decline in the domestic industry's pretax profits.

ANNEX C-3

CLOSING STATEMENT OF CHINA AT THE FIRST PANEL MEETING

1. Mr. Chairman and Members of the Panel, China would like to begin by thanking you and the Secretariat for the time and effort you are devoting to this proceeding. We hope that the discussion held during this hearing has assisted the Panel in enhancing its understanding of the claims raised by the United States, and China's response to those claims.

2. At this time, we would simply like to offer four brief observations regarding how the U.S. case has evolved during this proceeding so far.

3. First, we note with particular interest that the United States has shifted some of its arguments before the Panel. For example, in its First Written Submission, the United States focused on MOFCOM's supposed exclusion of joint ventures. Now, during the hearing, the United States appears to concede that MOFCOM did not exclude them. In addition, the United States previously argued that the petition failed to include any meaningful public summaries, but the United States now seems to argue that public summaries have been provided, but allegedly are insufficient. All of this shifting of arguments suggests that the United States may in fact be overreaching in its claims against China.

4. Second, the United States appears to rely heavily on the overly simplistic argument that the present case is the same as *China – GOES*. However, as the Panel now can see, that case differs in many fundamental respects from the present case. Concerning the adequacy of non-confidential summaries, for instance, the summaries at issue in this case are far more detailed than those in the *GOES* case. The non-confidential summaries in this case include text, trend lines, percentage changes, and related information, all of which provide more details than in *GOES*.

5. Also, this case presents different facts than *GOES* on the issue of facts available as the basis for all others rates. For example, in this case there is no question about the origin or derivation of the AD and CVD all others rates; the public notices of MOFCOM make perfectly clear how MOFCOM derived these rates. Further, as we discussed yesterday, the *GOES* panel did not expressly consider MOFCOM's logic and analysis in finding that the unknown U.S. exporters had determined not to participate in MOFCOM's investigations.

6. Moreover, the *GOES* panel found that adjustments were needed to ensure price comparability, but *only* in the context of a price undercutting analysis where prices are being compared. But in the present case, MOFCOM did not compare prices and did *not* make a price undercutting finding.

7. China's third observation concerns the U.S. claim under Article 6.9 of the AD Agreement. In its First Written Submission, the United States simply asserts that China violated this provision. Yet at the same time, the United States has not presented supporting documents to the Panel. As such, the United States has not met its initial burden of proof. The United States, as the complainant, must first make out a *prima facie* case by not just making the legal argument, but also by providing relevant evidence to support its arguments. Without doing so, the burden cannot shift to China.

8. China's final observation from this first hearing concerns the continuing U.S. argument that MOFCOM's notification of U.S. exporters and producers was inadequate. The record shows that MOFCOM engaged in a multi-pronged notification effort that included posting the registration notice on its website and requesting the U.S. government to provide the notice to all U.S. exporters and importers. The fact that four additional companies beyond those named in the petition registered for participation shows that the notification was effective. MOFCOM's notice also stated clearly that non-participation in the investigations could lead to the imposition of facts available, and thus, China satisfied its Article 6.8 notification obligation.

9. China would like to conclude by again thanking the Panel and the Secretariat for their attention and efforts during this hearing. We look forward to further clarifying the facts and issues for the Panel.

ANNEX C-4

EXECUTIVE SUMMARY OF THE SECOND WRITTEN SUBMISSION OF CHINA

I. INTRODUCTION

1. This dispute continues the overly broad attack by the United States on China's trade remedy procedures. Yet as China explained in its First Written Submission and during the First Substantive Meeting of the Parties, the aspects of MOFCOM's determinations before the Panel rest on a lawful and reasonable implementation of China's obligations under the AD and SCM Agreements.

II. ARGUMENTS

A. MOFCOM Appropriately Required Adequate Non-Confidential Summaries of Confidential Information

2. Article 31(1) of the Vienna Convention requires a provision to be interpreted "in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose." Therefore, when interpreting Article 6.5.1 of the AD Agreement and Article 12.4.1 of the SCM Agreement, the term "substance" in setting the public disclosure standard must be given due meaning. As the "substance" of the non-confidential summaries at issue concerns certain aspects of the petition's claims concerning injury, the substantive obligations concerning injury set out in Articles 3.4 of the AD Agreement and 15.4 of the SCM Agreement provides context. Article 3.4 requires an investigating authority to determine injury through an evaluation of all relevant economic factors and indexes that have a bearing on the industry, including actual or potential *declines* in certain specified injury factors, and actual or potential *negative effects* on certain other listed factors. Thus, the "substance" that must be ascertainable to the parties upon review of the non-confidential summaries in this case pertains to the *trends* of the specified injury factors and the relationship between subject imports and the domestic like product over time, rather than the absolute numbers themselves.

3. The United States argues that the trend lines provided in the petition do not provide an adequate summary because they are not to scale. The United States overlooks the fact, however, that for the vast bulk of the non-confidential summaries at issue, percentage changes are also provided, which give further detail and context for the non-confidential summaries at issue.

4. The United States also argues that the applicant could summarize absolute figures without disclosing confidential information by reporting the absolute figure as an average. The United States is in effect is arguing that the provision of "average" ranged figures is the only way to provide a non-confidential summary that would satisfy the requirements of Article 6.5.1. However, the text of the Article does not require any specific type or format for non-confidential summaries to be provided. Rather, Article 6.5.1 requires only that such summaries "be in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence." As discussed above, the "substance" of the confidential information at issue here relates to the trends in the relevant injury criteria discussed in the petition, in accordance with the context established by Article 3.4 of the AD Agreement. In such a trends-focused analysis, the percentage changes provided in the petition, coupled with trend lines over time, provide an adequate understanding of the substance of the information at issue. Additionally, each of the tables that the United States references relate to annual aggregate data concerning injury, the confidential treatment of which the United States has not challenged. Therefore, the United States is in effect arguing that the very information treated as confidential should have been disclosed, a circular argument that the *China – GOES* panel has previously found "not convincing."

5. Moreover, the U.S. argument that the petitioner in the present case never asserted that summarization was not possible or otherwise justified the absence of meaningful non-confidential summaries is beside the point. Petitioner never asserted that public summarization was not possible here for the simple fact that petitioner provided adequate non-confidential summaries.

B. The United States Has Failed to Establish a *Prima Facie* Case with Respect to its Claim that MOFCOM Did Not Disclose the Essential Facts Underlying its Dumping Margin Calculation

6. For reasons set forth in China's First Written Submission and its Opening Statement at the First Substantive Meeting of the Panel, the United States has failed to discharge its burden with respect to its claim under Article 6.9. The United States has provided no new evidence that would shift the burden to China as the respondent. Rather, in its response to the Panel's first set of questions, the United States argues that it can base its claim on just those documents "in its possession," implying that China, despite being the respondent, must supply the evidence for the United States to prove its case. The U.S. argument is without merit.

7. First, to make out a *prima facie* case, the complaining party must provide *both* adequate evidence and legal argument tying the alleged facts to a legal claim. As explained by the Appellate Body in *US – Gambling*, "{a} *prima facie* 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." The burden shifts to the responding party *only* if the complaining party adduces evidence sufficient to raise a presumption that what is claimed is true. Thus the burden cannot shift to the responding party where, as here, the United States has provided no evidence that would permit the Panel to adjudicate its claim of supposed deficiencies in MOFCOM's pre-final determination letters to the six U.S. exporters and producers for which it reached company-specific dumping determinations.

8. Second, the United States cannot establish a *prima facie* case by pointing to documents *other* than the pre-final determination disclosure letters to the six U.S. exporters and producers. As China explained, a legitimate *prima facie* case must tie alleged facts to the specific legal claim at issue. The U.S. references to unrelated documents that do not purport to be MOFCOM's pre-final determination disclosure letters are no substitute for evidence that is only contained in the disclosure letters to the U.S. exporters and producers.

9. Third, the U.S. comment that the disclosure letter provided by MOFCOM to the U.S. government did not provide the detail necessary for it to understand MOFCOM's dumping margin calculations misses the mark. The United States appears to imply that MOFCOM was required under Article 6.9 to provide to the U.S. government the same type of detailed disclosure of dumping margin calculations and analysis as provided to the individual company respondents, notwithstanding the inclusion of business confidential information ("BCI") in the disclosure letters to the individual respondents. Because MOFCOM calculated dumping margins based on company-specific BCI, the U.S. government could not reasonably expect that *it*, as a different interested party not authorized to receive this BCI, would receive the same level of disclosure.

C. MOFCOM Properly Resorted to Facts Available to Determine the AD and CVD All Others Rates, and Adequately Explained its Determinations

10. In its First Written Submission and in its arguments before the Panel during the First Substantive Meeting, the United States relied heavily on the panel report in *China – GOES*, claiming that this Panel should reach the "same" decision as that earlier panel. In *China – GOES*, however, the panel noted that it was unclear from the record how MOFCOM had determined the all others rate. No such question of clarity exists in this case; MOFCOM based the AD all others rate on the alleged rate of dumping provided in the petition, as explained in its Final Determination. The petitioner's basis for the all others rate is clearly laid out in the public version of the petition. The CVD all others rate was based on the highest calculated rate, i.e., the rate of subsidization determined for General Motors, as explained in detail in MOFCOM's pre-final determination disclosure letter to the U.S. government. Further, China submits that, in the absence of direct guidance in the AD and SCM Agreements, MOFCOM's administrative process – which first requires interested party registration and then proceeds with more detailed information requests – reasonably ensures an orderly investigation process that complies with the AD and SCM Agreements.

11. The United States has continued to insist that MOFCOM failed to provide adequate notice to those exporters and producers subject to the AD and CVD all others rates under Article 6.8 of the AD Agreement and Article 12.7 of the SCM Agreement. China reiterates that it took multiple steps to attempt to ensure that all exporters and producers of the subject merchandise were aware of

MOFCOM's AD/CVD investigations, as well as of the possibility that non-cooperation could result in the application of the facts available. Specifically, MOFCOM (i) posted its initiation notices on its website and placed them in its public reading room; (ii) requested the U.S. government to inform all U.S. producers and exporters of its investigations; and (iii) sent its questionnaires to all U.S. producers and exporters identified in the petition, as well as to a number of additional U.S. companies that voluntarily registered for participation in the investigations. These steps constituted a reasonable and comprehensive notification effort that made clear to potential exporters and producers that they faced the application of facts available should they choose not to cooperate with MOFCOM. China also rejects the reliance of the United States on the Appellate Body decision on *Mexico – Rice*, because in that case, there was no indication that the investigating authority warned interested parties that the investigating authority would apply facts available in the absence of participation in the investigation. In this case, MOFCOM provided the required notification to all potential exporters and producers of the consequences of non-cooperation with MOFCOM's investigations.

12. Furthermore, China respectfully suggests that, for purposes of the establishment of AD and CVD all others rates in circumstances like those presented by this case, it does not matter if the unknown exporters and producers do not exist or have chosen not to make themselves known. As a practical matter, an investigating authority may not be able to determine the basis for the non-responsiveness of unknown exporters and producers. China therefore does not believe that the Panel should adopt a new test in which investigating authorities are asked to do what may be impossible – i.e., determine whether unknown exporters do not exist or have simply chosen not to cooperate.

13. According to the United States, a purportedly WTO-consistent methodology for the calculation of AD and CVD all others rates may be to base such rates on simple or weighted averages of the rates determined for individually investigated companies. While the United States does not refer to any provision of the AD and SCM Agreements in making this suggestion, China understands that the United States is referring to Article 9.4 of the AD Agreement. However, the argument implied by the United States as to the applicability of Article 9.4 fails as a matter of law and policy.

14. Article 9.4 of the AD Agreement only applies when the investigating authority has limited the number of exporters and producers under investigation under the second sentence of Article 6.10. It does not apply to circumstances where, as here, the investigating authority investigated all exporters and producers of the subject merchandise that registered for participation in the AD/CVD investigations, under the preferred approach of Article 6.10. This corresponds with the objective of Article 9.4, which is to prevent prejudice against cooperative exporters not included by the investigating authority in its investigation. The method of calculating AD and CVD all others rates based on averages as suggested by the United States, on the other hand, would provide no inducement to non-cooperating exporters and producers to provide information to the investigating authority. In the event such a policy were to be applied, such exporters and producers would know that they would obtain rates as favorable as the average of the rates applied to those exporters and producers expending time and effort to cooperate with the investigating authority.

15. The United States further argues that MOFCOM did not explain why non-investigated exporters and producers should be subject to rates based on facts available; did not explain how non-exporting companies could refuse to provide necessary information; and did not explain why the facts available applied were appropriate under AD Agreement Articles 12.2 and 12.2.2 and SCM Agreement Articles 22.3 and 22.5. As an initial matter, China emphasizes that, in addressing this issue, any comparison with *China – GOES* is unwarranted. As noted above, a key question before the panel in *China – GOES* was how MOFCOM had derived an all others rate that differed from the rates determined for individual exporters and producers. In this case, there is no analogous question.

16. MOFCOM fully laid out its rationale for applying the all others rates to non-investigated U.S. exporters and producers based on facts available – i.e., having been notified of the investigations and given the opportunity to register for participation, MOFCOM determined that any U.S. exporters and producers that remained unknown had determined not to cooperate with MOFCOM's AD/CVD investigations. MOFCOM's logic in this respect was straightforward and reasonable, and there is no other analysis or rationale that MOFCOM could have further provided. The same

rationale applies with respect to the U.S. claim that MOFCOM did not explain how non-exporting companies could refuse to provide necessary information. Each step in MOFCOM's analysis is laid out in the Final Determination.

17. Concerning MOFCOM's selection of the all others rates, all findings and conclusions, as well as supporting relevant information, are readily apparent from the record. As MOFCOM first explained in the Preliminary Determination, it derived the AD all others rate directly from the rate alleged in the petition, and applied the all others rate from the highest calculated subsidy rate as the CVD all others rate. It affirmed both of these choices in the Final Determination.

18. China also emphasizes that the Articles 6.9 and 12.7 disclosure requirements apply only to certain *facts*, and do not extend to *reasoning*. These Articles thus do not obligate China to disclose its rationale for the selection of the all others rates, but only the essential facts underlying its choice of rates. The Articles 6.9 and 12.7 disclosure requirements similarly do not encompass *calculations*, which are a form of interpretation or assessment of facts.

D. MOFCOM's Definition of the Domestic Industry Is in Accordance with the AD and SCM Agreements

19. As an initial matter, the U.S. approach to its claim under Articles 3.1 and 4.1 of the AD Agreement and Articles 15.1 and 16.1 of the SCM Agreement has evolved considerably over the course of this proceeding. Most notably, the United States, having originally focused on MOFCOM's supposed exclusion of joint ventures from its definition of the domestic industry, now accepts (correctly) that MOFCOM did not exclude them. The United States has now shifted its focus to alleged distortion of MOFCOM's domestic industry definition pursuant to the Appellate Body's decision in *EC – Fasteners (China)*, and a new claim that the percentage of domestic production included in the domestic industry definition is, standing alone, too small to qualify as a "major proportion."

20. As China has explained, CAAM's membership is broad, encompassing all active domestic producers during the period of investigation, and thus including both joint ventures and domestically owned companies. MOFCOM included in its definition of the domestic industry and in its injury analysis all data provided by this group of eight domestic producers. Accordingly, MOFCOM's definition of the domestic industry is broadly representative of Chinese production of the domestic like product. Further, MOFCOM did not, as the United States alleges, limit its definition of the domestic industry to only those domestic producers that supported the petition. Rather, MOFCOM simply included data for all domestic producers that chose to participate, regardless of their position with respect to the petition. While China acknowledges that certain domestic producers did not register for participation in MOFCOM's injury investigation, MOFCOM did nothing to preclude that possibility.

21. The United States asserts that the Appellate Body's decision in *EC – Fasteners (China)* compels a finding of distortion in this case. However, the two cases differ in key respects, and no finding of distortion is warranted in this dispute. First, in *EC – Fasteners (China)*, the investigating authority affirmatively excluded from its definition of the domestic industry 25 out of 70 domestic producers that had supplied some initial information to the investigating authority. MOFCOM engaged in no such self-selection process, but rather incorporated into its injury analysis data from all those domestic producers that registered for participation in the investigation. Second, the Appellate Body in *EC – Fasteners (China)* found that the 25% domestic industry coverage benchmark applied by the investigating authority to determine a "major proportion" reduced the data coverage of the injury analysis and introduced a material risk of distortion. MOFCOM applied no such limiting benchmark in this case.

22. The United States argued for the first time at the First Substantive Meeting of the Panel that the percentage of domestic production included in MOFCOM's definition of the domestic industry is too low on its face. This new U.S. argument fails for several reasons. First, the AD and SCM Agreements nowhere define a specific quantitative threshold required to satisfy the "major proportion" test of Article 4.1 of the AD Agreement and Article 16.1 of the SCM Agreement. Second, MOFCOM's inclusion of data from all domestic producers that decided to participate in the injury investigation permits the Panel to conclude that MOFCOM's definition of the domestic industry constitutes a substantial reflection of total domestic production. Third, even though Article 4.1 of the AD Agreement and Article 16.1 of the SCM Agreement do not require an

investigating authority to identify specific "practical constraints" on its ability to obtain information from more domestic producers as the United States suggests, MOFCOM nonetheless *did* face the real constraint that it could not compel additional domestic producers to participate in the injury investigation, and took action to facilitate participation by additional domestic producers in the injury investigation. Finally, MOFCOM's registration process does not create a disincentive for domestic producers to participate in its injury investigation, as the United States contends. For one, MOFCOM's registration process is designed to ensure an orderly investigation process in which MOFCOM may quickly establish the pool of interested parties intending to supply information. Further, the injury registration notice that China supplied with its First Written Submission is a straightforward and relatively short questionnaire that cannot be described as burdensome.

E. MOFCOM's Price Effects Analysis Is Consistent with China's WTO Obligations

23. MOFCOM's finding of price depression in the present case was fully supported by record evidence and consistent with MOFCOM's obligations under Articles 3.1 and 3.2 of the AD Agreement, and Articles 15.1 and 15.2 of the SCM Agreement. MOFCOM's Final and Preliminary Determinations specifically linked the price depression it found to subject imports, under the section entitled "Price Effect of the Product Under Investigation on Prices of Chinese Like Product." The Final Determination found that the movement of price trends of the subject imports and domestic like product are consistent basically, and concluded that the increase in import volume and market share of the subject imports and the decrease of import price of subject imports in interim 2009 depressed the price of the domestic like product. The Final Determination also found that the price depression of domestic like products caused by increased import volume and market share of subject imports caused decreases in several indexes, including the sales price, the increase margin of the sales revenue, the pre-tax profit, and the return on investment of domestic like products. MOFCOM's Final Determination also discusses that MOFCOM found parallel trends between prices for subject imports and domestic like product, a dramatic increase in the volume of subject imports, and competitive overlap between the subject imports and the domestic like product, which further supported its price depression finding.

24. The fact that subject imports might have oversold the domestic like product at certain times during the POI does not undermine MOFCOM's finding of price depression. First, the U.S. claim that MOFCOM failed to address evidence that subject imports oversold the domestic like product is contradicted by the text of MOFCOM's Final Determination. The Final Determination specifically addresses this argument, and concludes that "{p}rice depression and price suppression do not require that the import price of the product under investigation be lower than the price of the domestic like product. The evidence indicates that since 2009, the decrease of the import price of the product under investigation depressed the price of the domestic like product." Second, price depression or suppression can occur without price undercutting being present. Competition with imports can depress or suppress prices for domestic like products, even if those imports are priced higher at any single point in time than prices for the domestic like product. Finally, the text of Articles 3.2 and 15.2 authorize Members to find adverse price effects upon the basis of price depression "or" price suppression "or" price undercutting, confirming that a Member can find price depression or suppression without price undercutting being present.

25. The existence of parallel price trends over the entire period of investigation supports MOFCOM's finding of price depression. While the United States focuses on price trends in 2007 to argue that MOFCOM's finding of parallel price trends "is belied by the relevant data," MOFCOM took into consideration price trends observed in the 2006-2007 time period in reaching its conclusion that "the movement of price trends of the product under investigation and domestic like product are *consistent basically*. Both of them increased *in general* from 2006 to 2008, and decreased in the first three quarters of 2009." The 2007 period is also when the volumes of subject imports skyrocketed, and when the domestic producers lost massive market share. The domestic industry was forced to fight back against the increase in market share of subject imports by decreasing prices at the expense of profits. As a result, the domestic industry's financial indicators were depressed, and hence injury was reflected in the financial indicators rather than in the production or market share of the domestic producers.

26. The massive increase in the volume of subject imports during the period of investigation, and especially in interim 2009, further supports MOFCOM's price depression finding. In the Final Determination, MOFCOM found that the significant increase in market share of the subject imports,

especially at the end of the POI, depressed the price of the domestic like product. While the United States focuses solely on interim 2009 to argue that the Final Determination failed to take into account an increase in market share of the domestic like product during a single period of the POI, the market share of domestic like products decreased from 18 percent at the start of the period of investigation to about 14 percent at the end. In contrast, the market share for subject imports increased substantially, from about 9.9 percent at the start of the period of investigation to about 13.4 percent at the end. The Final Determination also notes the important interaction between the volume effects and price effects of competition with subject imports, explaining that "{i}n interim 2009, the domestic industry was able to gain back some market share, but only at the price of further reductions to price as a result of competition from the massively rising volume of subject imports. And even so, the domestic producers still did not come close to gaining back the market share that they had held in 2006 at the start of the period of investigation."

27. In addition, it is not correct that subject imports only took market share from non-subject imports during the POI. The market share for imports from third countries remained relatively stable during the POI while the market share of subject imports increased by about 3.5 percent. Moreover, the United States is incorrect that subject imports took market share from Chinese producers not included in MOFCOM's definition of domestic industry, as the market share for Chinese producers not included in MOFCOM's definition of the domestic industry remained stable from interim 2008 to interim 2009, and in fact increased slightly over the entire period of investigation.

28. Similarly, the U.S. argument that the increases in the volume of subject imports in the 2006-2008 period "were commensurate with rising consumption of the subject merchandise in the Chinese market" also fails, because over the entire period of investigation, the massive increase in the volume of subject imports outstripped the rise in apparent consumption of the subject merchandise in the Chinese market. Further undercutting the U.S. argument that the volume of subject imports is linked to apparent consumption levels is the fact that in interim 2009 the volume of subject imports increased by 20 percent, even while apparent consumption declined significantly.

29. Furthermore, MOFCOM appropriately used average prices when examining price effects under Article 3.2 of the AD Agreement and 15.2 of the SCM Agreement. The U.S. argument that the panel and Appellate Body decisions in *China – GOES* requires MOFCOM to make adjustments to ensure comparability fails because the *China – GOES* decisions were expressly limited to instances when an investigating authority makes price comparisons in the context of a price undercutting analysis. In the present case, MOFCOM did not undertake a price undercutting analysis and did not compare prices. Rather, MOFCOM examined *relative* price movements of the domestic like product and subject imports over time in the course of conducting a price *depression* analysis. A comparison of absolute price levels is more central to the ultimate finding in a price undercutting analysis, because an investigating authority must determine and compare absolute price levels before making an undercutting finding. In contrast, a price depression finding relies instead on an analysis of *relative* price trends and movements over time rather than a comparison of *absolute* prices.

30. The United States argues that MOFCOM's use of average unit values was also inappropriate because MOFCOM should have made unspecified adjustments to ensure price comparability among the "varying grades of the automobiles MOFCOM was comparing." However, MOFCOM in its Final Determination thoroughly examined the issue of competitive overlap, including the arguments of the interested parties and the table supplied by Chrysler allegedly showing a lack of competition between subject imports and the domestic like product. MOFCOM concluded that the arguments by the exporters were not supported by the record and that "the product of the domestic industry and the product under investigation compete with each other." MOFCOM also investigated the extent of competitive overlap between the domestic like product by examining, *inter alia*, physical characteristics, use and sales channels, and prices and end users, and concluded that subject imports and the domestic like product compete with each other.

31. MOFCOM also addressed respondents' concern regarding competitive overlap in its Final Determination by adjusting the scope of the product under investigation and defining domestic like product based on the adjusted scope. The fact that some of the discussion of the significant similarity and competitive overlap between subject imports and the domestic like product took place in the context of MOFCOM's domestic like product determination does not undermine the

relevance of the information, as long as the discussion supports the factual conclusion that there was significant competitive overlap between subject imports and the domestic like product.

32. MOFCOM's Final Determination specifically took into account Chrysler's comments concerning the alleged lack of competition between subject imports and the domestic like product, including the table that Chrysler supplied, and found that Chrysler's arguments did not undermine its finding of competitive overlap between subject imports and the domestic like product. Moreover, the record evidence demonstrates that Chrysler's Table 6 is not reliable. For example, the four categories of vehicle it purports to use – "entry, mid, luxury, and premium" – are nowhere defined, and do not correspond strictly with discrete price segments. The data in Chrysler's Table 6 are also incomplete, as the total volume of subject imports shown in Chrysler's Table 6 for each year of the period of investigation is far less than the actual volume of subject imports shown in the Final Determination. Finally, even to the extent Chrysler's Table 6 can be relied upon, it still shows direct competition in three of the four product categories it identified, which represents significant competitive overlap.

F. MOFCOM Sufficiently Established A Causal Link Between Subject Imports and Material Injury To The Domestic Industry

33. MOFCOM's Final Determination thoroughly reviewed the record evidence and established a sufficient causal link between subject imports and the material injury suffered by the domestic industry, consistent with Articles 3.1, 3.4 and 3.5 of the AD Agreement, and 15.1, 15.4, and 15.5 of the SCM Agreement.

34. The United States argues that the significant increase in volume of subject imports over the POI is not relevant because, in interim 2009, subject imports took market share from Chinese products not included in MOFCOM's domestic industry definition and third-country imports. However, MOFCOM specifically examined statistical data for imports from all sources and concluded in the Final Determination that imports from other countries do not affect the finding of the causal link. MOFCOM's determination was based upon a review of the entire period of investigation, which showed that the market share of third country imports was relatively stable. In contrast, the market share of subject imports over the POI increased. In interim 2009, the volume of subject imports increased 20 percent at the same time prices declined significantly. In arguing that the market share of subject imports remained "relatively stable" in the 2006-2008 period, the United States fails to acknowledge that over that same time period, the domestic producers lost *massive* market share to the unfairly-priced flood of subject imports.

35. The argument advanced by the United States for the first time that MOFCOM failed to account for the role played by Chinese producers not included in its definition of the domestic industry is also without merit, as the record evidence shows that the market share held by Chinese producers not included in the definition of the domestic industry did not change significantly or in any meaningful way.

36. The United States also advances a speculative assertion concerning the role of the fall in apparent consumption in interim 2009, arguing that the domestic industry was forced to reduce prices when it found itself with excess production in interim 2009. However, the record contradicts the U.S. argument, which is apparently based on the premise that, in the Chinese domestic auto industry, production decisions are made independent of sales volumes. In fact, the Final Determination demonstrates that the "the sales model of Chinese like product is that the sales decides the production," demonstrating that production is a function of anticipated sales rather than the other way around, as the United States presumes.

37. Moreover, MOFCOM examined in detail the role of the decline in consumption in interim 2009, and found that in interim 2009, "although the apparent consumption of the domestic market decreased, the domestic industry still kept increasing production and sales, as well as the market share by improving production and operation levels and product competitiveness." Therefore, the Final Determination concluded that the change of the apparent consumption did not cause adverse impact on the domestic industry.

38. The United States continues to repeat its argument that a decline in the domestic labor productivity was a "likely culprit" that MOFCOM inappropriately ignored. However, labor costs are only a small portion of the total cost of producing a vehicle in China, and are not a meaningful

indicator when examining the causal link between subject imports and the material injury suffered by the domestic industry. In addition, the argument of the United States that the increase in labor costs eroded the profit of the domestic industry in interim 2009 by increasing overall costs is incorrect, because the increase in labor costs did not increase total per unit costs, which in fact *declined* in interim 2009 from interim 2008 levels. Also, while the United States argues that labor productivity is a "known factor" under Article 3.5 of the AD Agreement, prior panels have indicated that "known factors" include factors that are clearly raised before the investigating authority during the course of an AD investigation. No party raised the argument in the course of the underlying investigation in this case.

39. Finally, contrary to the U.S. argument that MOFCOM failed to address a respondent's allegation that a change in tax policy contributed to the material injury suffered by the domestic industry, MOFCOM reviewed the argument of the respondent and the response of the petitioner, and specifically concluded in the Final Determination that the respondent's argument was not consistent with the facts. The new assertion by the United States that MOFCOM should have responded to an argument that the respondents below did not even make—i.e., that tax increase may have contributed to the decline in domestic prices by making the vehicle less desirable to consumers—improperly imposes an obligation for the investigating authority to read the mind of respondents and to respond to arguments that are *different* than those that the respondent actually made.

III. CONCLUSION

40. For the reasons set forth in this submission, China respectfully requests that the Panel find that MOFCOM's determinations in the underlying investigations were fully consistent with China's WTO rights and obligations.

ANNEX C-5

EXECUTIVE SUMMARY OF THE OPENING STATEMENT OF CHINA
AT THE SECOND PANEL MEETING

I. Introduction

1. The United States notes that this is the third dispute settlement proceeding it has filed against AD/CVD measures imposed by China, as if that fact alone supports the validity of its claims before the Panel. However, the number of cases against China does not make the U.S. claims any more valid than the number of cases against the United States makes the claims against it any more persuasive. Rather, China submits that its AD/CVD procedures and findings in this case are lawful under the AD and SCM Agreements.

II. MOFCOM Appropriately Required Adequate Non-Confidential Summaries

2. Articles 6.5.1 of the AD Agreement and 12.4.1 of the SCM Agreement only require that a non-confidential summary be in "sufficient detail" to permit a "reasonable understanding" of the "substance" of the confidential information. The term "substance" is defined as "the essential nature or part of a thing." The "essential nature" can only be discerned by examining the purpose for which the confidential information is used in a particular case. Likewise, the terms "sufficient detail" and "reasonable understanding" cannot be determined in isolation pursuant to one independent, objective standard. Rather, they must be determined by looking at the *context* in which the confidential information at issue appears and the purpose for which that information is presented.

3. In this case, the petition focuses its injury allegations on the *trends* in the movement of various factors, rather than the absolute numbers themselves. Therefore, in the context of this case and the substantive obligations of Article 3, the "substance" at issue pertains to the movement, or trends, of certain factors, rather than the absolute numbers themselves. Because the current petition is based on a trends-focused injury analysis, the non-confidential summaries allow a reasonable understanding of the substance of those trends.

4. As for the discussion of sales to output ratio in Table 19, that table provides trend lines indicating the proportion of products sold by the domestic industry relative to production over time. This provides a reasonable understanding of the substance of the data, consistent with the petition's focus on a trends analysis. The trend line shows the ratio of sales to output increasing from 2006 to 2007, and decreasing generally from 2007 through the end of the period of investigation. Likewise, Table 27 provides a trend line showing movements in the return on investment over time, demonstrating that the return on investment dropped significantly after 2007. In addition, the vast bulk of the non-confidential summaries provide percentage changes, along with trend lines and additional text that give further detail and context for the non-confidential summaries at issue.

5. As such, the "substance" of the confidential information at issue in these tables relates to the trends in the relevant injury criteria, in accordance with Article 3.4 of the AD Agreement. While the United States complains of an absence of a scale for the trends provided in the public summaries, provision of a separate scale in addition to the percentage changes provided is not necessary where, as here, the focus of the underlying injury analysis is on the trends and the movement of the data rather than on the absolute values themselves.

6. The argument of the United States, that percentage changes are not sufficient because the petitioner could have instead provided an average of the aggregate figures themselves, is circular and should be rejected. Each of the tables at issue related to annual aggregate data concerning the domestic industry. Petitioner applied for, and MOFCOM granted, confidential treatment for that aggregate information. The United States has never challenged MOFCOM's decision to grant confidential treatment for the aggregate data. The United States cannot now challenge MOFCOM's provision of confidential treatment for that aggregate data by requiring petitioner to release it in the public version of the petition. The panel in *China - GOES* rejected this identical circular argument that the United States makes here.

7. Finally, no party objected to the adequacy of any of the non-confidential summaries during the underlying proceedings. China is not arguing, as the United States suggests, that an adequate public summary need only be provided if a party objects. Rather, China notes that it is relevant to the Panel's assessment that – as an evidentiary matter supporting China's conclusion – no party objected to the adequacy of the public summaries at issue.

III. The United States has Failed to Establish a Prima Facie Case with Respect to its Claim Under Article 6.9

8. The United States has not put forward any evidence in support of its claim that China failed to satisfy its obligation under Article 6.9 of the AD Agreement to disclose the "essential facts" underlying MOFCOM's dumping margin determinations. Thus, the United States has left the Panel with no basis to make any findings about the adequacy of MOFCOM's disclosures under Article 6.9.

9. The United States continues to argue that the Panel should rule in its favor because China failed to provide evidence showing that MOFCOM disclosed the essential facts of its dumping margin analysis. The United States bases its claim on the fact that none of the documents "before the Panel" demonstrate that MOFCOM disclosed the essential facts. However, the documents provided by the United States before the Panel do not include the confidential pre-final determination disclosure letters that MOFCOM provided to the respondents. As such, the U.S. theory of this issue seems to be that it is incumbent upon *China* to provide the evidence that counters the unsubstantiated U.S. claim. That is not how the burden of proof is allocated in WTO dispute settlement.

10. It is well-established that the complainant must first provide evidence in support of its claim. Indeed, a *prima facie* case must be based on *both* evidence and legal argument, not just the latter. Only when the complaining party "adduces evidence sufficient to raise a presumption that what is claimed is true…" does the burden shift to the respondent. When applying those rules here, the Panel must conclude that the United States has failed to make out a *prima facie* case under Article 6.9, and that the burden has not shifted to China. The United States has not explained, with reference to specific documents or facts, why MOFCOM's disclosure of essential facts to the company respondents was inadequate.

11. In addition, the United States is factually wrong in arguing that MOFCOM did not provide the required disclosure documents to interested parties. The Final Determination states clearly that MOFCOM issued a company-specific disclosure letter to each of the U.S. exporters and producers it investigated. The disclosure letters that MOFCOM provided to the U.S. exporters and producers contain business confidential information of those parties, and thus were not provided to the U.S. government. The disclosure letter that MOFCOM *did* provide to the U.S. government does not contain the business confidential information of the other parties, including the U.S. company respondents. Therefore, the U.S. government disclosure letter is irrelevant to the U.S. claim that the United States asserts here.

IV. MOFCOM's AD and CVD All Others Rates are Lawful

12. With regard to MOFCOM's determination of its AD and CVD all others rates, the U.S. claims rely extensively on the report of the panel in the *China - GOES* case. Since the last meeting before the Panel and the Parties' most recent written submissions, however, the decision of the *China - Broiler Products* panel has become available. While the *China - Broiler Products* and *China – GOES* panel both discussed at length the determination of MOFCOM's AD and CVD all others rates on similar facts, the *China - Broiler Products* panel came to different conclusions than the *China – GOES* panel.

13. The *China - GOES* panel based its decision on the all others rates in that case mainly on two factual findings. First, the *China – GOES* panel found that MOFCOM's notice of initiation did not specify all the information required for the AD and CVD investigations, and concluded that MOFCOM should have provided detailed notice of all required information before it could justify use of facts available.

14. The *China - Broiler Products* panel properly reached the opposite conclusion of the *China – GOES* panel on the same facts. The *China - Broiler Products* panel reasoned that the failure of an exporter to register and provide the initial information requested in MOFCOM's initiation notice, standing alone, meant that MOFCOM could not calculate a company-specific rate, and that

MOFCOM was justified in resorting to facts available to determine the applicable rate. The *China – GOES* panel's reasoning implies that an investigating authority must, before it can apply facts available, continue to request all information required for a full investigation from parties that have already signaled their intention not to cooperate with the authority. Such an approach is not supported by the AD and SCM Agreements and the jurisprudence, nor is it practically feasible or necessary for investigating authorities. It would be futile for an investigating authority to continue seeking information from a party that has decided not to cooperate with the first steps in the investigative process. Thus, China believes that this Panel should reach the same conclusion as the *China - Broiler Products* panel on this issue.

15. Second, the *China – GOES* panel relied on the fact that no other exporters existed beyond those identified by MOFCOM. On this basis, the panel rejected MOFCOM's resort to facts available for purposes of the all others rates, reasoning that non-existent exporters cannot refuse to cooperate with an investigating authority. Also, because the *China – GOES* panel found that no other exporters existed, it did not have to grapple with the practical problems that arise when an investigating authority does not or cannot know if other exporters exist. In this respect, the facts of the *China – GOES* case are different from those in the *China - Broiler Products* or the present cases. In the *China - Broiler Products* case, the United States never alleged that there were no other exporters beyond those known to MOFCOM. In this case, however the United States is again arguing that there were no exporters besides those known to MOFCOM. The United States, however, has pointed to no evidence from the investigation record before MOFCOM to support its argument. Indeed, in this case, MOFCOM never made any findings as to the existence or non-existence of other possible exporters and producers. Therefore, the second factual underpinning of the decision of the *China – GOES* panel was not present in the *China - Broiler Products* case, and is not present here.

16. The *China – GOES* and *China - Broiler Products* panels also differed sharply in their understanding of the panel and Appellate Body findings in the *Mexico – Rice* case. The *China - Broiler Products* panel identified a key factual difference between the actions of the investigating authority in *Mexico – Rice* and MOFCOM's method of notification, which it has consistently used in the recent cases we have been discussing. As the *China - Broiler Products* panel explained, there is no indication that the Mexican investigating authority warned interested parties that it would resort to facts available in case of failure to provide requested information. Here, as in the *China - Broiler Products* case, that message was perfectly clear in MOFCOM's notification. Similarly, the *China - Broiler Products* panel noted that MOFCOM made its initial request for information publicly available, such that interested parties unknown to the investigating authority could become aware of the request for information. There is no indication that the investigating authority in *Mexico – Rice* took this step. For these reasons, the U.S. reliance on the *China – GOES* panel's description of *Mexico – Rice* lacks merit.

17. The United States also complains that MOFCOM's multiple notification efforts in this case were inadequate to reach all possible U.S. exporters and producers. The United States appears to take the position that MOFCOM was required to individually notify each such company. Aside from being practically impossible, such an approach is not legally required. As the *China - Broiler Products* panel confirmed, international law recognizes that the accepted way to inform unknown interested parties in administrative proceedings is through public notices, including notices published in official gazettes or on the Internet. This recognition is embedded in the AD Agreement through the Article 12 requirement concerning the publication of preliminary and final determinations. The *China - Broiler Products* panel also agreed with China's position in this case that the Appellate Body in *Mexico – Rice* did *not* set forth a general rule requiring targeted requests for information to all individual exporters and producers. China further emphasizes the *China - Broiler Products* panel's conclusion that neither Article 6.8 of the AD Agreement nor Annex II specifies what form a request for information should take or how an authority is to communicate the request to interested parties.

18. An investigating authority determining individual AD/CVD rates for each exporter or producer cannot possibly know if it has identified all exporters and producers, regardless of what it tries to do. The *China - Broiler Products* panel recognized this inherent difficulty, finding that, in many investigations, an authority will be unable to satisfy itself that, even with best efforts, it has identified all exporters and producers. The United States maintains that MOFCOM should have undertaken some unspecified greater level of notification before resorting to facts available for the

determination of all others rates. China encourages the Panel to reject the U.S. argument on the same grounds as the *China - Broiler Products* panel.

19. The *China - Broiler Products* panel also explained that the U.S. position is problematic from a policy perspective, for two reasons. First, if an investigation authority were required to individually reach each unknown exporter or producer, it would be difficult, if not impossible, for the authority to determine appropriate AD/CVD rates for such entities. Second, the U.S. position could provide an incentive for unknown exporters and producers not to make themselves known, because they could avoid the application of AD/CVD measures through non-cooperation. The *China - Broiler Products* panel concluded that the Appellate Body report in *Mexico – Rice* did not require such results.

20. The United States also contends that MOFCOM's notification attempts were irrelevant because they could not have reached "unknown" U.S. exporters and producers. This U.S. argument fails on both legal and factual grounds. First, Article 6.8 of the AD Agreement and Article 12.7 of the SCM Agreement obligate investigating authorities to notify interested parties of the information required. Thus, the notification efforts of the investigating authority are indeed relevant. Second, MOFCOM's notification efforts were indeed relevant and effective because four U.S. exporters and producers not initially known to MOFCOM registered for participation in the investigation. This fact contradicts the U.S. claim that companies "unknown" to MOFCOM did not receive its notification.

21. The United States also argues that the application of the facts available all others AD rate to Ford is an example of why MOFCOM's approach produces unjustifiable results. However, the Ford situation provides no such example because MOFCOM did not apply facts available to Ford, as indicated in the Final Determination.

22. Furthermore, it should be noted that throughout this proceeding, the U.S. claims under Article 6.8 of the AD Agreement and Article 12.7 of the SCM Agreement have focused on whether MOFCOM satisfied the notification prerequisite to the application of facts available. The United States has not made any specific claim challenging MOFCOM's *choice* of facts available. In fact, the U.S. Request for the Establishment of a Panel is devoid of any claim based on paragraph 7 of Annex II, which provides guidance on the choice of facts available. MOFCOM's choice of facts available is therefore outside the terms of reference of this Panel.

23. Moreover, paragraph 6 of the Working Procedures for the Panel requires parties to submit a written submission presenting the facts of the case and its arguments prior to the first meeting with the Panel. The United States did not do so with respect to MOFCOM's choice of facts available in its First Written Submission, nor did it clearly articulate such a claim in its Second Written Submission. While the United States has referenced MOFCOM's choice of facts available in connection with certain procedural claims under other articles, those references do not substitute for a claim under AD Agreement Article 6.8 and Annex II, paragraph 7, and the equivalent provisions in the SCM Agreement.

24. China recognizes that the *China - Broiler Products* panel rejected China's argument that it should decline to rule on a U.S. claim concerning MOFCOM's choice of facts available because the United States articulated its claim too late in the proceeding. However, in *China - Broiler Products*, China did not make its argument concerning the absence of a U.S. claim regarding MOFCOM's choice of facts available until the interim review stage. In this case, China's argument that the United States did not make a proper claim regarding MOFCOM's choice of facts available is squarely before the Panel now. Further, China believes that it is even less clear in this case than it was in *China - Broiler Products* that the United States is specifically complaining about MOFCOM's choice of facts available. The U.S. written and oral submissions to the Panel nowhere clearly articulate such a claim. In China's view, this is not a proper claim on which the Panel can rule.

25. The United States also argues that MOFCOM did not live up to the disclosure obligations of Article 6.9 of the AD Agreement and Article 12.8 of the SCM Agreement. The U.S. argument is wrong for several reasons. First, the United States exaggerates the level and extent of disclosure required by these articles. These articles apply only to essential facts, and do not extend to the reasoning of the investigating authority. Second MOFCOM disclosed all pertinent facts leading to its selection and imposition of AD and CVD all others rates. There are no other salient facts that MOFCOM could have disclosed.

26. Moreover, the factual bases on which the *China – GOES* and *China - Broiler Products* panels ruled are not present in this case. In *China – GOES*, in the case of the AD investigation, the panel focused on the non-existence of other exporters and certain transactional data underlying the all others rate. For the CVD investigation, the *China – GOES* panel focused on the non-existence of other exporters. Similarly, the *China - Broiler Products* panel, in the case of the AD all others rate, found relevant certain facts related to the dumping calculation model used to generate the all others rate. In the case of the CVD all others rate, the *China - Broiler Products* panel based its findings on questions about the government programs included in the all others rate calculation.

27. The factual bases underlying the decisions of the *China – GOES* and *China - Broiler Products* panels are not present in this case. With respect to the AD all others rate, MOFCOM applied the rate in the petition with no further adjustments or calculations. For the CVD all others rate, MOFCOM applied the rate calculated for General Motors. Unlike the *China – GOES* and *China - Broiler Products* cases, the public record of the investigations in the present case leaves no questions whatsoever about the origin and application of the all others rates.

28. Finally, the United States continues to argue that MOFCOM did not provide an adequate explanation of its all others rate methodology for purposes of Articles 12.2 and 12.2.2 of the AD Agreement and Articles 22.3 and 22.5 of the SCM Agreement. While China has already addressed this argument in earlier submissions, the panel report in *China - Broiler Products* underscores an additional important point. The panel in *China - Broiler Products* based its findings on MOFCOM's calculations and analysis underlying the AD all others rate of 105.4%. Here, however, the AD rate of 21.5% is taken directly from the petition and the CVD rate of 12.9% is taken directly from the highest calculated rate. Thus, the bases for these rates are perfectly clear. The questions surrounding the derivation of the all others rates in the *China – GOES* and *China - Broiler Products* cases simply do not exist in this case.

V. MOFCOM Properly Defined the Domestic Industry

29. The U.S. claim regarding MOFCOM's definition of the domestic industry focuses on two main arguments. The first is that MOFCOM's definition must be distorted because, in the U.S. view, it included only domestic producers that supported the petition. The second is that the definition did not include enough domestic production to qualify as a "major proportion" of that production.

30. One of the options for defining the domestic industry provided by AD Agreement Article 4.1 and SCM Agreement Article 16.1 is the domestic producers whose combined production constitutes a major proportion of the total domestic production of the domestic like product. Nowhere do these articles specify a distortion test, mandate the collection of certain types of data, or otherwise limit the discretion of an investigating authority in defining the domestic industry. Prior WTO cases also make clear that these articles provide considerable flexibility for investigating authorities to adjust to the unique facts of each case.

31. The United States relies heavily on *EC – Fasteners* to argue that this case gives rise to the same type of distorted definition of the domestic industry previously rejected by the Appellate Body. The United States is wrong, however, for reasons laid out by the *China - Broiler Products* panel on materially identical facts. First, the *China - Broiler Products* panel carefully evaluated MOFCOM's process for providing public notice of its injury investigation – the same process followed here – and found that the United States did not demonstrate that MOFCOM's process excluded any domestic producers from participating in the investigation. Second, the *China - Broiler Products* panel found that MOFCOM did not apply a minimum threshold, as had been the case in *EC – Fasteners*. The same is true here. Third, the *China - Broiler Products* panel found that, unlike in *EC – Fasteners*, MOFCOM's process of defining the domestic industry did not involve sampling or any other type of limiting or self-selecting act, which is again true here. Fourth, the *China - Broiler Products* panel inquired if MOFCOM had affirmatively rejected information from domestic producers, as in *EC – Fasteners*, and concluded that it had not, as is the case before this Panel. Fifth, as in *China - Broiler Products*, the United States has not shown that MOFCOM or CAAM took any actions to limit or dictate the extent of domestic industry participation in MOFCOM's investigation.

32. In addition, the United States seems to imply that CAAM's role as the entity submitting domestic producer data to MOFCOM played an unspecified role in distorting the domestic industry definition. However, CAAM represents the entire domestic industry. The fact that CAAM was the single entity providing domestic producer data to MOFCOM did not limit, or artificially reduce,

domestic industry participation. Further, the eight participating domestic producers represent both joint ventures and domestically-owned producers. This broad domestic industry coverage belies alleged self-selection and confirms that MOFCOM obtained a representative and objective dataset for its injury analysis.

33. The United States makes much of the supposed obligation of an investigating authority to actively seek out information. In this regard, China stresses that its public notification process, which the *China - Broiler Products* panel just upheld, is designed to solicit information from any and all domestic producers willing to participate and to ensure an orderly investigative process. Further, the very jurisprudence on which the United States relies is linked to shortcomings in the evidence before the investigating authority. In this case, the United States has pointed to no concrete evidence of shortcomings in the data before MOFCOM; it has only offered speculation in claiming distortion.

34. MOFCOM included all data it received, covering eight producers, including domestically-owned producers and joint ventures. MOFCOM took no affirmative action that could have created a self-selection bias. Therefore, this Panel should reach the same conclusion on the U.S. claim as the *China - Broiler Products* panel reached on the identical claim.

35. Regarding its "major proportion" claim, the United States argues that the Panel should consider the percentage of domestic production covered by MOFCOM's definition of the domestic industry, in light of the process that MOFCOM employed to obtain the data. China does not believe that Article 4.1 of the AD Agreement or Article 16.1 of the SCM Agreement requires any such test. But even if they do, MOFCOM's process would pass such a test. This is because MOFCOM conducted an open and transparent registration process that permitted any domestic producer to participate in the injury investigation. MOFCOM excluded no company that provided data, and used all data provided by participating domestic producers. While the United States describes the participating group of domestic producers as "small," it is broadly representative of the Chinese domestic industry. As such, MOFCOM's process for defining the domestic industry did not impede satisfaction of the "major proportion" test.

36. The United States also contends that China did not satisfy the "major proportion" test because the domestic producer information in MOFCOM's possession was not "wide-ranging" or sufficiently "ample" to ensure an accurate injury assessment, and did not cover "a relatively high proportion" of domestic production. The United States does not, however, take the next step and explain how to apply these concepts to the facts of this case. The fact remains that MOFCOM opened its injury investigation to all domestic producers; it obtained data for eight domestic producers representing both domestic ownership and joint ventures; and it took no actions to limit participation in the investigation or to exclude any data. The result is coverage of adequate domestic production to satisfy the "major proportion" test.

37. In its Second Written Submission the United States appears to acknowledge that MOFCOM did not affirmatively exclude any domestic producers or segment of the industry from its injury dataset. However, it then faults MOFCOM for not counting more of the domestic industry than it did. By doing so, the United States is advocating for a standard that simply does not exist in the AD and SCM Agreements.

VI. MOFCOM's Price Effects Analysis is Consistent with Its WTO Obligations

38. MOFCOM's finding of price depression was fully supported by objective record evidence. MOFCOM's Final Determination addressed in detail the basis for its price depression finding and the causal relationship between the price depression it found and the subject imports. MOFCOM's Final Determination also explained that it had found parallel pricing and that the volume of subject imports increased dramatically over the period of investigation, especially in interim 2009, further contributing to the price depression.

39. The United States argues that there was no parallel pricing trend because prices moved in different directions from 2006 to 2007. However, MOFCOM based its finding of parallel price trends over the *entire* period of investigation. Prices for subject imports and the domestic like product increased from 2006 to 2008 by remarkably similar amounts. Also, prices for subject imports and the domestic like product both decreased by comparable amounts in interim 2009 from interim 2008 levels. In addition, a properly scaled chart of price movements over the entire period of

investigation, as provided in China's Second Written Submission, illustrates the parallel price trends over the entire period of investigation.

40. Contrary to U.S. arguments, MOFCOM did take into account the price trends observed in the 2006-2007 time period. MOFCOM's Final Determination states that the price trends are "consistent basically. Both of them increased in general from 2006 to 2008, and decreased in the first three quarters of 2009." The use of the qualifying terms "consistent basically" and "in general" demonstrate that MOFCOM took into account the price trends seen over 2006-2007. Perfect correlation is not required in a price trends analysis.

41. The United States alleges that MOFCOM's Final Determination failed to explain how the parallel price trends MOFCOM found supported its finding of price depression. MOFCOM's Final Determination, however, explains in sufficient detail both the basis for its finding of parallel price trends and the role of those trends in MOFCOM's price effects analysis. The fact that prices for subject imports and the domestic like product moved together, coupled with the finding that they competed with each other, support MOFCOM's finding that the drop in prices for subject imports in interim 2009 contributed to the parallel drop in prices for the domestic like product over the same period.

42. The United States also argues that the significant increase in the market share of subject imports at the end of the period of investigation that coincided with a decrease in prices should be discounted because it occurred at the same time as an increase in the domestic industry's market share. However, MOFCOM's analysis did not focus solely on interim 2009, but properly looked at trends over the entire period of investigation. The market share of the domestic like product *decreased* from the start of the period of investigation, whereas the market share for subject imports *increased* substantially.

43. Furthermore, when conducting its price effects analysis, MOFCOM appropriately used average unit prices. The United States argues that MOFCOM should have used some unidentified assortment of individual models or categories when conducting its price analysis. However, AD Agreement Article 3.2 and SCM Agreement Article 15.2 do not require investigating authorities to use any specific price methodology. Here, MOFCOM found significant evidence of competitive overlap that justified the use of average unit values. MOFCOM's Final Determination discussed the evidence of competitive overlap in detail, and based its conclusion on numerous pieces of evidence, such as similarity in physical characteristics, performance, product use, perceptions of consumers and producers, and price.

44. The United States relies heavily on a single chart submitted by a U.S. respondent showing sales in four alleged categories of vehicles. As China previously demonstrated, that table does not undercut MOFCOM's finding of competitive overlap, but rather demonstrates significant competitive overlap in most categories. The information in that table is also unreliable for many reasons. For instance, the alleged categories of vehicles are nowhere defined, and the data are incomplete and differ from the actual volume of subject imports.

45. Finally, the United States alleges that the *China – GOES* case prohibits MOFCOM's use of average unit values. However, the panel's analysis in *China – GOES* was based on the situation when an investigating authority conducts a price *undercutting* analysis. In this case, however, MOFCOM did *not* conduct a price undercutting analysis, but instead found price depression. The U.S. reference to the Appellate Body's Report in the *China – GOES* case, discussing "the depression or suppression of domestic prices," must be read in light of the fact that both the panel and Appellate Body in *China – GOES* found that MOFCOM used its price undercutting analysis to support its price depression and suppression analyses. The *China – X-Ray Equipment* panel also observed that both the panel and Appellate Body decisions in *China – GOES* arose "in circumstances where the investigating authority had conducted a price undercutting analysis without considering the need for adjustments to ensure price comparability." Thus, the continued reliance by the United States on the *China – GOES* case for the proposition that MOFCOM could not use average unit values when conducting a price depression analysis must be rejected.

46. In addition, on the facts of this case, the United States has not established that any possible differences in product mix would have distorted the use of average prices so as to render them insufficient for purposes of a price depression analysis. Moreover, there is no evidence that the product mix changed over the period of investigation, which might lead to a possible distortion in a trends analysis.

VII. MOFCOM Sufficiently Established a Casual Link between Subject Imports and Material Injury to the Domestic Industry

47. MOFCOM's Final Determination sets out in detail MOFCOM's thorough causation analysis. MOFCOM found that the volume of subject imports increased dramatically over the period of investigation, especially in interim 2009. MOFCOM also explained that prices for subject imports and the domestic like product exhibited similar trends over the period of investigation. And while apparent consumption declined in interim 2009, MOFCOM found that the domestic industry's production and sales did not suffer proportionately. MOFCOM also thoroughly examined the role of other factors that might have contributed to the material injury suffered by the domestic industry.

48. The United States alleges that declining demand in interim 2009, not subject imports, caused prices to decline. However, MOFCOM thoroughly examined the role of the decline in demand in interim 2009, and found that the change in market demand did not cause injury to the domestic industry because its production and sales continued to increase. The United States now claims that MOFCOM did not address the relationship between demand and price. On the contrary, the record demonstrates that the U.S. assumption that a decline in demand reduced the domestic industry's sales was factually incorrect, as sales actually increased. Thus, there is no evidence that the decline in demand caused prices to decline.

49. The United States also argues that the domestic industry's injury was caused by a decline in labor productivity. China previously demonstrated that labor costs are only a small portion of the total cost of producing a vehicle in China, and therefore played no meaningful role in explaining the domestic industry's declining financial performance. In addition, the United States assumes that total unit costs would have increased in interim 2009 from interim 2008 levels. However, total unit costs in fact *declined* in interim 2009 from interim 2008 levels. The record thus contradicts the U.S. claim.

50. The United States claims that MOFCOM failed to examine whether subject imports took market share from non-subject imports rather than from the domestic like product. However, MOFCOM's Final Determination noted that the volume of third country imports decreased sharply in interim 2009 and that imports from other countries did not affect the finding of the causal link. Moreover, the record shows that over the entire period of investigation, the market share for third country imports was relatively stable. In contrast, the market share of subject imports increased significantly. Thus, the U.S. allegation that MOFCOM failed to consider all relevant evidence is simply not correct.

51. The United States also alleges that MOFCOM failed to examine alleged "known factors" other than subject imports, and that MOFCOM was engaged in a "selective and non-objective analysis of the evidence" when it failed to discuss in detail the drop in labor productivity in its Final Determination. No party even raised this labor productivity issue during the underlying investigation, and it does not constitute a "known factor." Contrary to the U.S. claim, the fact that productivity is listed as a possible factor in Article 3.5 does not make it a "known factor" in this particular case. Article 3.5 only lists some examples of what *might* be a "known factor" in any given case. MOFCOM was not required to address issues that would have no bearing on its causation analysis.

52. Finally, the United States alleges that MOFCOM failed to examine the role played by an increase in the sales tax in China on certain vehicles. However, MOFCOM's Final Determination examined the impact of the change in tax treatment, and properly concluded that the respondent's argument was baseless, because the factual basis of the respondent's argument was incorrect – contrary to respondent's assertion, production and sales in fact *increased* between interim 2008 and interim 2009, despite the increased tax imposed on larger vehicles. The United States alleges that MOFCOM's analysis somehow "suggests a lack of objectivity," but in fact it is indicating that the respondent's factual assertions were on their face incorrect. This does not reflect a "lack of objectivity," but rather it reflects an administrating authority properly examining relevant evidence and reaching reasoned, objective conclusions on the basis of the record evidence before it.

ANNEX C-6

CLOSING STATEMENT OF CHINA AT THE SECOND PANEL MEETING

1. Mr. Chairman and Members of the Panel, China would like to offer several brief comments in closing.

2. First, China notes that the Panel has raised a number of questions about the disclosure letters that MOFCOM provided to the U.S. exporters pertaining to the calculation of their dumping margins. China reiterates that the burden is on the United States, as the complainant, to adduce the relevant evidence. The United States still has not done so. Accordingly, to the extent the Panel has any questions about the contents or substance of the disclosure letters, China would invite the Panel to request these documents from the United States. In *Broiler Products* and other recent cases, the United States recognized the need to discharge its burden as a complainant on identical claims under Article 6.9 of the AD Agreement, and it was able to do so. China therefore respectfully submits that the Panel should hold the United States to the same burden of proof in this case.

3. Turning to the AD and CVD all others rates, the United States has urged the Panel to follow the *GOES* precedent, while China believes *Broiler Products* is far more instructive on this issue. China will highlight two of the reasons why *Broiler Products* offers more compelling and relevant guidance in this case. First, the *Broiler Products* panel carefully assessed the same MOFCOM notification process as is before the Panel in this case, and found that MOFCOM could reasonably conclude that an exporter unwilling to respond to the registration notice will also not respond to the questionnaire. Second, the *Broiler Products* panel grappled with the very real practical problem that an investigating authority faces when it attempts to identify all exporters and producers. That panel found that the identical notification method before the Panel in this case was adequate to discharge China's notification responsibility under the AD and SCM Agreements.

4. Turning briefly to MOFCOM's definition of the domestic industry, the Panel has heard much speculation from the United States about supposed manipulation, distortion, or exclusion of the injury data before MOFCOM. The U.S. arguments in this respect are entirely unsubstantiated. The fact is that the record before the Panel contains no evidence showing or even implying that either MOFCOM or CAAM excluded or disregarded data from any of the domestic producers willing to participate in the investigation, or suggesting that either MOFCOM or CAAM determined which producers would participate. Again, MOFCOM issued a broad public notification of its investigation, and made it possible for any domestic producer to participate in its injury investigation.

5. We would also like to make a few comments on the other injury issues before the Panel. MOFCOM conducted a full and thorough injury investigation. It examined thoroughly the price effects issues. It found parallel pricing based on numerous pieces of record evidence. It properly examined the entire period of investigation rather than discrete fragments, as the United States does in its submissions. MOFCOM also linked the parallel pricing it found to the price depression that it also found. MOFCOM also conducted a full and through volume effects analysis. It found that subject imports flooded the market and that the petitioner lost significant market share. MOFCOM also found that third country imports did not lose market share over the period of investigation. MOFCOM's injury analysis also found that the domestic producers' prices declined in 2009 from competition with subject imports. MOFCOM also found significant competitive overlap between subject imports and the domestic like product, based on numerous pieces of evidence in the record.

6. MOFCOM answered issues that the parties raised, and it conducted a full and thorough non-attribution analysis. It examined the impact of the fall in demand in interim 2009, and concluded that the fall in demand did not cause the price depression MOFCOM found. MOFCOM also examined the impact of the change in tax policy, and also examined the impact and role of third country imports.

7. Finally, what MOFCOM did not do is answer and address issues that no party raised in the investigation below and which did not impact the injury analysis. There is no obligation on an

investigating authority to respond to and address issues that no party raised and which do not impact the injury analysis.

8. China would like to conclude by thanking the Panel and the Secretariat for the time and effort you are devoting to this proceeding. China treasures this opportunity to expand upon and clarify its positions in this case. China notes that its investigating authority is relatively young, with only about ten years of experience. We have worked diligently to implement the AD and SCM Agreements, and believe we have made good progress in this regard. We look forward to further clarifying the facts and issues of this case for the Panel in response to your questions.

ANNEX D

ARGUMENTS OF THIRD PARTIES

ANNEX D-1

EXECUTIVE SUMMARY OF THE THIRD PARTY WRITTEN SUBMISSION OF THE EUROPEAN UNION

1. The EU agrees with the US that the calculations employed by an authority to determine dumping margins, and the data underlying the calculations, constitute "essential facts under consideration which form the basis for the decision whether to apply definitive measures" within the meaning of Article 6.9 *ADA*. Those calculations are both material to the authority's decision and important for the determination. It is clear that without those calculations a decision on the definitive measure could not be taken. For these reasons, the EU agrees with the US that, by failing to disclose the actual data and calculations used to establish dumping margins, China acted inconsistently with Article 6.9 *ADA*.

2. With respect to the all others dumping determination, the EU anticipates that, absent cogent reasons for adopting a different approach, the Panel may be guided by prior DSB reports on this issue. This nevertheless leaves the question of what an authority is to do in order to ensure public notice of such investigations. As also indicated in recent cases, and below in the specific discussion of the *ASCM*, the EU is of the view that nothing precludes an investigating authority from requesting the authorities of the exporting WTO Member to identify any producing exporters that have not yet been identified.

3. Given the apparent absence of any meaningful disclosure, the EU agrees with the US with respect to this matter. The EU also agrees with the US that the single sentence in the Final Determination is not sufficient to meet that requirement, and that the failure to provide more detailed explanations constitutes a breach of Article 12.2.2 of the *ADA*.

4. With respect to the all others subsidy determination, the EU would point out that there are some differences in the wording of Article 6.1 *ADA* and Article 12.1 of the *ASCM*. These may reflect the fact that it is reasonable for a Member to know to which firms it has granted subsidies, and the Panel should take this into account.

5. In the injury determination, in its price effects analysis MOFCOM finds that the average sales prices of subject imports and of domestic products were increasing and decreasing in parallel during the period of investigation. Then, without expanding its reasoning any further, MOFCOM concludes that the decreasing prices of subject imports combined with a sharp increase of their market share in mid-2009 resulted in depressing the price of domestic like products. The US claims that the finding of continuous parallelism between domestic and import prices throughout this period is belied by the data on the record and that in any event it is not in itself sufficient to explain how subject imports depressed the prices of like domestic products. The EU agrees with the US on both points.

6. The US is correct in pointing out that the mere fact that the prices of subject imports and domestic products are moving in the same direction cannot itself establish the existence and the direction of a causal relationship. There could be several alternative explanations of price parallelism, of which price depression by subject imports is only one. As a matter of pure logic, it may not necessarily be the case that subject import prices were driving domestic product prices down. It could have been the other way round or, alternatively, both domestic and subject import prices could have been simultaneously driven in the same direction by exogenous third factors. It could also be that there was no causal link at all in the evolution of the two prices but a mere coincidence in their movement over the reference period. In any event, a simple concluding statement of the kind made by MOFCOM in its Final Determination is not enough to establish which one of these options actually holds true under the circumstances of the case at hand.

7. The need for an in-depth examination of the matter is all the more obvious in cases where at a certain point during the reference period the pattern of parallel pricing was broken and the prices of subject imports and domestic products were clearly moving in opposite directions to such an extent that for certain periods in 2007 subject imports were in fact priced lower than domestic products. Absent a reasonable explanation of this type of movement, the very existence of the trend of price parallelism can be called into question and the credibility of any conclusion drawn on that basis is further weakened.

8. Instead of providing a plausible explanation of the apparent inconsistency in the overall finding of price parallelism, MOFCOM's Final Determination attempts to conceal it by presenting an oversimplified end-point-to-end-point comparison of the prices of subject imports and domestic products in the beginning and at the end of the 2006-2008 period, only to conclude that over this period both sets of prices have increased "in general". An attempt to provide the missing explanation can probably be found in China's First Written Submission, where it is submitted that the diverging movements of subject import and domestic product prices in 2007 coincided with a period when "import volumes skyrocketed […] and domestic producers lost significant market share".

9. The EU submits that such explanation should have been provided earlier and spelled out in MOFCOM's Final Determination in order to satisfy the requirement of performing an objective assessment based on positive evidence at the time of the adoption of the contested measure. Putting this case into context, it is also worth mentioning that MOFCOM's failure to address in any detail the causal relationship between the pricing of subject imports and that of domestic products is not merely incidental but revealing of a systemic flaw in the way MOFCOM approaches injury analyses, that stems from an erroneous reading of Article 3.2 of the *ADA* and Article 15.2 of the *ASCM*.

10. In *China-GOES*, the AB confirmed that, pursuant to Article 3.2 of the *ADA* and Article 15.2 of the *ASCM*, an investing authority is required to consider, in the context of its price effects analysis, the explanatory force of subject imports for the occurrence of significant price depression. More specifically, the AB held that it is "not sufficient for an investigating authority to confine its consideration to what is happening to domestic prices for purposes of considering significant price depression or suppression," but, rather, "an investigating authority is required to examine domestic prices in conjunction with subject imports in order to understand whether subject imports have explanatory force for the occurrence of significant depression or suppression of domestic prices."

11. In reaching this conclusion the AB rejected China's argument that "the price effects considered under Articles 3.2 and 15.2 are not themselves the result of a causation determination. Rather, they serve as the basis for the causation determination required under Articles 3.5 and 15.5." Bearing in mind that the contested measures in this case were adopted more than a year prior to the moment when China brought the above argument up on appeal in *China-GOES*, it appears safe to assume that at the time when the price effects analysis in this case was carried out, MOFCOM was still acting on the erroneous understanding that it was under no obligation to consider the relevant causal link. That is why there is little credibility in China's arguments.

12. Turning to the different market segments, MOFCOM defined the products subject to its findings as "Saloon cars and Cross-country cars of cylinder capacity > 2500cc" and used average unit prices for these products in its price effects analysis. The US makes the point that cars (covered by the above definition) can be classified into four different segments: entry level, mid-level, premium and luxury. It further notes that during the reference period "the Chinese domestic industry sold primarily “entry” level vehicles, and a very small number of “premium” or “luxury” vehicles, while U.S. producers primarily sold “premium” and “luxury” vehicles, and a very small number of “mid” level vehicles; no sales of “entry” level vehicles by U.S. producers are reported."

13. Turning to the price effects analysis, applying a methodology that involves the comparison of average unit values for different products may be appropriate, for the purposes of a price effects analysis, only where the products are relatively homogeneous and sufficiently comparable. Otherwise, differences in average unit values may reflect changes or variations in product mix rather than genuine differences in pricing. If the comparisons applied fail to take into account the existence of considerable differences in product mix, they can yield results that are unreliable and skewed against the target exporters. In such cases the findings of price undercutting and price depression, and the ensuing determination of injury are not based on an "objective examination" of "positive evidence", contrary to the obligation imposed upon the investigating authorities by Articles 3.1 and 3.2 of the *ADA* and Articles 15.1 and 15.2 of the *ASCM*. The relevant question to answer in this case is therefore if, indeed, as a result of their focus on different car segments, domestic products and subject imports can be said to involve a different product mix affecting price comparability.

14. The EU observes that a differentiated approach to the car market might well be justified, given the broad variation in the levels of technology, the quality of the materials used, the after sales service and the goodwill of the brands of cars falling under the different segments. All of these factors provide an objective justification for the existing differences in pricing across the four

segments. In a related vein, one might also consider the likelihood that due to their varying requirements some (especially corporate and public entity) consumers might strongly focus in their demand on certain segments and completely exclude others from their consideration. To reach a definitive conclusion on this point however, it is necessary to collect empirical evidence that the factors just mentioned are actually relevant and perform as described in the context of the particular geographic market concerned.

15. On the other hand, factors that militate against a finding of differences in product mix affecting price comparability include (i) the difficulty to draw a clear cut-off line between the different car segments, and (ii) the evidence in this case that at a certain point in 2007 the average unit prices of subject imports (supposedly a high-end product mix) have temporarily fallen below the average unit prices of domestic products (supposedly a low-end product mix). All of this being said, it is worth mentioning that, regardless of whether the use of average unit values is deemed to be legally justified, in this case it is possible that it may operate in favour, rather than to the detriment, of US importers. As a matter of fact, in its First Written Submission the US itself puts considerable weight on the argument that US subject imports were actually priced higher that the domestic like products. It should be noted then, that the use of average unit values may tend to highlight the price gap between the high-end (subject imports) and low-end (domestic products) segments, thus providing support for the US' overselling argument. Adjusting the average unit values, on the other hand, would close up the gap and downplay the overselling argument, which presumably is not what the US is trying to achieve. That is why the Panel may wish to consider to what extent contesting the use of non-adjusted average unit values is actually instrumental in this case for refuting MOFCOM's finding of price depression.

16. In any event, the impact of using such values is stronger in cases of price undercutting, where a direct comparison is necessarily made between the prices of subject imports and those of domestic products. In this case, however, MOFCOM is focusing on the proposition of price depression, in which the prices of subject imports and domestic products are juxtaposed only for the purposes of explaining their mutual relationship and a direct mathematical comparison of their absolute values is not strictly necessary and certainly not decisive.

17. Turning to the issue of causation, the US claims that MOFCOM's statement that "[t]he quality and the client base between the domestic like products and that of the subject products is [...] roughly the same" and its overall finding that subject imports and domestic products have a competitive relationship, are contradicted by the evidence. The evidence invoked for that purpose includes (i) a table submitted by one of the respondents, indicating that domestic and import sales were largely focusing on different market segments in opposite ends of the spectrum, and (ii) the average unit values used by MOFCOM, indicating that the average prices of subject imports were 30.4% higher than those of domestic products in 2009, when the injury to the domestic industry was found to have occurred.

18. The EU submits that it is relevant and the argument in support of which it was presented is plausible, so that MOFCOM was under an obligation to analyse it in order to satisfy the "objective examination" standard imposed by Article 3.1 of the *ADA* and Article 15.1 of the *ASCM*. The EU considers, however, that the analysis presented in MOFCOM's Final Determination falls short of meeting this standard. As a matter of fact this analysis is reduced to broad and abstract statements, outlining MOFCOM's final conclusions without any reference to supporting empirical evidence.

19. The EU has two observations. First, the basic identity of production processes, quality and customer base across all segments of the market for "Saloon cars and Cross-country cars of cylinder capacity > 2500cc" is a doubtful line of reasoning, to say the least. MOFCOM has provided no evidence in respect of any of these three elements. Second, customer overlapping, or in other words the fact that some consumers choose to buy and simultaneously own two or more cars of different segments, does not necessarily prove that there is competition between these segments, just like buying bread and caviar from a supermarket does not prove that there is competition between these two products. Car rentals, for example, buy large numbers of cars of different segments and rent them out at a different price to customers with different needs and preferences.

20. The EU further observes that price difference is not in itself sufficient to negate competition between two products but it may at least be indicative of the lack of such competition. Once presented with an assertion and corresponding evidence in this sense, it is MOFCOM's task to examine the issue further and confirm or reject that assertion on the basis of positive evidence. For that purpose it would, for example, be appropriate to examine the cross-elasticity of demand

for different car segments by verifying if a small but significant and non-transient change in the pricing of one segment could attract customers from or drive customers towards another segment. There is no evidence, however, that MOFCOM has done anything of the kind. For all of the above reasons, the EU is of the opinion that MOFCOM's analysis of this matter falls short of the requirement to perform an objective examination based on positive evidence.

21. Turning to the question of market share, the US claims that subject imports took market share from non-subject imports and not from domestic products, whose market share was actually growing. It relies on this claim to challenge both MOFCOM's causation analysis and its price effects analysis. With regard to the price effects analysis it presents the simultaneous growth of market shares as a non-attribution argument, and with regard to the causation analysis it relies on it to demonstrate a contradiction between MOFCOM's finding of the domestic industry's decreased profitability and the evidence on record.

22. The EU has doubts about the relevance of this claim in either context. In its **price effects analysis** MOFCOM does not argue that either the alleged price depression or the diminished profitability of the domestic industry were in any way caused by a loss of market share, or indeed that a loss of market share even occurred to the domestic industry. On the other hand a finding of diminished profitability (by MOFCOM) is not necessarily in contradiction with a simultaneous increase of the market share of domestic products (invoked by the US). Profitability is a function of the ratio between the revenue gained and the costs incurred from selling a product, and not of the volume of sales or of the market share achieved. So far as the **causation analysis** is concerned, the EU agrees with China that MOFCOM's causation finding is, on its face, premised more on price declines than on changes in market share. For these reasons, the US' assertion (not contested by China) that subject imports took market share from non-subject imports and not from domestic products, seems of limited relevance. With respect to the decline in domestic productivity, the US claims that MOFCOM failed to explore the role, in causing injury to the domestic industry, of the 33.24% drop in the industry's productivity, combined with a 68.71 % expansion of its labour force in the first three quarters of 2009. Without contesting this factual point, China questions its potential significance as a causation factor, bearing in mind that MOFCOM's causation finding is based on sixteen other indicia, and that the low labour costs in China represented only 9 % of the domestic industry's total costs in 2009. China also notes that no party has ever raised this issue before MOFCOM.

23. The EU agrees with the US that domestic productivity is a relevant factor that should have been addressed in MOFCOM's determination and the question of its actual significance under the particular circumstances of the Chinese automobile industry should have been answered in the course of this discussion. The fact, that issue was never raised by any party during the investigation, does not imply that it was not "known" to MOFCOM and that dealing with it was therefore not required pursuant to Article 3.5 of the *ADA* and Article 15.5 of the *ASCM*. The relevant data about domestic productivity was obviously available to MOFCOM (and it is mentioned elsewhere in the text of the Final Determination) and its relevance to the causation analysis is expressly foreseen in Article 3.5 of the *ADA* and Article 15.5 of the *ASCM*. Failing to address this issue raises doubts about the objectiveness of MOFCOM's examination of the causation of injury, and therefore of its compliance with Articles 3.1 and 3.5 of the *ADA* and Articles 15.1 and 15.5 of the *ASCM*.

24. Finally, turning to the issue of the drop in demand, the US notes that the only part of the investigation period in which injury was found to have occurred (interim 2009) coincides with the only instance of contraction of demand during that period. It therefore objects to MOFCOM's dismissal of demand contraction as a non-attribution factor without further explanation. As it becomes clear from China's response in its First Written Submission, the explanation was to be found elsewhere in the text of the Final Determination, and in essence it was that the drop in apparent consumption was not the cause of injury to the domestic industry, because despite that drop "the domestic industry still kept increasing production and sales, as well as market share by improving production and operation levels and product competitiveness."

25. The EU finds this explanation unsatisfactory because, as a matter of fact, the injury suffered by the domestic industry was found to have taken the shape of decreasing prices and profitability and not of lost sales. The mere fact that the number of domestic product sales increased, does nothing to exclude the possibility that the shrinking demand may have driven sales prices down and diminished profitability of the domestic industry, or in other words, that it may have caused the injury identified by MOFCOM, despite the domestic industry's growing production and sales volumes.

ANNEX D-2

EXECUTIVE SUMMARY OF THE THIRD PARTY
WRITTEN SUBMISSION OF JAPAN

A. Preparation of Non-Confidential Summaries under Article 6.5.1 of the *AD Agreement*

1. In the *First Written Submission of the United States* (the "US FWS"), the United States argues that MOFCOM "accepted confidential information without requiring adequate non-confidential summaries of that information" and that consequential "lack of transparency significantly prejudiced the ability of [interested parties and the interested Member] to defend their interests."[1] The United States alleges that the application simply redacted the information from the part in which the information was provided. The United States further asserts that there was only a "simple assertion that the information was confidential"[2] and that the "application contain[ed] no explanation of why such information could not be summarized."[3] The United States thus claims that the redaction of information without non-confidential summary is inconsistent with Article 6.5.1 of the *AD Agreement*.

2. Article 6.5.1 requires the party submitting confidential information to provide non-confidential summaries except where exceptional circumstances have been demonstrated. Article 6.5.1 also requires that the non-confidential summary should provide a reasonable understanding of the substance of the confidential information. This requirement clarifies that the non-confidential summary must be sufficiently in detail to protect and observe the due process right of interested parties for the defense of their interests under Article 6.2. In case that interested parties did not submit sufficiently detailed non-confidential summaries of confidential information, accordingly, Article 6.5.1 requires the authorities to scrutinize the stated reasons establishing the existence of exceptional circumstances. The authority may permit the interested party not to submit non-confidential summaries only when they decide that the reason outweighs the due process right of the interested parties for their defense. At minimum, as the panel in *Mexico – Olive Oil* stated, "general statements ['it is not possible to prepare public summaries of the information and documents that we classified as confidential because of the nature of such information and documents'] are not sufficient as they constitute an unsupported assertion rather than a statement of reasons".[4]

B. Disclosure of Essential Facts before the Final Determination Under Article 6.9 of the *AD Agreement*

3. The United States argues that MOFCOM failed to disclose the "data it used and calculations it performed to determine the existence and margin of dumping, including the calculation of the normal value and export price for the respondents"[5] and thus acted inconsistently with Article 6.9 of the *AD Agreement*.

4. The first sentence of Article 6.9 of the *AD Agreement* provides that the authorities must disclose the "essential facts under consideration which form the basis for the decision whether to apply definitive measure." The second sentence states that "such disclosure take place … for the parties to defend their interests." Thus, these provisions of Article 6.9 set forth the level of detail of each essential fact that the authority must disclose. As the panel in *EC – Salmon (Norway)* stated, the 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, provide additional information or correct perceived errors, and comment on or make arguments as to the proper interpretation of those facts."[6]

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[1] US FWS, para. 35.
[2] *Id.*, para. 42.
[3] *Id.*, para. 45.
[4] Panel Report, *Mexico – Olive Oil,* para. 7.101.
[5] US FWS, para. 47.
[6] Panel Report, *EC – Salmon (Norway)*, para. 7.805.

5. With respect to dumping determinations, the panel in *Argentina - Poultry Anti-Dumping Duties* found 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."[7] Indeed, the normal value and the export price data are facts found by the authorities based on individual items of evidence such as actual invoice prices and various cost and expenses data.

6. The panel in *China – X-Ray Equipment* further clarified that the facts related to the existence of the dumping margin must be disclosed to interested parties for their effective defense of interests. It held that:

> …we consider that **the transaction-specific price and adjustment data that are developed and used by the investigating authority for the purpose of establishing a margin of dumping constitute "essential facts"** within the meaning of Article 6.9. Such data are salient to the establishment of the margin of dumping. Furthermore, the margin established cannot be understood without such data.[8]

7. As this panel clarified, an authority is obliged to disclose specific transaction prices, which the authority found as the fact to establish normal value and export prices and to determine the margins of dumping in the final determination. Mere disclosure of the finally-calculated normal value and export prices would not be sufficient for interested parties to present their defense. For example, the interested party would not be able to argue whether the authority correctly identified the transaction prices without knowing the actual invoice prices that the authorities decided to use. Moreover, the interested party would also not be able to present the defense for the correct amount of adjustments to make fair comparison under Article 2.4 of the *AD Agreement* without knowing the amount of the individual expenses that the authorities verified to be deducted from the invoice price. All these facts that the authorities found in the process to reach the determination of dumping margin are required for the interested parties to present an effective defense. Therefore, the authorities must disclose these facts to meet the requirements under Article 6.9 of the *AD* Agreement.

C. Consistency of the Determination of the All Others Rates Based on Facts Available with Article 6.8 and Annex II of the *AD Agreement*

8. The United States alleges that MOFCOM's application of facts available to determine the anti-dumping duty rate for unexamined exporters/producers was inconsistent with Article 6.8 and Paragraph I of Annex II of the *AD Agreement*.[9]

9. According to the United States, MOFCOM applied an all others dumping rate of 21.5 percent to unexamined U.S. producers/exporters, "despite the fact that the dumping margin for the respondents ranged from 2 percent to 8.9 percent".[10] The United States alleges that MOFCOM "had no evidence that any interested party 'refused access to' or otherwise 'did not provide' information that was 'necessary' to the antidumping investigation or otherwise 'significantly impeded' the investigation."[11]

10. The United States argues that because "no other U.S. exporters existed at the time of the investigation,"[12] it was not proper to apply facts available "as it is logically impossible for a non-existent exporter to cooperate."[13] In order to apply the facts available to an interested party, "Articles 6. 8 and Annex II, paragraph 1 together ensure that an exporter or producer has an opportunity to provide information required by an investigating authority before the latter resorts to the use of facts available."[14]

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[7] Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.223 (emphasis in original).
[8] Panel Report, *China – X-Ray Equipment*, para. 7.417 (emphasis added, a footnote omitted).
[9] US FWS, para. 59.
[10] *Id*., para. 58 and fn. 81.
[11] *Id*., para. 64.
[12] *Id*.
[13] *Id*., para. 65.
[14] *Id*., para. 62.

11. The *AD Agreement* sets forth the procedural rules to investigate the margin of dumping of individual exporter/producers. 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". Accordingly, the *AD Agreement* requires that authorities give notice of specific information to an interested party from which the specific information is needed. Article 6.8 of the *AD Agreement* then sets forth that facts available may be applied to an interested party only when the interested party "refuses access to, or otherwise does to provide, necessary information … or significantly impedes the investigation". Paragraph 1 of 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, facts available cannot be applied to an interested party with respect to specific information, which the authorities had not asked the interested party to submit such information and had not informed that its failure to submit would result in application of facts available.

12. As explained by the Appellate Body,[15] the *AD Agreement* makes clear that the importing Member may not use facts available to determine the margin of dumping of exporters/producers for which the Member's authorities had not given any notice of necessary information.

13. The panel in *China – GOES* further clarified that the authorities' notice as required under paragraph 1 of Annex II must be such that "the party is aware" of the consequences of not supplying necessary information.[16] In this connection, "posting a notice in a public place or on the internet will not necessarily ensure this awareness in each interested party." [17] It also clarified that while "the notice of initiation requested interested parties to provide some general information", investigating authorities could not "replace[…] more information than this with 'facts available'".[18] This is all the more true for exporters that did not exist during the period of investigation. As noted by the panel in *China – GOES*, "It is not clear how non-existent exporters could possibly refuse to provide information or impede an investigation."[19]

D. The Price Effect Analysis under Articles 3.1 and 3.2 of the *AD Agreement*

14. The United States argues that MOFCOM's price effects analysis "is not based on 'positive evidence' and . . . did not 'involve an objective assessment."[20] Specifically, the United States submits that the subject automobiles imported from the United States primarily fell into a different grade from those primarily sold by the Chinese domestic producers and, in light of these varying grades of the automobiles, MOFCOM should have made necessary adjustments to ensure price comparability in its price comparison, or, at the very least, explained why such adjustments were not necessary in this case[21].

15. Japan understands that the United States intends to submit that there was no or, if any, very limited competition between the subject imports and the domestic like products in this case. From Japan's point of view, this argument is in line with the recent precedents, that is, the Appellate Body report in *China – GOES* and the panel report in *China – X-Ray Equipment*. In particular, in the latter case, it was made clear that the investigating authority must examine whether there is a competition between the subject imports and the domestic like products.

16. In the first place, in *China – GOES* the Appellate Body has clarified the investigating authority's obligations in its price effect analysis pursuant to Article 3.2 of the *AD Agreement*, explaining that the authorities must consider "whether certain price effects are the consequences of subject imports."[22] The Appellate Body further explained the rigor of this analysis:

[15] Appellate Body Report, *Mexico –Anti-Dumping Measure on Rice*, para. 259 (emphasis in original, footnote omitted). *See also* Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 459.
[16] Panel Report, *China – GOES*, para. 7.386.
[17] *Id*.
[18] *Id*.
[19] *Id*., para. 7.387.
[20] US FWS, para. 126.
[21] *Id*., paras. 141, 144.
[22] Appellate Body Report, *China – GOES*, para. 136.

> Moreover, the syntactic relation expressed by the terms "*to* depress prices" and "[*to*] prevent price increases" is of a subject (dumped or subsidized imports) doing something to an object (domestic prices). The language of Articles 3.2 and 15.2 thus expressly links significant price depression and suppression with subject imports, and contemplates an inquiry into the relationship between two variables, namely, subject imports and domestic prices. More specifically, an investigating authority is required to consider whether a first variable—that is, subject imports—has explanatory force for the occurrence of significant depression or suppression of a second variable—that is, domestic prices.[23]

17. In this analysis, the Appellate Body has further clarified that the objective examination of positive evidence under Article 3.1 requires that the authorities must ensure price comparability when comparing the domestic price and the import price in its price effect analysis. It has stated:

> [W]e do not see how a failure to ensure price comparability could be consistent with the requirement under Article 3.1 … Indeed, if subject import and domestic prices were not comparable, this would defeat the explanatory force that subject import prices might have for the depression or suppression of domestic prices. We therefore see no reason to disagree with the Panel when it stated that "[a]s soon as price comparisons are made, price comparability necessarily arises as an issue".[24]

18. Following the Appellate Body's analysis, the panel in *China – X-Ray Equipment* applied this legal requirement to facts in that underlying investigation. In that case, having confirmed that "the fact that where a broad basket of goods under consideration and a broad basket of domestic goods have been found by an investigating authority to be "like", this does not mean that each of the goods included in the basket of domestic goods is "like" each of the goods included within the scope of the product under consideration"[25], the panel found that "the dumped imports consisted only of 'low-energy scanners', while there was no such limit on the energy levels of the domestic like product."[26] In such factual situation, the panel found that the authorities must consider differences between the two before making their comparison, stating:

> [T]here was evidence on the record to indicate that there were significant differences between the dumped imports and some of Nuctech's scanners, in terms of uses, physical characteristics and prices, for example. Further, MOFCOM's own findings indicated that "high-energy" and "low-energy" scanners have different uses and are perceived differently by consumers. In the light of this evidence, the Panel is of the view that MOFCOM clearly failed to conduct an objective examination of positive evidence by proceeding with its price effects analysis without even considering, let alone taking into account, these differences in the products being compared.[27]

19. As the Appellate Body in *China – GOES* and the panel in *China – X-Ray Equipment* have clarified, the fact that the domestic product is the "like product" as defined in Article 2.6 of the *AD Agreement* is not sufficient to compare with subject imports. The authorities must further review whether these products are comparable. Indeed, "[i]f two products being analyzed in an undercutting analysis are not comparable, for example in the sense that they do not **compete with each other**, it is difficult to conceive how the outcome of such an analysis could be relevant to the causation question."[28] Thus, this requirement means that the investigating authorities must examine whether the subject imports and the domestic like products are in competition with each other, by inquiring, for example, whether these products have substantially the same physical

[23] *Id*. (internal citations omitted).
[24] *Id*., para. 200 (internal citations omitted).
[25] Panel Report, *China – X-Ray Equipment*, para. 7.65.
[26] *Id*., para. 7.68.
[27] *Id*., para. 7.68.
[28] *Id.*, para. 7.50.

characteristics and are used by customers as interchangeable, etc.[29] In this connection, it is to be noted that a simple observation of parallel price trends would not be sufficient.[30]

E. The Causation Analysis under Articles 3.1 and 3.5 of the *AD Agreement*

20. The United States argues that "MOFCOM's causation analysis includes and relies upon a number of findings that are contradicted by the evidence . . ., contrary to the requirements of Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement."[31] The United States alleges further that "MOFCOM failed to meet its obligations under Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement to base its determination on an examination of all relevant evidence before it and to examine any known factors other than dumped and subsidized imports that were injuring the domestic industry."[32]

21. Article 3.5 of the *AD Agreement* provides that the causation must be demonstrated through the effects of dumping as set forth in Article 3.2. As the panel in *China – X-Ray Equipment* found, where the authority "relied upon the price effects of subject imports in its causation analysis, the flaws in the price effects analysis also undermine [the authority's] conclusion on the causal link between the subject imports and the injury suffered by the industry."[33]

22. Article 3.5 of the *AD Agreement* also requires investigating authorities to "examine all known factors other than the [subject] imports which at the same time are injuring the domestic industry." Injury caused by such other factors "must not be attributed to the [subject] imports" in the causation analysis. As explained by the Appellate Body,[34] the authorities must separate and distinguish the causes of injurious effects of the other factors from the injurious effects of dumped imports when analyzing causation of injury. Although the analysis might not be "easy," the Appellate Body has cautioned that it is necessary to properly conduct the non-attribution analysis to assess injury.[35]

[29] E.g. *Id*., para. 7.92.
[30] *See* Appellate Body Report, *China – GOES*, para. 210.
[31] US FWS, para. 154.
[32] *Id*., para. 154.
[33] Panel Report, *China – X-Ray Equipment*, para. 7.239.
[34] Appellate Body Report, *US – Hot-Rolled Steel*, para. 223.
[35] *Id*., para. 228.

ANNEX D-3

EXECUTIVE SUMMARY OF THE THIRD PARTY
ORAL STATEMENT OF JAPAN

I. INTRODUCTION

1. Mr. Chairman, and distinguished Members of the Panel, Japan thanks this opportunity to appear before you today. This dispute involves important systemic issues on the disciplines of the *AD Agreement* that matter to Japan. In its third party submission, Japan discussed both substantive and procedural issues, such as the price effect analysis and causation analysis for the injury determination, the determination of the all others rate, the preparation of non-confidential summaries, and disclosures of essential facts. All of these issues are important to clarify disciplines on anti-dumping regimes of the WTO Members, but Japan would like to focus today on the price effect analysis that the authority is required to conduct under Articles 3.1 and 3.2 of the *AD Agreement*.

II. DISCUSSION

2. Japan clarified in its third party submission that Article 3.2 of the *AD Agreement* requires the authority to examine whether subject imports compete with such domestic like products in its price effects analysis.[1] As the Appellate Body in *China – GOES* has explained, Article 3.2 requires the authority to consider "whether certain price effects are the consequences of subject imports".[2] Therefore, the authority must examine "the relationship between two variables, namely, subject imports and domestic prices."[3] The panel in *China – X-Ray Equipment* further explained, "where a broad basket of goods under consideration and a broad basket of domestic goods have been found by an investigating authority to be "like", this does not mean that each of the goods included in the basket of domestic goods is "like" each of the goods included within the scope of the product under consideration."[4] "To be comparing the prices of [subject imports of] low energy scanners with the prices of a much broader mix of [domestic] "like" products, including products **with different uses** and which were **not perceived by customers to be substitutable**, does not constitute an objective examination of positive evidence for the purposes of the price undercutting."[5]

3. These findings clarify that Article 3.2 requires the authority to ascertain that for the purpose of price effects analysis, a type of subject imports is in competition with a type of the domestic like products. When examining the state of competition of the products at issue, the investigating authority must take into account various factors, for example physical characteristics, usage and customers' perceptions to make an objective examination in price comparisons. Indeed, if the authority does not address such factors, the price comparability between subject imports and the domestic like products is not ensured. The price comparison , if it ignores differences in physical characteristics, usage and customers' perceptions, would not provide any meaningful analysis on "whether certain price effects are the consequences of subject imports".

4. Japan also notes that the price effects analysis under Article 3.2 "form[s] the basis for the overall causation analysis contemplated in Article 3.5."[6] The panel in *China – X-Ray Equipment* explained,

> the causation question is not resolved by such a general finding of coincidence. Rather, we consider that MOFCOM was required to conduct a more detailed analysis.[7]

[1] Third Party Submission of Japan, 30 April 2013, paras. 23-30.
[2] Appellate Body Report, *China – GOES*, para. 136.
[3] Appellate Body Report, *China – GOES*, para. 136.
[4] Panel Report, *China – X-Ray Equipment*, para. 7.65.
[5] Panel Report, *China – X-Ray Equipment*, para. 7.88 (emphasis added).
[6] Appellate Body Report, *China – GOES*, para. 128.
[7] Panel Report, *China – X-Ray Equipment*, para. 7.247.

Thus the mere finding of parallel price trends between subject imports and the domestic like product is not sufficient to conclude that the price effects to the domestic like product are the consequence of subject imports.

5. In its First Written Submission, China acknowledged that MOFCOM used averages of all types of the subject imports and the domestic like product, including passenger sedans and off-road vehicles.[8] China explained that "the product under investigation is generally the same with the product manufactured by the domestic industry in terms of size of automobile bodies, wheel base and performance indicators", and "the domestic product and the product under investigation overlap partially in terms of prices and consumers, and thus are competing and substituting for each other".[9] China then argues, "MOFCOM found substitutability and mutual competition between subject imports and the domestic like product, further justifying the use of averages in this case."[10] According to China, MOFOM's preliminary and final determinations briefly discuss their physical characteristics, production process, use, sales channels, price, consumer, competitiveness or substitution.[11] However, the determinations only contain the conclusions that the two products are the same in terms of these factors, without pointing to any concrete facts or evidence supporting these conclusions, for example, evidence that would suggest the Chinese market does not distinguish passenger vehicles from off-road vehicles.

6. Although Japan does not take any particular position in the factual issues in this case, it is doubtful, as a matter of general observation of automobile sector that the off-road vehicles do not differ from passenger sedans in terms of physical characteristics, usage, customers' perceptions, etc.. As the panel in *EC – X-Ray Equipment* correctly found, a type of vehicles in a basket of subject imports would not be necessarily "like" the other type of vehicles combined together in a basket of domestically produced vehicles. It is likely that the average price of different types of vehicles would ignore the price difference and fluctuation stemming from, for example, differences in physical characteristics, usage, and perception in the market. The comparison of annual average prices of all imports and domestically produced vehicles would compound such differences, and accordingly likely to provide no meaningful results for the price effects analysis under Article 3.2.

7. Japan respectfully requests that the Panel carefully analyse whether MOFCOM based its price effects analysis on an objective examination of positive evidence consistently with the requirements under Articles 3.1 and 3.2 of the *AD Agreement*, as discussed above.

III. CONCLUSION

8. In conclusion, Japan respectfully requests the Panel to examine carefully the facts presented by the parties in this dispute in light of the arguments presented in Japan's submission and this oral statement. Japan is happy to answer questions that the Panel may have.

[8] First Written Submission of the People's Republic of China ("China FWS"), 22 April 2013, paras. 204-205.

[9] China FWS, para. 204, quoting the MOFCOM's preliminary determination, pp. 29-30 (CHN-05).

[10] China FWS, para. 210.

[11] MOFCOM's preliminary determination, pp. 29-34 (CHN-05), and final determination, p. 158 (CH0-07).

ANNEX D-4

EXECUTIVE SUMMARY OF THE THIRD PARTY ORAL STATEMENT OF KOREA

Mr. Chairman and Members of the Panel,

1. Korea appreciates this opportunity to present our views to the Panel as a third party participant to this dispute. In this dispute, the United States challenges the anti-dumping and countervailing duties imposed by China on imported automobiles from the United States. Korea would like to share what we think of as the key issues in this case and our opinion on such issues with regard to the *Agreement on Implementation of Article VI of General Agreement on Tariffs and Trade 1994* ("AD Agreement") and the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement").

2. Among various issues, Korea would like to present its views on the "calculation of dumping margins applicable to non-investigated entities" and the "definition of Domestic Industry."

Dumping margins for non-investigated entities

3. Article 6.10 of the AD Agreement allows the relevant investigative authorities, the MOFCOM in this dispute, to limit their examination to a reasonable number of interested parties, in cases where the number of exporters, producers, importers or types of products involved is so large as to make the determination impracticable. However, the AD Agreement is silent on determining dumping margins for non-investigated entities, and the issue in this dispute is whether the dumping margin calculated based on facts available could be applied to non-investigated entities.

4. Non-investigated entities can be divided into three categories. The first category consists of non-investigated entities that were willing to participate but discouraged due to the impracticability of conducting an anti-dumping investigation; the second category consists of non-investigated entities unwilling or having no interest in participating in the investigation; and the third category consists of non-investigated entities unaware of the ongoing investigation or nonexistent at the time of the investigation.

5. With regard to those entities in the first category, Korea believes such entities should be subject to paragraph 4 of Article 9 of the AD Agreement and facts available not applicable to such entities. Non-investigated entities in the second category are blameworthy for their behavior and there is no doubt that they are subject to the dumping margins calculated based on facts available under Article 6.8 of the AD Agreement. With regard to entities in the third category, Korea views that dumping margins calculated based on facts available are applicable, if the investigating authority had used its best efforts to notify the interested parties of the initiation of the anti-dumping investigation and give an appropriate public notice under Article 12 of the AD Agreement. In case of an entity that did not exist at the time of the anti-dumping investigation, it may resort to Article 9.5 of the AD Agreement and request a review on an accelerated basis during which the imposition of anti-dumping duties will be suspended.

Definition of Domestic Industry

6. Both the AD Agreement, in Article 4, and the SCM Agreement, in Article 16, contains a definition of "domestic industry." In principle, domestic industry means "the domestic producers as a whole of the like products or those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products." In this dispute, MOFCOM chose to define China's domestic industry in terms of "domestic producers whose collective output of the products constitutes a major proportion of the total domestic production of those products." The issue here is what level of collective output of the products could be taken as a major proportion of the total domestic production of those products (major proportion test).

7. Considering the fact that the AD Agreement and the SCM Agreement both stipulate "domestic producers as a whole of the like products" and "domestic producers whose collective output of the products constitutes a major proportion of the total domestic production of those products" in parallel with each other in defining domestic industry, Korea views that a major proportion of domestic production of like products should encompass a relatively high portion of the output of the domestic production of like products so that it could be considered equivalent to the domestic producers as a whole of like products. The Appellate Body in *EC-Fasteners* case also stated that a proper interpretation of the term "a major proportion" under Article 4.1 of the AD Agreement requires that the domestic industry defined on this basis encompass producers whose collective output represents "a relatively high proportion that substantially reflects the total domestic production."

8. Keeping in mind that domestic producers representing 46 percent of total domestic production had been accepted as a "major proportion" of the "domestic industry" under Article 4.1 of the AD Agreement in *Argentina - Poultry AD Duties(Panel)* case, Korea notes that the Appellate Body in *EC-Fasteners* case stated that "in the special case of a fragmented industry with numerous producers, the practical constraints on an authority's ability to obtain information may mean that what constitutes 'a major proportion' may be lower than what is ordinarily permissible in a less fragmented industry." Korea agrees to the decision made in *EC-Fasteners* in relation to the meaning of major proportion and thus views that, in general, in order to be acknowledged as a major proportion, the defined domestic industry must encompass producers whose collective output represents a relatively high proportion that substantially reflects the total domestic production, except, in fragmented industries, what constitutes a major proportion may be lower.

9. That having been said, the automobile industry is not a fragmented industry with numerous producers that may limit an authority's ability to obtain information, and therefore the major proportion of the auto industry requires that it encompass producers whose collective output represents "a relatively high proportion that substantially reflects the total domestic production."

10. Also, it is not a mere provision of an opportunity for a major proportion of domestic producers of like products to participate, but actual reflection of a major proportion of domestic producers of like products in the injury investigation that suffices to be recognized as the definition of domestic industry under Article 4.1 of the AD Agreement.

Thank you for your attention. We would be happy to take any question you might have.

ANNEX D-5

EXECUTIVE SUMMARY OF THE THIRD PARTY
WRITTEN SUBMISSION OF SAUDI ARABIA

I. INTRODUCTION

1. The Kingdom of Saudi Arabia's participation in this dispute addresses systemic issues relating to the interpretation of the Agreement on Subsidies and Countervailing Measures (the SCM Agreement) and the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the Anti-Dumping Agreement). The Kingdom takes no position on the merits of the claims that are based on the particular facts of this case.

II. AN INVESTIGATING AUTHORITY MAY RESORT TO "FACTS AVAILABLE" IN LIMITED CIRCUMSTANCES

2. WTO rules impose explicit limitations on an investigating authority's application of facts available. First, an investigating authority may only use "facts available" in the event of non-cooperation. Under Article 6.8 of the Anti-Dumping Agreement and Article 12.7 of the SCM Agreement, an investigating authority may resort to "facts available" in three limited circumstances: when an interested party (i) refuses access to, or (ii) otherwise does not provide, necessary information within a reasonable period; or (iii) significantly impedes the investigation.

3. Second, an investigating authority may only resort to "facts available" where it has provided proper notice. Annex II of the Anti-Dumping Agreement stipulates that an authority may only resort to "facts available" where it has (i) given proper notice of the information required, and (ii) informed interested parties of the possibility that "facts available" will be applied in the event of non-cooperation. Thus, an investigating authority must ensure that interested parties have been contacted and adequately informed before resorting to "facts available".

4. Third, "facts available" may be used "solely for the purpose of replacing information that may be missing", as the purpose of these provisions is to ensure that the investigation is not frustrated by non-cooperation on the part of interested parties. Correspondingly, an investigating authority must employ "the *best* information available", and any determination must have a factual foundation and must not be based on conjecture, or speculative inferences.

III. INVESTIGATING AUTHORITIES MUST DISCLOSE ESSENTIAL FACTS IN A MANNER WHICH ALLOWS PARTIES TO DEFEND THEIR INTERESTS

5. Article 6.9 of the Anti-Dumping Agreement and Article 12.8 of the SCM Agreement require an investigating authority: (i) to disclose all "essential facts" which form the basis for its determinations; and (ii) to ensure that an interested party has adequate time to review those facts and correct them in a manner that permits parties to defend their interests.

6. The Kingdom is of the view that where an investigating authority resorts to the use of "facts available", the disclosure of "essential facts" must include those facts which led the investigating authority to that conclusion, as well as the actual facts subsequently relied upon in reaching the subsidy or dumping determination. In the interest of due process, the "essential facts" must be identified as such so that the interested parties have an opportunity to review the facts used to replace the necessary information and to comment on the choice of "facts available" on which the investigating authority has relied. An investigating authority also must explain why these facts constitute the "best" information available.

IV. INVESTIGATING AUTHORITIES MUST ENSURE THAT PUBLIC NOTICES MEET SEVERAL TRANSPARENCY REQUIREMENTS

7. Both the Anti-Dumping and the SCM Agreements stipulate that investigating authorities must include in public notices "sufficient detail" on all "material issues" and, where measures are

imposed, "all relevant information on the matters of fact and law" and the "reasons which have led to the imposition of final measures".

8. An issue is "material" under Article 12.2 of the Anti-Dumping Agreement and Article 22.3 of the SCM Agreement where it has arisen in the course of the investigation and must be resolved in order for the investigating authority to be able to reach its determination. The obligation on investigating authorities to set forth findings and conclusions in "sufficient detail" requires that explanations are provided for *all* material elements of the determination. Possible alternative explanations must also be addressed in the public notice in the same level of detail. Where there is an affirmative determination for the imposition of a duty, Article 12.2.2 of the Anti-Dumping Agreement and Article 22.5 of the SCM 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".

9. Thus, a public notice should include any facts relating to the decision to resort to "facts available" because that is "one step in the process leading to the imposition of a final measure". It also should include the "facts available" actually selected and relied upon to calculate the dumping and subsidy rates.

V. ALL ASPECTS OF THE DETERMINATION OF INJURY MUST BE BASED ON AN OBJECTIVE EXAMINATION OF POSITIVE EVIDENCE

10. Every aspect of an injury determination is subject to the "overarching" obligation in Article 3.1 of the Anti-Dumping Agreement and Article 15.1 of the SCM Agreement that Members' investigating authorities must conduct an "objective examination" based on "positive evidence". The requirement to conduct an "objective examination" means that the examination must accord with the basic principles of good faith and fundamental fairness, and be both unbiased and even-handed. While "positive evidence" must be assessed on a case-by-case basis, evidence which is "positive" is that which is "affirmative, objective, verifiable, and credible".

11. The definition of "domestic industry" under Article 4.1 of the Anti-Dumping Agreement and Article 16.1 of the SCM Agreement is fundamental to an accurate injury and causation analysis that is based on an "objective examination" of "positive evidence". The Kingdom is of the view that the Panel should take this opportunity to confirm that legally permissible injury and causation determinations cannot follow from a definition of domestic industry that does not meet the same standards of "objective examination" and "positive evidence". This conclusion flows directly from the text of each Agreement, which repeatedly links the definition of "domestic industry" to the injury determination.

12. The Appellate Body recognized this linkage to mean that "the purpose of defining the domestic industry… [is] to provide the basis for the injury determination". The Appellate Body explained that the requirements of an "objective examination" based on "positive evidence" inform the substantive obligations for defining the domestic industry, and the "domestic industry" definition must "ensure that the subsequent injury analysis is based on positive evidence and involves an objective examination". Given that this is the case, the definition of "domestic industry" must itself also be based on an "objective examination" of positive evidence.

13. A price effects analysis under Article 3.2 of the Anti-Dumping Agreement and Article 15.2 of the SCM Agreement must meet several substantive and procedural requirements. First, the investigating authority must assess whether domestic prices are depressed or suppressed *by subject imports*, and the Appellate Body has confirmed that it will not be sufficient for an authority to confine its consideration to what is happening to domestic prices. Second, price effects determinations must be based on "positive evidence" and involve an "objective examination". Although an investigating authority is only required to "consider" price effects and need not make a definitive determination in this respect, this "does not diminish the rigour that is required of the inquiry" nor "the scope of *what* the investigating authority is required to consider". Finally, an investigating authority's consideration of price effects must be reflected in relevant documentation, such as an authority's final determination.

14. An investigating authority must also "demonstrate" causation, including specific injury findings and a proper "non-attribution" analysis, in accordance with Article 3.5 of the Anti-

Dumping Agreement and Article 15.5 of the SCM Agreement. The requirement to "demonstrate" causation is rigorous, and requires the investigating authority to "do more than simply list other known factors, and then dismiss their role with bare qualitative assertions". The authority must explain the causal analysis that has been conducted and thereby establish the requisite causal link for each factor in the analysis. The causation analysis under Articles 3.5 and 15.5 is informed by other parts of Articles 3 and 15, and an investigating authority's analysis of price effects, volume effects, and the domestic industry must tie into its final causation analysis.

15. In order to "demonstrate" causation, an investigating authority must conduct a "non-attribution" analysis, which demands a cogent explanation of the injurious effects of factors other than the dumped or subsidized imports. "Known factors" include those clearly raised by interested parties as well as those that the investigating authorities become aware of as a result of their own investigations. The injurious effects of those other factors must be separated and distinguished from the injurious effects of the subject imports, because this approach is the only way that an investigating authority can make a reasoned judgment as to the degree of injury caused by other factors.

16. Separating and distinguishing the injurious effects of dumped or subsidized imports from the injurious effects of each other known factor requires a *satisfactory or meaningful explanation* of the *nature and extent* of the other factors' injurious effects, as distinguished from those of the subject imports. The investigating authority is obligated to determine the *nature* and *extent* of the injurious effects of the factors under consideration, and to establish a genuine and substantial causal relationship between the dumped or subsidized imports and the injury found to exist. Conclusions as to attribution should be accompanied by "quantitative or thorough qualitative support", and the analysis "must go deeper than a simple comparative statement".

VI. CONCLUSION

17. The Kingdom respectfully requests the Panel to consider its positions on the interpretive issues set out above.

ANNEX D-6

EXECUTIVE SUMMARY OF THE THIRD PARTY
ORAL STATEMENT OF SAUDI ARABIA

I. INTRODUCTION

1. Thank you, Mr. Chairman. The Kingdom of Saudi Arabia would like to take this opportunity to affirm all of the positions set out in its Third Party submission. Today, the Kingdom will summarize its views on two of the systemic issues relating to the interpretation of the Anti-Dumping Agreement and the Agreement on Subsidies and Countervailing Measures: the use of "facts available" and the analysis of injury and causation.

II. FACTS AVAILABLE

2. The first issue concerns the circumstances under which an investigating authority may resort to "facts available". Article 6.8 of the Anti-Dumping Agreement and Article 12.7 of the SCM Agreement establish that "facts available" may only be used by an investigating authority in limited circumstances: where a party refuses access to, or otherwise does not provide, necessary information within a reasonable period; or where the party significantly impedes the investigation.

3. Moreover, an investigating authority may only resort to "facts available" where it has provided proper notice. Annex II of the Anti-Dumping Agreement stipulates that an authority may resort to "facts available" only where it has, first, given proper notice of the information required, and, second, informed interested parties of the possibility that "facts available" will be applied in the event of non-cooperation. Thus, an investigating authority must ensure that interested parties have been contacted and adequately informed before resorting to "facts available".

4. Finally, it is important to emphasize that when an investigating authority does resort to "facts available", it may only do so in order to fill in any gaps in the necessary information that was requested from, but not provided by, interested parties. The actual facts that may be relied upon to fill in any gaps are also limited. Specifically, investigating authorities are expected to employ "the *best* information available", which means that only those facts that are the most fitting or most appropriate to the case at hand should be used. Furthermore, even in cases of non-cooperation, investigating authorities must ensure that their determinations of the "facts available" have a factual foundation and are not based on conjecture or speculative inferences designed to increase the dumping or subsidy margin.

5. The Kingdom emphasizes that the function of the "facts available" provisions is to ensure that the work of an investigating authority is not frustrated by non-cooperation on the part of interested parties. As such, an investigating authority should not be permitted to resort to "facts available" where the absence of information before it is directly attributable to the authority's own failure to request it, or where better record evidence is available.

III. INJURY AND CAUSATION

6. The second issue relates to the requirements of a proper injury analysis. Every aspect of an injury determination is subject to the "overarching" obligation in Article 3.1 of the Anti-Dumping Agreement and Article 15.1 of the SCM Agreement that Members' investigating authorities must conduct an "objective examination" based on "positive evidence". The requirement to conduct an "objective examination" means that the examination must agree with the basic principles of good faith and fundamental fairness, and must be both unbiased and even-handed. "Positive evidence" is that which is "affirmative, objective, verifiable, and credible".

7. It is the Kingdom's view that the obligation to conduct an "objective examination" of "positive evidence" also must apply to an investigating authority's definition of the "domestic industry" under Article 4.1 of the Anti-Dumping Agreement and Article 16.1 of the SCM Agreement. Because the industry definition will provide the basis for the injury and causation analyses, the definition is fundamental to an "objective examination" of "positive evidence".

8. That these procedural and evidentiary obligations apply to the definition of "domestic industry" follows directly from the text of each Agreement, which repeatedly links the definition of "domestic industry" to the injury determination. The Appellate Body confirmed this linkage when it stated that "the domestic industry forms the basis on which an investigating authority makes the determination of whether the dumped imports cause or threaten to cause material injury to the domestic producers". With this in mind, the Appellate Body in *EC – Fasteners (China)* specifically instructed that, "to ensure the accuracy of an injury determination, an investigating authority must not act so as to give rise to a material risk of distortion in defining the domestic industry, for example, by excluding a whole category of producers of the like product". The definition chosen must not "introduce a material risk of skewing the economic data and, consequently, distorting [the] analysis of the state of the industry".

9. Given that the definition of "domestic industry" provides the basis for the injury determination, and that every aspect of the injury determination requires an "objective examination" based on "positive evidence", it logically follows that the definition of "domestic industry" under Article 4.1 of the Anti-Dumping Agreement and Article 16.1 of the SCM Agreement must meet the same standard. The Kingdom respectfully requests that this Panel reaffirm that legally permissible injury and causation determinations can only follow from a definition of "domestic industry" that meets the same standards of "objective examination" and "positive evidence".

10. The Kingdom would also like to take this opportunity to highlight an investigating authority's price effects analysis under Article 3.2 of the Anti-Dumping Agreement and Article 15.2 of the SCM Agreement. Any such analysis must meet several substantive and procedural requirements. First, the investigating authority must assess whether domestic prices are depressed or suppressed *by subject imports*, and the Appellate Body has confirmed that it will not be sufficient for an authority to only conduct a general analysis of domestic prices.

11. Second, a price effects analysis must be based on "positive evidence" and involve an "objective examination". Although an investigating authority is only required to "consider" price effects and need not make a definitive determination in this respect, this "does not diminish the rigour that is required of the inquiry" nor "the scope of *what* the investigating authority is required to consider".

12. Third, an investigating authority's consideration of price effects must be reflected in relevant documentation, such as the authority's final determination.

13. Finally, the Kingdom wishes to elaborate on how an investigating authority must "demonstrate" causation, including specific injury findings and a proper "non-attribution" analysis, in accordance with Article 3.5 of the Anti-Dumping Agreement and Article 15.5 of the SCM Agreement. The requirement to "demonstrate" causation is rigorous, and requires the investigating authority to "do more than simply list other known factors, and then dismiss their role with bare qualitative assertions". The authority must explain the causal analysis that has been conducted and thereby establish the requisite causal link for each factor in the analysis. The causation analysis under Articles 3.5 and 15.5 is informed by other parts of Articles 3 and 15, and an investigating authority's analysis of price effects, volume effects, and the domestic industry must tie into its final causation analysis.

14. In order to "demonstrate" causation, an investigating authority must conduct a "non-attribution" analysis, which demands a cogent explanation of the injurious effects of factors other than the dumped or subsidized imports. "Known factors" include those clearly raised by interested parties as well as those that the investigating authorities become aware of as a result of their own investigations. The injurious effects of those other factors must be separated and distinguished from the injurious effects of the subject imports, because this approach is the only way that an investigating authority can make a reasoned judgment as to the degree of injury caused by other factors.

15. Separating and distinguishing the injurious effects of dumped or subsidized imports from the injurious effects of each other known factor requires a *satisfactory or meaningful explanation* of the *nature and extent* of the other factors' injurious effects, as distinguished from those of the subject imports. The investigating authority is obligated to determine the *nature* and *extent* of the

injurious effects of the factors under consideration, and to establish a genuine and substantial causal relationship between the dumped or subsidized imports and the injury found to exist. Conclusions as to attribution should be accompanied by "quantitative or thorough qualitative support", and the analysis "must go deeper than a simple comparative statement".

IV. CONCLUSION

16. Mr. Chairman, the Kingdom urges the Panel, when considering the systemic issues raised in this dispute, to preserve the Anti-Dumping and SCM Agreements' carefully negotiated balance of interests between WTO Members. This balance requires the consistent application of the Agreements' multilateral disciplines.

17. This concludes the Kingdom's statement. Thank you for your attention.

ANNEX D-7

EXECUTIVE SUMMARY OF THE THIRD PARTY
WRITTEN SUBMISSION OF TURKEY

I. INTRODUCTION

1. The Republic of Turkey (hereinafter referred to as "Turkey") makes this third party submission due to its interest in the correct and coherent legal interpretation of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (hereinafter referred to as the "AD Agreement") and Agreement on Subsidies and Countervailing Measures (hereinafter referred to as the "SCM Agreement").

2. Turkey understands that the outcomes of this panel will have significant ramifications on the application of both agreements. Turkey, at this stage, would like to confine its submission to two important issues, namely the use of "facts available" based dumping margin /subsidy amount calculations vis-a-vis unknown exporters and disclosure standards regarding calculation of dumping margin/subsidy amount imposed to interested parties.

II. THE USE OF "FACTS AVAILABLE" METHODOLOGY IN CALCULATIONS AS REGARDS UNKNOWN EXPORTERS IN ANTI-DUMPING AND SUBSIDY INVESTIGATION

A. Summary of Arguments of Parties

4. In its first written submission, United States of America (hereinafter referred to as "United States") argues that, pursuant to Articles 6.1, Article 6.8 and Annex II of the AD Agreement as well as Article 12.1 and Article 12.7 of the SCM Agreement, during a dumping or countervailing duty investigation the authority is not entitled to use "facts available" based calculations and conclusions as regards foreign producers/exporters which are unknown to the investigating authority.

5. The United States further underscores that the investigating authority cannot resort to *"facts available"* based calculations since the "unknown producer/exporter" was not notified on the requested information and, as a matter of fact, these producer/exporters had not the opportunity to respond to the required information communicated to "known producer/exporters" in line with paragraph 1 of Annex II to AD Agreement.[1]

6. In response, the People's Republic of China (hereinafter referred to as "China") discusses that the AD Agreement and SCM Agreement are both silent on the methodology concerning the calculations regarding unknown producer/exporters. In this context, China argues that the absence of clear cut rules leave the investigating authority with a considerable discretion to adopt a reasonable method as regards the conclusions on foreign producers/exporters unknown to authority[2]. China equally admits that the predicate for the application of facts available under Article 6.8 of the AD Agreement is notification to all interested parties. China, however, asserts that the weight of legal responsibility upon the investigating authority, in terms of notification, would differ considering the structure of the industry in the country under investigation. It underlines that every case should be evaluated considering its own facts[3]. Finally, it claims that China has fulfilled the notification requirements enshrined both in AD Agreement and SCM Agreement and the "unknown exporters" in this case were US companies that deliberately opted in to stay unknown which was a choice to non-cooperate within the framework of Article 6.8 of AD Agreement and Article 12.7 of SCM Agreement.[4]

[1] United States' first submission, paras. 60,61.
[2] China's first submission, para. 100.
[3] China's first submission, para. 110.
[4] China's first submission, para. 114.

B. Summary of Leading Panel/Appellate Body Reports

7. The United States identifies the Appellate Body report of *Mexico-Rice (AB)* and the panel report of *China-GOES (panel)* as the leading cases to be considered in this dispute.

8. In the adjudication of *Mexico-Rice (AB)* the Appellate Body upheld the findings of the panel by concluding that an investigating authority infringes the provisions of Article 6.8 of and paragraph 1 of Annex II to AD Agreement in the event that it resorts to facts available, based on information in the application for initiation, to exporters that were not given notice of the information required by the authority.[5] The Appellate Body, however, underlines in following paragraphs[6] that the *information submitted by the petitioning domestic industry* cannot be used as a basis of fact available which leaves the question open whether information other than those present in the application of initiation can be used for the findings vis-à-vis unknown exporters.

9. In the report of China-*GOES (panel)* the panel concludes that the legal discipline of Article 6.8 of the AD Agreement should be considered together with provision of Article 6.1. In this line, the panel holds that a producer/exporter cannot be held liable of refusing to provide information which was not notified to this producer/exporter in first place. The panel concentrates on the point that such producers/exporters, which were unaware of the investigation and did not receive any communication, had not the opportunity to respond to information demanded by the authority. Consequently, they cannot be accused of any act (refusal/not providing required information, impediment of investigation) under Article 6.8 of AD Agreement (or Article 12.7 of the SCM Agreement) which leads to use facts available.[7] Finally, even though the panel admits that there is a lacuna in the AD Agreement on how the "unknown exporters" issue will be addressed it underlines that such a legal gap does not vindicate any decision violating the discipline enshrined in Article 6.8 of and Annex II to AD Agreement[8].

C. Observations of Turkey

10. Turkey considers that this legal discussion bears outcomes that have the potential to profoundly influence the practice of member countries enforcing anti-dumping/countervailing duties on prospective basis. Turkey observes that these ramifications will influence a wide spectrum of issue extending from the effectiveness of duties to the position of "unknown exporters" in final determinations and reviews.

11. Turkey understands that before analyzing whether the AD Agreement and SCM Agreement justifies the use of "*fact available*" to unknown producers/exporters it is important to address first the phases that lead to use of the "facts available". In that sense, without understanding the margin of the obligations to identify producers/exporters incumbent upon the investigating authority the analysis will be incomplete.

12. Pursuant to Article 5.2 (ii) of the ADA and Article 11.2(ii) of the SCM the domestic producers that claim to act as the domestic industry have to show in their application the identity of *known* exporters or producers operating in the investigated country/countries. Under Article 5.3 of ADA and Article 11.3 of the SCM, after an examination, if the investigating authority is satisfied with the accuracy and adequacy of the information and concludes that there is sufficient evidence to justify the initiation of an investigation it can take the necessary steps to commence an investigation.

13. The crucial question to be asked is whether, at this stage, the investigating authority is obliged to identify further potential producers/exporters that were not shown in the application. The Appellate Body report on *Mexico-Rice (AB)* discussed this issue and concluded that there is no provision in the AD Agreement or in the SCM Agreement that envisages the extension of obligation of identifying potential producers/exporters other than those *known* by the investigation authority at the time of submission of relevant questionnaires.

14. The Appellate Body supports this conclusion by stressing that there is no legal basis in Article 6.1 (Article 12.1 of the SCM Agreement) and Article 6.1.3 (Article 12.1.3 of SCM

[5] Appellate Body Report, Mexico-Rice, para. 259.
[6] Appellate Body Report, Mexico-Rice, paras. 261, 264.
[7] Panel Report, China-Goes (panel), paras. 7.386-7.393.
[8] Panel Report, China-Goes (panel), para. 7.390.

Agreement) of the AD Agreement requiring the investigating authority to notify not only the known producers/exporters but also those producers/exports which could have been identified if the authority had deepen its pre-initiation examination.[9] Accordingly, the word *"known exporters"*, as used in Article 6.1.3 of the ADA (12.1.3 of the SCM) encompasses the companies that were identified in the application by the domestic industry and those that were pinpointed by the investigating authority before initiation of the investigation.

15. The concept of *"known exporter"* in Article 6.10 of Anti-Dumping Agreement, however, should be considered differently from the same term used in Article 6.1.3 of the ADA. Article 6.10 reads as follows:

> *The authorities shall, as a rule, determine an individual margin of dumping for* ***each known*** *exporter or producer concerned of the product under investigation. In cases where the number of exporters, producers, importers or types of product involved is so large as to make such a determination impracticable, the authorities may limit their examination either to a reasonable number of interested parties or products by using samples which are statistically valid on the basis of information available to the authorities at the time of selection, or to the largest percentage of volume of the exports from the country in question which can be reasonably be investigated (emphasis added)*

16. The concept of *"known"* in this provision includes those producers/exporters that the investigating authority got aware of during investigation. This conclusion was also confirmed by the Appellate Body Report of *Mexico-Rice (AB)*.[10] In light of our explanations, *"known producers/exporters"* within the meaning of Article 6.10 of the ADA will be comprised of the following:

a. The producer/exporters which received a questionnaire at the beginning of the investigation and cooperated in full manner without being subject to "facts available" procedure.

b. Under the condition that Article 6.14 of AD Agreement and Article 12.12 of the SCM Agreement is maintained, the producer/exporters which made themselves known after the initiation of investigation who got informed about the process from sources other than the investigating authority and cooperated in full sense.

17. In cases where sampling is warranted under Article 9.4 of the ADA, dumping margins for producers/exporters outside the scope of examination will be calculated in line with the methodology stipulated in Article 9.4. In such a case the calculation will not be company-specific.

18. Another group of producers/exporters which will not be recipients of company specific dumping margins will be those who did not comply with the rules of Articles 6.8 and Annex II of the ADA (Article 12.7 of the SCM). Consequently, the dumping margin/subsidy amount calculated for this group will be based on "facts available".

19. The case law confirms that under the legal discipline of Article 6.10 of the ADA the investigating authority is not under any obligation to calculate an individual margin for producers/exporters which the authority was not aware of.[11] Accordingly, the position of this third group of producers/exporters, namely those which;

- were not in the list of producers or exporters shown in the domestic industry's application and consequently never received relevant questionnaires.
- could not be identified even tough best effort has been displayed by the investigating authority.
- were not notified by their own government agencies,
- were genuinely uninformed concerning the ongoing process,

constitute the central element of the discussion.

[9] Appellate Body Report, Mexico-Rice, paras. 247, 251.
[10] Appellate Body Report, Mexico-Rice, para. 255.
[11] Appellate Body Report, Mexico-Rice, para. 255.

20. Turkey considers that the focus of the jurisprudence concerning the interpretation of Article 6.8 of and paragraph 1 of Annex II to the AD Agreement (Article 12.7 of the SCM Agreement) is on the principle that *due process* should be observed during the investigation.

21. The reports of leading cases emphasize that the use of facts available should be an outcome of a *"process"* which, by definition, necessitates the active participation of the investigating authority and the interested party under investigation. It is underlined that the Article 6.8 of the AD Agreement (Article 12.7 of SCM Agreement) envisages that the interested party may become subject to fact available methodology if it refuses access to, or otherwise does not provide necessary information within a reasonable period or significantly impedes the investigation through various means. Under all scenarios the adverse response/action of the party is considered to be needed. Under such consideration, the jurisprudence holds that the authority cannot be entitled to impose a less favorable duty, calculated with facts available methodology, on a foreign producer/exporter which was not notified on the responsibilities within legal framework of Article 6.8 of the AD Agreement (Article 12.7 of the SCM Agreement).

22. Turkey understands the legal reasoning of the Appellate Body and Panel report. Yet the outcome of the case law is disputable under a number of points.

23. During the *China-GOES* adjudication China rightly voiced its concern that the Appellate Body report of *Mexico- Rice* did not consider the policy implications and that there were no guiding principles or rules in Articles 9.4 and 6.10 of the ADA on how to act vis-à-vis unknown producers or exports in anti-dumping investigations. This point has correctly been raised again in this panel. Turkey argues that the silence of both AD and SCM Agreement on how the calculations/findings will be based for unknown producers/exporters creates a lacuna in the legal structure of both agreements. Such a legal grey zone is not a question on procedure but relates to the very substance of the investigation affecting the imposition of its outcome. Even though this issue was partially addressed in the panel report of *China-GOES* (panel) the question still necessitates further clarification.[12]

24. Turkey agrees with the argument that the legal margins of the obligation under Article 6.1, 6.1.3 and 6.10 of AD Agreement to determine all known producers/exporters should be considered under the peculiarities of the industry in which the foreign producers/exporters are operating. In this respect Turkey would like reiterate that both the conceptual reading of the relevant articles and case law affirms that the investigating authority is not under an obligation to determine potential producer/exporters which could have been found if the examination had been extended outside the borders of the application of petitioning domestic industry.

25. Turkey considers that the United States` approach and jurisprudence stays silent concerning the producers/exporters which get informed on the investigation through sources other than the investigating authority yet preferred to stay *unknown* being aware that even "facts available" based calculation is not possible to be applied. Although, it is understood that the case law aims to protect the *bona fide* exporter/producer, it still leaves a gap as regards those companies that deliberately prefer to stay out of scrutiny to avoid any measure.

26. Turkey opines that the case law based interpretation of the facts available methodology would encourage non-cooperation for unknown producers/exporters which are not identified by the applicant(s) and/or by the investigating authority. Accordingly, the non-applicability of "facts available" for unknown producers/exporters and the absence of instrument or clear rules to determine dumping margin and subsidy amount by the investigating authority can undermine the effectiveness of the anti-dumping and countervailing measures.

27. In the light of these arguments the Panel may want to clarify how the lacuna in AD and SCM Agreements will be addressed without harming the due process requirements in investigations but observing the ultimate objective of trade remedies discipline namely the protection of domestic industry from unfair trade practices.

[12] Panel Report, China-Goes (panel), para. 7.390.

III. DISCLOSURE OF CALCULATIONS AND DATA USED TO DETERMINE THE EXISTENCE OF DUMPING TO THE INTERESTED PARTIES

A. Observations of Turkey

28. In its first written submission, the United States claims that China breached Article 6.9 of the AD Agreement by failing to disclose to interested parties the "essential facts" forming the basis of MOFCOM's decision to apply anti-dumping duties.

29. Article 6.9 of the AD Agreement requires the investigating authority to disclose to interested parties the "essential facts" forming the basis of the investigating authority's decision to apply anti-dumping duties:

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

30. It is clear that Article 6.9 requires the investigating authority to make a one-time disclosure before a final determination is made as to whether a definitive measure will be applied.

31. Disclosure of "essential facts" is a crucial procedural obligation for the investigating authorities and a procedural right for the interested parties in order to defend their interests and present counter arguments before imposition of final measures. In this regard, fulfilling of this obligation by the investigating authority and giving a meaningful opportunity to the interested parties to defend their interests depends mainly on the facts to be disclosed.

32. Turkey is of the view that the facts related with the existence of dumping and injury on the domestic industry and the causal link between dumped imports and injury on the domestic industry are "essential facts". Because, no measure is possible to be imposed if one these elements is absent.

33. This consideration of Turkey seems to be supported by the Panel in *Argentina – Poultry Anti-Dumping Duties* which further considered the term of "essential facts". The Panel stated that "We do not believe that the ordinary meaning of the word "fact" would support a conclusion that Article 6.9, when using the term "fact" refers not only to "facts" in the sense of "things which are known to have occurred, to exist or to be true" but also to "motives, causes or justifications"[13].

34. The calculations relied on by the investigating authority to determine the normal value and export price –as well as data underlying those calculations- and the methodology followed by the investigating authority cited in Article 2.4.2 in the AD Agreement constitute "essential facts" forming the basis of the investigating authority's imposition of final measures within the meaning of Article 6.9. Thus, disclosure of calculations gives interested parties to check correctness of these calculations. If there is a clerical or mathematical error in these calculations which could seriously distort the actual dumping margin might be raised to be reviewed by the investigating authority.

35. In addition to this, Turkey would like to clarify that these company specific calculations, which in most cases include confidential information, should be disclosed only to the related interested party and not to all interested parties. Thus the disclosure should be limited only to the relevant interested party.

IV. CONCLUSION

36. In the light of our explanations Turkey would like to underscore the following conclusions:

a. The legal interpretation of the United States concerning the non-application of Article 6.8 and Annex II of the Anti-Dumping Agreement as well as the Article 12.7 of the Subsidies Agreement for unknown producers/exporters bears negative policy implications in terms of the effectiveness of duties and the level of protection of the domestic industry.

[13] Panel Report, Argentina – Poultry, para.7.225.

b. The lacuna in the legal structure of the AD and SCM Agreements concerning rules and procedures will be followed in calculations/conclusions as regards unknown producers/exporters is an issue that need to be addressed carefully. As underlined before such a legal grey zone has the potential to create many downsides for practitioners which can extended from the problems created by producers and exporters that deliberately preferred to remain unknown to the circumvention of the measure through company-shifting. Turkey has serious concerns whether this interpretation serves the objective of the trade remedies discipline which aims to protect of the domestic industry from unfair trade practices.

c. The calculations and data used to determine the existence of dumping are "essential facts" within the interpretation of "essential facts" in Article 6.9 of the Anti-Dumping Agreement. This is clear procedural obligation of the investigating authority to disclose these facts to give an opportunity to interested parties to examine the correctness of the calculations and the data used.

37. Turkey appreciates this opportunity to present its views to the Panel. Turkey requests this Panel to review the comments stated in this submission, in interpreting AD and SCM Agreements.

ANNEX D-8

EXECUTIVE SUMMARY OF THE THIRD PARTY ORAL STATEMENT OF TURKEY

I. Introduction

Mr. Chairman, Members of the Panel,

1. Turkey welcomes this opportunity to present its views in the present dispute. Turkey has systemic interest in the issues raised by the US in this dispute and intervenes to provide its views for the proper interpretation and application of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (hereinafter referred to as the "AD Agreement") and Agreement on Subsidies and Countervailing Duties (hereinafter referred to as the "SCM Agreement").

2. In this statement, Turkey will focus on "the use of "facts available" in calculations concerning unknown producers/exporters" and "disclosure of data used to determine the existence of dumping".

II. The Use of "Facts Available" In Calculations Concerning Unknown Producers/Exporters

Mr. Chairman,

3. Let me start with expressing Turkey's view on "using facts available in calculations concerning unknown producers/exporters".

4. There is no rule, principle or guidance in the AD or SCM Agreement regarding determination of anti-dumping margin or subsidy amount for the producers/exporters which are not identified by the complainant and the investigating authority and not cooperated during the investigation process.

5. Having no rule, principle or guidance in the agreements induces investigating authorities to find solutions in order to impose duty for these producers/exporters due to the fact that imposition of anti-dumping duty or countervailing duty for these unknown producers/exporters is essential for the effectiveness of the trade remedies.

6. According to the Appellate Body decision in Mexico-Rice (AB)[1] and textual reading of Article 5.2 (ii) of the AD Agreement and Article 11.2(ii) of the SCM Agreement, Turkey opines that the investigating authority is not under the obligation to identify the potential producers/exporters which did not appear on the petition of the domestic industry at the initial phase of the investigation. In addition to this, the notice of initiation provided to the diplomatic authorities of the investigated country does not generate any obligation for the investigated country to make their producers/exporters aware of the investigation[2].

7. Thus, taking into account that neither the investigating authority nor the government of the investigated country is obliged to identify all producers/exporters it would be fair to conclude that there will always be a group of producers/exporters falling outside the individual examination of the investigating authority in AD or CVD investigations. The number of unknown producers/exporters will be higher when the investigated industry is fragmented.

8. As a result, it is clear that there will be residual producers/exporters in nearly all AD or CVD investigations which are not known by the complainant and not identified by the investigating authority despite its best effort and not informed by the government of the investigated country.

9. Having said that, the crucial question that should be addressed and responded by the panel that arises in this dispute is whether "facts available" can be used for determination and imposition of an AD/CVD for residual exporters/producers. In relation to this question, Turkey believes that

[1] Appellate Body Report, Mexico Rice, paras. 247,251.
[2] Appellate Body Report, Mexico Rice, para. 263.

the question whether it is necessary to determine anti-dumping margin or subsidy amount for these unknown producers/exporters and impose duty for these producers/exporters is out of the scope of the examination of the Panel.

10. However, taking into account the importance of the response to that question, let me start with expressing Turkey's view whether it is necessary to determine anti-dumping margin or subsidy amount for these unknown producers/exporters and impose duty for these producers/exporters?

11. Turkey considers that it is essential and necessary to calculate anti-dumping margin or subsidy amount and impose duty for unknown producers/exporters. Firstly, if no measure is imposed for these exporters/producers this will undermine the credibility and effectiveness of the measure, makes the measure inutile and may lead to circumvention.

12. Secondly, these exporters/producers which are unknown and not identified by the complainant in the petition and by the investigating authority at the initiation stage of the investigation despite its best efforts will be out of the scope of the measure. So these producers/exporters will continue to sell their products with/without dumped prices – no clarity whether their products are dumped because no determination has been made - by taking advantage of extra costs for cooperated exporters/producers brought by AD/CVD measures.

13. It is clear that such an approach will encourage non-cooperation for unknown producers/exporters. In fact, while the legal rationale of panel and Appellate Body reports[3], understandably, aims to protect the "*bone fide*" producer/exporter through "*due process*" requirement they still leave unanswered questions on how to treat those producer/exporters which were fully aware of the initiation of the ongoing investigation but deliberately stayed unknown to avoid a possible trade measure.

14. Fourthly, non-imposition of a measure for "unknown" producers/exporters makes newcomer investigation process inutile for producers/exporters due to the fact that these producers/exporters will not be subject to the measure. As it is clear that newcomer process stipulated in Article 9.5 of the AD agreement and Article 19.3 of the SCM Agreement protect producers/exporters right which have no export sales during the investigation period or which come out after the imposition of the measures and subject to the measure. It should be highlighted at this point that if no measure is imposed to the producers/exporters which have no export sales during the investigation period there is no need to have a newcomer mechanism in AD and SCM Agreement. In this respect, having a newcomer mechanism in AD and SCM Agreements should be interpreted as a measure shall be imposed to exporters/producers which do not have export sales during the investigation period.

15. In relation to this issue, I would like to recall at this stage that Article 3.2 of the Dispute Settlement Understanding envisages that the recommendations and rulings of the Dispute Settlement Body can not add to or diminish the rights and obligations provided in the covered agreements.

16. In addition to this, I would like to highlight that there is also a need to impose a measure in cases where there is no producer/exporter except cooperated companies. This practice will prevent circumvention of a measure through many ways like changing company names or establishment of a new company and protect rights of the producers/exporters that may come out after the measure is imposed by resorting newcomer review process.

17. Let me move back to the question that should be addressed and responded by the panel whether "facts available" can be used for determination of anti-dumping margin and subsidy amount for imposition of a measure on residual exporters/producers.

18. As underlined at the beginning of our statement there is no rule, principle or guidance in the AD or SCM Agreement displaying the methodology on how the dumping margin/subsidy amount should be calculated for producers/exporters unknown to the investigating authority. Turkey considers such an absence as a significant lacuna in the fabric of both agreements. Notwithstanding, Turkey has no clear response concerning the basics of the calculations. Even

[3] Appellate Body Report, Mexico -Rice, paras.259; Panel Report, China-GOES (Panel), paras. 7.386-7.393.

though the jurisprudence holds that "facts available" based calculations are not applicable to unknown producers/exporters and underlines such a legal lacuna cannot be remedied through the expansion of discretional powers[4] of the investigating authority the basis of these calculations still remains unanswered.

19. As a last point, it has been argued in third party submissions that the case of "unknown producers/exporters" would appear differently in countervailing duty investigations. It is highlighted that, for practical reasons, the member state, granting the subsidy, would possess knowledge on the names and addresses of the recipients.[5] Thus, as a rebuttable presumption, the companies included to the subsidy program cannot be considered to be a part of the "unknown producer/exporter" group since they will be informed by their own government authorities. Even though the reasoning of such an approach appears to be sound the position of the companies that are not a part of a long lasting subsidy program is still ambiguous. Furthermore, it is not clear what will happen if the member state under investigations refuses to cooperate or partially cooperate. Lastly, the questions why a member would refrain from conveying the notice of investigation to the relating firm or why this firm would deliberately keep itself unknown[6] need to be addressed.

III. Disclosure of Data Used To Determine the Existence of Dumping

Mr. Chairman,

20. Let me move to clarify Turkey's position regarding "disclosure of data used to determine the existence of dumping".

21. Taking this opportunity, I would like to reiterate that disclosure of "essential facts" is a crucial procedural obligation for the investigating authorities and a procedural right for the interested parties in order to defend their interests and present counter arguments before imposition of final measures. In this regard, fulfilling of this obligation by the investigating authority and giving a meaningful opportunity to the interested parties to defend their interests depends mainly on the facts to be disclosed.

22. Having said that, the calculations relied on by the investigating authority to determine the normal value and export price –as well as data underlying those calculations- and the methodology followed by the investigating authority cited in Article 2.4.2 in the AD Agreement constitute "essential facts" forming the basis of the investigating authority's imposition of final measures within the meaning of Article 6.9. Thus, disclosure of calculations gives interested parties to check correctness of these calculations. If there is a clerical or mathematical error in these calculations which could seriously distort the actual dumping margin might be raised to be revised by the investigating authority.

23. In addition to this, Turkey would like to clarify that these company specific calculations, which in most cases include confidential information, should be disclosed only to the related interested party and not to all interested parties. Thus the disclosure should be limited only to the relevant interested party.

Turkey appreciates this opportunity to present its view and would be happy to take questions you might have.

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[4] Panel Report, China-GOES, para. 7.390.
[5] Third Party Written Submission of the European Union, p. 9.
[6] Third Party Written Submission of the European Union, p. 11.