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

RECOURSE TO ARTICLE 21.5 OF THE DSU BY THE UNITED STATES

REPORT OF THE PANEL

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EC – Bananas III (Article 21.5 – Ecuador)	Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 of the DSU by Ecuador*, WT/DS27/RW/ECU, adopted 6 May 1999, DSR 1999:II, p. 803
EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)	Appellate Body Reports, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Second Recourse to Article 21.5 of the DSU by Ecuador*, WT/DS27/AB/RW2/ECU, adopted 11 December 2008, and Corr.1 / *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 of the DSU by the United States*, WT/DS27/AB/RW/USA and Corr.1, adopted 22 December 2008, DSR 2008:XVIII, p. 7165
EC – Bananas III (Article 21.5 – US)	Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 of the DSU by the United States*, WT/DS27/RW/USA and Corr.1, adopted 22 December 2008, upheld by Appellate Body Report WT/DS27/AB/RW/USA, DSR 2008:XIX, p. 7761
EC – Bed Linen	Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/AB/R, adopted 12 March 2001, DSR 2001:V, p. 2049
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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
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EC – IT Products	Panel Reports, *European Communities and its member States – Tariff Treatment of Certain Information Technology Products*, WT/DS375/R / WT/DS376/R / WT/DS377/R, adopted 21 September 2010, DSR 2010:III, p. 933
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
EC – Sardines	Appellate Body Report, *European Communities – Trade Description of Sardines*, WT/DS231/AB/R, adopted 23 October 2002, DSR 2002:VIII, p. 3359
EC – Selected Customs Matters	Appellate Body Report, *European Communities – Selected Customs Matters*, WT/DS315/AB/R, adopted 11 December 2006, DSR 2006:IX, p. 3791
EU – Footwear (China)	Panel Report, *European Union – Anti-Dumping Measures on Certain Footwear from China*, WT/DS405/R, adopted 22 February 2012, DSR 2012:IX, p. 4585
Korea – Certain Paper (Article 21.5 – Indonesia)	Panel Report, *Korea – Anti-Dumping Duties on Imports of Certain Paper from Indonesia – Recourse to Article 21.5 of the DSU by Indonesia*, WT/DS312/RW, adopted 22 October 2007, DSR 2007:VIII, p. 3369
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US – FSC (Article 21.5 – EC II)	Appellate Body Report, *United States – Tax Treatment for "Foreign Sales Corporations" – Second Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS108/AB/RW2, adopted 14 March 2006, DSR 2006:XI, p. 4721
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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)	Appellate Body 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/AB/RW, adopted 11 May 2007, DSR 2007:IX, p. 3523

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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
US – Zeroing (EC) (Article 21.5 – EC)	Appellate Body Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing") – Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS294/AB/RW and Corr.1, adopted 11 June 2009, DSR 2009:VII, p. 2911
US – Zeroing (EC) (Article 21.5 – EC)	Panel Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing") – Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS294/RW, adopted 11 June 2009, as modified by Appellate Body Report WT/DS294/AB/RW, DSR 2009:VII, p. 3117

ABBREVIATIONS USED IN THIS REPORT

Abbreviation	Description
Anti-Dumping Agreement	Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994
AK Steel	AK Steel Corporation
AK Steel Supplementary Questionnaire Response	AK Steel Corporation, Supplementary Industry Injury Investigation Questionnaire Response (Exhibit US-18) (BCI)
Allegheny Ludlum	ATI Allegheny Ludlum Corporation
AUV	Average unit value
Baosteel	Baosteel Group Corporation
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
GATT 1994	General Agreement on Tariffs and Trade 1994
GOES	Grain oriented flat-rolled electrical steel
MOFCOM	Ministry of Commerce of the People's Republic of China
Original Determination	MOFCOM, Final Determination in Anti-Dumping and Anti-Subsidy Investigations on GOES Imports from the US and Russia, No. 21, 10 April 2010 (Exhibit US-4)
Price negotiation letters	Price negotiation letters exchanged between a Chinese producer and Chinese purchasers (Exhibits US-7, US-8 and US-9) (BCI)
Redetermination	MOFCOM, Determination on the Re-investigation of Anti-Dumping and Countervailing Duties on Grain Oriented Flat-Rolled Electrical Steel Imports from the United States, Public Notice [2013] No. 51, including its annexes (Exhibit US-1)
Redetermination – China's translation	MOFCOM, Determination of the Ministry of Commerce of the People's Republic of China on the Anti-dumping and Countervailing Reinvestigation on Imports of Grain Oriented Flat-rolled Electrical Steel Originating in the United States (Exhibit CHN-1)
Redetermination Disclosure	MOFCOM, Notice of information disclosure before the industry injury verdict of the anti-dumping on imported grain-oriented silicon electrical steel with the country of origin in the United States and Russia and the anti-subsidy on the imported grain-oriented silicon electrical steel with the country of origin in the United States, Public Notice [2013] No. 327 (Exhibit US-3)
Redetermination Disclosure – China's translation	MOFCOM, Notice of Disclosure Prior to Industry Injury Determination in the Anti-dumping Reinvestigation on Imports of Grain Oriented Flat-rolled Electrical Steel originating in the U.S. and Russia and the Anti-subsidy Reinvestigation on Imports of Grain Oriented Flat-rolled Electrical Steel originating in the U.S. SDCYCH [2013] No. 327 (Exhibit CHN-2)
Russian contract	Contract between a Russian producer and a Chinese purchaser (Exhibit US-6) (BCI)
SCM Agreement	Agreement on Subsidies and Countervailing Measures
Wuhan	Wuhan Iron and Steel Corporation
WTO Agreement	Marrakesh Agreement Establishing the World Trade Organization

1 INTRODUCTION

1.1 Complaint by the United States

1.1. This compliance dispute concerns the challenge by the United States to measures taken by China to comply with the rulings and recommendations of the Dispute Settlement Body (DSB) in *China – Countervailing and Anti-Dumping duties on Grain Oriented Flat-rolled Electrical Steel from the United States*.

1.2. On 13 January 2014, the United States requested consultations with China pursuant to paragraph 1 of the understanding reached on 19 August 2013 between China and the United States in "Agreed Procedures under Articles 21 and 22 of the Dispute Settlement Understanding" (Sequencing Agreement), which states that should the United States consider that the situation described in Article 21.5 of the Understanding on Rules and Procedures Governing the Settlement of Dispute ("DSU") exists, the United States will request that China enter into consultations with the United States.

1.3. Consultations were held on 24 January 2014, but failed to resolve the dispute.

1.2 Panel establishment and composition

1.4. On 13 February 2014, the United States requested the establishment of a panel pursuant to Articles 6 and 21.5 of the DSU with standard terms of reference.[1]

1.5. At its meeting on 26 February 2014, the Dispute Settlement Body (DSB) referred this dispute, if possible to the original Panel, in accordance with Article 21.5 of the DSU.

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

> To examine, in the light of the relevant provisions of the covered agreements cited by the parties to the dispute, the matter referred to the DSB by the United States in document WT/DS414/16 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.[2]

1.7. In accordance with Article 21.5 of the DSU, the Panel was composed on 17 March 2014 as follows:

Chairperson:	Mr John Adank
Members:	Mr Anthony Abad Mr Jan Heukelman

1.8. The European Union, India, Japan and the Russian Federation notified their interest in participating in the Panel proceedings as third parties.

1.3 Panel proceedings

1.3.1 General

1.9. After consultation with the parties, the Panel adopted its Working Procedures[3] and timetable on 22 May 2014. After further consulting the parties, the Panel revised its timetable on 24 October 2014. The Panel further modified its timetable on 19 January 2015.

1.10. The Panel held its substantive meeting with the parties on 14 and 15 October 2014. A session with the third parties took place on 15 October 2014. The Panel issued its Interim Report to the parties on 17 March 2015. At the request of China, the Panel held a further meeting with

[1] WT/DS414/16.
[2] WT/DS414/17.
[3] See the Panel's Working Procedures in Annex A-1.

the parties to consider issues identified in the parties' requests for interim review on 23 April 2015. The Panel issued its Final Report to the parties on 5 May 2015.

1.3.2 Working procedures on Business Confidential Information (BCI)

1.11. After consultation with both parties, the Panel adopted, on 22 May 2014, additional procedures for the protection of BCI.[4]

2 FACTUAL ASPECTS

2.1 The measures at issue

2.1. This dispute concerns measures taken by China to implement the DSB recommendations and rulings in *China – Countervailing and Anti-Dumping duties on Grain Oriented Flat-rolled Electrical Steel from the United States*, as set forth in MOFCOM's Redetermination issued on 31 July 2013, pursuant to which China continues to impose anti-dumping and countervailing duties on imports of GOES from the United States.

3 PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

3.1. The United States requests that the Panel find that:

a. MOFCOM's injury determination is inconsistent with Articles 3.1, 3.2, 3.4 and 3.5 of the Anti-Dumping Agreement and Articles 15.1, 15.2, 15.4 and 15.5 of the SCM Agreement. Specifically:

   i. MOFCOM's price effects analysis is inconsistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement and Articles 15.1 and 15.2 of the SCM Agreement;

   ii. MOFCOM's impact analysis is inconsistent with Articles 3.1 and 3.4 of the Anti-Dumping Agreement and Articles 15.1 and 15.4 of the SCM Agreement; and

   iii. 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.

b. MOFCOM acted inconsistently with its obligations under Article 6.9 of the Anti-Dumping Agreement and Article 12.8 of the SCM Agreement by failing to disclose certain essential facts in connection with its Redetermination.

c. MOFCOM acted inconsistently with its obligations under Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement and Articles 22.3 and 22.5 of the SCM Agreement by failing to set forth in sufficient detail in its Redetermination or a separate report, China's findings and conclusions on certain material issues of fact and law in connection with its Redetermination.

3.2. China requests that the Panel reject the United States' claims in this dispute in their entirety.

4 ARGUMENTS OF THE PARTIES

4.1. The arguments of the parties are reflected in their executive summaries, 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 European Union and Japan are reflected in their executive summaries, provided in accordance with paragraph 19 of the Working Procedures adopted by the Panel (see Annex D). India and the Russian Federation did not submit written or oral arguments to the Panel.

[4] See Additional Working Procedures on BCI in Annex A-2.

6 INTERIM REVIEW

6.1. On 17 March 2015, the Panel submitted its Interim Report to the parties. On 31 March 2015, the United States and China both submitted written requests for the review of precise aspects of the Interim Report. In addition, China requested an interim review meeting, which was held on 23 April 2015.

6.2. In accordance with Article 15.3 of the DSU, this section of the Report sets out the Panel's response to the parties' requests made at the interim review stage. We modified certain aspects of the Report in light of the parties' comments where we considered it appropriate, as explained below. As a result of the changes that we have made, the numbering of footnotes in the Final Report has changed from the Interim Report. References to footnotes in this section relate to the Final Report. References to paragraph numbers are to the Interim Report.

6.1 Requests submitted by the United States

6.3. The United States requests that the Panel revise the last sentence of paragraph 7.20 of the Interim Report to reflect the fact that it challenged China's argument regarding the replacement of the term "low" with the term "unfair" in MOFCOM's Redetermination, referring to its oral statement at the Panel's meeting with the parties in this regard.[5] China did not comment on this request.

6.4. We have reviewed the United States' oral statement at the Panel's meeting with the parties, and we have amended the last sentence of paragraph 7.20 to reflect more accurately the arguments made by the United States.

6.5. The United States requests that the Panel revise the last sentence of paragraph 7.63 of the Interim Report to align this sentence with the standard of review as enunciated by the Panel at paragraph 7.4 and as applied by the Panel in paragraphs 7.58 and 7.120.[6] China did not comment on this request.

6.6. We agree that, for consistency and clarity, the same terminology should be used in our report where, as in this instance, the same standard is being applied and the same meaning is intended. We have therefore amended the last sentence of paragraph 7.63 to align this sentence with other references to the standard of review as set out in paragraphs 7.4, 7.58 and 7.120.

6.7. The United States requests that the Panel modify its findings in paragraph 8.2 of the Interim Report. The United States recalls that it requested the establishment of the Panel pursuant to Article 21.5 of the DSU because it considered that China's measures taken to comply were inconsistent with the covered agreements, and as a result, China failed to comply with the DSB's recommendations and rulings in this dispute, and suggests that the Panel modify paragraph 8.2 to frame its findings of inconsistency in similar terms.[7] At the interim review meeting, China commented that there was no need for the new language suggested by the United States, contending that since the measures at issue no longer exist, there is no basis for a statement that China has failed to bring its measures into compliance.[8]

6.8. Having considered the matter, and in light of our decision regarding the United States' request concerning paragraph 8.6 of the Interim Report below, we have granted the United States' request and modified paragraph 8.2, albeit using different language from that suggested by the United States. Notwithstanding China's views concerning the termination of the measures, in this proceeding we have found that the measures taken by China to comply with the recommendations and rulings in the original dispute are inconsistent with relevant provisions of the Anti-Dumping and SCM Agreements. In this context, we consider that the conclusion that China failed to comply with the recommendations and rulings of the DSB is justified, regardless of subsequent events.

6.9. The United States requests that the Panel delete the recommendation set out in paragraph 8.6 of the Interim Report. The United States notes that this is a compliance proceeding, and suggests that there is consequently no need for the Panel to make a recommendation that

[5] United States' request for interim review, paras. 3-4.
[6] Ibid. paras. 5-7.
[7] Ibid. paras. 8-10.
[8] China's oral statement at the interim review meeting, para. 15.

China bring its measures taken to comply into conformity. The United States contends that a panel in a compliance proceeding is tasked with determining whether a measure taken to comply by the Member concerned that is within the panel's terms of reference exists or is inconsistent with a covered agreement, and asserts, relying on the report of the Appellate Body in *US – FSC (Article 21.5 – EC II)*[9], that the Panel fulfils its mandate when it concludes that China has failed to implement the recommendations and rulings of the DSB, and that until a Member has brought its measures found to be inconsistent by the DSB into full compliance with its WTO obligations, the original recommendation by the DSB will remain operative, and no further recommendation pertaining to the measure taken to comply is necessary.[10] At the interim review meeting, China argued that the original recommendations were no longer operative, as there are no longer any disputed measures in effect to which those recommendations could apply, and asserted that termination of the measures at issue in this proceeding brings China into full compliance.[11]

6.10. While *US – FSC (Article 21.5 – EC II)* concerned in particular a recommendation under Article 4.7 of the SCM Agreement, the Appellate Body's reasoning suggests that a recommendation to bring the measures taken to comply into conformity is not necessary in an Article 21.5 compliance proceeding in any case, as the original recommendations and rulings of the DSB under Article 19.1 remain in effect until fully complied with. The Appellate Body and a number of panels have in fact taken this view and not issued recommendations in Article 21.5 proceedings.[12] As discussed below, at paragraphs 6.20-6.25, we have no evidence properly before us on the basis of which we could conclude that there is no longer any disputed measure in effect to which the original recommendations and rulings of the DSB could apply, and thus no basis on which we could conclude that China is in compliance with those recommendations and rulings.

6.11. Having considered the matter, we agree with the United States that a recommendation is not necessary in this proceeding, and have therefore decided to grant the United States' request and modified paragraph 8.6 to reflect our views.

6.2 Requests submitted by China

6.12. China requests that paragraph 7.21 of the Interim Report be modified to reflect its view that the term "unfair imports" is not unclear and that the change from "low-priced imports" to "unfair imports" was not cursory, and that the changes were necessary to refer more precisely to the imports at issue and avoid confusion about whether MOFCOM had engaged in price comparisons. China makes no specific suggestions in this regard.[13] At the interim review meeting, the United States recalled its arguments on this issue and argued that China provided no basis for its request.[14]

6.13. We recall that we found China's explanation for the change in terminology, rather than the term "unfair imports" itself, to be unclear. Nothing in China's request affects our conclusion that the change in terminology appears to have been made primarily to avoid the reference to low prices that both we and the Appellate Body found problematic in the original dispute. Moreover, we considered the change in terminology specifically in evaluating whether it demonstrated a change in the Redetermination sufficient to allow the United States to challenge MOFCOM's analysis of the relevant injury factors, concluding that it did not. Accordingly, we see no reason to make any changes to paragraph 7.21, and deny China's request.

[9] Appellate Body Report, *US – FSC (Article 21.5 – EC II)*, paras. 85-87, 100.

[10] United States' request for interim review, paras. 11-12.

[11] China's oral statement at the interim review meeting, paras. 12-14.

[12] E.g. Panel Report, *Korea – Certain Paper (Article 21.5 – Indonesia)*, para. 7.4 (the panel found that the Korean investigating authority's redetermination finding violated the Anti-Dumping Agreement but stated that since the original DSB recommendations and rulings remained operative, it would make no new recommendation under Article 19.1 of the DSU); Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 470; Panel Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 9.2 (neither the panel nor the Appellate Body made a new recommendation, but the Appellate Body recommended that "the DSB request the United States to implement fully the recommendations and rulings of the DSB [in the original proceeding]"); Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*, para. 186; Panel Report, *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*, para. 8.2 (neither the panel nor the Appellate Body made a new recommendation but the Appellate Body recommended that the DSB request the United States to "implement fully the recommendations and rulings of the DSB"). See Panel Report, *EC – Bananas III (Article 21.5 – US)*, paras. 6.50, 8.13.

[13] China's comments on the interim report, para. 3.

[14] United States' oral statement at the interim review meeting, para. 23.

6.14. China requests that the Panel delete paragraphs 7.55-7.57 and 7.66 of the Interim Report. China notes that the Panel stated that it could "draw no conclusion" on the quarterly data under the standard of review, and states that it is not clear why the Panel included this discussion. In China's view, the Panel should discuss and rely upon only those facts that the Panel finds properly within its purview under the standard of review. China suggests that the discussion at these paragraphs, and "elsewhere" in the Interim Report, of facts the Panel believes are not properly before it should be deleted. In addition, with respect to paragraph 7.56, China states that the Panel appears to have transposed inadvertently the shift in market share by subject imports and non-subject imports in Q1 2004. China makes no specific suggestions in this context, and cites no support with respect to its assertion regarding paragraph 7.56.[15] At the interim review meeting, the United States observed that the facts at issue were evidence submitted by China to the Panel, and that it was therefore appropriate for the Panel to examine and discuss that evidence, including its role in light of the standard of review and of the fact that it provided further support for the Panel's findings. The United States asserted that no changes to the report were therefore necessary.[16]

6.15. With respect to the alleged "inadvertent transposition" of data in paragraph 7.56, we have double-checked the figures set out in that paragraph against those provided by China in its response to Panel question 14, and they are the same. Therefore, there is no evidentiary basis for any changes to paragraph 7.56 in this regard. Turning to the remainder of China's comments regarding paragraphs 7.55 to 7.57 and 7.66, we note that while we made "observations" in paragraphs 7.55 to 7.57 on the basis of the quarterly data submitted by China, our findings in paragraph 7.66 were made on the basis of China Customs import data that was available to MOFCOM and the data on subject import volume in Q1 2009 set out in MOFCOM's Redetermination Disclosure. We do not consider that we are precluded from making the observations in paragraphs 7.55 to 7.57, despite the fact that the information in question was not relied on by MOFCOM. We made it clear that we drew no conclusions, adverse or otherwise, concerning shifts in market share based on the quarterly data submitted in this proceeding by China, relying in our conclusions on evidence that was appropriately before us in light of the standard of review. In light of the foregoing, we deny China's request to delete paragraphs 7.55-7.57 and 7.66, and have made no changes to paragraph 7.56.

6.16. China requests the Panel to clarify that the only pricing data on the record were average unit values ("AUVs") and to reflect China's explanation that MOFCOM addressed the price data, but did not compare the relative prices of subject imports and the domestic like product because of the deficiencies associated with AUV comparisons pointed out by the Appellate Body, referring specifically to paragraphs 7.58 and 7.63-7.65 of the Interim Report in this regard.[17] At the interim review meeting, the United States, noting that China offered no basis for the Panel to modify the reasoning or findings in question, stated its view that no changes were necessary.[18]

6.17. China's request essentially would require us to make a finding that the "only" price data before MOFCOM was AUV data. It is not clear to us, and China has not explained, why such a finding is necessary or appropriate. The issue before us was not whether the AUV data was the "only" price data available to MOFCOM, but rather whether MOFCOM could have reached the specific conclusions that it did, regarding the linkages between increases in volume of subject imports and price effects suffered by the domestic industry, without comparing the prices of subject imports and the domestic like product. Whether AUV data was the only data before MOFCOM on prices is not relevant to our consideration of that issue. Insofar as China requests us to include its explanation that MOFCOM addressed the price data regarding subject imports and the domestic like product, China's request does not clearly identify which specific aspect of MOFCOM's consideration of the price data remained unexplained in our report, what specific explanations it seeks to have included, or any support for such explanations. We therefore deny these aspects of China's request. However, having reviewed China's arguments in this regard, we grant China's request that we reflect its explanation that MOFCOM did not make price comparisons between subject imports and the domestic like product because of the deficiencies in the price data that were highlighted by the Appellate Body, as this relates to an aspect of China's own arguments. We have therefore added a new footnote 128 to paragraph 7.65 in this report.

[15] China's comments on the interim report, paras. 4-5.
[16] United States' oral statement at the interim review meeting, paras. 24-26.
[17] China's comments on the interim report, para. 6.
[18] United States' oral statement at the interim review meeting, para. 27.

6.18. China asserts that the Panel dismissed as insufficient MOFCOM's verification of the domestic industry's production capability with respect to high grade GOES despite the fact that MOFCOM properly addressed the issue of whether subject imports and the domestic like product were substitutable, referring to paragraphs 7.72-7.81 of the Interim Report. China expresses concern that the Panel's finding sets a precedent that "an authority must address every factual assertion placed on record, even where it is adequately addressed by other means, and no matter the context in which it is offered or the extent to which its significance is rendered moot by other facts and findings of the authority."[19] China makes no specific requests for changes to the interim report, and cites no evidence in support of its concerns. At the interim review meeting, the United States, noting that it had responded to China's arguments on this issue, and the Panel had explained its findings, stated its view that no changes are necessary.[20]

6.19. We explained the basis of our conclusions in paragraphs 7.72-7.81, which include our review of the evidence before MOFCOM, relevant arguments provided by the parties and MOFCOM's ultimate conclusions as provided in its Redetermination finding. In the absence of any specific suggestions for change, we see no basis to modify our analysis and conclusions and have made no changes in this section of the report.

6.20. Finally, China stated in its request for interim review that the measures at issue in this proceeding would expire on 10 April 2015 because the domestic industry did not request a review of those measures, which might have resulted in their continuation, and requested that the Panel take this into consideration and issue no recommendations in the final report.[21] On 21 April 2015, China submitted exhibit CHN-3, a copy of MOFCOM's public notice of termination of the measures dated 10 April 2015. At the interim review meeting, the United States argued that the Panel should reject China's attempt to introduce new evidence during the interim review stage of this proceeding as contrary to the DSU, inconsistent with paragraph 8 of the Working Procedures of the Panel and not based on the evidence before the Panel.[22] The United States noted that in its request for interim review, China stated its expectations regarding the future termination of the measures at issue. In the United States' view, since China's request was not based on any evidence that had been developed by the parties and considered by the Panel prior to issuance of the report, there was no need or basis for the Panel to review its findings further.[23] Finally, the United States asserted that China's new evidence, in addition to being untimely, was not relevant to the matter being examined by the Panel, noting that the Appellate Body has stated that, as a general rule, the measures subject to a panel's review "must be measures that are in existence at the time of the establishment of a panel," and therefore the task of the panel is to determine whether the measures at issue are consistent with the obligations at issue "*at the time the Panel was established.*"[24] According to the United States, China's exhibit has no relevance to the legal situation that existed on the date of the Panel's establishment when the DSB referred the matter to the Panel, and thus is not relevant to the Panel's legal assessment and its findings and conclusions in this proceeding.

6.21. Article 15.2 of the DSU entitles parties to submit a written request for the panel to review "precise aspects of the interim report" prior to circulation of the final report. However, a number of panels and the Appellate Body have held that Article 15.2 is available only for the panel to review precise aspects of the interim report and does not permit parties to introduce new evidence.[25] Further, the panel in *EC - IT Products* concluded that evidence regarding the repeal of a measure at issue in that dispute, submitted by the EC subsequent to the issuance of the interim report, was such "new evidence" and could not be considered at the stage of interim review.[26] The panel in

[19] China's comments on the interim report, para. 7.

[20] United States' oral statement at the interim review meeting, para. 28.

[21] China's comments on the interim report, para. 8.

[22] United States' oral statement at the interim review meeting, paras. 6-14.

[23] Ibid. paras. 15-16.

[24] Ibid. paras. 17-18, citing Appellate Body Report, *EC – Chicken Cuts*, para. 156; Appellate Body Report, *EC – Selected Customs Matters*, para. 264; Panel Report, *EC – Approval and Marketing of Biotech Products,* para. 7.456.

[25] Appellate Body Report, *EC – Sardines*, para. 301; Appellate Body Report, *EC – Selected Customs Matters*, para. 259; Panel Report, *EC – Bananas III (Article 21.5 – US)*, paras. 6.1-6.18; Panel Report, *EC – IT Products*, para. 6.48.

[26] Panel Report, *EC - IT Products,* para. 6.48. The panel observed:

Consistent with the Appellate Body's approach and in the interest of protecting the due process rights of the complainants, who had no opportunity to make submissions for the record on the

that case retained its recommendation under Article 19.1, observing that there was no evidence "properly before the Panel" confirming the repeal of some of the measures at issue.

6.22. The situation in the present case is analogous to that in *EC - IT Products*. As in that case, China has submitted new evidence, i.e. Exhibit CHN-3, subsequent to the issuance of the interim report. In our view, MOFCOM's public notice of termination is new evidence that was not before the Panel at the time it issued its interim report.

6.23. We note in this context the similarities between this case and the proceedings in *EC - Bananas III (Article 21.5 – US)*. In that case, as here, both parties requested during interim review that the panel delete the recommendation made in the interim report, but for different reasons: the United States because it considered such a recommendation to be unnecessary in a compliance proceeding, and the then-European Communities because it had adopted an amending regulation eliminating the measure challenged by the United States in that compliance dispute. The European Communities informed the compliance panel of the repeal of the measure when it filed its comments on the interim report, and submitted a copy of the amending regulation at the interim review meeting. The panel found the evidence regarding the amending regulation to be inadmissible as it had been submitted after the comments on interim review had been filed, at which stage it could no longer consider new evidence, but decided to delete the recommendation, considering that the original DSB recommendations and rulings continued to be operative in the compliance proceeding.[27]

6.24. On appeal, the European Communities argued that the panel's statement that the original DSB recommendations continued to be operative in the compliance proceeding constituted a "concealed recommendation" and that the panel had erred in issuing such a recommendation in relation to an expired measure. The Appellate Body disagreed, concluding that the panel had made no recommendation in relation to a measure which was no longer in force.[28] The Appellate Body itself made no recommendation on the ground that the measure at issue had ceased to exist.[29]

6.25. In light of the above, we deny China's request. Nonetheless, we note that, if the measures have in fact expired, there would in our view be no further obligation on China to "bring the [expired] measure[s] into conformity".

6.3 Editorial changes

6.26. Finally, we have made a number of changes of an editorial nature to improve the clarity and accuracy of the Report or to correct typographical errors, including certain changes suggested by the United States.[30]

7 FINDINGS

7.1 General principles regarding treaty interpretation, the standard of review, and 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". Article 17.6(ii) of the Anti-Dumping Agreement similarly requires panels to interpret that Agreement's provisions in accordance with the customary rules of

documents provided, we decline to consider further the documents attached by the European Communities to its request for interim review. The Panel also declines to make adjustments to the Interim Reports to exclude the measures in question from the Panel's recommendation and to add text about the European Communities' confirmation that certain measures have been repealed, as requested by the European Communities.

[27] Panel Report, *EC – Bananas III (Article 21.5 – US),* paras. 6.50, 8.13.

[28] Appellate Body Report, *EC – Bananas III (Article 21.5 – US)*, para. 272.

[29] Ibid. para. 479.

[30] United States' request for interim review, paras. 13-37.

interpretation of public international law.[31] 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. While we have not found it necessary to engage with any significant issues of treaty interpretation in this proceeding, we have nonetheless been mindful of these principles in our analysis.

7.1.2 Standard of review

7.2. Article 11 of the DSU 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.

In addition, Article 17.6 of the Anti-Dumping Agreement sets forth the special standard of review applicable to disputes under the Anti-Dumping Agreement:

> (i) in its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned;
>
> (ii) the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.

Thus, Article 11 of the DSU and Article 17.6 of the Anti-Dumping Agreement together establish the standard of review we will apply with respect to both the factual and the legal aspects of the present dispute.

7.3. The Appellate Body has explained that where a panel is reviewing an investigating authority'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] In the context of Article 17.6(i) of the Anti-Dumping Agreement, 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 investigating authority. A panel must limit its examination to the evidence that was before the investigating authority 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 investigating authority; a panel's examination of those conclusions must be "in-depth" and "critical and searching".[34]

7.4. The Appellate Body has clarified a panel's standard of review of the facts pursuant to the above provisions in the following terms:

> It is well established that a panel must neither conduct a *de novo* review nor simply defer to the conclusions of the national authority. A panel's examination of those conclusions must be critical and searching, and be based on the information contained in the record and the explanations given by the authority in its published report. A panel must examine whether, in the light of the evidence on the record, the conclusions reached by the investigating authority are reasoned and adequate. What

[31] 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.

[32] Appellate Body Reports, *US – Countervailing Duty Investigation on DRAMS*, para. 186; and *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.

is 'adequate' will inevitably depend on the facts and circumstances of the case and the particular claims made, but several general lines of inquiry are likely to be relevant. The panel's scrutiny should test whether the reasoning of the authority is coherent and internally consistent. The panel must undertake an in-depth examination of whether the explanations given disclose how the investigating authority treated the facts and evidence in the record and whether there was positive evidence before it to support the inferences made and conclusions reached by it. The panel must examine whether the explanations provided demonstrate that the investigating authority took proper account of the complexities of the data before it, and that it explained why it rejected or discounted alternative explanations and interpretations of the record evidence. A panel must be open to the possibility that the explanations given by the authority are not reasoned or adequate in the light of other plausible alternative explanations, and must take care not to assume itself the role of initial trier of facts, nor to be passive by 'simply *accept[ing]* the conclusions of the competent authorities.'[35] (Footnote omitted.)

7.1.3 Burden of proof

7.5. The general principles applicable to the allocation of the burden of proof in WTO dispute settlement require that a party claiming a violation of a provision of a WTO Agreement must assert and prove its claim.[36] Therefore, as the complaining party in this proceeding, the United States bears the burden of demonstrating that certain aspects of the 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.[37] Finally, it is generally for each party asserting a fact to provide proof thereof.[38]

7.2 The United States' claim with respect to adverse impact

7.6. In this section of our report, we examine the United States' claim that MOFCOM's finding that the subject imports had an adverse impact on the domestic industry was not based on an objective examination of all relevant economic factors and indices having a bearing on the state of that industry. More specifically, the United States claims that, in its Redetermination, MOFCOM failed to examine the impact of subject imports on the domestic industry and to evaluate all relevant economic factors and indices having a bearing on the state of the industry consistently with China's obligations under Articles 3.1 and 3.4 of the Anti-Dumping Agreement and Articles 15.1 and 15.4 of the SCM Agreement. China responds, in the first instance, that the United States' claim is not properly before the Panel in a compliance proceeding under Article 21.5 of the DSU. China adds that, even if it were to be considered, the US claim would fail on the merits. Given China's jurisdictional objection, we must first consider whether the US claim with respect to adverse impact falls within our terms of reference before turning, if necessary, to its merits.

7.2.1 Main arguments of the parties

7.7. The United States argues that its claim is properly before the Panel because it challenges aspects of China's compliance measure that are inconsistent with the covered agreements. The United States specifically alleges that MOFCOM modified its adverse impact analysis in the Redetermination by (i) replacing all references to imports of product concerned "at a low price" with references to "unfair" imports of the subject merchandise and (ii) relying significantly on market conditions in 2008, in contrast to its original impact analysis.[39] The United States considers that its claim relates directly to China's compliance measure, which it argues includes a revised

[35] Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93.
[36] Appellate Body Report, *US – Wool Shirts and Blouses*, para. 337.
[37] Appellate Body Report, *EC – Hormones*, paras. 98, 104.
[38] Appellate Body Report, *US – Wool Shirts and Blouses*, para. 337.
[39] United States' second written submission, para. 67.

injury analysis and newly disclosed facts.[40] It maintains that China's arguments regarding the admissibility of claims under Article 21.5 of the DSU are misguided.

7.8. China asserts that the United States is not entitled to expand the scope of the dispute in this Article 21.5 proceeding to include a wholly new claim not previously addressed by the panel, and that it would be extremely unfair to allow this claim.[41] China notes there is no question that this is a new claim by the United States, as there was no reference to either Article 3.4 of the Anti-Dumping Agreement or Article 15.4 of the SCM Agreement in the original request for consultations.[42] China relies on several Appellate Body reports in arguing that a complaining Member ordinarily would not be allowed to raise a claim in an Article 21.5 proceeding that it could have pursued in the original proceedings, but did not. According to China, the first mention of any such claim was in the United States' first written submission in this proceeding. Moreover, China maintains that MOFCOM's discussion of injury in the Redetermination is essentially unchanged from the original.[43] China argues that the introduction of a new claim at this stage of the proceedings would be contrary to basic principles of fairness and due process.[44] It would give the United States a second chance to raise a claim it failed to raise in the original proceeding and would expose China to possible suspension of concessions for a violation it was never given a fair opportunity to address.[45]

7.2.2 Evaluation by the Panel

7.9. In the original proceedings, the United States made no claim concerning MOFCOM's evaluation of the various economic factors and indices having a bearing on the state of the domestic industry for purposes of the injury determination under Articles 3.4 and 15.4 of the Anti-Dumping and SCM Agreements, respectively. Accordingly, the Panel and Appellate Body did not consider any claim under these Articles and made no findings in this respect. Therefore, the question we must resolve is whether this aspect of the Redetermination is subject to review by the Panel in this Article 21.5 proceeding.

7.10. Article 21.5 of the DSU provides, in relevant part:

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

7.11. Inherent in proceedings under Article 21.5 of the DSU is the need to balance important systemic interests. Expanding the scope of a compliance proceeding to measures not originally challenged by the complaining Member may be necessary to ensure prompt and thorough verification of compliance. However, it could also result in circumvention of the normal dispute settlement process if it allows the complaining Member to obtain a finding of non-compliance and potentially seek retaliation without the responding Member having had a reasonable period of time in which to bring any inconsistent measures into compliance.

7.12. The scope of a panel's jurisdiction with respect to what measures and claims it may consider in an Article 21.5 compliance proceeding has been addressed by a number of panels and the Appellate Body. Several fundamental principles have emerged from these decisions. Thus, it is now accepted that nothing in Article 21.5 limits a compliance panel to considering only certain issues, or certain aspects of a measure taken to comply. Panels have found that to satisfy the objective of prompt settlement of disputes, a complainant can challenge all aspects of a new measure taken to comply, not only those related to issues covered by the original proceedings.[46]

7.13. Similarly, the Appellate Body has found that a panel is not limited, in conducting its review under Article 21.5, to examining the measures taken to comply from the perspective of the claims,

[40] United States' second written submission, para. 69.
[41] China's first written submission, para. 68.
[42] Ibid. para. 71.
[43] China's second written submission, paras. 60-61.
[44] China's first written submission, paras. 71, 74.
[45] Ibid. para. 71.
[46] See, e.g. Panel Report, *EC – Bananas III (Article 21.5 – Ecuador)*, paras. 6.3-6.12.

arguments and factual circumstances that related to the measure that was the subject of the original proceedings.[47] The Appellate Body has observed that if a compliance panel were restricted to examining the new measure from this limited perspective, it would be unable to examine fully, in accordance with Article 21.5, the consistency with a covered agreement of the measures taken to comply.[48] The Appellate Body has also upheld compliance panels' rulings that new claims challenging a changed component of the measure taken to comply are admissible.[49]

7.14. However, the Appellate Body has also concluded that, in the context of a compliance proceeding, a Member may be precluded from bringing the same claim with respect to an aspect of another Member's redetermination that is unchanged from the determination at issue in the original dispute.[50] An unchanged aspect of the original measure that a Member does not have to change, and does not change, in complying with the recommendations and rulings of the DSB thus should not be susceptible to challenge in a compliance proceeding.[51] One panel, in applying these principles, distinguished between a new claim on an aspect of the measure taken to comply that constituted a new or revised element of the original measure, and which thus could not have been raised in the original proceedings, and another new claim that concerned aspects of the original measure that were unchanged.[52] The panel found the former to be admissible, and the latter inadmissible.[53]

7.15. We now proceed to consider the facts of this case, in light of the principles just described, to determine whether the United States' claim with respect to adverse impact is properly before us in this compliance proceeding.

7.16. Were we to conclude that MOFCOM changed the substance of its analysis or conclusions regarding adverse impact in the Redetermination, such that the United States could not have meaningfully raised the claim it now asserts in the original proceeding, we might conclude that allowing the United States' claim in this compliance proceeding would not unduly deprive China of its due process rights. However, should the changes in MOFCOM's Redetermination not be sufficient to justify this conclusion, we may find that the United States is challenging aspects of the original measure that are essentially unchanged, and which it could have challenged in the original dispute, and therefore conclude that allowing the United States' new claim in this compliance proceeding could jeopardize fundamental principles of fairness and due process and should therefore not be allowed to proceed. We are of the view that the latter conclusion is warranted in this case.

7.17. It is undisputed that the United States is introducing a new claim in this compliance proceeding. The United States made no claims under Articles 3.4 and 15.4 of the Anti-Dumping and SCM Agreements in the original proceeding. However, the United States asserts that MOFCOM's Redetermination was changed from its original Determination, and that its claim is a justified challenge to this changed Redetermination. In arguing that MOFCOM's Redetermination is changed from its original Determination, the United States focuses on the deletion of references to subject imports "at a low price" and an alleged change in the temporal focus of MOFCOM's injury analysis to 2008. China maintains that MOFCOM's Redetermination is essentially unchanged from its original Determination.

[47] See, e.g. Appellate Body Report, *Canada – Aircraft (Article 21.5 – Brazil)*, paras. 37-41.
[48] Appellate Body Report, *Canada – Aircraft (Article 21.5 – Brazil)*, paras. 37-41.
[49] See, e.g. Appellate Body Report, *US – FSC (Article 21.5 – EC)*, paras. 197-222.
[50] Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, paras. 88-89. In that case, the Appellate Body found that India was seeking to challenge an unchanged aspect of the original measure that the European Communities did not have to change, and did not change, in complying with the recommendations and rulings of the DSB. The Appellate Body considered that: (i) the EC's redetermination could be separated into distinct parts; (ii) India was merely reasserting a claim that it had raised, and as to which it had failed to make a *prima facie* case before the original panel; and (iii) India was precluded from bringing the same claim with respect to an aspect of the redetermination that was unchanged from the determination at issue in the original dispute.
[51] Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, paras. 88-89.
[52] Panel Report, *US – Countervailing Measures on Certain EC Products (Article 21.5 – EC)*, paras. 7.1-7.77.
[53] Ibid.

7.18. MOFCOM's injury analysis in the original Determination contained four references to imports of the product concerned "at a low price".[54] In the Redetermination, these four references have been reformulated, and now refer to "unfair" imports of subject merchandise in the otherwise nearly identical text.[55] China contends that "none of these references are engaging in price comparisons of any sort" and that "references to 'low price' imports in this discussion are just synonyms for unfairly traded imports."[56] China thus suggests that these different formulations are simply interchangeable references to the subject imports in the context of MOFCOM's injury analysis.

7.19. The Panel and Appellate Body in the original proceeding considered MOFCOM's discussion of the "low price" of subject imports in the context of price effects and found that, "although MOFCOM did not make a finding of significant price undercutting, MOFCOM's finding as to the 'low price' of subject imports referred to the existence of price undercutting between 2006 and 2008, and that MOFCOM relied on this factor to support its finding of significant price depression and suppression."[57] The Appellate Body specifically was not persuaded by China's arguments that the references to "low price" were simply references to the prices of subject imports in relation to their historical prices or to the low price established by virtue of the sale of subject imports at dumped and/or subsidized levels.[58] Thus, MOFCOM's references to "low price" were considered more significant by the Panel and Appellate Body in the original proceedings than was argued by China.

7.20. Accordingly, we have considered whether the deletion of these references from MOFCOM's injury analysis in the Redetermination and their replacement by a term that does not directly implicate price reflects a change in the focus and substance of the Redetermination from the original. We specifically asked China to clarify why MOFCOM replaced the original term in the Redetermination. China responded that MOFCOM replaced the Chinese term meaning "low" with one meaning "unfair" to avoid any confusion with the concept of price undercutting.[59] China further responded that MOFCOM thus inserted what it deemed to be the more precise term for "unfair" in its injury analysis in the Redetermination to refer to subject merchandise in the sense of "unfairly traded dumped or subsidized imports."[60] The United States argued that China provided no support for this assertion, and that the Appellate Body had already rejected this argument.[61]

7.21. In our view, the term "unfair imports" appears to connote a broader concept than the term "low-priced imports", as it implies that the imports in question are dumped or subsidized. But dumping and subsidization are determinations that can only be reached following thorough investigation and analysis. Accordingly, we find China's explanation for this change in terminology unclear. The change seems to be a cursory attempt to eliminate the reference to low prices that both we and the Appellate Body found problematic in the original dispute. Nevertheless, in the present proceeding, we consider this change in references specifically to assess whether it demonstrates a change in the Redetermination sufficient to allow the United States to challenge MOFCOM's analysis of the relevant injury factors.

7.22. On the basis of China's explanation, and in light of the text of the Redetermination and the arguments in the original dispute, we are of the view that the injury analysis and determination component of the measure taken to comply in this case, that is, the Redetermination, has not been changed from the original determination in a manner that makes it susceptible to challenge in this compliance proceeding. As was the case in *EC – Bed Linen (Article 21.5 – India)*, there was no need for MOFCOM in this case to change its determination of injury in seeking to comply with

[54] MOFCOM, Final Determination in Anti-Dumping and Anti-Subsidy Investigations on GOES Imports from the US and Russia, No. 21, 10 April 2010 (Original Determination) (Exhibit US-4), pp. 60-63.

[55] Compare Original Determination, (Exhibit US-4), pp. 60-63, with MOFCOM, Determination on the Re-investigation of Anti-Dumping and Countervailing Duties on Grain Oriented Flat-Rolled Electrical Steel Imports from the United States, Public Notice [2013] No. 51, including its annexes (Redetermination) (Exhibit US-1), pp. 29-32; and MOFCOM, Determination of the Ministry of Commerce of the People's Republic of China on the Anti-Dumping and Countervailing Reinvestigation on Imports of Grain Oriented Flat-rolled Electrical Steel Originating in the United States (Redetermination – China's translation) (Exhibit CHN-1), pp. 29-33.

[56] China's second written submission, para. 64.

[57] Appellate Body Report, *China – GOES*, para. 196.

[58] Ibid. para. 194.

[59] China's response to Panel question No. 48, para. 135.

[60] Ibid. para. 136.

[61] United States' opening statement at the meeting of the Panel, para. 48.

the DSB's recommendation.[62] As that determination was unchallenged in the original proceeding, the Redetermination simply incorporates elements of the original determination, unchanged in any material respect. In our view, the changes in wording between the original determination and the Redetermination are not substantively relevant to MOFCOM's analysis and determination of injury, and do not constitute a change that gives rise to a new aspect of that analysis and determination that can be challenged in this compliance proceeding.

7.23. The same reasoning applies to the United States' allegation that MOFCOM changed the temporal focus of its injury analysis to 2008. The texts of the original Determination and Redetermination with respect to MOFCOM's injury analysis are identical in almost all respects[63]; the minor changes between the original determination and the Redetermination do not reflect a shift in the temporal focus of MOFCOM's analysis to 2008.[64]

7.24. Finally, while the United States has focused on the changes in wording in the Redetermination, the new claim it is raising in this compliance proceeding does not relate specifically to those changes, but rather to aspects of MOFCOM's analysis and conclusions regarding the injury factors that are unchanged from the original determination and unaffected by the change in wording. We note that in a previous dispute, the Appellate Body emphasized that disallowing Brazil's claim in the compliance proceeding in *Canada – Aircraft* would have resulted in Brazil being precluded from making claims that it could not have raised in the original dispute.[65] In contrast, in this case, the substance of MOFCOM's injury analysis in the original determination and in the Redetermination are identical to such a degree that it is clear to us that the United States could have raised, in the original dispute, the same claim regarding the injury analysis in the original determination it now seeks to bring before us with respect to the Redetermination. It chose not to do so in the original proceeding, and we conclude that it may not do so in this compliance proceeding.

7.2.3 Conclusion regarding adverse impact

7.25. Thus, we find that the few changes between MOFCOM's original determination and Redetermination are inconsequential in the context of the latter, and the United States in this case seeks to challenge aspects of the Redetermination that are essentially unchanged from the original determination. In these circumstances, allowing the United States' new claim under Articles 3.1, 3.4 and 15.1, 15.4 of the Anti-Dumping and SCM Agreements respectively, with respect to adverse impact in the present compliance proceeding would jeopardize fundamental principles of fairness and due process, and we therefore conclude it is not properly before us.

7.3 Whether MOFCOM's Redetermination regarding price effects is consistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement and Articles 15.1 and 15.2 of the SCM Agreement

7.3.1 Introduction

7.26. The United States contends that the following three aspects of MOFCOM's Redetermination on price effects were not based on an objective examination of positive evidence, in violation of China's obligations under Articles 3.1 and 3.2 of the Anti-Dumping Agreement and Articles 15.1 and 15.2 of the SCM Agreement:

a. Subject imports suppressed domestic prices in 2008 and Q1 2009;

b. Subject imports depressed domestic prices by 30.25% in Q1 2009; and

c. Pricing policies of subject country exporters caused price depression in Q1 2009.

[62] Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, paras. 86-87.

[63] Original Determination, (Exhibit US-4), pp. 60-64; Redetermination, (Exhibit US-1), pp. 28-33; and Redetermination – China's translation, (Exhibit CHN-1), p. 29-33.

[64] Redetermination, (Exhibit US-1), p. 28 (The only textual change of a temporal nature in MOFCOM's injury analysis in the Redetermination consists of the addition of the phrase "during the same period" at the end of the last full paragraph on page 28 in reference to the period 2007, 2008 and Q1 2009). See also Redetermination – China's translation, (Exhibit CHN-1), p. 29.

[65] Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 88, discussing Appellate Body Report, *Canada – Aircraft (Article 21.5 – Brazil)*. That is not the situation in this case.

In particular, the United States makes a number of fact-specific arguments questioning MOFCOM's finding that subject imports had the "effect" of suppressing and depressing domestic prices, and also questions MOFCOM's decision to not make price comparisons between subject imports and the domestic like product, as part of its price effects analysis.[66]

7.27. China rejects the United States' contentions, asserting that MOFCOM's conclusions that the increased volume of subject imports and the domestic industry's loss in market share had a suppressive and depressive effect on domestic like product prices were supported by factual findings indicating a competitive relationship between subject imports and the domestic like product.[67] China further argues that price negotiation letters exchanged between Chinese producers and customers, as well as provisions of a contract between a Russian producer and a Chinese customer (collectively referred to as "pricing policy documents") supported MOFCOM's conclusions regarding the existence of price competition and also the influence of prices on purchaser decisions as well as attempts by subject country exporters to set prices lower than those of the domestic like product.[68] These three factors, in turn, supported MOFCOM's conclusion that subject imports had had a suppressive and depressive effect on domestic prices.[69]

7.3.2 Provisions at issue

7.28. Article 3.1 of the Anti-Dumping Agreement provides:

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

Article 3.2 of the Anti-Dumping Agreement provides:

> With regard to the volume of the dumped imports, the investigating authorities shall consider whether there has been a significant increase in dumped imports, either in absolute terms or relative to production or consumption in the importing Member. With regard to the effect of the dumped imports on prices, the investigating authorities shall consider whether there has been a significant price undercutting by the dumped imports as compared with the price of a like product of the importing Member, or whether the effect of such imports is otherwise to depress prices to a significant degree or prevent price increases, which otherwise would have occurred, to a significant degree. No one or several of these factors can necessarily give decisive guidance.

Articles 15.1 and 15.2 of the SCM Agreement are identical to Articles 3.1 and 3.2, respectively, of the Anti-Dumping Agreement, with the exception that all references to "dumped imports" are replaced by references to "subsidized imports".

7.3.3 Main arguments of the parties

7.3.3.1 United States

7.29. The United States rejects MOFCOM's conclusion that the increased volume of subject imports and consequential loss of market share by the domestic industry, predominantly to subject

[66] See, e.g. United States' first written submission, para. 46.

[67] China's second written submission, para. 23. In this regard, China argues that MOFCOM's factual findings regarding the following seven factors supported its finding of a directly competitive relationship between subject imports and the domestic like product: (a) like product analysis; (b) cumulation analysis; (c) statement by US producer Allegheny Ludlum that the subject merchandise that it produced or exported to China was highly substitutable and competitive with the Chinese domestic like product and the like product from other countries; (d) parallel price trends of subject imports and the domestic like product; (e) pricing policy documents; (f) customer overlap; and (g) market share replacement. See also China's opening statement at the meeting of the Panel, p. 5; China's response to Panel question No. 4, para. 18.

[68] China's response to Panel question No. 1, paras. 13-17.

[69] Ibid.

imports, had the effect of suppressing or depressing the prices of the domestic like product.[70] The United States argues that MOFCOM could not have concluded that subject imports had the effect of suppressing or depressing domestic like product prices without comparing the actual prices of subject imports and the domestic like product, which MOFCOM admittedly did not do.[71] Further, the United States questions the linkage that MOFCOM drew between increases in the volume of subject imports in 2008 and adverse effects on the domestic like product prices in Q1 2009, contending that the volume of subject imports declined from Q3 2008 to Q4 2008 and from Q4 2008 to Q1 2009, making it less plausible that the decline in domestic industry prices in Q1 2009 was related to subject imports.[72] The United States also requests the Panel to reject as *ex post facto* rationalizations arguments made by China in this proceeding on the basis of quarterly 2008 market share data concerning shifts in market shares of subject imports, non-subject imports and the domestic like product. The United States asserts that this information was neither considered by MOFCOM in the Redetermination nor disclosed to the interested parties.[73] The United States emphasizes, however, that the quarterly market share data casts further doubt on MOFCOM's conclusions regarding the linkage between increases in the market share of subject imports and price effects in Q1 2009. According to the United States, the fact that non-subject imports gained market share in Q4 2008 makes it more plausible that the decline in domestic like product prices in Q1 2009 was in response to increases in non-subject imports' market share rather than that of subject imports.[74]

7.30. The United States submits that MOFCOM's factual findings purporting to demonstrate that the subject imports and the domestic like product competed on price were flawed. First, the United States contends that MOFCOM failed to consider submissions by the US exporter AK Steel that [***].[75] In particular, the United States emphasizes that MOFCOM failed to consider evidence submitted by AK Steel that GOES produced by domestic producers was not certified for use in large transformers, i.e. transformers of 500kW and above.[76]

7.31. Further, the United States questions MOFCOM's conclusions concerning price competition on the ground that the factual findings relied upon by MOFCOM in support of this conclusion were either general in nature, or were not representative of the market dynamic as a whole.[77]

7.3.3.2 China

7.32. China rejects the United States' contention that MOFCOM could not have reached its conclusions regarding the suppressive and depressive effect of subject imports on the domestic like product prices without considering evidence of actual prices of subject imports compared to the prices of the domestic like product. China contends that Article 3.2 of the Anti-Dumping Agreement and Article 15.2 of the SCM Agreement do not require investigating authorities to make comparisons between the prices of subject imports and the prices of the domestic like product.[78] Further, China argues that while MOFCOM did not compare the prices of subject imports and the domestic like product, MOFCOM's Redetermination discussed and demonstrated the competitive relationship between subject imports and the domestic like product.[79]

7.33. China submits that increases in the volume of subject imports, and in particular, gains in market share, may affect domestic prices regardless of whether the subject imports are priced higher or lower than the domestic like product.[80] China notes that the domestic industry lost 5.65 percentage points of market share in 2008 while subject imports gained 5.56 percentage points of market share in the same period.[81] China submits that this showed that it was the

[70] See, e.g. United States' first written submission, paras. 49-53, 59-62; and second written submission, paras. 23-27, 48-56.
[71] United States' first written submission, para. 47.
[72] Ibid. para. 78.
[73] United States' comments on China's response to Panel question No. 14.
[74] Ibid.
[75] United States' opening statement at the meeting of the Panel, para. 30.
[76] United States' comments on China's response to Panel question No. 40.
[77] United States' opening statement at the meeting of the Panel, paras. 25-35.
[78] China's first written submission, para. 15.
[79] Ibid. para. 25.
[80] Ibid. para. 19.
[81] China's response to Panel question No.1, para. 9.

subject imports, which were taking market share from the domestic industry, which forced the domestic industry to respond to that loss by restraining or reducing prices.[82] In addition, China also submits that MOFCOM had specific evidence that the domestic industry lowered its prices in reaction to the loss of market share during 2008.[83]

7.34. China argues that MOFCOM's factual findings regarding (a) likeness and cumulation, (b) statements by US exporter Allegheny Ludlum that its exports were highly substitutable with the domestic like product, (c) parallel price trends, (d) consumer overlap, (e) market share replacement and (f) pricing policy documents, all supported its conclusion that subject imports and the domestic like product competed on price.[84]

7.35. Regarding the United States' arguments concerning evidence furnished by US exporter AK Steel, China argues that first, while AK Steel submitted a questionnaire response during the original proceeding, it did not make any comments on the factual disclosure or the preliminary determination in the original investigation regarding the non-substitutability of certain product categories exported by it with the domestic like product or make any comments on this issue during the Redetermination proceedings.[85] Second, AK Steel's exports of high-end GOES accounted for only about ten per cent of total subject country exports to China.[86] Therefore, according to China, the United States' argument regarding MOFCOM's failure to consider AK Steel's submission would have no bearing on MOFCOM's review of the effect of subject imports as a whole.[87]

7.36. Further, China asserts that while it may be true that test manufacturing of 500 kW transformers employing domestically-produced materials was not expected until the end of 2009, i.e. subsequent to the period of investigation, it did not necessarily follow that the domestic industry did not produce GOES capable of being used in 500 Kw transformers earlier.[88]

7.3.4 Main arguments of the third parties

7.37. The European Union contends that an increase in the volume of subject imports and a decline in the domestic industry's market share, taken together with the existence of price competition between subject imports and the domestic like product, will generally indicate that subject imports suppress or depress domestic like product prices.[89] However, the European Union adds that while in principle, it may be possible to establish price competition between subject imports and the domestic like product without comparing the prices of subject imports and the domestic like product, it is unclear whether in practice, it is possible to do so.[90] Further, the European Union submits that by disregarding evidence that may call into question the explanatory force of subject imports for price effects, an investigating authority acts contrary to its obligations under Articles 3.1 and 3.2 of the Anti-Dumping Agreement and Articles 15.1 and 15.2 of the SCM Agreement.[91]

7.38. Japan submits that an increase in the volume of subject imports and a decline in the domestic industry's market share, coupled with the existence of price competition, will not be sufficient to demonstrate price depression or price suppression within the meaning of Articles 3.1 and 3.2 of the Anti-Dumping Agreement.[92] It contends that if increases in import volume and decreases in domestic industry market share were sufficient to find price effects, the price effects analysis would be rendered redundant.[93] In Japan's view, an increase in the volume of subject imports or parallel pricing between subject imports and the domestic like product only establishes

[82] China's response to Panel question No.1, para. 9.
[83] Ibid.
[84] China's opening statement at the meeting of the Panel, p. 5.
[85] China's comments on the United States' response to Panel question No. 40.
[86] Ibid.
[87] Ibid.
[88] Ibid.
[89] European Union's third-party response to Panel question No. 3.
[90] European Union's third-party response to Panel question No. 1.
[91] Ibid.
[92] Japan's third-party response to Panel question No. 3.
[93] Ibid.

the potential for subject imports to suppress or depress domestic like product prices, and not actual price suppression or depression by subject imports.[94]

7.39. Japan finds MOFCOM's reliance on (a) the likeness analysis, (b) parallel pricing between subject imports and the domestic like product, (c) overlap in consumers between subject country exporters and domestic industry and (d) pricing policies of subject countries producers to establish price competition between subject imports and the domestic like product to be flawed.[95] Japan submits that while investigating authorities may assess a competitive relationship for the purpose of a likeness enquiry, such inquiry is different from the scope, purpose and depth of consideration of a competitive relationship necessary in the context of a price effects analysis.[96] With respect to parallel pricing, Japan argues that parallel movement in prices of subject imports and the domestic like product is not evidence of a competitive relationship between subject imports and the domestic like product, and that the existence of parallel pricing between subject imports and the domestic like product does not necessarily mean that subject import prices are having an effect on domestic like product prices.[97] Further, Japan questions MOFCOM's reliance on consumer overlap, arguing that when subject imports and the domestic like product are concentrated at different ends of the like product spectrum, the fact that the same consumer may be procuring from subject country exporters and the domestic industry does not mean that price competition exists between subject imports and the domestic like product.[98] Finally, with respect to pricing policies of subject country exporters, Japan states that the mere consideration of prices of other producers while setting prices does not by itself establish the existence of a competitive relationship.[99]

7.3.5 Evaluation by the Panel

7.40. The principal issue before us is whether MOFCOM's conclusions regarding the price suppressing effect of subject imports in 2008 and the price suppressing and depressing effect of subject imports in Q1 2009 were based on an objective examination of positive evidence, in accordance with Articles 3.1 and 3.2 of the Anti-Dumping Agreement and Articles 15.1 and 15.2 of the SCM Agreement. In other words, we must determine whether the conclusions reached by MOFCOM, as explained in the Redetermination, are such as could be reached by an objective and impartial decision-maker on the basis of the information and arguments that were before MOFCOM.

7.41. Regarding price suppression and depression, Articles 3.2 and 15.2 require investigating authorities to consider whether the effect of subject imports is to "depress prices to a significant degree or prevent price increases, which otherwise would have occurred, to a significant degree". The Appellate Body has stated that this requires investigating authorities to consider whether certain price effects are the "consequence" of subject imports.[100] We agree. But Articles 3.2 and 15.2 do not prescribe any particular methodology for that consideration. Therefore, investigating authorities retain some degree of discretion in adopting a methodology they deem fit for this purpose. This discretion, however, is not without limit. It is qualified by the overarching obligation set out in Articles 3.1 and 15.1 that investigating authorities shall base their determinations on an objective examination of positive evidence of, *inter alia*, the effect of subject imports on the market prices of domestic like products.

7.42. In *China – GOES*, the Appellate Body stated that the objective examination of positive evidence, in the context of price suppression or depression, requires that when an investigating authority "is faced with elements other than subject imports that may explain the significant price depression or suppression of domestic prices, it must consider relevant evidence pertaining to such elements for purposes of understanding whether subject imports indeed have a depressive or suppressive effect on domestic prices".[101] The Appellate Body found support for this conclusion in Articles 3.2 and 15.2, which obligate investigating authorities to consider whether subject imports prevented price increases "which otherwise would have occurred".[102] We agree with the Appellate

[94] Japan's third-party submission, para. 9.
[95] Japan's third-party response to Panel question No. 1.
[96] Ibid.
[97] Ibid.
[98] Ibid.
[99] Ibid.
[100] Appellate Body Report, *China – GOES*, para. 136.
[101] Ibid. para. 152.
[102] Ibid.

Body that investigating authorities may not disregard evidence which raise questions as to whether it is subject imports or some other element or elements that are suppressing or depressing domestic like product prices.

7.43. In this case, the United States argues that MOFCOM failed to compare the prices of subject imports and the domestic like product, despite evidence in the record indicating that there was a substantial divergence in the prices of subject imports and the domestic like product, and that in Q1 2009, subject imports were priced higher than the domestic like product. The United States argues that this evidence raised questions as to whether subject imports in fact had a suppressive or depressive effect on the domestic like product prices which MOFCOM, by not comparing the subject import and domestic like product prices, failed to consider. The United States contends that MOFCOM failed to explain how subject imports had the effect of suppressing or depressing domestic like product prices when subject import prices were higher in Q1 2009 than domestic like product prices. China argues that Articles 3.2 and 15.2 do not require investigating authorities to compare the prices of subject imports and the domestic like product, relying, in particular, on the Appellate Body's statement that, in light of the text of Articles 3.2 and 15.2, price suppression or depression may stem from "the price and/or volume of such imports".[103] China contends that increases in the volume of subject imports may have the effect of suppressing or depressing domestic prices independently of any effect of the prices of those imports, and that therefore no consideration of their prices in comparison to domestic like product prices is necessary in making such a determination.

7.44. In our view, the issue in the present case is not whether price comparisons are mandated under Articles 3.2 and 15.2, whether increased volumes of subject imports may have a price suppressive or depressive effect independent of any consideration of their relative prices, or whether higher priced imports may have a suppressive or depressive effect on domestic like product prices. Instead, the issue is whether, with respect to the findings of price suppression and depression, MOFCOM's Redetermination in this case, on its own merits, was based on an objective examination of positive evidence and provides reasoned explanations for those findings, in light of the evidence and arguments before it. Therefore, we do not consider it necessary to determine whether price comparisons are or are not required by Articles 3.1 and 3.2 of the Anti-Dumping Agreement or Articles 15.1 and 15.2 of the SCM Agreement as a general matter of law. Rather, we will consider, as part of our overall review of MOFCOM's conclusions on price effects, whether MOFCOM's failure to make price comparisons in this particular case, in light of the evidence and arguments before it, meant that it failed to make reasoned determinations regarding price effects on the basis of an objective examination of positive evidence.

7.45. MOFCOM concluded that the increases in the volume of subject imports and consequential gains in their market share, at the expense of the domestic like product sales, had the effect of suppressing and depressing domestic like product prices. China asserts that its conclusions were supported by factual findings demonstrating that the subject imports and the domestic like product competed on the basis of price. Therefore, we will commence our analysis by considering MOFCOM's conclusions on the effect of the increased volume of subject imports and consequential increase in their market share in 2008 on the prices of the domestic like product in 2008 and Q1 2009. Second, we will consider MOFCOM's findings concerning price competition between subject imports and the domestic like product. In that context, we will also consider whether, as argued by the United States, MOFCOM failed to properly take into account specific assertions by US exporter AK Steel that certain product categories it exported could not be commercially supplied by the Chinese domestic industry. Finally, we will assess whether, as argued by China, these findings, viewed as a whole, are sufficient to sustain MOFCOM's conclusions with respect to the price suppressing and depressing effects of subject imports.

7.3.5.1 The effect of the increase in the volume and market share of subject imports on domestic like product prices

7.46. MOFCOM found that the volume of subject imports increased in 2008 and the domestic industry consequently lost 5.65 percentage points of market share in 2008, predominantly to subject imports, which gained 5.56 percentage points of market share in the same period. MOFCOM concluded that the domestic industry had no option "but to compete with the subject

[103] Appellate Body Report, *China – GOES*, para. 138.

merchandise on pricing".[104] This precluded price increases in 2008, despite rising costs, resulting in a 7% decline in the domestic industry's price-cost differential.[105] On this basis, MOFCOM concluded that subject imports suppressed domestic like product prices in 2008.

7.47. Further, MOFCOM found that as a result of the increase in the volume of subject imports in 2008, and a decline of 1.25% in subject import prices in Q1 2009 as compared to Q1 2008, the domestic industry reduced its prices by 30.25% in Q1 2009 as compared to Q1 2008 so as to avoid further loss of market share, resulting in price depression in Q1 2009.[106] MOFCOM also found that, as a result of the decline in the domestic like product prices, the price-cost differential of the domestic industry declined by 75% in Q1 2009, as compared to Q1 2008, and thus found that subject imports also suppressed prices in Q1 2009.[107]

7.48. In this regard, we note China's argument that although market share increases of subject imports alone do not necessarily explain price effects in all cases, in this particular case they did.[108] China focuses on the close correspondence between the domestic industry's loss of market share and gains in market share by subject imports. Further, China contends that the "extent and nature of the other evidence in this case" was sufficient to support the inference that subject import had adverse price effects and also that MOFCOM had "specific evidence" that the domestic industry lowered its prices in reaction to the loss of market share during 2008.[109]

7.49. China has not identified any "specific evidence" before MOFCOM that indicates that the domestic industry lowered its prices in reaction to the loss of market share during 2008. Nor has China identified the "other evidence in this case" whose "extent and nature" allegedly supports the inference that subject imports suppressed and depressed domestic prices. To the extent that China's reference to such evidence is actually a reference to the various factors relied on by MOFCOM in its conclusions on price competition, we discuss these separately below.

7.50. Before examining MOFCOM's conclusions, we recall that Articles 3.2 and 15.2 require investigating authorities to consider two lines of enquiry. With regard to the volume of dumped or subsidized imports, investigating authorities are required to consider whether there has been a significant increase in dumped or subsidized imports, in absolute terms, or relative to production or consumption in the importing Member. With regard to the effect of the dumped imports on prices, investigating authorities are required to consider "whether there has been a significant price undercutting by the dumped imports as compared with the price of a like product of the importing Member, or whether the effect of such imports is otherwise to depress prices to a significant degree or prevent price increases, which otherwise would have occurred, to a significant degree". In our view, it is clear that these two lines of enquiry are separate, and that increases in subject import volume and/or market share may, or may not, have consequences for domestic prices. In order to decide which the case in any given investigation is, the investigating authority must specifically consider the question of price effects, guided by the requirements of Articles 3.2 and 15.2. It is clear to us that it cannot simply be assumed that an increase in subject import volume and market share will have a price suppressing or depressing effect on domestic prices. If investigating authorities could simply assume that an increase in subject imports' volume and market share suppresses and/or depresses domestic like product prices, without specifically explaining whether the effect of such dumped or subsidized imports was to suppress or depress prices, the second prong of Articles 3.2 and 15.2 would be rendered redundant.

7.51. Therefore, in our view an investigating authority may conclude that increases in the volume of subject imports and consequential market share gains have a price suppressing and depressing effect on the domestic like product only if it establishes a linkage between the subject import's increased volume and market share on the one hand and the price suppression or depression observed on the other. Furthermore, where an authority is faced with elements other than subject imports that may explain the price depression or suppression, it must consider the evidence

[104] Redetermination, (Exhibit US-1), p. 26; and Redetermination – China's translation, (Exhibit CHN-1), p. 27.
[105] Ibid.
[106] Redetermination, (Exhibit US-1), p. 24; and Redetermination – China's translation, (Exhibit CHN-1), p. 25.
[107] Redetermination, (Exhibit US-1), p. 26; and Redetermination – China's translation, (Exhibit CHN-1), p. 27.
[108] China's response to Panel question No. 1, para. 9.
[109] Ibid.

relevant to such elements for purposes of understanding whether subject imports indeed have a depressive or suppressive effect on domestic prices.[110] By taking into account such elements, an investigating authority ensures that its consideration of significant price depression and suppression under Articles 3.2 and 15.2 is properly based on positive evidence and involves an objective examination, as required by Articles 3.1 and 15.1.[111] With this understanding in mind, we turn to the specific facts in this case.

7.3.5.1.1 Price Suppression in 2008

7.52. MOFCOM concluded that subject imports suppressed domestic like product prices in 2008 because the volume of subject imports increased in 2008 and the domestic industry lost market share as a consequence, predominantly to subject imports, which precluded price increases by the domestic industry despite rising costs. MOFCOM's analysis and determination raise a number of concerns.

7.53. First, MOFCOM assumed that if the domestic industry was losing market share, predominantly to subject imports, any inability to raise domestic prices must be a consequence of that loss in market share. We see no reference in MOFCOM's Redetermination to any evidence which could have led MOFCOM to the conclusion that the domestic industry's inability to increase prices and cover increased costs was actually the result of the loss in the domestic industry's market share to subject imports. Nor is there any explanation of how MOFCOM linked lost market share, which may well translate into lost revenues, to the industry's inability to increase prices to cover costs. MOFCOM's assumptions are particularly problematic in light of its failure to engage with or consider relevant evidence on the record, which could have affected MOFCOM's conclusion that the close correspondence between the domestic industry's loss of 5.65 percentage points of market share and the subject imports' gain of 5.56 percentage points of market share showed the suppressive effect of increased imports on domestic industry prices.

7.54. For instance, while MOFCOM concluded that price suppression was an effect of the domestic industry's loss of significant market share almost entirely to the subject imports, as we discuss below in considering MOFCOM's causation analysis, it failed to consider the impact of non-subject imports on domestic like product prices, even though the volume of such imports was greater than that of subject imports. Moreover, as MOFCOM itself observed, the prices of non-subject import prices were "close to" the price of subject imports in 2008.[112] Since subject imports, non-subject imports and the domestic like product all competed in the Chinese market, it is unclear how MOFCOM reached the conclusion that domestic industry prices were precluded from increasing as a result of the increased volume of subject imports, but that the significant volume of non-subject imports in the Chinese market, at prices similar to those of subject imports, had no such effect. Similarly, it is not clear to us how MOFCOM concluded that relative changes in market share between the domestic industry and subject imports had the effect of suppressing and depressing domestic prices, but relative changes in the much greater volume of non-subject imports did not.

7.55. China argues that non-subject imports gained only 0.09 percentage points of the 5.65 percentage points of market share lost by the domestic industry in 2008, given that subject imports gained 5.56 percentage points. Therefore, China contends that it was the subject imports' volume and market share increase that had the effect of suppressing and depressing domestic prices.[113] In response to questions from the Panel, China provided the following information concerning quarterly shifts in market share in 2008 and Q1 2009 to the Panel, which was not set out in MOFCOM's Redetermination.[114]

[110] Appellate Body Report, *China – GOES*, para. 152.
[111] Ibid.
[112] See Redetermination, (Exhibit US-1), p. 37; and Redetermination – China's translation, (Exhibit CHN-1), p. 37; GOES: Imports into China (China Customs import data), (Exhibit US-12) (this exhibit contains no page numbers).
[113] China's first written submission, para. 119.
[114] China's response to Panel question No. 14, para. 52.

Quarterly shifts in market share

	Q1 2008	Q2 2008	Q3 2008	Q4 2008	Q1 2009	Q1 2009 compared to Q1 2008
Domestic Industry	...	-1.85%	-5.00%	0.39%	7.50%	1.04%
Subject imports	...	10.28%	4.14%	-4.69%	-8.75%	1.17%
Non-subject imports	...	-8.44%	0.86%	4.30%	1.08%	-2.21%

Source: China's response to Panel question No. 14.

7.56. While, in light of the standard of review, we draw no conclusions on the basis of this quarterly data, we observe that it undermines to a degree MOFCOM's conclusion that the market share lost by the domestic industry in 2008 was taken up almost exclusively by subject imports. For instance, we note that China submits, relying on this quarterly data, that in Q4 2008, "subject imports remained very high", "the domestic industry began to react" to increases in volumes of subject imports, and that the domestic AUV fell in Q4 2008, in comparison to Q3 2008.[115] Further, China explains that it is only in Q1 2009, with the cumulative effect of price decreases in Q4 2008 and Q1 2009, that the domestic industry began to regain market share that it had lost in 2008.[116]

7.57. Yet, the quarterly data show that in Q4 2008, non-subject imports gained 4.30% market share, in comparison to Q3 2008, whereas subject imports lost 4.69% of market share, in comparison to Q3 2008. We observe that MOFCOM's conclusion that in 2008 the domestic industry lost market share predominantly to subject imports does not adequately reflect the market dynamics prevalent in Q4 2008, and thereby understates the relevance or possible effect of non-subject imports on the domestic like product prices in 2008. This is particularly difficult to understand because China's submissions indicate that the price reactions from the domestic industry started in Q4 2008 and continued in Q1 2009, both of which are quarterly periods when non-subject imports gained and the subject imports lost market share.[117] Therefore, we observe that far from offering relevant context for MOFCOM's conclusion regarding linkages between increases in subject import volume and adverse price effects suffered by the domestic industry, the quarterly data casts further doubt on MOFCOM's conclusions.

7.58. Second, in our view, a reasonable and unbiased investigating authority could not have concluded that the domestic industry reacted to increased volumes of subject imports by competing on price without considering the relative prices of subject imports and the domestic like product. We recall that there was information before MOFCOM on the prices of the subject imports, non-subject imports, and the domestic like product. While we draw no conclusions as to the probative value of that information, we do question MOFCOM's failure to consider it at all in the Redetermination. Such a consideration is, in our view, important to understand the relationship between subject import and domestic like product prices. For example, if there is a significant variation between the price levels of subject imports and the domestic like product, it may be questioned whether domestic industry prices were, in fact, precluded from increasing by the increases in the volume of subject imports in the market, or whether other factors were responsible for such price suppression. It is undisputed that MOFCOM did not make price comparisons.[118] In our view, MOFCOM could not have reached a reasoned and adequate conclusion that the domestic industry's prices were suppressed by the volume of subject imports, having failed to consider the relative prices of subject imports and the domestic like product at all.

7.3.5.1.2 Price suppression and depression in Q1 2009

7.59. With respect to the price suppressing and depressing effect of subject imports in Q1 2009, MOFCOM concluded that (a) the "large increase" in the volume of subject imports since 2008 *and*

[115] China's response to Panel question No. 14, paras. 55-56.
[115] Ibid. para. 55.
[116] Ibid. para. 56.
[117] Ibid. paras. 55-56.
[118] See, e.g. China's response to Panel question No. 7, para. 29.

(b) the "sharp decrease" in the price of those imports in the first quarter of 2009, together depressed and suppressed the price of the Chinese domestic like product in Q1 2009.[119]

7.60. In our view, when an investigating authority concludes that the increased volume and decreased prices of subject imports, taken together, affects domestic prices, it is not for a panel to independently seek to determine the price suppressive or depressive effect of either the volumes or prices of subject imports alone. Absent some indication that the investigating authority itself considered the effect on domestic prices of the volumes and prices independent of each other, such an inquiry would require us to undertake a *de novo* analysis of the facts, which we are not permitted to do.[120] Therefore, we asked China to clarify whether MOFCOM found that the domestic industry's loss of market share to subject imports in 2008 and the 1.25% decline in subject import prices in Q1 2009, taken together, forced the domestic industry to lower prices by 30.25% in the same period.

7.61. China clarified, referring to other parts of MOFCOM's Redetermination, that while MOFCOM noted both the increased volume of subject imports and consequential gains in market share and the decrease in import prices, it placed much more emphasis on the loss of domestic market share and was more concerned with the decline in subject import prices in the face of rising domestic costs than it was with the extent of the decline in subject import prices.[121] The following statement reflects this:

> In the first quarter of 2009, drawing upon the lesson of losing market share in 2008, the domestic industry was forced to cut price to avoid further losing market share. Given that sales price of the domestic like product fell by 30.25% compared to the previous year, the domestic industry won back part of the market share that was lost in 2008, but still failed to recover to the market share level of 2007 when the subject merchandise had not yet been imported in large quantities.[122]

7.62. This statement refers to the effect of the increased volume of subject imports and consequential loss in domestic industry's market share alone on the domestic like product prices, suggesting that MOFCOM did consider the effect of the volume of subject imports independent of the effect of the price decline.[123] Therefore, we now turn to consider whether MOFCOM's conclusion regarding the linkage between the increased volume of subject imports in 2008 and price effects in Q1 2009 was based on an objective examination of positive evidence.

7.63. We have two specific concerns regarding the linkage that MOFCOM draws between increases in subject import volume and price effects in Q1 2009. First, MOFCOM found that the domestic industry was forced to lower prices to avoid further loss of market share.[124] However, MOFCOM made no attempt to compare the prices of subject imports and the domestic like product. If subject imports were priced higher than the domestic like product, it is not clear that further price reductions by the domestic industry would enable it to limit further market share losses, which occurred even though domestic prices were lower than subject import prices. We note in this context that the US government specifically argued that subject imports were priced higher than the domestic like product in Q1 2009 and MOFCOM did not find this assertion of fact to be incorrect.[125] In our view, MOFCOM could not have reached a reasoned and adequate conclusion regarding the linkage between increases in subject import volume and price effects suffered by the domestic industry, without examining the price levels of subject imports and the domestic like product.

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[119] Redetermination, (Exhibit US-1), pp. 28, 41; and Redetermination – China's translation, (Exhibit CHN-1), pp. 28, 42.

[120] See Appellate Body Report, *China – GOES*, paras. 216, 220.

[121] China's response to Panel question No. 27, para. 93.

[122] Redetermination, (Exhibit US-1), p. 49; and Redetermination – China's translation, (Exhibit CHN-1), p. 49.

[123] In this regard, we find no similar independent references to the depressive or suppressive effect of a 1.25% decline or sharp decrease on domestic like product prices, nor does China argue that MOFCOM's finding could be sustained on the basis of a sharp decrease in subject import prices in Q1 2009. Therefore, we do not consider this issue further.

[124] Redetermination, (Exhibit US-1), p. 26; and Redetermination – China's translation, (Exhibit CHN-1), p. 27.

[125] Redetermination, (Exhibit US-1), p. 41; and Redetermination – China's translation, (Exhibit CHN-1), p. 42.

7.64. We recall that, in the original proceeding, the Appellate Body found that the "fact that there was a substantial divergence in pricing levels over that period [Q1 2009] could suggest that the two products [subject imports and the domestic like product] were not in competition with each other or that there were other factors at work".[126] In the Redetermination, instead of considering whether this substantial divergence in pricing levels (which China does not deny existed) brought into question its determination, MOFCOM simply chose not to make price comparisons or take the price levels into consideration at all.[127] In our view, in situations where a panel or the Appellate Body highlights certain concerns, based on the underlying evidence, regarding the consistency of a measure with the Anti-Dumping Agreement or SCM Agreement, it is on its face problematic for an investigating authority to simply decline to engage with the evidence that was the basis of the decision it is seeking to implement by making a new determination based on the same record evidence.

7.65. In this case, given the nature and scope of the findings in the original proceeding, we would have expected MOFCOM, in making a new determination based on the same record evidence, to provide some analysis or explanation as to why the evidence regarding divergences in price levels between subject imports and the domestic like product did not affect its conclusions, or why it found it unnecessary to consider such evidence at all. However, MOFCOM chose not to address that question, and ignored the evidence altogether, relying on the Appellate Body's statement that price comparisons are not required as a matter of law.[128] Even if price comparisons are not required in order to make a determination regarding the price effects of imports as a matter of law, a failure to at least consider evidence of price divergences where such evidence is before the investigating authority is difficult to understand. An analytical approach based on disregarding evidence which might lead to a different conclusion casts doubt on the reasonableness and objectivity of the investigating authority's examination of the evidence and its conclusions. This is particularly so in a case like the present one, when there were specific arguments advanced by the United States government that subject imports were priced higher than the domestic like product in Q1 2009, both the panel and the Appellate Body questioned the adequacy of MOFCOM's analysis of the pricing evidence in the original determination, the record evidence underlying the Redetermination is unchanged from the original proceeding, and the same ultimate conclusions were reached by MOFCOM.

7.66. Second, MOFCOM's conclusions seem even more questionable given that, as argued by the United States, subject imports declined from Q3 2008 to Q4 2008 and from Q4 2008 to Q1 2009, undermining the plausibility of a conclusion that the price suppression and depression in Q1 2009 were the effect of increases in subject import volumes.[129]

7.67. China questions the United States' reliance on quarterly import statistics from China Customs, on the ground that quarterly data may have anomalies.[130] China argues that such anomalies may arise because it takes time for subject imports to arrive in China and be counted, while decisions about how much to import and how much to charge for those shipments are based on information from an earlier time.[131] However, China clarified that its arguments "relate more to

[126] Appellate Body Report, *China – GOES*, para. 226.

[127] See, e.g. Redetermination, (Exhibit US-1), p. 41; and Redetermination – China's translation, (Exhibit CHN-1), p. 42.

[128] In this regard, China argues that it did not consider the price differences between subject imports and the domestic like product because, in the original proceeding, the Appellate Body found deficiencies in the price data that was used for price comparisons. In the absence of new price data in the redetermination proceeding, MOFCOM could not have made price comparisons without using the same deficient price data. China's comments on the interim report, para. 6. In its Redetermination, MOFCOM decided not to collect new evidence and based its redetermination on the evidence from the original investigation and determination. While China may, in the first instance, seek to bring its measures into conformity with its WTO obligations in whatever manner China deems appropriate, any measure taken to comply with its WTO obligations, in this case, MOFCOM's Redetermination, must itself be consistent with China's WTO obligations. In this case, for the reasons set out in this Report, we have found that MOFCOM's failure to make price comparisons, as well as other errors, resulted in findings and explanations which were not "reasoned and adequate" to support MOFCOM's determination, and therefore concluded, *inter alia*, that the Redetermination is inconsistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement and Articles 15.1 and 15.2 of the SCM Agreement. We do not consider that China's explanation as to why MOFCOM did not make price comparisons between subject imports and the domestic like product justifies the errors that we found in MOFCOM's price effects analysis.

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

[130] China's first written submission, para. 62; and response to Panel question No. 35, paras. 108-110.

[131] China's response to Panel question No. 35, para. 108.

the price than the volume" and that given the closer proximity to the market, domestic producers could react with a new price while the subject imports would react on a delayed basis.[132] Since the United States' argument concerns the effect of the declining volume of subject imports rather than their price, we do not consider that China's argument undermines the argument raised by the United States, that is, whether MOFCOM's redetermination could be considered reasonable since MOFCOM focused on shifts in market share in 2008 as a whole, while ignoring evidence that the volume of subject imports declined from Q3 2008 onwards.[133]

7.68. MOFCOM's Redetermination does not suggest that this issue was considered by MOFCOM, nor has China argued to the contrary. In our view, a reasonable and unbiased investigating authority could not conclude that an increase in the volume of subject imports and a consequential market share gain of 5.56 percentage points in 2008 resulted in domestic price declines in Q1 2009 to avoid further loss of market share, without taking into account the fact that subject imports actually declined from Q3 2008 to Q4 2008 and again from Q4 2008 to Q1 2009. In our view, this evidence is clearly relevant to assessing the linkages, if any, between market share shifts in 2008 and price declines in Q1 2009.

7.69. To be clear, we do not mean to suggest that it is impossible that the Chinese domestic industry experienced price depression in Q1 2009 in the face of a declining volume of subject imports from Q3 2008 to Q1 2009. However, we do consider that, faced with evidence of declining import volumes toward the end of the period, which could potentially affect any findings regarding the price suppressing and depressing effect of subject imports, MOFCOM should have, at a minimum, considered and addressed this evidence. MOFCOM failed to do so.

7.70. Our review of MOFCOM's determination with respect to price suppression and price depression in 2008 and Q1 2009 based on subject import volumes and market share has revealed serious errors in MOFCOM's analysis of the underlying evidence, which in our view call into question whether MOFCOM's conclusions regarding price effects could have been reached by an investigating authority considering the evidence objectively, and are supported by reasoned explanations. Nonetheless, we now turn to an examination of whether this evidence, considered in conjunction with evidence of price competition between the subject imports and the domestic like product is an adequate basis for MOFCOM's conclusions regarding the price suppressing and depressing effect of subject imports on domestic like product prices.

7.3.5.2 MOFCOM's finding regarding price competition between subject imports and the domestic like product

7.71. Turning to MOFCOM's findings on price competition, we will first examine MOFCOM's consideration of evidence furnished by the US exporter AK Steel that certain product categories manufactured by it could not be commercially supplied by the domestic industry. In our view, the inability of the domestic industry to meet the needs of certain specific end-uses may well affect a finding of price competition between subject imports and the domestic like product. Second, we will examine whether, as argued by China, MOFCOM's seven factual findings concerning price competition, taken as a whole, supported MOFCOM's conclusions regarding price competition between subject imports and the domestic like product. Finally, we will consider whether, and if so how, MOFCOM's finding of price competition, taken together with its findings regarding the volume and market share of subject imports, reasonably explain and support its conclusions regarding the price effects of those imports.

7.3.5.2.1 AK Steel's evidence of non-substitutability of certain product categories

7.72. The United States argues that MOFCOM failed to adequately consider evidence submitted by AK Steel that [***].[134] Further, AK Steel also contended that lower grade Chinese-produced GOES was not readily substitutable for imported GOES and that any substitution would require downstream users to make significant manufacturing changes, with consequent adverse effects on the final product and on manufacturing costs.[135] In particular, the United States emphasizes that

[132] China's response to Panel question No. 35, paras. 108-109.
[133] See Redetermination, (Exhibit US-1), p. 50; and Redetermination – China's translation, (Exhibit CHN-1), p. 50.
[134] United States' opening statement at the meeting of the Panel, para. 30.
[135] Ibid.

MOFCOM failed to consider evidence submitted by AK Steel that GOES produced by domestic producers was not certified for use in large transformers, i.e. transformers of 500kW and above.[136] The United States asserts that AK Steel was a much more significant participant in the Chinese market than the other participating US exporter, Allegheny Ludlum, and that by ignoring AK Steel's submissions, MOFCOM disregarded evidence relating to a significant proportion of the imports under investigation.[137]

7.73. China responds first that, while AK Steel submitted a questionnaire response during the original proceeding containing the assertions relied on by the United States, it did not make any comments on MOFCOM's factual disclosure or preliminary determination in the original investigation with respect to the issue of non-substitutability of certain product categories or any comments on this issue during the Redetermination proceedings.[138] Second, China contends that AK Steel's exports of high-end GOES accounted for only about ten per cent of total subject country exports to China and for that reason, would not have had any material impact on MOFCOM's analysis of the cumulated effect of subject imports as a whole.[139] Further, China asserts that while it may have been true that the Government of China did not expect test manufacturing of 500 kW transformers employing domestically-produced GOES until the end of 2009, i.e. subsequent to the period of investigation, it did not necessarily follow that the domestic industry did not produce GOES capable of being used in such transformers.[140] Finally, China submits that since AK Steel did not distinguish the product categories exported by it from those exported by Allegheny Ludlum, MOFCOM was well within its rights to forego any further consideration of AK Steel's contentions.[141]

7.74. China referred to the following excerpt from MOFCOM's Redetermination, which China contends responded to the submissions of AK Steel regarding the inability of the domestic industry to manufacture certain product types in commercial quantities, without explicitly referring to AK Steel by name:

> The interested parties that submitted responses to the questionnaire for overseas producers and domestic importers at one point argued that laser scribing, low iron loss and other high-end products can only be produced in the U.S., Japan and other countries. During the verification of the domestic producers, the Investigating Authority verified their production lines of laser scribing, collected evidence such as their product catalogues, product testing reports and sales invoices, which prove that the domestic industry indeed did produce and sell laser-scribing and low-iron-loss grain GOES product. The domestic industry also provided use evaluation reports from the downstream users, proving that domestic like product is of similar quality to the subject merchandise and that the two are competitive and substitutable.[142]

7.75. There is a considerable degree of factual dispute between the parties as to whether AK Steel's submissions were considered by MOFCOM and whether AK Steel's submissions were accurate in light of MOFCOM's conclusions concerning the substitutability of different product types. While we will not undertake a *de novo* review of the information provided by AK Steel, we will examine carefully whether the "explanations given disclose how the investigating authority treated the facts and evidence in the record" and whether the "explanations provided demonstrate that the investigating authority took proper account of the complexities of the data before it, and that it explained why it rejected or discounted alternative explanations and interpretations of the record evidence".[143]

7.76. First, we do not accept that merely because AK Steel did not advance specific arguments on an issue beyond providing information in its questionnaire, MOFCOM was entitled to disregard the

[136] United States' response to Panel question No. 40, para. 22.
[137] United States' opening statement at the meeting of the Panel, paras. 30, 32.
[138] China's comments on the United States' response to Panel question No. 40.
[139] Ibid.
[140] Ibid.
[141] Ibid.
[142] Redetermination, (Exhibit US-1), p. 51; and Redetermination – China's translation, (Exhibit CHN-1), p. 51.
[143] Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93.

relevant facts submitted by AK Steel. [***][144] We understand China to be arguing that in order for MOFCOM to consider whether this was in fact true, AK Steel was required to make some additional submission specifically raising an argument based upon the facts presented in its questionnaire response. We disagree. If interested parties make available relevant evidence to the investigating authority, within prescribed timelines, there is no obligation on those parties to, in addition, make further arguments based on that evidence in the form of separate written or oral submissions. On the other hand, investigating authorities are required, in order to ensure an objective examination of the evidence, to consider all the evidence presented, and not merely that which is the subject of elaborated arguments.

7.77. Further, MOFCOM based the Redetermination on "record evidence submitted by interested parties as well as record evidence collected by the investigating authority in the original investigation".[145] It is clear that AK Steel was not required to resubmit its questionnaire response again in the Redetermination proceeding, and the same consideration we discussed above means it was not required to make additional arguments on the basis of the facts it submitted originally in the Redetermination proceeding. Therefore, as the questionnaire response continued to be part of the evidence on record before MOFCOM in the Redetermination proceeding, MOFCOM remained obligated to consider the information in its analysis and conclusions or explain why it was not relevant or probative.

7.78. Second, we reject China's argument that, absent an attempt by AK Steel to distinguish its steel from that shipped by Allegheny Ludlum, or any arguments on the issue, MOFCOM was entitled to forego any further consideration of AK Steel's contentions. Indeed, we find it difficult to understand this argument, given that it is entirely possible that one exporter simply has no knowledge of the product mix of another exporter, and therefore could not make such an argument. Moreover, even if the exporter did have this information, we cannot accept the view that the failure of an interested party to make certain arguments justifies an investigating authority's failure to consider relevant evidence submitted to it. China has pointed to no provision in the Anti-Dumping Agreement or the SCM Agreement, which would allow this. To the contrary, it is clear to us that the obligation of an investigating authority is to consider all the evidence presented to it, evaluate and weigh it, and draw conclusions supported by reasoned explanations. We fail to see how an investigating authority can satisfy this standard if it refuses to consider seemingly relevant information without a sufficient explanation.

7.79. Third, looking at MOFCOM's statement concerning arguments regarding [***], we observe that while MOFCOM took note of the assertions by interested parties that laser scribing, low iron loss and other high-end products could only be produced in the US, Japan and other countries, it is unclear to us how this responds to the specific assertions of AK Steel.[146] For instance, AK Steel stated that "HiB grades" manufactured by Wuhan were not certified for use in large transformers of 500 kW and above, and that based on AK Steel's feedback from its customers, Chinese transformer manufacturers were refusing to use domestically-produced GOES for these applications.[147] It is not discernible from MOFCOM's analysis or explanations how or if it considered this specific assertion. In our view, the fact that the domestic industry was allegedly unable to satisfy a specific end-use need in the Chinese market, i.e. supply GOES for use in large transformers of 500 Kw or above, was a relevant fact which should have been considered and resolved by MOFCOM in concluding that the domestic product and subject imports competed on price.

7.80. Finally, China contends that AK Steel did not quantify its shipments of GOES destined for use in transformers of capacity 500 Kw and above and therefore questions the United States'

[144] United States' response to Panel question No. 40, paras. 10-13 (quoting AK Steel Corporation, Supplementary Industry Injury Investigation Questionnaire Response, (AK Steel Supplementary Questionnaire Response), (Exhibit US-18) (BCI)).

[145] Redetermination, (Exhibit US-1) (this part of the Redetermination contains no page numbering); and Redetermination – China's translation, (Exhibit CHN-1), p. 1.

[146] Redetermination, (Exhibit US-1), p. 51; and Redetermination – China's translation, (Exhibit CHN-1), p. 51.

[147] United States' response to Panel question No. 40, paras. 13, 22 (quoting AK Steel Supplementary Questionnaire Response, (Exhibit US-18) (BCI), p. 4). See also News article, *China encourages domestic production of grain-oriented electrical steel for large transformers*, (Exhibit US-19). This Exhibit was presented as evidence in the original investigation before MOFCOM and cited in AK Steel's supplementary questionnaire response. See AK Steel Supplementary Questionnaire Response, (Exhibit US-18) (BCI), p. 4.

reliance on AK Steel's information.[148] Further, China argues that high-end GOES accounted for only about 10% of total subject imports and for that reason, United States' argument was not material to MOFCOM's analysis of the effect of subject imports as a whole.[149] We reject both of these arguments. The fact that the volume of imports of a grade not produced by the domestic industry may be relatively small as a percentage of total imports may well be relevant in assessing the question of price competitiveness, but it does not justify an investigating authority's refusal to undertake an analysis on the issue. Further, it is not for the Panel to make *de novo* findings as to whether MOFCOM's failure to consider such evidence was inconsequential in light of the limited volume of exports of such product categories into China.[150] There is nothing in the Redetermination that suggests that MOFCOM itself took this view.

7.81. In sum, MOFCOM's Redetermination does not explain how MOFCOM actually considered the information submitted by AK Steel in the context of its conclusion that the subject imports competed with the domestic like product on the basis of price.

7.3.5.2.2 Seven factors supporting MOFCOM's finding of price competition

7.82. China argues that, in making its determination of price effects, MOFCOM considered the domestic industry's loss of market share to increased volumes of subject imports in conjunction with other evidence demonstrating a competitive relationship based on price between subject imports and the domestic like product.[151] We agree that price competition may be a relevant element in determining whether subject imports had an effect on domestic like product prices. In that context, an investigating authority must be able to explain the connection between a factual finding of price competition between the domestic like product and subject imports and its ultimate conclusions concerning the price effects of those imports.

7.83. We now turn to consider each of the seven factors which China argues supported MOFCOM's finding of price competition. We note that China acknowledges that each of these factors, viewed in isolation, may be insufficient to support a finding regarding price competition or price effects.[152] Thus, while we review each of the factors individually, our conclusions will take into account all of them as a whole.

Like product and cumulation

7.84. In the Redetermination, MOFCOM summarized its analysis of likeness as follows:

> In summary, the GOES produced by China's domestic industry and the subject merchandise are not different in terms of physical character, and aspects such as production techniques and processes, product use, product substitutability, evaluations by consumers and producers, and sales channel are *fundamentally similar* and the price trends are *overall consistent*. Being similar and comparable, they are substitutable. Therefore, the GOES produced by China's domestic industry and the subject merchandise are like products.[153] (emphasis added)

With respect to cumulation, MOFCOM stated:

> Based on investigation, comparing the subject merchandise and the subject merchandise and the Chinese domestic like products, the physical characteristics, production techniques and processes and end uses are *fundamentally the same*, the sales channel and sale price trends are *fundamentally the same*, they all arose in the

[148] China's comments on the United States' response to Panel question No. 40.
[149] See, e.g. China's comments on the United States' response to Panel question No. 40.
[150] In this regard, we do not share China's view that because AK Steel's exports [***] constituted only ten per cent of total subject imports, it would not materially affect MOFCOM's analysis of price competition between subject imports and the domestic like product. In our view, the non-substitutability of even ten per cent of subject imports with the domestic like product may well be relevant in assessing the extent of price competition. In any event, investigating authorities may not summarily reject arguments regarding non-substitutability solely because they affect a relatively small segment of the domestic market.
[151] China's response to Panel question No. 5, para. 21.
[152] China's response to Panel question No. 4, para. 19.
[153] Redetermination, (Exhibit US-1), p. 12; and Redetermination – China's translation, (Exhibit CHN-1), p. 13.

> Chinese market at *fundamentally the same time*, product quality is *similar*, they satisfy customer requirements, they are substitutable, a competitive relationship exists between them, and the competition conditions are *fundamentally the same*.[154] (emphasis added)

7.85. The United States argues that MOFCOM's determinations of likeness and cumulation did not go beyond very general similarities or include any meaningful consideration of the nature of price competition or lack thereof.[155] China contends that it is difficult to conceive that subject imports and the domestic like product which were (a) "fundamentally the same", in terms of physical characteristics and terms of use, (b) travelled through the same channels, (c) were directly competitive with each other, (d) and were substitutes of each other, were not competing on price.[156] China argues that the finding of substitutability, in particular, strongly supported the notion of price competition.[157]

7.86. We agree that products which have similar physical characteristics and uses and are directly competitive and substitutable with each other are likely to compete on price. However, MOFCOM's findings are qualified, as indicated by the text italicized in the quotations above. Thus, in our view, the extent of similarities between subject imports and the domestic like product is less than clear, and thus the conclusion of price competition is somewhat attenuated. For instance, MOFCOM finds that the end uses of the domestic like product and the subject imports were "fundamentally the same". However, the extent and nature of the differences might well give insight as to whether the domestic product and subject imports are only broadly similar or close substitutes which could be used interchangeably for many, most, or all commercial purposes. In particular, we recall the assertions of AK Steel that certain GOES manufactured by the domestic industry was not certified for use in large transformers, and thus did not compete with the imported product.[158] MOFCOM's qualified conclusions give no indication as to whether or how it considered these assertions, which in our view would be relevant to a conclusion that the domestic like product competed with subject imports on the basis of price.

Statement by US producer Allegheny Ludlum

7.87. MOFCOM also relied on US producer Allegheny Ludlum's statement that the subject merchandise it produced and exported to China was highly substitutable and competitive with the domestic like product and the like product from other countries in its finding of price competition between subject imports and the domestic like product.[159] The United States asserts that MOFCOM could not have properly drawn conclusions regarding price competition based on Allegheny Ludlum's statement, particularly because MOFCOM failed to consider the submission of AK Steel, a bigger participant in the Chinese market, which argued that [***].[160]

7.88. While MOFCOM was entitled to take into account Allegheny Ludlum's statement that its exports were highly substitutable and competitive with the domestic like product, we note that there is nothing in MOFCOM's determination suggesting that the product types exported by Allegheny Ludlum were representative of subject imports from the United States, or subject countries, as a whole. We recall our concerns with MOFCOM's failure to fully consider the information submitted by AK Steel, and the fact that AK Steel's exports accounted for a larger share of US exports than did those of Allegheny Ludlum. Since MOFCOM was making a finding with respect to subject imports as a whole, it is not clear to us why MOFCOM would rely on Allegheny Ludlum's statement without thoroughly considering the submissions of AK Steel, whose exports to China were greater than those of Allegheny Ludlum, and would thus seem to have been more likely to be representative of US imports, even if not of subject imports as a whole. In these circumstances, we consider that Allegheny Ludlum's statements give little support to MOFCOM's conclusion of price competition.

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[154] Redetermination, (Exhibit US-1), p. 21; and Redetermination – China's translation, (Exhibit CHN-1), p. 22.
[155] United States' second written submission, para. 31.
[156] China's second written submission, para. 34.
[157] Ibid.
[158] United States' response to Panel question No. 40, para. 9.
[159] China's opening statement at the meeting of the Panel, p. 5 (quoting Redetermination, (Exhibit US-1), p. 51; and Redetermination – China's translation, (Exhibit CHN-1), p. 51).
[160] United States' opening statement at the meeting of the Panel, paras. 29-30.

Parallel price trends from 2006 to 2008

7.89. MOFCOM also relied on parallel trends in the prices of imports and the domestic like product in finding price competition. China argues that the divergence in the price trends of subject imports and the domestic like product in Q1 2009 did not undermine MOFCOM's conclusions because MOFCOM adequately explained the reasons for that divergence.[161] According to MOFCOM, the domestic industry reduced prices in Q1 2009 in order to regain market share lost to subject imports in 2008.[162] The United States contends that MOFCOM's reliance on parallel price trends to show price competition was misplaced, especially in light of the substantial divergence in the price trends of subject imports and the domestic like product in Q1 2009.[163]

7.90. MOFCOM relied on the following data concerning the average unit values (AUV)[164] of subject imports and domestic like product over the period of investigation[165]:

Percentage changes in AUV of subject imports and domestic like product

	2007	2008	Interim 2009
Subject imports	+2.9%	+17.57%	-1.25%
Domestic like product	+6.66%	+14.53%	-30.25%

Source: United States' second written submission[166]

On the basis of this data, MOFCOM concluded:

> The Investigating Authority based on the investigation determines that the conclusion that the pricing trends are fundamentally consistent was arrived at from the analysis of the import price of the subject merchandise during the period of the investigation and domestic price of the Chinese domestic like product. From 2006 through the first quarter of 2009, the two prices first increased and then decreased. The trends are fundamentally consistent.[167]

7.91. In response to arguments by the US government and AK Steel that the 1.25% drop in subject import price in Q1 2009, compared to the drop of 30.25% in domestic like product prices, indicated a lack of correlation between the prices of subject imports and the domestic like product, MOFCOM noted as follows:

> The Investigating Authority finds that the analysis in the price effects section of the redetermination comprehensively analysed the situation in 2008 and the first quarter of 2009. After taking into full consideration the import volume of the subject merchandise, corresponding changes in the market share of the subject merchandise and domestic like product and the corresponding changes in average price, the Investigating Authority finds that the continual substantial increase in the import volume of the subject merchandise caused the domestic [industry] to face a dilemma: if the domestic industry maintained the proper price level, the domestic industry would lose its market share; if the domestic industry wanted to avoid losing market

[161] China's first written submission, para. 43.
[162] Redetermination, (Exhibit US-1), p. 49; and Redetermination – China's translation, (Exhibit CHN-1), p. 49.
[163] United States' second written submission, paras. 34-35.
[164] Average unit values or AUVs, as noted in the original proceeding, represented the volume weighted average unit values for all transactions during a given calendar year. See Panel Report, *China – GOES*, footnote 497. China clarified that the AUV data on domestic prices was the same data on domestic prices available and discussed in the original determination. See China's response to Panel question No. 7, para. 25. We understand that MOFCOM used AUVs as proxies for actual prices of the domestic like product.
[165] See United States' first written submission, p. 19. The United States provided, in table form, the percentage changes in prices of subject imports and the domestic like product, as considered by MOFCOM, in the Redetermination.
[166] United States' second written submission, para. 33. The figures are based on percentage changes in price trends that were disclosed by MOFCOM in the Redetermination.
[167] Redetermination, (Exhibit US-1), pp. 39-40; and Redetermination – China's translation, (Exhibit CHN-1), p. 40.

> share, then it had to lower the price. The evidence that the Investigating Authority obtained fully support[s] this determination.[168]

7.92. We recall that in the original proceeding the panel and the Appellate Body had questioned MOFCOM's failure to explain why the different rates of decrease in the prices of subject imports and domestic like product did not affect its parallel price trends analysis or its overall price effects analysis.[169] China argues that MOFCOM did explain this in the Redetermination and that MOFCOM's analysis addressed trends both over the 2006 to 2008 period, as well as the divergence in Q1 2009, referring to the following:

> The domestic industry had no choice in the first quarter of 2009 but to substantially lower the price to avoid further losing its market share. Based on a comprehensive rather than isolated analysis of the situation in 2008 and the first quarter in 2009, the abovementioned evidence fully support the decision of the Investigating Authority, namely that in light of the impact of the large volume of the subject merchandise starting in 2008, the domestic industry was facing a the [*sic*] loss of market share and the decline in profitability; if the domestic industry hoped to maintain its market share, it had to reduce price and bear a further decrease in profitability.[170]

7.93. We have already explained our concerns with MOFCOM's conclusions regarding the price suppressing and depressing effects of the increased volume of subject imports and consequential gains in market share. For the same reasons, we find MOFCOM's explanation of the divergence in the prices of subject imports and the domestic like product in Q1 2009 to be unpersuasive, and thus the finding of parallel price trends lends little if any support to the finding of price competition.[171]

Customer overlap

7.94. In the Redetermination, MOFCOM found a degree of overlap between the users of subject imports and the domestic like product:

> Based on the comparison of the top ten clients by purchase volume provided by the domestic importers and domestic producers, the overlap ratio of the downstream users of the subject merchandise and domestic like product is around 50%. The sales contracts for the subject merchandise and the price negotiation documents between the domestic industry and the downstream clients that were provided by the domestic producers also prove that the subject merchandise and domestic like product are directly competitive and price is an important factor in the purchasing decisions of the downstream clients.[172]

7.95. The United States argues that MOFCOM's finding on consumer overlap does not support MOFCOM's conclusions on price competition, because the same customers may be buying different types of GOES for different applications from different sources.[173] China emphasizes that MOFCOM's finding was part of its overall evaluation and that MOFCOM reasonably established that

[168] Redetermination, (Exhibit US-1), pp. 48-49; and Redetermination – China's translation, (Exhibit CHN-1), pp. 48-49.

[169] Appellate Body Report, *China – GOES*, footnote 350.

[170] Redetermination, (Exhibit US-1), pp. 49-50; and Redetermination – China's translation, (Exhibit CHN-1), p. 49.

[171] In this regard, we also note China's assertion that from Q4 2008 to Q1 2009, domestic AUVs fell by 31.11% while subject import AUVs fell by only 18.32%. On the other hand, subject import AUVs were 1.25% lower in Q1 2009 than in Q1 2008, while domestic AUVs were 30.25% lower. China emphasizes that the difference in the decline in AUVs of subject imports and the domestic like product was less from Q4 2008 to Q1 2009 than it was from Q1 2008 to Q1 2009. China argues that this quarterly data regarding changes in AUVs of subject imports and the domestic like product from Q4 2008 to Q1 2009 was before MOFCOM but not discussed in the Redetermination, and strongly supports the finding of parallel pricing. Since we can find no reference in MOFCOM's Redetermination to such quarterly data, or any consideration thereof, we decline to rely on China's arguments in this regard, as there is no indication that MOFCOM itself took this into account in the Redetermination. See China's response to Panel question No. 10, para. 42.

[172] Redetermination, (Exhibit US-1), p. 51; and Redetermination – China's translation, (Exhibit CHN-1), p. 51.

[173] United States' first written submission, para. 72; and second written submission, para. 43.

subject imports and the domestic like product had (a) common customers, (b) sold the same products and (c) there was no attenuated competition due to specialty products.[174]

7.96. In our view, MOFCOM's analysis on customer overlap is at a level of generality which is insufficient to shed light on the issue as to whether there was price competition between subject imports and the domestic like product. In particular, it is not clear to us from MOFCOM's analysis how it reached a conclusion that the subject imports and domestic like product competed on the basis of price, simply because half of the customers in a sample provided to MOFCOM purchased both the subject imports and the domestic like product. MOFCOM's analysis offers no insight as to whether individual customers were sourcing the same GOES from both subject imports and the domestic industry for the same uses. It may very well be, as suggested by the United States, that customers purchased subject imports and domestic product for use in different applications. Thus, we conclude that MOFCOM's finding of consumer overlap lends little support to its finding of price competition.

Market share recapture

7.97. In the Redetermination, MOFCOM stated that the domestic industry was able to regain some market share in Q1 2009 by reducing its prices.[175] China argues that the domestic industry was able, in Q1 2009, to regain 5.15 of the 5.65 percentage points of market share that it had lost over 2008.[176] China acknowledges that there is no specific reference to the extent of market share recapture in Q1 2009 in MOFCOM's Redetermination but contends that recapture of market share, pursuant to a significant decline in domestic like product prices, was indicative of price competition between subject imports and the domestic like product.[177] The United States argues that MOFCOM's Redetermination does not refer to a 5.15 percentage point gain in market share in Q1 2009, and therefore, this line of argument is entirely *ex post facto* rationalizations.[178]

7.98. As noted, China itself admits that there is no reference in MOFCOM's Redetermination to the extent of market share regained in Q1 2009.[179] Indeed, there is nothing in the Redetermination that would suggest that the extent or quantum of market share recaptured by the domestic industry in Q1 2009 was even considered by MOFCOM in finding price competitiveness between subject imports and the domestic like product.[180] We agree with the United States that this focus on the amount of market share re-captured in Q1 2009 is an *ex post facto* argument, and we will not consider it, but will rather focus on MOFCOM's actual findings as set out in the Redetermination.

7.99. MOFCOM did find that the domestic industry was able to regain "some" of the market share that it lost in 2008, as a result of a reduction in its prices.[181] The question therefore is whether this finding supports MOFCOM's conclusions on price competition between subject imports and the domestic like product.

7.100. We recall that the domestic industry's prices declined significantly in Q1 2009. In our view, the fact that the domestic industry is able to regain market share from subject imports when its prices decline, suggests that consumers were reacting to the price decline. This could indicate that customers were sensitive to price changes and were basing their purchasing decisions on price considerations. Therefore, in our view, it was plausible for MOFCOM to consider that the gain in market share in Q1 2009 supported the conclusion of price competition between subject imports and the domestic like product.

[174] China's second written submission, paras. 50-51.
[175] China's opening statement at the meeting of the Panel, p. 5 (citing Redetermination, (Exhibit US-1), p. 28; and Redetermination – China's translation, (Exhibit CHN-1), p. 27).
[176] China's opening statement at the meeting of the Panel, para. 20.
[177] China's response to Panel question No. 18, para. 66.
[178] United States' comments on China's response to Panel question No. 18 (citing Panel Report, *Argentina – Ceramic Tiles*, para. 6.27).
[179] China's response to Panel question No. 18, para. 66.
[180] See, e.g. China's response to Panel question No. 18, paras. 66-68 (citing Redetermination, (Exhibit US-1), pp. 26, 34, 43; and Redetermination – China's translation, (Exhibit CHN-1), pp. 25-27, 32, 43).
[181] See Redetermination, (Exhibit US-1), p. 26; and Redetermination – China's translation, (Exhibit CHN-1), p. 27.

Pricing policy documents

7.101. MOFCOM relied on a contract between a Russian supplier and a Chinese customer and price negotiation letters exchanged between domestic producers and Chinese suppliers ("pricing policy documents") in support of its findings of price competition.[182] China clarified that MOFCOM also considered that these pricing policy documents demonstrated that prices were influencing purchaser decisions and that subject country exporters were attempting to set lower prices than those set by the domestic industry.[183] As we find MOFCOM's conclusions and the parties' arguments based on these documents to be interlinked, we examine them together below.

7.102. In the Redetermination, MOFCOM made the following findings on the basis of the pricing policy documents:

> During the verification period, domestic producers submitted to the Investigating Authority a contract concerning the foreign producers' sales of subject merchandise in the Chinese market, in which relevant provisions of the contract demonstrate that in the first quarter in 2009 Russian producers adopted a pricing strategy that set lower prices than those of the domestic like products. The domestic producers also submitted documents on price negotiations with downstream users, which demonstrated that the prices of subject merchandise imported from the United States in the first quarter of 2009 were lower than that of the domestic like products, forcing the domestic industry to lower its prices. The Investigating Authority finds that the aforementioned evidence reveals that the subject merchandise has a direct competitive relationship with the domestic like products in terms of sales and pricing, that prices have a marked influence on the purchasing decisions of downstream users, and that in the first quarter of 2009 the subject merchandise attempted to set the price in the Chinese domestic market lower than the domestic like product.[184]

7.103. We turn first to the contract between a Russian producer and a Chinese purchaser ("Russian contract"). MOFCOM considered that the Russian contract indicated that "in the first quarter in 2009 Russian producers adopted a pricing strategy that set lower prices than those of the domestic like products".[185] The United States argues that [***].[186] We agree with the United States, as in our view, the contract is clear that [***]. We do not consider that a reasonable investigating authority could have inferred from the cited provisions of the contract that the Russian exporter adopted a "price strategy that set lower prices". Moreover, the contract certainly cannot be understood as providing any information as to the pricing policies of exporters in other subject countries, or even other Russian exporters. We do not consider that this contract demonstrates that subject country exporters attempted to set lower prices than those of the domestic industry.

7.104. In relation to MOFCOM's conclusions regarding price competition and the relevance of prices in consumers' purchasing decisions, the fact that [***]. Therefore, we consider that MOFCOM could have relied upon the contract as part of its overall evaluation of price competition between subject imports and the domestic like product. Nevertheless, since the Russian contract set out the terms and conditions applicable only between one specific Chinese purchaser and the Russian supplier, the contract offered only very limited insight into the competition between subject imports and the domestic like product as a whole.

7.105. Second, [***]

7.106. The United States argues that the price negotiation letters, involving limited tonnage, provided nothing more than limited, anecdotal evidence and that since these letters all pertained

[182] China's opening statement at the meeting of the Panel, p. 5. See Contract between a Russian producer and a Chinese purchaser, (Russian contract), (Exhibit US-6) (BCI), p. 3 and Price negotiation letters exchanged between a Chinese producer and Chinese purchasers, (Price negotiation letters), (Exhibits US-7, US-8 and US-9) (BCI).

[183] China's response to Panel question No. 3, para. 13.

[184] Redetermination, (Exhibit US-1), p. 24; and Redetermination – China's translation, (Exhibit CHN-1), p. 25.

[185] Ibid.

[186] United States' first written submission, para. 69.

to negotiations in Q1 2009, they offered no insight on price competition prior to that.[187] China argues that the price negotiation letters indicate that the domestic consumers were using subject import prices to drive down domestic prices and the pricing policy documents as a whole were further evidence of a competitive relationship between subject imports and the domestic like product.[188]

7.107. MOFCOM stated that the "domestic producers also submitted documents on price negotiations with downstream users, which demonstrated that the prices of subject merchandise imported from the United States in the first quarter of 2009 were lower than that of the domestic like product, forcing the domestic industry to lower its prices".[189] In the absence of any comparison of the prices of subject imports and the domestic like product, we have serious concerns regarding a conclusion that the price negotiation letters "demonstrated" that the prices of subject merchandise imported from the United States in Q1 2009 were lower than those of the domestic like product. However, we can accept that, as suggested by China, MOFCOM's reference to the "lower" prices was only a description of the prices mentioned in the documents themselves, and not a finding as to the overall relationship between the price levels of subject imports and the domestic like product.[190] However, in this context, the reference to "lower" prices gives little support to MOFCOM's conclusions regarding price competition overall.

7.108. With respect to the conclusions reached by MOFCOM in light of these letters we consider that, like the Russian contract, they have some relevance to understanding the competitive relationship between prices of subject import and the domestic like product. However, it is unclear from MOFCOM's Redetermination why it considered the price negotiation letters, which concern specific transactions of limited tonnage, to be representative of direct price competition between subject imports and the domestic like product as a whole. There is nothing in MOFCOM's Redetermination that would even suggest that these three groups of letters were somehow representative of the entire spectrum of competition between subject imports and the domestic like product. Given their limited scope, while they do show that, in the transactions concerned, customers used the prices of subject imports in negotiating prices with Chinese suppliers, we have no basis on which to conclude that the facts represented in those letters, i.e., that subject import prices were lower than the originally quoted domestic like product prices, were true. Thus, these three groups of letters at most demonstrate the existence of price negotiations driven by customers, which suggests some degree of price competition in the transactions at issue. However, they lend at best little support to MOFCOM's overall conclusions.

7.3.5.2.3 Conclusions on price competition

7.109. While as set out above, we do have some concerns regarding the factual findings relied upon by MOFCOM in support of its conclusions on price competition between subject imports and the domestic like product, as well as MOFCOM's failure to adequately consider submissions made by AK Steel, the question before us is whether MOFCOM's conclusion regarding price competition between subject imports and the domestic like product, on the basis of the factual findings taken as a whole, is one an objective investigating authority could have reached based on the facts and explanations given.

7.110. We consider that the concerns highlighted above with respect to MOFCOM's price competition finding weaken MOFCOM's conclusion concerning price competition. In particular, MOFCOM's failure to engage with evidence furnished by AK Steel regarding [***], raises doubts as to whether subject imports and the domestic like product were in competition with each other across at least some part of the spectrum of the GOES like product. Nonetheless, we find that the facts overall, including the fact that the domestic industry was able to regain market share from subject imports (as well as from non-subject imports), provided a reasonable basis for MOFCOM to

[187] United States' comments on China's response to Panel question No. 3; and second written submission, para. 39.

[188] China's first written submission, para. 47; and second written submission, para. 56.

[189] See Redetermination, (Exhibit US-1), p. 24; and Redetermination − China's translation, (Exhibit CHN-1), p. 25.

[190] China's response to Panel question No. 3, para. 13. In this regard, we also have concerns with MOFCOM's statement that prices of subject merchandise imported from the United States in the first quarter of 2009 "were lower" than those of the domestic like product, forcing the domestic industry to lower its prices, in light of the specific argument by the US government that subject imports were priced higher than the domestic like product in Q1 2009, which was not examined by MOFCOM.

conclude that subject imports and the domestic like product competed on the basis of price. However, we recall that the core issue we are called upon to resolve is whether MOFCOM's conclusion that the volume and market share of subject imports had a suppressive and depressive effect on domestic like product prices is one that could be reached by a reasonable decision maker on the basis of the evidence and arguments before MOFCOM, and not simply whether subject imports and the domestic like product competed on price.

7.111. The concern that remains, having considered MOFCOM's Redetermination in light of the evidence and arguments presented to it and to us, is that it does not explain how MOFCOM's findings on price competition support its conclusions regarding the suppressive and depressive effect on domestic like product prices of the volume and market share of subject imports. We consider price competition to be an important analytical tool that goes to the question of whether subject imports have the potential to affect domestic prices – if subject imports and the domestic like product do not compete on price, it is unlikely that subject imports will affect domestic like product prices. However, it does not necessarily follow, in our view, that just because subject imports and the domestic like product compete on price, increases in subject import volumes and market share will necessarily have a suppressive or depressive effect on the domestic like product prices.[191] Therefore, we consider that it is incumbent on an investigating authority to demonstrate how its factual findings concerning price competition support its conclusions regarding the price effects of subject imports on the domestic like product.[192] MOFCOM failed to draw any such analytical linkage in this case.

7.3.6 Conclusion

7.112. Based on the foregoing, we conclude that MOFCOM's conclusions regarding the price effects of subject imports are not consistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement and Articles 15.1 and 15.2 of the SCM Agreement.

7.4 The United States' claim with respect to causation

7.113. In this section of our report, we consider the United States' claim that MOFCOM's finding of causation in the Redetermination is inconsistent with China's obligations under Articles 3.1 and 3.5 of the Anti-Dumping Agreement and Articles 15.1 and 15.5 of the SCM Agreement because it is not based on an "objective examination" and "positive evidence" as required by those provisions. The United States argues both that MOFCOM's determination of causation under Articles 3.5

[191] See, e.g. Japan's third-party submission, para. 9. Japan argues that factors such as increases in volume of subject imports or parallel price trends between subject imports and the domestic like product at best only establish the potential for subject imports to suppress or depress domestic prices. As explained, in our view, even the fact of price competition between subject imports and the domestic like product at best only establishes the potential for subject imports to suppress or depress domestic prices. See also, Appellate Body Report, *US – Tires (China)*, para. 192. The Appellate Body in *US – Tires* commented on the relevance of an analysis of the conditions of competition between subject imports and the domestic like product in the context of the causation analysis under paragraph 16.4 of China's Accession of Protocol to the WTO. We are mindful that the discipline under paragraph 16.4 which stipulates that market disruption shall exist when imports of an article, which is like or directly competitive with an Article produced by the domestic industry, is increasing rapidly, either absolutely or relatively, so as to be a significant cause of material injury, or threat of material injury to the domestic industry, is different from the considerations set out in Articles 3.2 and 15.2 of the Anti-Dumping Agreement and SCM Agreement respectively. The Appellate Body also commented that unless there is actual or potential competition between imports and the domestic like product, imports cannot be a significant cause of material injury to the domestic industry, but noted that the examination of the conditions of competition is an analytical tool which is not dispositive on the question of causation. In other words, while competition may be a necessary element for causation of material injury, it is not necessarily sufficient. Similarly, in our view, while price competition may be a necessary element of price suppression or depression, it is not necessarily sufficient.

[192] See, e.g. Panel Report, *China – Autos*, para. 7.265. In this regard, we find it relevant that the panel considered that although parallel pricing may provide some basis for a determination that subject imports depressed domestic like product prices, such a determination must explain the role of parallel pricing in the price depression found. In the case before us, MOFCOM relied on parallel pricing analysis in support of its intermediate finding of price competition. However, we consider that as explained by the panel in *China – Autos* ultimately, the investigating authority must show how its findings on factors such as parallel pricing supports its ultimate conclusions regarding the suppressive or depressive effect of subject imports on domestic like product prices. In that sense, we find no analysis in MOFCOM's Redetermination as to how its conclusions on parallel pricing or the other factors, on the basis of which it reached its intermediate finding of price competition, supported its conclusions regarding the suppressive or depressive effect of subject imports.

and 15.5 of the Anti-Dumping and SCM Agreements is undermined by its defective conclusions with respect to price effects under Articles 3.2 and 15.2 of the Anti-Dumping and SCM Agreements, and that MOFCOM's analysis of the effect of subject imports on the domestic industry under Articles 3.5 and 15.5 of the Anti-Dumping and SCM Agreements is itself invalid. With respect to the latter aspect, the United States focusses on MOFCOM's conclusions regarding the industry's inability to benefit from economies of scale, and its failure to consider properly the effects of other causes of injury, i.e., domestic industry expansion and increased production, as well as non-subject imports. China counters that none of the United States' arguments undermine MOFCOM's basic finding that the increasing volume and market share of the directly competitive subject imports caused material injury to the domestic industry.

7.4.1 Provisions at issue

7.114. Articles 3.1 and 15.1 of the Anti-Dumping and SCM Agreements are set out above at paragraph 7.28.

7.115. Article 3.5 of the Anti-Dumping Agreement provides:

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

7.116. Article 15.5 of the SCM Agreement is virtually identical to Article 3.5 of Anti-Dumping Agreement but for references to "subsidized imports" and "subsidies" in place of "dumped imports" and "dumping".

7.4.2 Factual background

7.117. In the original dispute, the United States claimed that MOFCOM's analysis and conclusion regarding causation were inconsistent with Articles 3.5 and 15.5 of the Anti-Dumping and SCM Agreements, respectively, because MOFCOM's finding of a causal link was inadequate, and because MOFCOM failed to adequately consider the effects of other known factors causing injury to the domestic industry. We agreed, finding:

a. With respect to price effects, MOFCOM's findings on price depression and price suppression suffered from a number of analytical shortcomings. As MOFCOM relied primarily on the price effects of subject imports in its finding that subject imports caused material injury to the domestic industry, these shortcomings undermined its conclusion. While MOFCOM had also considered the adverse effects of the volume of subject imports, the Panel concluded that it would be inappropriate to consider the possibility that MOFCOM's finding of causation might be upheld purely on the basis of MOFCOM's analysis of the effects of the volume of subject imports.

b. With respect to other causes of injury, MOFCOM had concluded that the increase in the domestic industry's inventories was caused by the increase in subject imports rather than the increase in the domestic industry's capacity and production. However, the Panel noted that the increase in the domestic industry's production was greater than the increase in subject imports. As a result, the increased domestic production would have accounted for at least some of the increase in inventories. As MOFCOM had failed to address the fact that domestic production increased more than subject imports in this

context, the Panel concluded that MOFCOM had failed to adequately consider other factors possibly causing injury.

7.118. China did not appeal our finding that MOFCOM's causation determination was inconsistent with Articles 3.1 and 3.5 of the Anti-Dumping Agreement and Articles 15.1 and 15.5 of the SCM Agreement. The Appellate Body observed that, as a result, the Panel's finding regarding MOFCOM's causation finding stands.[193]

7.4.3 Legal framework

7.119. The interpretation of Articles 3.5 and 15.5 of the Anti-Dumping and SCM Agreements has been considered by a number of panels and the Appellate Body. In addition, given the near identity of the texts of Article 3.5 of the Anti-Dumping Agreement and Article 15.5 of the SCM Agreement, we consider that the principles derived from these decisions are equally applicable in cases involving either.[194] It is by now well understood that investigating authorities are required, as a part of their causation analysis, to examine all "known factors" other than dumped imports that are causing injury to the domestic industry. Where such other known factors are causing injury, the investigating authority must ensure that the injurious effects of these factors are not attributed to the dumped imports. The non-attribution analysis requires "separating and distinguishing the injurious effects of the other factors from the injurious effects of the dumped imports", rather than making "mere assumptions" about the effects of the imports and the other factors.[195]

7.120. It is also well established that the role of a panel considering an investigating authority's causation findings is not to conduct a *de novo* review of the facts considered by the investigating authority in making its determination.[196] However, neither may a panel simply defer to the conclusions of the investigating authority.[197] Rather, we must determine whether the explanations given by the investigating authority for the conclusions reached are reasoned and adequate to support those conclusions, in the light of other plausible alternative explanations.

7.4.4 Price effects

7.4.4.1 Main arguments of the parties

7.121. The United States argues that MOFCOM's conclusion that a causal link exists between subject imports and the material injury suffered by the domestic industry rests on a price effects analysis that is contrary to the evidence, lacks a discernible factual basis, and fails to reflect an objective examination of the record.[198] The United States claims the present case is analogous to *China – Autos*, in which the Panel concluded that MOFCOM's defective price effects analysis undermined its causation analysis.[199] The United States argues that, far from being collateral to its injury determination, MOFCOM's price effects analysis was an important element of that determination in this case, as in *China – Autos*.[200] The United States further argues that, as in *China – Autos*, it would be difficult for MOFCOM to have made its determination of causation in this case without relying on price effects.[201] Absent a demonstration that subject imports had any significant price effects on the domestic like product, MOFCOM's causation analysis must therefore fail.[202]

7.122. China does not accept that MOFCOM relied on an allegedly defective analysis of price effects to establish causation. China first maintains MOFCOM was not required to, and did not in

[193] Panel Report, *China – GOES*, paras. 7.620-7.638; Appellate Body Report, *China – GOES*, para. 114.
[194] See also 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.
[195] See, e.g. Appellate Body Report, *US – Hot-Rolled Steel*, para. 226.
[196] Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93.
[197] Ibid.
[198] United States' first written submission, para. 109.
[199] United States' second written submission, para. 81 (citing Panel Report, *China – Autos*, para. 7.327).
[200] Ibid. para. 82.
[201] Ibid.
[202] United States' first written submission, para. 110.

fact, make price comparisons in considering price effects.[203] Rather, MOFCOM considered the increased volume of imports, along with a number of other elements (i.e., product comparability and substitutability, price trends consistent with a competitive relationship, overlap in customers, and evidence of purchasers' attempts to use subject import prices to reduce the prices of the domestic like product) in its analysis, and made well-reasoned findings that properly establish the explanatory force of increasing subject import volumes and market share on domestic prices and thus establish the necessary causal link.[204]

7.4.4.2 Main arguments of the third parties

7.123. Japan agrees with the United States that a flawed price effects determination necessarily results in a flawed causation analysis, citing several panels that have reached this conclusion, and argues that the Panel should follow the same approach in evaluating MOFCOM's determination in this proceeding.[205]

7.4.4.3 Evaluation by the Panel

7.124. As discussed above, MOFCOM found that the subject imports caused price suppression and depression based primarily on the volume and market share of the subject imports, considered together with its findings regarding price competition between the subject imports and the domestic like product. Given the shortcomings we have identified in MOFCOM's findings regarding price effects, as set out above, we consider that those findings cannot adequately support a finding that the subject imports caused material injury to the domestic industry. We recall that several panels have similarly found determinations of causation to be inadequate where underlying determinations of price effects were found to be inadequate.[206] It is clear to us that MOFCOM's causation determination rests, at least in part, on its conclusions regarding the price effects of subject imports. Accordingly, we find that, to the extent that it is based on the price effects of subject imports, MOFCOM's causation determination is inconsistent with Articles 3.5 of the Anti-Dumping Agreement and 15.5 of the SCM Agreement.

7.125. While this finding resolves the United States' claim with respect to its arguments regarding the element of price effects, the United States made further arguments regarding economies of scale, domestic industry expansion and increased production, and non-subject imports. Accordingly, we now proceed to consider specifically these additional elements below.

7.4.5 Economies of scale

7.4.5.1 Main arguments of the parties

7.126. The United States argues that MOFCOM's conclusion that the domestic industry was prevented by subject imports from reaping the benefits of economies of scale does not rest on an objective examination of positive evidence. The United States maintains that MOFCOM's findings in this context are merely conclusory assertions unsupported by any factual analysis.[207] The United States asserts that Baosteel commenced production of GOES in May 2008 and Wuhan's largest capacity expansion occurred in the first quarter of 2009.[208] Given that steel production facilities have high start-up costs, the United States asserts that it was unrealistic for MOFCOM to expect the domestic industry to realize economies of scale and attendant profits immediately upon bringing significant new capacity online.[209] The United States further argues that neither of the two separate and competing companies in the domestic industry could be expected to realize economies of scale as a result of an increase in the production capacity of the other.[210]

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[203] China's first written submission, para. 97.
[204] Ibid. para. 98; and second written submission, para. 92.
[205] Japan's third-party written submission, para. 16 (citing Panel Reports, *China – GOES*, para. 7.620; *China – X-Ray Equipment*, paras. 7.239-7.240; and *China – Autos*, paras. 7.327-7.328).
[206] Panel Reports, *China – X-Ray Equipment*, para. 7.239; *China – Autos*, paras. 7.327-7.328; and *China – HP-SSST (Japan)/China – HP-SSST (EU)*, para. 7.191.
[207] United States' first written submission, para. 112; and second written submission, para. 89.
[208] United States' first written submission, para. 113.
[209] Ibid.; and second written submission, para. 84.
[210] United States' first written submission, para. 115; and second written submission, para. 87.

7.127. China counters that MOFCOM determined that the domestic industry reasonably invested in new or additional GOES production capacity in an expanding domestic market.[211] China argues that investment in greater production capacity in an expanding domestic market should have allowed domestic producers to realize economies of scale and reduce per-unit costs.[212] However, in the present case, unfairly traded subject imports captured a significant part of the expanding domestic market.[213] Domestic producers' resulting inability to benefit from the expected economies of scale thus constitutes an adverse effect that reasonably supports a finding of causation.[214]

7.4.5.2 Main arguments of the third parties

7.128. Japan argues that "even if MOFCOM's finding that the domestic industry was prevented from realizing the benefits of economies of scale had certain evidentiary support and was not a mere conclusory assertion, that finding cannot be sufficient to establish a causal link."[215] It argues that it would be untenable to allow investigating authorities to impose anti-dumping duties simply on the basis that the domestic industry was prevented from realizing the benefits of economies of scale.[216] Japan maintains that investigating authorities must base their causation determinations on examinations of the volume of dumped imports and their price effects.[217]

7.4.5.3 Evaluation by the Panel

7.129. Economies of scale may be defined generally as the cost advantages realized by an enterprise as a result of the size, output or scale of its operations. Assuming fixed costs that can be spread over additional units of output, economies of scale would generally cause the cost per unit of output to decrease as the size, output or scale of an enterprise's operations increases, and thus result in increased profits at the same price level. However, there are a number of underlying considerations as to the nature of the industry, product, market, etc. that must be taken into account in an analysis of economies of scale. MOFCOM's Redetermination does not address, much less establish, even basic premises and assumptions, such as the extent to which economies of scale may be realizable in this particular segment of the steel industry.

7.130. In the Redetermination, MOFCOM refers to the domestic industry's inability to realize economies of scale as evidence of the causal relationship between the subject imports and injury to the domestic industry. However, the Redetermination contains only passing references to economies of scale.[218] MOFCOM does not analyze economies of scale in the same manner in which it analyzes the other principal indicators of injury in the Redetermination.

7.131. In its answers to our questions, China asserted that fixed costs for this industry "in the range of 30-40 percent of total costs" constitute "a significant percentage of the total costs" and, based on "accounting truisms", concluded that a lower production volume necessarily results in higher fixed costs per unit.[219] However, China itself characterizes MOFCOM's consideration of economies of scale simply as a qualitative assessment and as establishing a qualitative connection.[220] China concludes by confirming that MOFCOM did not perform any specific calculations in this regard.[221]

7.132. We also note that the impact of the timing of the domestic industry's capacity expansions is important. Wuhan was the only domestic producer of GOES for much of the POI, until Baosteel's later entry into the market, with its capacity coming online at the end of 2008 and in the first quarter of 2009. It is unclear what, if any, data MOFCOM had before it on the basis of which it could conclude that either Wuhan (which expanded its capacity steadily from 2006 through 2008,

[211] China's second written submission, para. 96.
[212] China's first written submission, para. 100.
[213] Ibid.
[214] China's second written submission, para. 95.
[215] Japan's third-party written submission, para. 17.
[216] Ibid.
[217] Ibid.
[218] Redetermination, (Exhibit US-1), pp. 28, 29, 42, 43; and Redetermination – China's translation, (Exhibit CHN-1), pp. 29, 43, 44.
[219] China's response to Panel question No. 58, paras. 158-160.
[220] China's second written submission, paras. 94, 98.
[221] China's response to Panel question No. 57, para. 156.

with the greatest increase of 51.65% in 2008[222]) or Baosteel (which entered the market in 2008) individually were unable to benefit from economies of scale, or that the domestic industry as a whole was unable to benefit from economies of scale towards the end of the POI. Similarly, it is entirely unclear how MOFCOM linked this alleged inability to benefit from economies of scale to the subject imports. China argues that "when subject imports gained volume and market share at the expense of the domestic industry, subject imports by definition imposed higher per unit costs on the domestic industry."[223] However, while increased volume and market share of subject imports may well have affected the domestic industry's sales and profitability, this does not necessarily mean that unit costs increased as a result, particularly in view of continued increases in the domestic industry's output, which would tend to lead to lower unit costs. Nothing in the Redetermination explains how, or to what degree, unit costs for the industry increased as a result of the subject imports' increased market share, and thus we fail to see how MOFCOM linked the increased imports to the domestic industry's failure to achieve economies of scale.

7.133. Given the lack of underlying information and the minimal nature of MOFCOM's analysis of economies of scale, we find MOFCOM's conclusions in this context insufficient to support its determination of causation.

7.4.6 Domestic industry expansion and increased production

7.4.6.1 Main arguments of the parties

7.134. The United States argues that the domestic industry's overexpansion and overproduction caused injury that MOFCOM failed to attribute properly. It maintains that MOFCOM assumed that the domestic industry could have reasonably expected the domestic market to absorb all of its increased production from increased capacity[224], but that Baosteel and Wuhan in fact were forced to compete aggressively with each other for customers in the domestic market, as their expanded capacity and production far outstripped the growth in demand in the domestic market.[225] The United States further argues that MOFCOM avoided acknowledging the role of the domestic industry's overexpansion and overproduction in the large increase in domestic inventories by attributing this increase instead to unspecified "sales obstacles".[226]

7.135. The United States also challenges MOFCOM's use of 2007 as the baseline for its analysis, as it is the year in which the domestic industry had the highest market share, thus understating the domestic industry's contribution to inventory overhangs.[227] The United States further challenges MOFCOM's failure to consider the first quarter of 2009 separately from 2008.[228] It argues that the domestic industry's contribution to inventory overhangs through overproduction was particularly significant in the first quarter of 2009, which was the only part of the period of investigation when the domestic industry's prices declined and the domestic industry was not profitable.[229]

7.136. China argues that the volume of GOES resulting from Baosteel's entry into the market and Wuhan's production capacity expansion did not exceed the growth in overall demand on the domestic market, and that MOFCOM properly separated and distinguished the effect of this excess volume by identifying subject imports as the "sales obstacles" hindering the domestic industry.[230] It also contends that MOFCOM explained its choice of 2007 as the base year as being a reasonable basis for the industry's market forecasts, a comparable and representative year for evaluating changes in 2008, and a year in which imports were stable and the industry was not showing declines.[231] China also contends that MOFCOM explained its consideration of inventory build-up

[222] United States' first written submission, para. 123; China's response to Panel question No. 59, para. 162.
[223] China's second written submission, para. 95.
[224] United States' first written submission, para. 133.
[225] Ibid. paras. 122-123.
[226] Ibid. para. 124.
[227] United States' first written submission, para. 130; and second written submission, paras. 91-92.
[228] United States' second written submission, para. 93.
[229] United States' first written submission, para. 132.
[230] China's first written submission, paras. 105-106.
[231] China's second written submission, para. 105.

over the period 2008-Q1 2009 on the principle that inventory accumulates over time, and thus requires a different approach to understand the reasons for increases.[232]

7.4.6.2 Main arguments of the third parties

7.137. Japan maintains that MOFCOM does not appear to have distinguished properly the injurious effects of the domestic industry's overexpansion and overproduction from those of the subject imports.[233]

7.4.6.3 Evaluation by the Panel

7.138. In the original proceeding, we found that the increase in production by the domestic industry from 2007 to 2008 was greater than the increase in subject imports, and would have accounted, at least in part, for the inventory accumulation, which thus could not be attributed entirely to the lesser increase in subject imports.[234] We were unable to verify MOFCOM's finding that total domestic capacity did not exceed total domestic demand because China failed to provide the underlying data.[235] Nevertheless, we concluded that "even if this finding were accurate, it would not change the fact that subject imports did not account for the totality of the injurious inventory overhangs."[236] We concluded that MOFCOM had failed to examine properly whether a known factor other than subject imports was simultaneously injuring the domestic industry, as "an objective and impartial investigating authority could not properly have found that the domestic industry's increase in production was not a cause of injury."[237]

7.139. In the present compliance proceeding, the United States makes essentially the same argument it had made in the original dispute. The United States contends that "[t]he domestic industry's expansion of capacity and production outstripped the growth in demand for GOES in the Chinese market by wide margins."[238] In support of its argument, the United States relies on information on growth in demand, capacity and output in MOFCOM's original Determination and the Redetermination[239] to calculate and compare the percentage changes in these growth rates from 2006 to 2008. We have compiled this information, including the United States' calculation, in the chart below:

Changes in demand, capacity, output and inventories

	Demand	Capacity	Output	Inventories
2007	22.80%	35.33%	36.76%	-49.01%
2008	18.09%	53.67%	23.91%	839.02%
2006-08[240]	45.01%	107.96%	69.46%	--
Q1 2009[241]	12.46%	80.13%	55.23%	978.81%

Source: MOFCOM's Determination and Redetermination, United States' first written submission[242]

7.140. China faults the United States for making comparisons on the basis of percentage changes in demand, capacity and output, each with potentially different base levels. However, the Redetermination does not contain the underlying data from which these changes were calculated, as MOFCOM treated the information as confidential. China has not pointed us to any additional information in the record before MOFCOM on these factors. Thus, the United States' argument is

[232] China's second written submission, para. 111.
[233] Japan's third-party submission, paras. 18-20.
[234] Panel Report, *China – GOES*, para. 7.632.
[235] Ibid. para. 7.635.
[236] Ibid. para. 7.635.
[237] Ibid. para. 7.632.
[238] United States' first written submission, para. 122.
[239] Original Determination, (Exhibit US-4), p. 60; Redetermination, (Exhibit US-1), p. 28; and Redetermination – China's translation, (Exhibit CHN-1), p. 29.
[240] United States' first written submission, para. 122.
[241] Compared with Q1 2008.
[242] Original Determination, (Exhibit US-4), pp. 60-61; Redetermination, (Exhibit US-1), pp. 28, 30; and Redetermination – China's translation, (Exhibit CHN-1), pp. 29, 31; United States' first written submission, para. 122.

based on the only information available to it, the percentage changes reported in the Redetermination. While it may well be that the underlying base values are different, which could affect the validity of the comparisons made, there is no better basis of information for either the United States' argument or our review. At a minimum, the United States' argument highlights seemingly relevant comparisons in the changes in the growth of demand, capacity, output and inventory that would have merited more detailed examination and explanation by MOFCOM. Indeed, even if the base levels from which the changes began were different, it is clear that the rate of increase in the domestic industry's capacity and output was notably greater than the growth in demand during the entire period examined. Unless demand was fairly high at the beginning of the period, and capacity and output were very low, at these rates of increase it is difficult to envision a situation in which domestic industry capacity and output did not surpass domestic demand.

7.141. MOFCOM also compared percentage changes in demand and output in the Redetermination.[243] It found that domestic demand was "almost twice" the output of the domestic like product in 2007, and that the growth in domestic demand of 18.09% in 2008 must therefore be "roughly equivalent" to a 36% increase in output over the level of 2007. It then concluded that this 36% figure was greater than the increase in output in 2008 over 2007 of 23.91%.[244] This is simply an approximation of output relative to demand which we cannot verify from the limited information before us. Nothing in China's arguments in this proceeding persuades us that our original conclusion, that, relative to the increase in domestic demand, the increases in the domestic industry's capacity and production were at least partly responsible for the accumulation of inventory in 2008 and the first quarter of 2009, was wrong.

7.142. As to MOFCOM's choice of 2007 as the baseline year for its analysis of domestic demand and output, as well as the consideration of 2008 and the first quarter of 2009 as a whole for its analysis of inventories, China asserts that the WTO agreements do not specify any particular methodology. China also contends that MOFCOM sufficiently and reasonably explained its choices.[245] We agree with China that the Anti-Dumping and SCM Agreements do not specify a particular methodology in this context, especially not at the level of detail of how an investigating authority establishes a baseline year for its analysis. However, an investigating authority's choice of methodology or baseline year should not affect the objectivity of its analysis, as the United States argues happened in this case.[246]

7.143. In this situation, an explanation is necessary to enable us to ensure that the choice of baseline year was appropriate. To justify MOFCOM's choice of baseline year, China argues that using 2006 as the baseline year would not have allowed MOFCOM to focus on the impact of subject imports at the end of the period of investigation and specifically the effect of the surge in subject imports in 2008.[247] However, we fail to see how the use of 2006 as the baseline year could have prevented MOFCOM from focusing on these specific developments in 2008. China also reiterates MOFCOM's explanation that inventory accumulation is a continual process, warranting its analysis across time periods.[248] However, production and sales could also be argued to be continual processes, yet MOFCOM did not analyse them across time periods as it did inventories. Moreover, companies are likely to assess these elements at specific times to gauge performance and establish accounts. In our view, inventories are not significantly different from production, sales, or indeed, other economic factors, and we find nothing further in the Redetermination that

[243] Redetermination, (Exhibit US-1), p. 52; and Redetermination – China's translation, (Exhibit CHN-1), p. 52.

[244] Ibid.

[245] China's first written submission, para. 116. China cites to pages 53 and 54 of the Redetermination, which provides the following main reasons for the choice of 2007 as the baseline year for MOFCOM's analysis: (i) 2007 is the closest, most comparable and representative year to 2008, when the volume of subject imports and domestic inventories started to increase substantially; and (ii) 2007 can be regarded as a year of normal market conditions during which the volume of subject imports did not increase substantially and the domestic industry did not yet show signs of being adversely affected.

[246] United States' second written submission, paras. 90-95. The United States argues that MOFCOM's choice of 2007 as the baseline year for its analysis minimizes the responsibility of the domestic industry's overproduction for inventory overhangs in 2008 and the first quarter of 2009, because the domestic industry's market share increased significantly in 2007. Had MOFCOM used 2006 as the baseline year, its analysis would not have been distorted by the domestic industry's significant market share gain in 2007. The United States argues that MOFCOM modified its analysis in this context to obtain the result it wanted.

[247] China's first written submission, para. 116.

[248] Ibid. para. 117 (citing Redetermination, (Exhibit US-1), pp. 54-55).

explains why inventories, whether in this particular industry or more generally, should be treated differently.

7.144. While MOFCOM considered the fifteen months of 2008 and the first quarter of 2009 together, it accorded particular weight to inventory data for 2008.[249] However, in the first quarter of 2009, the volume of subject imports decreased while inventories skyrocketed. In our view, an objective and impartial investigating authority examining this evidence would not have considered the first quarter of 2009 together with the rest of 2008, and virtually disregarded the changes happening in the first quarter of 2009 for purposes of its analysis. MOFCOM's approach fails to consider the changes in inventories in a manner that would ensure that any injurious effects of those inventories are not attributed to subject imports.

7.145. In the continued absence of underlying data regarding growth in domestic demand, capacity and output, even if only in summary form to preserve its confidentiality, and given the inconsistencies in MOFCOM's analytical approach to inventories and time periods, we conclude that MOFCOM's determination that the domestic industry's expansion and increased production did not cause injury to the domestic industry is not one that could have been reached on the basis of the information and arguments in this case. Accordingly, we find that MOFCOM failed to ensure that injuries caused by increased inventories were not attributed to the subject imports consistently with the requirements of Articles 3.5 and 15.5 of the Anti-Dumping and SCM Agreements.

7.4.7 Non-subject imports

7.4.7.1 Main arguments of the parties

7.146. The United States argues that, given the rising and substantial volumes and competitive prices of non-subject imports, MOFCOM should have considered more carefully whether it was attributing to subject imports injury actually caused by non-subject imports.[250] The Redetermination includes additional evidence in this context that was not in the original Determination, but the United States contends MOFCOM did not examine this evidence objectively.[251] The United States questions how the increase in non-subject imports throughout the period of investigation could have had no injurious effects on the domestic industry.[252] The United States also focuses specifically on the first quarter of 2009, during which the volume of subject imports decreased while that of non-subject imports increased.[253] In addition, the United States argues that MOFCOM's analysis of market share conflates shifts in market share with absolute market share data.[254] The United States alleges that MOFCOM limited its analysis to the former and ignored the latter.[255]

7.147. China argues that the United States errs in focusing entirely on the absolute volume of non-subject imports and average sales values, while completely ignoring the market share shifts that MOFCOM emphasized in its analysis.[256] China further argues that MOFCOM's emphasis on market shares was important because market share figures adjust for the changing size of the overall market when it is expanding and market share figures allow for a direct comparison of all the analytically relevant actors in the market (i.e., the domestic industry, subject imports and non-subject imports).[257] MOFCOM established that subject imports accounted for the vast majority of the increase in imports in 2008 and the first quarter of 2009, and that the condition of the domestic industry began to deteriorate when subject imports surged in 2008.[258] By comparison, non-subject imports never gained market share and were fairly traded.[259] China thus maintains that MOFCOM properly accounted for the effect of non-subject imports.

[249] China's second written submission, para. 113.
[250] United States' first written submission, para. 139.
[251] Ibid. para. 138.
[252] Ibid. para. 141.
[253] Ibid. para. 140; and second written submission, para. 96.
[254] United States' second written submission, para. 100.
[255] Ibid.
[256] China's first written submission, para. 121.
[257] Ibid. para. 120; and second written submission, para. 120.
[258] China's first written submission, para. 122; and second written submission, para. 121.
[259] China's first written submission, para. 124.

7.4.7.2 Main arguments of the third parties

7.148. Japan maintains that MOFCOM does not appear to have distinguished properly the injurious effects of the non-subject imports from those of the subject imports.[260]

7.4.7.3 Evaluation by the Panel

7.149. It is apparent from the Redetermination that the volume of non-subject imports was greater than that of subject imports throughout the period of investigation. In fact, the volume of non-subject imports was twice that of subject imports in 2007, more than twice that of subject imports in 2008, and almost three times that of subject imports in the first quarter of 2009. Even in 2008, when the difference was the smallest, the volume of non-subject imports was one and one-half times that of subject imports. The price of non-subject imports was also below that of subject imports in 2006 and 2008. The volume of subject imports increased significantly in 2008, when they were priced higher than non-subject imports, and declined significantly in the first quarter of 2009 as compared to the first quarter of 2008, when they were priced well below non-subject imports.[261]

7.150. The data relied on by MOFCOM in the Redetermination, including those relating to non-subject imports which were not provided by MOFCOM in the original Determination[262], are compiled in the chart below:

Volumes and prices of subject and non-subject imports

	Subject Imports Volume (tons)	Subject Imports Price (RMB/ton)	Non-Subject Imports Volume (tons)	Non-Subject Imports Price (RMB/ton)
2006	83,837	25,913	169,846	25,468
2007	84,600	26,684	183,349	28,701
2008	135,900	31,372	213,517	30,999
Q1 2009	19,400	26,673	54,206	32,359

Source: MOFCOM's Determination and Redetermination[263]

7.151. MOFCOM's reliance primarily on shifts in market share for purposes of assessing the causal link between subject imports and injury to the domestic industry causation in this context is perplexing. The data considered in the Redetermination suggest that the price of the larger volume of non-subject imports fluctuated as much as that of the smaller volume of subject imports. Subject imports recorded the most striking increase in terms of volume during the period of investigation (approximately 60% from 2007 and 2008), at a time when their price increased faster and to a higher level than that of non-subject imports. In addition, the volume of subject imports dropped in the first quarter of 2009, at the same time as their prices declined from 2008 levels to approximately 18% below that of non-subject imports, which by contrast had increased from 2008 levels.

7.152. In our view, this relationship between volumes and prices, with volumes of subject imports increasing when their prices are higher than those of non-subject imports and vice versa, would seem to warrant a more careful examination and more detailed explanation than MOFCOM provided in the present case. For example, the volume of non-subject imports and the changes in their prices are such that it is conceivable respondents and members of the domestic industry occasionally may have established their volumes and prices in response to non-subject import trends. A simple comparison of percentage changes in the market share of the various sets of actors, rather than a comparison of actual or even indexed volume and price data established on clear bases, cannot serve to explain satisfactorily the trends in this market.

[260] Japan's third-party submission, paras. 18-20.
[261] Redetermination, (Exhibit US-1), pp. 23, 24, 36, 37; and Redetermination – China's translation, (Exhibit CHN-1), pp. 24, 37.
[262] Original Determination, (Exhibit US-4), pp. 57-58 (data on subject imports only); Redetermination, (Exhibit US-1), pp. 23, 24, 36, 37 (data on subject and non-subject imports, respectively); and Redetermination – China's translation, (Exhibit CHN-1), pp. 24, 37.
[263] Original Determination, (Exhibit US-4), pp. 57-58; Redetermination, (Exhibit US-1), pp. 23, 24, 36, 37; and Redetermination – China's translation, (Exhibit CHN-1), pp. 24, 37.

7.153. Given the shortcomings in MOFCOM's analytical approach to non-subject imports, we conclude that its determination that non-subject imports were not a cause of injury is flawed. Accordingly, we find that MOFCOM failed to examine properly whether non-subject imports injured the domestic industry at the same time as subject imports consistently with the requirements of Articles 3.5 and 15.5 of the Anti-Dumping and SCM Agreements.

7.4.8 Conclusion regarding causation

7.154. For all the above reasons, we conclude that MOFCOM's revised finding that subject imports caused material injury to the domestic industry is inconsistent with Articles 3.1 and 3.5 of the Anti-Dumping Agreement and Articles 15.1 and 15.5 of the SCM Agreement.

7.5 The United States' claim with respect to disclosure

7.5.1 Introduction

7.155. In this section of our report, we consider the United States' claim that MOFCOM failed to disclose facts under consideration that formed the basis for the Redetermination, inconsistent with China's obligations under Articles 6.9 of the Anti-Dumping Agreement and 12.8 of the SCM Agreement. The United States contends that the facts allegedly not disclosed were significant in MOFCOM's determination and formed part of the basis for its determination and decision to apply definitive measures. China contends that the United States has failed to demonstrate that these facts were "essential", and in any event argues that MOFCOM did disclose all the facts identified in the US claim, while striking a balance between necessary disclosure and the need to protect confidential information.

7.5.2 Provisions at issue

7.156. Article 6.9 of the Anti-Dumping Agreement provides as follows:

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

Article 12.8 of the SCM Agreement is identical to Article 6.9 of the Anti-Dumping Agreement but for the addition of a reference to "all interested Members" as well as all interested parties in the first sentence, which is not relevant in this dispute.

7.5.3 Legal framework

7.157. The scope of the disclosure obligation under Articles 6.9 of the Anti-Dumping Agreement and 12.8 of the SCM Agreement has been discussed in a number of previous panel and Appellate Body reports. Recently, the Appellate Body in *China – GOES* observed that "essential facts" are those that (a) form the basis for the decision to apply definitive measures and (b) ensure the ability of interested parties to defend their interests.[264] Further, Articles 6.9 and 12.8 do not require the disclosure of all facts before an investigating authority.[265] Facts that do not form the basis of the decision to impose definitive measures do not constitute essential facts.[266] Also, as we observed in the original proceeding, essential facts refer to facts that were actually under consideration by the investigating authority rather than facts that should have been considered by the authority.[267]

7.158. The Appellate Body has indicated that what constitutes an "essential" fact must be determined in light of the findings an investigating authority must make to satisfy the substantive obligations of the Anti-Dumping and SCM Agreements in order to apply definitive measures under the Anti-Dumping and SCM Agreements.[268] Put differently, the relevant facts are those that are

[264] Appellate Body Report, *China – GOES*, para. 240.
[265] Ibid.
[266] Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.223.
[267] Panel Report, *China – GOES,* para. 7.653.
[268] Appellate Body Report, *China – GOES*, para. 241.

essential to reach conclusions on the issues of dumping and/or subsidization, material injury and causation, as well as other issues the investigating authority must resolve in a particular case in concluding that whether to impose definitive measures.[269] However, essential facts are not limited to those facts that support a determination, but rather are the body of facts essential to any determinations that are being considered in the process of analysis and decision-making by the investigating authority.[270] The obligation to disclose under these provisions applies only to facts, as opposed to reasoning. In addition, the obligation to disclose applies even where the essential facts in question are confidential, in which case investigating authorities may discharge their obligation through disclosure of non-confidential summaries of those facts. Investigating authorities may not, however, rely on confidentiality to justify a failure to disclose essential facts.[271]

7.159. With this understanding of the relevant obligations in mind, we turn to the specific facts at issue in the dispute before us. In our evaluation, we will address separately the allegedly undisclosed essential facts with respect to MOFCOM's determination regarding price effects and the allegedly undisclosed essential facts regarding its determination of causation. As noted above, disclosure must come before the determination is final, so as to allow parties to defend their interests. Therefore, the relevant document for our consideration of whether MOFCOM disclosed the essential facts in this case is the Redetermination Disclosure provided to interested parties on 4 July 2013.[272]

7.5.4 Failure to disclose essential facts regarding MOFCOM's price effects determination

7.160. The United States' claim of failure to disclose essential facts relating to MOFCOM's price effects determination focuses on the following three elements:

a. Information underlying MOFCOM's assertion that the trends of the prices of the subject imports and the domestic like product were the same;

b. Information regarding the evidence that MOFCOM allegedly considered, and the analysis that it allegedly conducted, in concluding that the domestic industry's loss of market share in 2008 led it to slash prices by over 30% in the first quarter of 2009; and

c. Information regarding MOFCOM's assertion that the price-cost differential for Wuhan decreased in 2008.

7.5.4.1 Main arguments of the parties

7.5.4.1.1 United States

7.161. First, with respect to MOFCOM's statement that the price trends of subject imports and the domestic like product in 2007, 2008 and Q1 2009 were the same, the United States argues that MOFCOM failed to disclose the basis of MOFCOM's conclusions and in particular, takes issue with China's argument that some of the data could not be disclosed because it was confidential.[273] The United States argues that while there may be some complications where essential facts are confidential information, this does not excuse the investigating authority from its obligation to disclose the essential facts which formed the basis of the decision to apply definitive measures.[274]

7.162. Second, the United States asserts that MOFCOM failed to disclose the essential facts under consideration with respect to its conclusion that the domestic industry's loss in market share in

[269] Panel Report, *Mexico – Olive Oil*, para. 7.110.
[270] Panel Report, *EC – Salmon (Norway)*, para. 7.796.
[271] Appellate Body Report, *China – GOES*, para. 247.
[272] MOFCOM, Notice of information disclosure before the industry injury verdict of the anti-dumping on imported grain-oriented silicon electrical steel with the country of origin in the United States and Russia and the anti-subsidy on the imported grain-oriented silicon electrical steel with the country of origin in the United States, Public Notice [2013] No. 327 (Redetermination Disclosure) (Exhibit US-3); and MOFCOM, Notice of Disclosure Prior to Industry Injury Determination in the Anti-Dumping Reinvestigation on Imports of Grain Oriented Flat-rolled Electrical Steel originating in the U.S. and Russia and the Anti-subsidy Reinvestigation on Imports of Grain Oriented Flat-rolled Electrical Steel originating in the U.S. SDCYCH [2013] No. 327 (Redetermination Disclosure – China's translation) (Exhibit CHN-2).
[273] United States' second written submission, para. 107.
[274] Ibid. para. 109.

2008 led it to slash prices by over 30% in Q1 2009.[275] The United States emphasizes that the information disclosed by China could not be considered to be essential facts but was, in fact, the reasoning provided by MOFCOM for its conclusions.[276]

7.163. Third, the United States contends that China failed to disclose any essential facts in the Redetermination Disclosure relevant to MOFCOM's conclusions regarding a decline in Wuhan Iron and Steel's price-cost differential over 2008.[277] It reiterates the view that claims of confidentiality do not justify failure to disclose essential facts.[278]

7.5.4.1.2 China

7.164. China argues that the United States has failed to make a *prima facie* case with respect to the specific claims made by the United States with regard to MOFCOM's alleged failure to disclose all essential facts that formed the basis of the Redetermination.[279] China contends that the United States' non-disclosure claim is factually, as well as legally, incorrect.

7.165. First, China contends that MOFCOM did disclose the essential facts relevant to MOFCOM's finding that the price trends of subject imports and the domestic like product were the same. The price trends or percentage changes in subject import prices were based on China Customs data and both the trends and the underlying data are set out in the Redetermination Disclosure.[280] The price trends of the domestic industry were based on verified data of the domestic industry and are set out in the Redetermination Disclosure. The underlying data was treated as confidential and thus not disclosed.[281] China asserts that the percentage changes in domestic like product prices, disclosed in the Redetermination Disclosure, constitute an adequate public summary of that confidential information.[282]

7.166. Second, China argues that MOFCOM's conclusion that the domestic industry's loss in market share in 2008 led it to slash prices by over 30% in Q1 2009 was based on the following information, which was disclosed in the Redetermination Disclosure:

a. subject imports surged in 2008 resulting in loss of market share for the domestic industry[283];

b. one-to-one correlation between the market share lost by the domestic industry and the market share gained by subject imports[284]; and

c. faced with a continued surge in the volume of subject imports in Q1 2009, the domestic industry was forced to lower prices by 30.25% to compete with the subject imports to regain market share.[285]

China submits that these statements and the specific facts, upon which they were based, were the essential facts that were under consideration before MOFCOM.[286]

7.167. Third, China rejects the United States' assertion that MOFCOM failed to disclose essential facts regarding the extent of the decline in Wuhan's price-cost differential. In this regard, China asserts that MOFCOM did disclose the extent of decline in Wuhan's gross profit, and that gross profit is a common way of expressing the price-cost differential.[287] China contends that the

[275] United States' second written submission, para. 115.
[276] Ibid.; and comments on China's response to Panel question No. 62.
[277] China's second written submission, para. 116.
[278] Ibid.
[279] United States' first written submission, paras. 130-135.
[280] China's first written submission, para. 138; and second written submission, para. 128.
[281] China's second written submission, para. 128.
[282] China's comments on the United States' response to Panel question No. 64.
[283] China's first written submission, para. 141 (quoting Redetermination Disclosure, (Exhibit US-3), p. 10); and response to Panel question No. 62, para. 175.
[284] Ibid.
[285] Ibid.
[286] China's response to Panel question No. 62, para. 175.
[287] China's first written submission, paras. 142-143; and second written submission, para. 132.

percentage figures showing the extent of decline in Wuhan's gross profit constituted an adequate non-confidential summary of the confidential information.[288]

7.5.4.2 Main arguments of the third parties

7.168. Japan supports the United States' claims regarding MOFCOM's failure to fulfill its disclosure obligations under Articles 6.9 and 12.8 of the Anti-Dumping and SCM Agreements. It contends that the facts identified by the United States were taken into consideration by MOFCOM in its injury and causation determination, and therefore should have been disclosed.[289]

7.5.4.3 Evaluation by the Panel

7.5.4.3.1 Alleged non-disclosure of information underlying MOFCOM's conclusion that the trend of the prices of the subject imports and the domestic like product were the same

7.169. With respect to the question of whether parallel price trends of subject imports and the domestic like product constituted "essential facts" for the purpose of Articles 6.9 and 12.8 which MOFCOM allegedly failed to disclose, we recall that "essential facts" include all facts necessary to the process of analysis and decision-making by an investigating authority.

7.170. In the Redetermination Disclosure, MOFCOM found that the prices of subject imports and the domestic like product first went up and then went down.[290] On this basis, MOFCOM concluded that the prices of subject imports and the domestic like product kept "in line", i.e., were parallel.[291] MOFCOM relied on this finding of parallel pricing in support of its finding of price competition, which MOFCOM relied on in turn in its final conclusions regarding the price effects of imports and causation. Indeed, this is precisely what China has argued before us. Thus, it is clear that the facts on which the finding of parallel pricing was based were part of the facts under consideration in MOFCOM's analysis and conclusions regarding the effect of subject imports on domestic like product prices. Put differently, they were essential facts under consideration which formed the basis of MOFCOM's decision to impose definitive measures.

7.171. The question raised by the United States' claim is whether MOFCOM failed to disclose these essential facts. In the Redetermination Disclosure, MOFCOM stated that the price of the subject imports was based on Chinese Customs data and that the price of the like products was based on the verified data of the domestic industry.[292] The price trends on which MOFCOM based its conclusion of parallel prices were based on the weighted average unit values of imports from the Russian Federation and the United States combined with respect to subject imports, and the weighted average unit values of the domestic like product. MOFCOM disclosed the weighted average prices of subject imports from the United States and the Russian Federation. Therefore, it is clear that information concerning subject import prices was disclosed to interested parties. However, we do not consider that this was sufficient to constitute disclosure of the essential facts underlying MOFCOM's conclusions on parallel pricing.

7.172. China maintains that price trends of the domestic like product over the period of investigation were based on confidential AUV data of the domestic producers and therefore could not be disclosed to the interested parties.[293] We note that China provided, in the course of this proceeding, information on domestic price ranges on a confidential basis. While this information provides a better understanding of MOFCOM's finding of parallel pricing, and apparently was part of the record before MOFCOM, it was not included in the Redetermination Disclosure. As a

[288] China's second written submission, para. 132.
[289] Japan's third-party submission, para. 24.
[290] Redetermination Disclosure, (Exhibit US-3), p. 10; and Redetermination Disclosure – China's translation, (Exhibit CHN-2), p. 11.
[291] Ibid.
[292] Redetermination Disclosure, (Exhibit US-3), pp. 9-10; and Redetermination Disclosure – China's translation, (Exhibit CHN-2), p. 11.
[293] China's first written submission, para. 138. In this regard, we note that MOFCOM's parallel pricing analysis concerned price trends in 2007, 2008 and Q1 2009. The AUV data for 2007 was based on Wuhan's prices alone while the AUV data for 2008 and Q1 2009 reflected the weighted average of Baosteel's and Wuhan's prices. See China's response to Panel question No. 7, para. 27.

consequence, it cannot be considered in our evaluation of whether China complied with the disclosure obligations at issue.

7.173. Further, while we are sympathetic to the fact that in situations where there are only two domestic producers, disclosure of even average domestic sales prices may allow the competing producers in that two producer industry to calculate each other's information, this does not obviate the obligation to disclose essential facts, at least in some non-confidential summary form. There is no indication in the Redetermination that MOFCOM even attempted to do so, and no explanation of why it was impossible to do so, if that was MOFCOM's view. We emphasize that we do not understand Article 6.9 or Article 12.8 to require an investigating authority to disclose confidential information which it is obliged to protect pursuant to Article 6.5 of the Anti-Dumping Agreement or Article 12.4 of the SCM Agreement. We note that the United States has not challenged MOFCOM's decision to treat the domestic price information as confidential. Nonetheless, we find that having failed to even attempt to provide a non-confidential disclosure of essential facts regarding domestic prices which formed the basis of its consideration of parallel pricing, MOFCOM acted inconsistently with Articles 6.9 and 12.8 of the Anti-Dumping and SCM Agreements.

7.5.4.3.2 Alleged non-disclosure of essential facts regarding MOFCOM's finding that the domestic industry's loss in market share in 2008 led it to slash prices by over 30% in Q1 2009

7.174. In the Redetermination, MOFCOM found that the domestic industry's loss of market share in 2008 led it to slash prices by over 30% in Q1 2009. MOFCOM relied on this finding in support of its conclusions regarding the price effects of imports and causation. Thus, again, it is clear that the facts on which the finding was based were part of the facts under consideration in MOFCOM's analysis and conclusions regarding the effect of subject imports on domestic like product prices. Put differently, they were essential facts under consideration which formed the basis of MOFCOM's decision to impose definitive measures.

7.175. China asserts that the following statements, along with the specific facts upon which they were based, are the "essential facts" which were under consideration and that formed the basis of MOFCOM's decision:

a. subject imports surged in 2008 resulting in loss of market share for the domestic industry;

b. there was a one-to-one correlation between the market share lost by the domestic industry and the market share gained by subject imports; and

c. faced with a continued surge in the volume of subject imports in Q1 2009, the domestic industry was forced to lower prices by 30.25% to compete with subject imports and to regain market share.

7.176. We note that the United States contends that "MOFCOM fail[ed] to support its assertion that the domestic industry's loss of market share led it slash prices by over 30% in the first quarter of 2009".[294] Further, the United States submits that "obligations contained in the covered agreements apply to the disclosure of facts, and not reasoning".[295] We understand the United States to argue that the three factors relied upon by China, set out in paragraph 7.175 above, were in fact "reasons" provided by MOFCOM for its conclusions rather than essential facts. As noted above, Article 6.9 of the Anti-Dumping Agreement and Article 12.8 of the SCM Agreements require the disclosure of "essential facts", not the reasoning of the investigating authority.[296] In this instance, it seems to us that the United States is arguing that MOFCOM disclosed reasoning, but not facts, and that the reasoning was unsupported by facts disclosed to the parties.

[294] United States' second written submission, para. 115.
[295] Ibid.; and comments on China's response to Panel question No. 62.
[296] See, e.g. Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.225. The panel in that case concluded that the "essential facts" within the meaning of Article 6.9 of the Anti-Dumping Agreement did not include motives, causes or justifications for the investigating authority's findings. We agree.

7.177. As explained above, we do have serious concerns regarding MOFCOM's conclusions regarding the linkage between the domestic industry's market share loss in 2008 and the 30.25% decline in the domestic industry's price in Q1 2009. However, MOFCOM did disclose the essential facts under consideration on the basis of which it made these findings, i.e. percentage figures relating to market share shifts and price fluctuations. Moreover, we understand that subject import statistics from China Customs were available to the interested parties. It is not clear to us from the United States' submissions what additional facts it contends MOFCOM should have disclosed, but did not. For these reasons, we reject the United States' claim in this respect.

7.5.4.3.3 Essential facts regarding MOFCOM's finding that the price-cost differential for Wuhan decreased in 2008

7.178. Before considering the United States' claim, we wish to clarify our understanding of why a decline in the price-cost differential for Wuhan in 2008 was relevant to MOFCOM's Redetermination. In the original proceeding, we expressed specific concerns regarding MOFCOM's failure to consider the possible effect of Baosteel's start-up costs in suppressing domestic like product prices in 2008.[297] We understand from China's argument that MOFCOM, in the Redetermination, examined this question, and concluded that Wuhan did not experience such start-up costs, and faced an even more significant decline in its price-cost differential. On this basis, MOFCOM found that the effect of Baosteel's start-up costs on the domestic industry was relatively small.[298]

7.179. In light of China's argument, it seems to us that facts concerning the decline in Wuhan's price-cost differential were considered by MOFCOM in determining whether subject imports had a price suppressive effect in 2008, and in this context, therefore, constituted essential facts under consideration by MOFCOM.

7.180. The United States argues that MOFCOM failed to disclose facts underlying MOFCOM's finding that Wuhan's price-cost differential decreased in 2008. China asserts that the gross profit margin is the difference between price and costs and thus serves as a sufficient proxy for the price-cost differential.[299] It further asserts that figures concerning the decline in Wuhan's gross profits were disclosed.[300] The United States does not dispute that MOFCOM disclosed facts regarding the gross profit margins, but asserts that this is not a sufficient disclosure of the essential facts. However, the United States does not specifically explain why the disclosure of gross profit margins cannot be considered a sufficient non-confidential summary of a decline in Wuhan's price-cost differential. In light of United States' failure to rebut China's argument, we reject the United States' claim in this respect.

7.5.5 Failure to disclose essential facts regarding MOFCOM's causation determination

7.5.5.1 Main arguments of the parties

7.5.5.1.1 United States

7.181. The United States' claim of failure to disclose essential facts relating to MOFCOM's causation determination focuses on the following four elements:

a. Information regarding the "sales obstacles" that allegedly prevented the domestic industry from making more sales in 2008 and the first quarter of 2009;

b. Information underlying MOFCOM's assertion that the domestic industry was prevented by subject imports from realizing economies of scale;

c. Information underlying MOFCOM's finding that the capacity and output of the domestic GOES industry did not exceed market demand; and

[297] Panel Report, *China – GOES*, para. 7.548; and Appellate Body Report, *China – GOES*, para. 168.
[298] China's first written submission, para. 30 (quoting Redetermination, (Exhibit US-1), p. 25).
[299] Ibid. para. 30.
[300] Ibid.

d. Information supporting MOFCOM's division of responsibility for the inventory overhang.

7.182. The United States argues the following with respect to these four elements:

a. the Redetermination Disclosure does not make clear what were the sales obstacles to which MOFCOM referred[301];

b. MOFCOM failed to disclose any facts underlying its conclusion that the domestic industry was prevented by subject imports from realizing economies of scale[302];

c. MOFCOM failed to disclose any information underlying its finding that the capacity and output of the domestic industry did not exceed market demand[303]; and

d. MOFCOM failed to disclose any information supporting its allocation of responsibility for the domestic industry's inventory overhang.[304]

7.5.5.1.2 China

7.183. China maintains the following with respect to these four elements:

a. MOFCOM's Redetermination Disclosure makes clear that the increase in subject imports that were the sales obstacle in issue[305], and the United States does not clearly identify the facts regarding subject imports which MOFCOM purportedly failed to disclose[306];

b. MOFCOM explained the reasoning for its finding regarding economies of scale[307];

c. MOFCOM disclosed not only information on the percentage changes in capacity and output, adjusted for differences in the base amounts of each[308], but also facts showing that domestic capacity from 2006 through 2008 remained significantly below the total market demand despite the growth in capacity during that period[309]; and

d. MOFCOM extensively discussed the cause of the domestic industry's inventory overhang, relying on the percentage changes in the relevant factors, which were disclosed in the Redetermination Disclosure, to establish that inventories first declined while subject imports were steady in 2007 and then increased when subject imports also increased in 2008.[310]

7.5.5.2 Main arguments of the third parties

7.184. Japan supports the United States' claims regarding MOFCOM's failure to fulfill its disclosure obligations under Articles 6.9 of the Anti-Dumping Agreement and Article 12.8 of the SCM Agreement. It contends that the facts identified by the United States were taken into consideration by MOFCOM in its injury and causation determinations, and therefore should have been disclosed.[311]

[301] United States' second written submission, para. 114.
[302] United States' first written submission, para. 146; and second written submission, para. 111.
[303] United States' first written submission, para. 146; and second written submission, para. 117.
[304] United States' first written submission, para. 146; and second written submission, paras. 118-119.
[305] China's first written submission, para. 140; and second written submission, para. 130.
[306] China's second written submission, para. 130.
[307] China's first written submission, para. 139; and second written submission, para. 129.
[308] China's second written submission, para. 144, footnote 186.
[309] China's second written submission, para. 133.
[310] China's first written submission, para. 145; and second written submission, para. 134.
[311] Japan's third-party submission, para. 24.

7.5.5.3 Evaluation by the Panel

7.5.5.3.1 Essential facts regarding "sales obstacles"

7.185. China asserts in this proceeding that the "sales obstacles" to which MOFCOM made reference in the Redetermination were specifically subject imports.[312] While the Redetermination Disclosure does contain information on the volumes of subject imports, we see nothing that would connect that information to the notion of subject imports specifically constituting the "sales obstacles" referred to in the Redetermination. Thus, to the extent MOFCOM considered "sales obstacles" in making its determination of causation, we see nothing in the Redetermination Disclosure that could be understood to constitute the essential facts concerning those sales obstacles. In this respect, MOFCOM failed to comply with the obligations set out in Articles 6.9 and 12.8 of the Anti-Dumping and SCM Agreements.

7.5.5.3.2 Essential facts regarding economies of scale

7.186. MOFCOM referred to economies of scale in the context of its injury and causation analyses in the Redetermination.[313] These references consist of the repeated statement that the increase in the domestic industry's output and capacity did not result in "corresponding economies of scale" for the domestic industry. However, the references in the Redetermination appear unsupported by any specific underlying facts. China refers to the Redetermination Disclosure at pages 22-23 to argue that MOFCOM disclosed the essential facts regarding economies of scale and at page 13 to argue that the percentage changes in demand, capacity and output are the facts that were the basis for MOFCOM's findings regarding economies of scale. However, pages 22-23 appear to relate to US comments on the disclosure of information in the original investigation and the percentage changes at page 13 do not relate specifically to economies of scale. Thus, we fail to see the relevance of China's references to these pages of the Redetermination Disclosure in the context of this claim.

7.187. As discussed above, MOFCOM's findings with respect to economies of scale rely on several premises that are not explained in the Redetermination, and for which there are no facts set out in either the Redetermination itself, or in the Redetermination Disclosure. Indeed, China acknowledges that there are no facts other than the information concerning percentage changes in demand, capacity and output relevant to the issue of economies of scale set out in the Redetermination Disclosure.[314] Thus, it appears that MOFCOM did not actually have any other facts before it that could be under consideration with respect to this issue.

7.188. While we have concluded that MOFCOM's findings regarding economies of scale are not sufficiently explained, and therefore are not substantively adequate, it does appear that MOFCOM disclosed the essential facts under consideration with respect to that substantively inadequate determination. In this situation, we see no basis for a finding that MOFCOM failed to comply with the obligation to disclose essential facts set out in Articles 6.9 and 12.8 of the Anti-Dumping and SCM Agreements.

7.5.5.3.3 Essential facts regarding capacity, output and demand

7.189. In support of its conclusion that domestic capacity and output did not exceed demand from 2006 through 2008, MOFCOM referred only to the percentage changes in these factors and a statement that domestic demand in 2007 was "almost twice" domestic output.[315] China has not asserted that there was any other information in the record that formed the basis for MOFCOM's findings regarding capacity, output and demand.

7.190. While we find it difficult to understand how MOFCOM based its findings regarding these factors on the facts to which China refers, these facts are undisputedly set out in the Redetermination Disclosure. Accordingly, MOFCOM did disclose the essential facts under consideration with respect to its determination. In this situation, we see no basis for a finding that

[312] China's first written submission, para. 140; and second written submission, para. 130.
[313] Redetermination, (Exhibit US-1), pp. 28, 29, 42, 43; and Redetermination – China's translation, (CHN-1), pp. 29, 43, 44.
[314] China's second written submission, paras. 94, 98; and response to Panel question No. 57, para. 156.
[315] Redetermination, (Exhibit US-1), p. 52; and Redetermination – China's translation, (CHN-1), p. 52.

MOFCOM failed to comply with the obligation to disclose essential facts set out in Articles 6.9 and 12.8 of the Anti-Dumping and SCM Agreements.

7.5.5.3.4 Essential facts regarding inventory overhang

7.191. In support of its conclusion that subject imports caused the increase in the domestic industry's inventory in 2008, MOFCOM relied on the fact that the domestic industry's inventory and subject imports increased at commensurate rates during that period. China has not asserted that there was any other information in the record that formed the basis for MOFCOM's findings regarding inventory overhang.

7.192. While we consider that MOFCOM's findings regarding inventory overhang are not sufficiently explained, and therefore are not substantively adequate, it does appear that MOFCOM disclosed the facts under consideration with respect to that substantively inadequate determination. In this situation, we see no basis for a finding that MOFCOM failed to comply with the obligation to disclose essential facts set out in Articles 6.9 and 12.8 of the Anti-Dumping and SCM Agreements.

7.6 The United States' claim with respect to public notice

7.6.1 Introduction

7.193. In this section of our report, we consider the United States' assertions that MOFCOM explained neither the matters of fact and law nor the reasons that led it to maintain anti-dumping and countervailing duties in the public notice of the Redetermination, and thus claims that its public notice is inconsistent with China's obligations under Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement and Articles 22.3 and 22.5 of the SCM Agreement. Specifically, the United States contends that MOFCOM's Redetermination does not explain:

a. MOFCOM's finding that the trends of the prices of the subject imports and the domestic like product were the same;

b. the evidence that MOFCOM allegedly considered, and the analysis that it allegedly conducted, in concluding that the domestic industry's loss of market share in 2008 led it to slash prices by over 30% in the first quarter of 2009;

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

d. its assertion that the domestic industry was prevented by subject imports from realizing economies of scale; and

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

The United States contends that these findings and conclusions were material and thus subject to public notice requirements because they had to be resolved before MOFCOM could make an affirmative determination.[316]

7.194. China counters that the Redetermination is sufficiently clear as to the facts and reasoning that led MOFCOM to its conclusions, while also respecting the need to protect confidential information. China maintains that (i) MOFCOM fully respected the requirement to provide a reasoned account of the factual basis for its decision to impose definitive measures[317], (ii) the United States failed to establish a *prima facie* case[318], and (iii) some of the United States' claims

[316] United States' first written submission, para. 154.
[317] China's first written submission, para. 153.
[318] Ibid.

are factually inaccurate.[319] In addition, in its second written submission, China contends that the United States abandoned some of its original claims concerning public notice.[320]

7.6.2 Provisions at issue

7.195. Article 12.2 of the Anti-Dumping Agreement provides:

> 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 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.

Article 22.3 of the SCM Agreement is virtually identical to Article 12.2 of the Anti-Dumping Agreement but for references to "Article 18" and "a definitive countervailing duty" in place of "Article 8" and "a definitive anti-dumping duty" in the first sentence.

7.196. Article 12.2.2 of the Anti-Dumping Agreement further provides:

> A public notice of conclusion or suspension of an investigation in the case of an affirmative determination providing for the imposition of a definitive duty or the acceptance of a price undertaking shall contain, or 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.

Again, Article 22.5 of the SCM Agreement is virtually identical to Article 12.2.2 of the Anti-Dumping Agreement. None of the differences are relevant in this dispute.[321]

7.6.3 Legal framework

7.197. We begin by recalling the difference in the obligations imposed by Articles 6.9 and 12.2.2 of the Anti-Dumping Agreement and the analogous provisions, Articles 12.8 and 22.5, of the SCM Agreement. As explained by the Appellate Body in the original proceedings, Article 6.9 concerns the disclosure of essential facts prior to a definitive determination. Article 12.2.2 requires "public notice of conclusion" of an investigation, and thus applies once a final determination is made.[322] Therefore, in this case, the document to be considered in resolving the United States' claims is the Redetermination document issued by MOFCOM.

7.198. Further, the chapeau of Article 12.2.2 (i.e., Article 12.2) and the corresponding provision of the SCM Agreement, Article 22.3, require investigating authorities to make available, in sufficient detail, the findings and conclusions reached on all issues of fact and law "considered material by the investigating authorities." Therefore, if an issue of fact or law was not considered material to its determinations, MOFCOM would not be obliged to give public notice of findings and conclusions on that issue, regardless of its relevance or importance to the parties, or a reviewing panel. However, we also agree with the view taken by some panels that material issues of fact and

[319] United States' second written submission, para. 122.
[320] China's second written submission, para. 137.
[321] Article 22.5 refers to "an undertaking" rather than "a price undertaking" in the first sentence, and refers to "paragraph 4" rather than "subparagraph 2.1" and "interested Members" in addition to " exporters and importers" in the second sentence. Article 22.5 of the SCM Agreement also omits the reference at the end of Article 12.2.2 of the Anti-Dumping Agreement to sampling under Article 6.10 of the latter Agreement. There is no corollary provision to Article 6.10 in the SCM Agreement.
[322] Appellate Body Report, *China – GOES*, para. 240.

law include issues that arisen in the course of an investigation and which must necessarily be resolved in order for the investigating authorities to make the necessary determinations.[323] In other words, an investigating authority cannot simply conclude that an issue that arises in an investigation is not material and make no findings regarding it if, viewed objectively, that issue requires resolution in the context of the findings made by the investigating authority.

7.199. In addition, as we stated in the original proceedings, the public notice requirement under Article 12 of the Anti-Dumping Agreement and Article 22 of the SCM Agreement does not extend to confidential information.[324] Indeed, both provisions make clear that "due regard" must be paid to the requirement to protect confidential information. Where the public notice requirement implicates information treated as confidential in an investigation, investigating authorities may reconcile their obligation to protect confidential information from disclosure with their obligations with respect to public notice by basing the public notice on non-confidential summaries of the relevant information.[325] As the public notice obligations only require investigating authorities to make available "findings" and "conclusions" on issues of fact, and "matters of fact" which have led to arguments being rejected, it is also not necessary to include all relevant underlying, or even supporting facts, in the public notice.[326]

7.200. Before we turn to the specific assertions of the United States regarding allegedly inadequate public notice, we have considered the application of judicial economy with respect to those assertions which relate to aspects of MOFCOM's Redetermination which we have, in this report, found to be inconsistent with China's substantive obligations under the Anti-Dumping and SCM Agreements. We note that where we have found such inconsistency, we have based that decision principally on the basis of the explanations of MOFCOM's analysis and conclusions in the Redetermination, consistently with the applicable standard of review. In this situation, we consider immaterial the question of whether the public notice of such an inconsistent determination is "sufficient". We find the question of whether it is necessary or appropriate for us to make findings on the adequacy of the public notice to be particularly relevant in this case as, where we have found substantive inconsistencies in MOFCOM's price effects and causation analysis, the primary basis for those findings is our conclusion MOFCOM failed, in the Redetermination, to engage adequately with relevant evidence before it, and/or failed to explain the basis of its finding. Therefore, where we have found that aspects of MOFCOM's Redetermination are inconsistent with China's substantive obligations we exercise judicial economy and make no finding on the corresponding claims under Articles 12 and 22 of the Anti-Dumping and SCM Agreements respectively.

7.201. Our decision is in keeping with that of several previous panels, which have concluded that, where there is a substantive inconsistency with the provisions of the Anti-Dumping Agreement, it is neither necessary nor appropriate to make findings on claims of violation of Articles 12 and/or 22 of the Anti-Dumping and SCM Agreements.[327] In this regard, we note in particular the findings of the panel in *EC – Bed Linen*:

> A notice may adequately explain the determination that was made, but if the determination was substantively inconsistent with the relevant legal obligations, the adequacy of the notice is meaningless. Further, in our view, it is meaningless to consider whether the notice of a decision that is substantive [*sic*] inconsistent with the requirements of the AD Agreement is, as a separate matter, insufficient under Article 12.2. A finding that the notice of an inconsistent action is inadequate does not add anything to the finding of violation, the resolution of the dispute before us, or to the understanding of the obligations imposed by the AD Agreement.[328]

We agree with the findings of the panel in *EC – Bed Linen* to this effect, in particular with respect to the lack of any additional value to be had from findings as to whether a notice of a substantively inadequate determination is consistent with the public notice requirements of the Anti-Dumping

[323] See Panel Reports, *China – Broiler Products*, para. 7.527; and *EU – Footwear (China)*, para. 7.844.
[324] Panel Report, *China – GOES*, para. 7.334.
[325] Ibid. para. 7.335; and Appellate Body Report, *China – GOES*, para. 259.
[326] See, e.g. Appellate Body Report, *China – GOES*, para. 256.
[327] Panel Reports, *EC – Bed Linen*, para. 6.259; and *EC – Salmon (Norway)*, para. 7.831.
[328] Panel Report, *EC – Bed Linen*, para. 6.259.

and SCM Agreements. We therefore adopt them as our own, and will follow the same approach in evaluating the United States' public notice claims in this proceeding.

7.6.4 Main arguments of the parties

7.6.4.1 United States

7.202. The United States contends that, *inter alia*, MOFCOM's Redetermination did not contain all relevant information on matters of fact and law which led MOFCOM to conclude that price trends of subject imports and the domestic like product were the same.[329]

7.203. The United States further contends that MOFCOM's Redetermination explains neither its conclusions that the domestic industry was prevented by subject imports from realizing economies of scale[330] nor its finding that the capacity and output of the domestic industry did not exceed market demand.[331] In its second written submission, the United States further argues that China's representations that increased imports are the "sales obstacles" referred to in the Redetermination are not supported by the Redetermination itself.[332]

7.6.4.2 China

7.204. China argues that by failing to establish that the facts referred to by the United States in its public notice claims were critical to an understanding of the factual basis that led to the imposition of final measures, the United States has failed to make a *prima facie* case that MOFCOM violated Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement and Articles 22.3 and 22.5 of the SCM Agreement.[333] With regard to MOFCOM's conclusions regarding trends in prices of subject imports and the domestic like product, China argues that MOFCOM provided, in the Redetermination, the public version of the data supporting these conclusions.[334] In relation to MOFCOM's conclusion that the domestic industry's market share loss in 2008 led it to reduce prices significantly in Q1 2009, China submits that MOFCOM disclosed all matters of fact and law that led to this conclusion.[335]

7.205. In addition, China contends that MOFCOM fully explained not only its analysis and findings regarding the domestic industry's failure to realize economies of scale due to subject imports, referring to pages 23 and 24 of the Redetermination[336], but also the basis for its finding that domestic capacity and output did not exceed market demand, referring to the Redetermination at page 52.[337] China further contends that it was clear from MOFCOM's Redetermination that subject imports were the sales obstacles in issue, and how MOFCOM considered them, referring to the Redetermination at pages 24-26.[338]

7.6.5 Main arguments of the third parties

7.206. Japan argues that the facts identified by the United States in its public notice claims were material because they were taken into consideration by MOFCOM in its injury and causation determinations. Japan requests us to examine carefully whether MOFCOM complied with its obligations in this regard.[339]

7.6.6 Evaluation by the Panel

7.207. Turning to the specific assertions of the United States regarding allegedly inadequate public notice, we note that each of these relates to aspects of MOFCOM's Redetermination which

[329] United States' second written submission, para. 122.
[330] United States' first written submission, para. 153.
[331] Ibid.
[332] United States' second written submission, para. 124.
[333] China's first written submission, para. 150.
[334] Ibid. para. 156.
[335] Ibid. para. 159.
[336] Ibid. para. 157; and second written submission, para. 143.
[337] China's first written submission, para. 161.
[338] Ibid. para. 158.
[339] Japan's third-party submission, para. 24.

we have found, in this report, to be substantively inconsistent with China's obligations. More specifically, the United States' claims regarding the adequacy of the public notice of MOFCOM's price effects and causation determinations relate to our substantive findings as follows:

a. In relation to MOFCOM's conclusions regarding similar trends in the prices of subject imports and the domestic like product, we note that MOFCOM's conclusions were relevant to its factual findings on parallel trends in prices of subject imports and the domestic like product. The findings on parallel trends formed part of MOFCOM's intermediate findings concerning price competition and were part of MOFCOM's price effects analysis. We found MOFCOM's parallel pricing analysis to be erroneous, for the reasons described above.[340] It is also relevant to note that we found MOFCOM's overall price effects analysis to be inconsistent with China's obligations under Articles 3.1 and 3.2 of the Anti-Dumping Agreement and Articles 15.1 and 15.2 of the SCM Agreement.

b. With regard to the United States' claim concerning MOFCOM's alleged failure to provide in the Redetermination, relevant information on facts and law, which led MOFCOM to the conclusion that the domestic industry's loss of market share in 2008 led it to slash prices by over 30% in the first quarter of Q1 2009 we highlighted specific errors in MOFCOM's analysis, in particular, in light of MOFCOM's failure to engage with probative evidence before it, which could have brought its conclusions into question, and also because of MOFCOM's failure to adequately explain the basis for its finding.[341] We found MOFCOM's volume based price suppression analysis, in this case, to be flawed and inconsistent with China's obligations under Articles 3.1 and 3.2 of the Anti-Dumping Agreement and Articles 15.1 and 15.2 of the SCM Agreement.

c. With respect to economies of scale, the US claim is based upon MOFCOM's failure to explain its conclusions that the domestic industry was prevented by subject imports from realizing economies of scale. Similarly, our finding that MOFCOM's conclusions regarding economies of scale do not support its determination of causation is based on the fact that MOFCOM's findings in this context rely on several premises that are not explained in the Redetermination, and for which there are no facts set out in either the Redetermination itself, or in the Redetermination Disclosure.[342]

d. With respect to capacity, output and demand, the US claim is based upon MOFCOM's failure to explain its finding that the capacity and output of the domestic industry did not exceed market demand. Similarly, our finding that MOFCOM's conclusions regarding these three economic factors do not support its determination of causation is based on the continued absence of underlying data regarding growth in domestic demand, capacity and output.[343]

e. With respect to sales obstacles, the US claim is based upon the fact that China's representations that increased imports are the "sales obstacles" referred to in the Redetermination are not supported by the Redetermination itself. Similarly, we have found nothing that would connect the information presented by MOFCOM on the volumes of subject imports to the notion of subject imports specifically constituting the "sales obstacles" encountered by the domestic industry.[344]

7.208. As the United States' claims of inadequate public notice relate specifically to the aspects of MOFCOM's price effects and causation determinations that constitute the basis of our findings of inconsistency of those determinations with various provisions of the Anti-Dumping and SCM Agreements, we apply judicial economy based on the considerations set out above and make no findings on these public notice claims under Articles 12 and 22 of the Anti-Dumping and SCM Agreements respectively.

[340] See, above, paras. 7.89-7.93.
[341] See, above, paras. 7.40-7.112.
[342] See, above, paras. 7.129-7.133.
[343] See, above, paras. 7.138-7.145.
[344] See, above, para. 7.185.

8 CONCLUSIONS

8.1. For the reasons set forth in this Report, we conclude that the United States' claim regarding adverse effects under Articles 3.1 and 3.4 of the Anti-Dumping Agreement and Articles 15.1 and 15.4 of the SCM Agreement is not properly before us.

8.2. Further, and for the reasons set forth in this Report, we conclude that:

a. MOFCOM's conclusions regarding the price effects of subject imports are not consistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement and Articles 15.1 and 15.2 of the SCM Agreement;

b. MOFCOM's revised finding that subject imports caused material injury to the domestic industry is not consistent with Articles 3.1 and 3.5 of the Anti-Dumping Agreement and Articles 15.1 and 15.5 of the SCM Agreement; and

c. MOFCOM acted inconsistently with Article 6.9 of the Anti-Dumping Agreement and Article 12.8 of the SCM Agreement with respect to the disclosure of essential facts regarding parallel pricing and sales obstacles.

Accordingly, China's measures taken to comply with the DSB's recommendations and rulings, at issue in this proceeding, are inconsistent with the relevant covered agreements, and therefore China failed to comply with the recommendations and rulings of the DSB.

8.3. In addition, and for the reasons set forth in this Report, we conclude that the United States has failed to demonstrate that MOFCOM acted inconsistently with Article 6.9 of the Anti-Dumping Agreement and Article 12.8 of the SCM Agreement with respect to the disclosure of essential facts regarding the domestic industry's loss of market share in 2008 and price reduction in the first quarter of 2009, the decrease in Wuhan's price-cost differential in 2008, economies of scale, domestic capacity, output and demand, and inventory overhang.

8.4. Finally, in light of our findings of substantive violations, we exercised judicial economy and made no findings with regard to the United States' public notice claims under Article 12 of the Anti-Dumping Agreement and Article 22 of the SCM Agreement.

8.5. 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. We conclude that, to the extent that we have found the measures at issue inconsistent with the provisions of the Anti-Dumping and SCM Agreements cited above, they have nullified or impaired benefits accruing to the United States under these agreements.

8.6. We therefore conclude that China failed to implement the recommendations and rulings of the DSB to bring its measures into conformity with its obligations under the Anti-Dumping and SCM Agreements.[345] To the extent that China failed to comply with the recommendations and rulings of the DSB in the original dispute, those recommendations and rulings remain operative.

[345] We recall that China asserts that the measures at issue expired after the issuance of the Interim Report. However, there is no evidence properly before us in this regard.

WORLD TRADE ORGANIZATION

WT/DS414/RW/Add.1

31 July 2015

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

RECOURSE TO ARTICLE 21.5 OF THE DSU BY THE UNITED STATES

REPORT OF THE PANEL

Addendum

This *addendum* contains Annexes A to D to the Report of the Panel to be found in document WT/DS414/RW.

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WORKING PROCEDURES OF THE PANEL

ANNEX A-1

CHINA – COUNTERVAILING AND ANTI-DUMPING DUTIES ON GRAIN ORIENTED FLAT-ROLLED ELECTRICAL STEEL FROM THE UNITED STATES (WT/DS414) RECOURSE TO ARTICLE 21.5 OF THE DSU BY THE UNITED STATES

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 by another Member to the Panel 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 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.

4. 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.

5. 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 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.

Submissions

6. Before the substantive meeting of the Panel with the parties, each party shall transmit to the Panel a first written submission, and subsequently a written rebuttal, in which it presents the facts of the case and its arguments, and counter-arguments, respectively, 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 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 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 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 promptly in writing, preferably no later than the next filing or meeting (whichever occurs earlier) following the submission which contains the translation in question. 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 US-1, US-2, etc. If the last exhibit in connection with the first submission was numbered US-5, the first exhibit of the next submission thus would be numbered US-6.

Questions

11. The Panel may at any time pose questions to the parties and third parties, orally in the course of the substantive meeting or in writing.

Substantive meeting

12. Each party shall provide to the Panel the list of members of its delegation in advance of the meeting with the Panel and no later than 5.00 p.m. the previous working day.

13. The substantive meeting of the Panel 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 opening statement as well as its closing statement, if any, preferably at the end of the meeting, and in any event no later than 5.00 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.

Third parties

14. The Panel shall invite each third party to transmit to the Panel a written submission prior to the substantive meeting of the Panel with the parties, in accordance with the timetable adopted by the Panel.

15. Each third party shall also be invited to present its views orally during a session of the 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 5.00 p.m. the previous working day.

16. 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 5.00 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

17. The description of the arguments of the parties and third parties in the descriptive part of the Panel report shall consist of executive summaries provided by the parties and third parties, which shall be annexed as addenda to the report. These executive summaries shall not in any way serve as a substitute for the submissions of the parties and third parties in the Panel's examination of the case.

18. Each party shall submit executive summaries of the facts and arguments as presented to the Panel in its written submissions, other than responses to questions, and its oral statements, in accordance with the timetable adopted by the Panel. Each executive summary of a written submission shall be limited to no more than 10 pages, and each summary submitted by each party of both opening and closing statements presented at a substantive meeting shall be limited to no more than 5 pages. The Panel will not summarize in the descriptive part of its report, or annex to its report, the parties' responses to questions.

19. Each third party shall submit an executive summary of its arguments as presented in its written submission and statement in accordance with the timetable adopted by the Panel. This summary may also include a summary of responses to questions, where relevant. The executive summary to be provided by each third party shall not exceed 6 pages.

20. The Panel reserves the right to request the parties and third parties to provide executive summaries of facts and arguments presented by a party or a third party in any other submissions to the Panel for which a deadline may not be specified in the timetable.

Interim review

21. 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.

22. 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.

23. The interim report, as well as the final report prior to its official circulation, shall be kept strictly confidential and shall not be disclosed.

Service of documents

24. 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 4 paper copies of all documents it submits to the Panel. However, when exhibits are provided on CD-ROMS/DVDs, 2 CD-ROMS/DVDs and 2 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, 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 XXXXXX and XXXXXX. 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 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. 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 5.00 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

CHINA – COUNTERVAILING AND ANTI-DUMPING DUTIES ON GRAIN ORIENTED FLAT-ROLLED ELECTRICAL STEEL FROM THE UNITED STATES (WT/DS414) RECOURSE TO ARTICLE 21.5 OF THE DSU BY THE UNITED STATES

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 that was previously treated by 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, any confidential information submitted by that entity in the course of those investigations.

3. 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.

4. 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.

5. 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.

6. 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 5. 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.

7. 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.

8. 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.

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ANNEX B

ARGUMENTS OF THE UNITED STATES

ANNEX B-1

EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION OF THE UNITED STATES

I. INTRODUCTION

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

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

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

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

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

II. REVIEW UNDER ARTICLE 21.5 OF THE DSU

6. Under Article 21.5 of the DSU, measures that negate or undermine compliance with the DSB's recommendations and rulings and any measures taken to comply that are inconsistent with a covered agreement may come within the scope of an Article 21.5 proceeding. An Article 21.5 panel is to engage in an objective assessment to determine the existence or consistency of a measure taken to comply.

7. If on a specific issue the underlying evidence and the explanations given by the investigating authority have not changed from the original determination, then an Article 21.5 panel should reach the same conclusions as the original panel. Moreover, in this dispute, one question is whether MOFCOM's conclusions are "reasoned and adequate" in "light of the evidence." Accordingly, investigating authorities in antidumping and countervailing duty investigations may have to consider conflicting arguments and evidence and will need to exercise discretion. However, the investigating authority is responsible for ensuring that its explanations reflect that conflicting evidence was considered.

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

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

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

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

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

10. Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement impose two important requirements on authorities that make injury determinations. The first is that the determination be based on "positive evidence." The second requirement is that the injury determination involves an "objective examination" of the volume of the dumped or subsidized imports, their price effects, and their impact on the domestic industry.

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

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

11. MOFCOM's analysis is seriously flawed. In its Re-determination, MOFCOM seems to take the position that a price effects analysis can be conducted without taking into account the relationship between the prices of subject imports and the prices of the domestic like product. In considering the effect of the subject imports on prices under Article 3.2 of the AD Agreement and Article 15.2 of the SCM Agreement, the investigating authority shall consider evidence as to that effect, such as evidence of the prices of imported products compared to the prices of domestic products. An investigating authority cannot determine that subject imports had a particular price effect while ignoring the evidence as to the actual prices of imports compared to domestic products. Yet MOFCOM ignored the price comparison evidence altogether in its Re-determination.

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

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

13. Moreover, MOFCOM's price suppression analysis suffers from a more fundamental flaw because it fails to show that any price suppression was the effect of subject imports. MOFCOM simply assumed that any price suppression was linked to subject imports. Notably, MOFCOM has now disavowed making any price comparisons between the subject imports and the domestic like product. MOFCOM admits that it "neither conducted a comparison of the price level of the subject

merchandise and the domestic like product nor did it issue any finding on 'low price' or price cutting." In other words, MOFCOM actually has no statistical data or evidence showing that the prices of subject imports were adversely affecting the prices of the domestic like product.

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

14. In the absence of any evidence showing that the prices of subject imports were adversely affecting the prices of the domestic like product, MOFCOM has simply proffered a theory that the increase in the subject imports' volume and market share in 2008 caused the prices of the domestic like product to be suppressed. There are several problems with MOFCOM's analysis.

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

16. The Appellate Body recognized that price movements in the first quarter of 2009 indicated that subject imports and the domestic product were not competing on the basis of price. At no point in its analysis, however, has MOFCOM attempted to address this fundamental flaw. Instead, MOFCOM relies on three arguments in an attempt to show that subject imports were affecting the prices of the domestic like product. First, it contends that there was parallel pricing between subject imports and the domestic product. Second, it argues that certain documents obtained during its verification of domestic producers show that respondents had adopted a pricing strategy to set price lower than those of the domestic product. Finally, it claims that a partial overlap in customers proves that price was important in purchasing decisions. Each of these arguments is unpersuasive, as discussed below.

d. MOFCOM's Reliance on Parallel Pricing is Unsubstantiated

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

18. In its report, however, the Appellate Body explained that, although it could "conceive of ways in which an observation of parallel price trends might support a price depression or suppression analysis ... there is no basis on which to draw any such conclusion in this case." MOFCOM's reliance on parallel pricing is just as unsupported in the Re-determination as it was in the original determination. In short, MOFCOM's reliance on parallel pricing to show that subject imports affected domestic prices is not supported by positive evidence.

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

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

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

20. MOFCOM also cites to a partial overlap in customers to support its assertion that price was an important factor in purchasing decisions. This partial overlap in customers, however, does not prove what MOFCOM says it does. The fact that some customers – be they distributors of electrical equipment or electrical utilities – buy both from subject sources and from domestic producers does not establish that there is direct competition for sales to these purchasers by domestic and subject suppliers, that the domestic and subject suppliers were selling the same products, or that price is an important factor in purchasing decisions.

21. MOFCOM should have conducted a thorough inquiry into the relative importance of price and non-price factors in purchasing decisions, rather than simply attributing the price suppression to the subject imports. But the Re-determination demonstrates that MOFCOM failed to do this, thereby underscoring the lack of objectivity of its examination. Because MOFCOM failed to show that subject imports "have explanatory force" for the suppression of domestic prices, MOFCOM's analysis is inconsistent with Articles 3.1 and 3.2 of the AD Agreement and Articles 15.1 and 15.2 of the SCM Agreement.

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

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

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

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

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

25. In addition to the fundamental implausibility of MOFCOM's reasoning, there are also other defects in its analysis, which cast further doubt on whether MOFCOM conducted an objective examination based on positive evidence. The price negotiation documents also fail to support MOFCOM's claims.

5. Conclusion

26. In sum, MOFCOM's findings that the volume of subject imports suppressed domestic prices in 2008 and the first quarter of 2009 is not based on positive evidence, and does not reflect an objective examination of the evidence. Furthermore, MOFCOM's theories that a 5.56 percent increase in subject imports' market share in 2008 drove the domestic industry to cut prices

by 30.25 percent in the first quarter of 2009, or that the domestic industry was driven to do so by "pricing policies" of subject foreign producers, lack any foundation in the record. As a result, MOFCOM has not shown, through these findings, that "the effect of such imports is otherwise to depress prices to a significant degree or prevent price increases, which otherwise would have occurred, to a significant degree." Accordingly, MOFCOM's analysis is inconsistent with Articles 3.1 and 3.2 of the AD Agreement and Articles 15.1 and 15.2 of the SCM Agreement.

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

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

28. The "examination" contemplated by Articles 3.4 and 15.4 must be based on a "thorough evaluation of the state of the industry" and it must "contain a persuasive explanation as to how the evaluation of relevant factors led to the determination of injury." MOFCOM failed to conduct such an examination with respect to its finding that the domestic industry was materially injured in 2008.

29. Additionally, an authority's factual findings under Article 3.4 of the AD Agreement and Article 15.4 of the SCM Agreement must comply with the "objective examination" and "positive evidence" requirements articulated in Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement, respectively. MOFCOM's findings are not based on an objective examination and are not supported by positive evidence. MOFCOM's examination of the factors enumerated in Articles 3.4 and 15.4 for 2008 is highly distorted and selective. It is distorted because factors that are identified as being indicative of material injury are not viewed in their proper context. It is selective because it ignores the fact that many of these factors showed that the domestic industry was performing well in 2008.

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

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

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

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

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

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

33. Because MOFCOM has not established that the imports under investigation had any significant price effects on the domestically produced product, a necessary element of its causal

link analysis fails. Accordingly, due to its failure to demonstrate significant price effects, China has failed to demonstrate that dumped or subsidized imports are causing injury, as required by Articles 3.1 and 3.5 of the AD Agreement and Articles 15.1 and 15.5 of the SCM Agreement.

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

34. At several points in the Re-determination, MOFCOM states that China's domestic GOES industry increased its production capacity, but that it was injured by subject imports because they prevented it from realizing attendant economies of scale. These are nothing more than conclusory assertions, unsupported by any factual analysis. Among the questions that MOFCOM leaves unaddressed are: which of the two domestic producers was prevented from realizing economies of scale? Why should the producer have reasonably expected to realize economies of scale? What should these economies of scale have been, and when should they have been realized?

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

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

36. The original panel found that MOFCOM breached Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement by failing to conduct a non-attribution analysis to ensure that it was not attributing to subject imports injury caused by the Chinese GOES industry's overexpansion and overproduction. China did not appeal the original panel's findings with regard to causation to the Appellate Body, nor has it fixed the deficiencies that the original panel found. MOFCOM's analysis of this factor in the Re-determination is marred by numerous errors and unsupported, conclusory statements, and continues to fall short of what is required by Articles 3.1 and 3.5 of the AD Agreement, and Articles 15.1 and 15.5 of the SCM Agreement.

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

37. MOFCOM's Re-determination Disclosure make new disclosures concerning the volumes of nonsubject imports and the Re-determination relies on these data in finding that nonsubject imports did not affect the causal link between subject imports and material injury to the domestic industry. As before, MOFCOM's non-attribution analysis with respect to nonsubject imports is unpersuasive and is not based on an objective examination of the newly-disclosed evidence.

38. There are two significant problems with MOFCOM's analysis. First, MOFCOM's statement about the relative importance of subject and nonsubject imports since 2008 is demonstrably incorrect. Second, and more fundamentally, MOFCOM's analysis fails to address the inquiry that MOFCOM should have conducted, which is to ask how the increasing quantity of subject imports in 2008 could have had injurious effects on the domestic industry while the increasing and much greater quantity of nonsubject imports sold in 2008 at lower AUVs could have had no injurious effects.

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

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

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

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

42. The facts are "essential facts" in that they are "facts that are significant in the process of reaching a decision as to whether or not to apply definitive measures." They formed part of the basis for MOFCOM's determination of material injury and decision to apply the definitive measures at issue in this dispute. MOFCOM was required to disclose the essential facts that supported its price effects examination and causation analysis, so that interested parties could defend their interests.

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

43. The original panel found that China breached Article 12.2.2 of the AD Agreement and Article 22.5 of the SCM Agreement because MOFCOM did not adequately explain the basis for its "low price" findings for its decision that nonsubject imports were not a cause of injury. The Appellate Body agreed with the panel, finding that MOFCOM had failed to disclose all relevant information on the matters of fact relating to its conclusion that there had been price undercutting.

44. MOFCOM's Re-determination suffers from the same flaws. It does not explain the matters of fact and law and reasons which led to the imposition of antidumping and countervailing duties. These issues were "material" within the meaning of Articles 12.2 of the AD Agreement and 22.3 of the SCM Agreement because they had to be resolved before MOFCOM could render an affirmative material injury determination. This information also constituted "relevant information on the matters of fact and law and reasons which have led to the imposition of final measures," within the meaning of Article 12.2.2 of the AD Agreement and Article 22.5 of the SCM Agreement. This information was an integral part of MOFCOM's pricing analysis, which was central to its finding of a causal link between subject imports and material injury. As such, MOFCOM's failure to disclose the information in its final determinations therefore breached Article 12.2.2 of the AD Agreement and Article 22.5 of the SCM Agreement.

IV. CONCLUSION

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

ANNEX B-2

EXECUTIVE SUMMARY OF THE SECOND WRITTEN SUBMISSION OF THE UNITED STATES

I. INTRODUCTION

1. In its first written submission, the United States demonstrated that a number of aspects of the Determination on the Re-investigation of Antidumping and Countervailing Duties on Grain Oriented Flat-Rolled Electrical Steel Imports from the United States ("Re-determination") that the Government of the People's Republic of China ("China") has adopted with respect to imports of grain oriented flat-rolled electrical steel ("GOES") from the United States are inconsistent 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"). Accordingly, China has failed to comply with the recommendations and rulings of the Dispute Settlement Body ("DSB") to bring its measures into conformity with China's obligations under the AD and SCM Agreements.

2. China's responses are characterized by unsubstantiated assertions, and a failure to address the substance of the U.S. arguments. Contrary to China's assertions, the issues in this dispute do not involve questions of how to interpret conflicting evidence, and the United States is not asking the Panel to second-guess China's Ministry of Commerce ("MOFCOM"). Instead, on issue after issue, the United States has proven that MOFCOM's analysis does not rest on an objective examination based on positive evidence. MOFCOM's analysis is not based on data that provide an accurate and unbiased picture, and has not been conducted without favoring the interests of any party.

3. China's responses suffer from a fundamental weakness. Despite the findings of the DSB that MOFCOM had not provided positive evidence to support the findings and conclusions contained in its original determination, MOFCOM chose to base its revised findings on essentially the same faulty record. MOFCOM continued to rely on evidence that the DSB specifically identified as having dubious probative value, without attempting to rectify the obvious flaws. Instead of rectifying its evidentiary shortcomings, in its Re-determination, MOFCOM simply deleted references to "low prices," and switched its rationale to rely solely on the volume of subject imports. The little new information contained in the revised materials only serves to underscore the fact that the deficiencies of the original determination have not been remedied in MOFCOM's Re-determination.

4. When the Panel scrutinizes MOFCOM's Re-determination and China's arguments, the United States is confident that the Panel will agree that China failed to comply with the DSB's recommendations and rulings as well as China's obligations under the AD and SCM Agreements. In this submission, the United States focuses on some of the key issues in this dispute, including those that have arisen as a result of China's first written submission.

II. CHINA CANNOT DEFEND MOFCOM'S REVISED PRICE EFFECTS ANALYSIS

5. As demonstrated in the U.S. first written submission, China breached Articles 3.1 and 3.2 of the AD Agreement and Articles 15.1 and 15.2 of the SCM Agreement because MOFCOM's price effects analysis was fundamentally flawed in a number of respects. In response, China offers arguments that are unconvincing and do not serve to rebut the U.S. showing that China's price effects analysis in the Re-determination fell far short of meeting China's WTO obligations.

A. China's Disregard of Price Comparisons is Based on a Flawed Interpretation of the Covered Agreements and Does Not Reflect an Objective Examination Based on Positive Evidence

6. According to China, an authority may choose to conduct a price effects analysis that does not even consider the record evidence concerning the relative prices of imports and domestic products. The text of the covered agreements is the starting point for showing that China's legal position is incorrect. First, under Article 3.2, the question to be examined is the "effect of the

dumped imports on prices in the domestic market for like products." Second, Article 3.1 states that an injury determination must be based on "positive evidence" and must involve an "objective examination" of this question of price effects. Third, Article 3.2 contains some details on what factors are relevant to determining what, if any, effects imports may have had on domestic prices. Fourth, Article 3.2 closes with the statement that "No one or several of these factors can necessarily give decisive guidance." The common sense reading of these provisions is that an objective assessment of all of the relevant factors would require an evaluation of evidence on relative prices.

7. The United States also notes that China provides no support for its position in any prior panel or Appellate Body reports. The United States further notes that the fact that MOFCOM neglected to undertake price comparisons suggests that available evidence of prices would have weakened the "explanatory force" of subject imports for any adverse price effects. Finally, China misrepresents the U.S. position in this dispute.

B. China Fails to Show that Subject Imports Had "Explanatory Force" for Any Price Suppression

8. In its first written submission, the United States showed that MOFCOM's price effects analysis in its Re-determination contains a crucial gap because it fails to show that subject imports had any "explanatory force" for the asserted price effects. In essence, MOFCOM's analysis consisted of little more than its observations that: (i) the volume and market share of subject imports increased in 2008; (ii) the domestic industry experienced price suppression and depression; and (iii) consequently subject imports must have caused these price effects. MOFCOM ignored compelling evidence in the record of an absence of price competition between subject imports and the domestic like product. Instead of addressing the evidence, China attempts to explain away this fundamental gap in MOFCOM's analysis.

1. Market Share Shifts in 2008 Do Not Demonstrate a Linkage Between Subject Imports and Prices of the Domestic Like Product

9. China contends that by merely noting the domestic industry's loss of market share to subject imports in 2008 "MOFCOM more than met its burden of showing that subject imports had some explanatory force." MOFCOM's analysis contains a crucial flaw. MOFCOM simply *assumed* that the increasing volume and market share of subject imports in 2008 had explanatory force for the alleged price suppression experienced by the domestic industry in 2008 and the first quarter of 2009. The problem with MOFCOM's so-called analysis is that coincidence is not tantamount to evidence of price effects, nor does it automatically amount to explanatory force. The sharply divergent price trends, along with the muted market share response, in the first quarter of 2009 demonstrated the absence of price competition between subject imports and the domestic like product.

10. Moreover, China's efforts to discount the relevance of the Appellate Body's discussion of the price movements in the first quarter of 2009 are unavailing. The Appellate Body specifically addressed China's argument regarding "the importance of the increase in subject import volume to MOFCOM's finding of significant price depression and suppression," and did not find it persuasive.

11. Additionally, China makes much of its characterization that the subject imports' gain in market share and the domestic industry's loss of market share in 2008 were of similar magnitude. But China's characterization is misleading because it ignores a key fact. China has failed to acknowledge that the overall market was experiencing substantial growth, and that sales of both imported products and domestic products were increasing. In short, MOFCOM can point to no evidence linking the increase in the subject imports' market share in 2008 to any price suppression in 2008 or the first quarter of 2009.

2. MOFCOM's Findings in Connection With its Like Product and Cumulation Determinations Do Not Support MOFCOM's Assumption that Competition Was Based on Price

12. China maintains that MOFCOM's findings in two different contexts – its determination of the domestic like product, and its determination to cumulate imports from the United States and

Russia – support a conclusion that subject imports and the domestic like product were competitive for purposes of MOFCOM's price effects analysis. China's contention is unfounded. MOFCOM's like product and cumulation analyses do not go beyond very general similarities between subject imports and the domestic like product, and do not include any meaningful consideration of the nature of price competition – or lack thereof – between these products. China's assertion that these analyses were sufficient to show that there was direct competition between subject imports and the domestic like product – such that subject imports could be found to have "explanatory force" for price effects – is without any merit.

3. Any Findings of "Parallel Pricing" Do Not Show a Competitive Relationship Based on Price

13. As noted in the U.S. first written submission, the Appellate Body explained that, although it could "conceive of ways in which an observation of parallel price trends might support a price depression or suppression analysis … there is no basis on which to draw any such conclusion in this case." China claims that its findings on parallel pricing have "expanded significantly." This "expanded analysis," however, is merely rhetoric regarding the same conclusory statements made in the original determination. MOFCOM's reliance on parallel pricing, thus, is just as unsupported in the Re-determination as it was in the original determination.

14. Moreover, MOFCOM's theory of parallel pricing has two problems. First, the price trends that it identifies are at such a level of generality as to have no probative value. The second flaw in MOFCOM's theory is that it simply mischaracterized the data, or characterized it in such a broad-brush fashion as to be of little value. MOFCOM stated that "[i]n 2007 and 2008, the rate change in the price of the subject merchandise was close to that of domestic like products;" and that "from 2006 to 2008, the trend of change between the subject merchandise and the domestic like product was consistent and the rate of change was similar." This is clearly a mischaracterization of the data.

15. In addition, China urges the Panel not to "second-guess" MOFCOM. But, contrary to the way in which China seeks to portray this issue, this is not an instance where there are divergent but reasonable ways to evaluate the evidence. In concluding that the data discussed above showed that there was parallel pricing sufficient to establish the existence of a competitive relationship between subject imports and the domestic like product, MOFCOM failed to engage in an objective examination.

4. China's Reliance on Alleged Pricing Policies is Misplaced

16. The United States showed in its first submission that the four verification documents relied upon by MOFCOM were not probative of price competition between the subject imports and the domestic like product. China fails to rebut the U.S. argument. The United States noted at the outset that these verification documents pertain only to the first quarter of 2009, and thus shed little, if any, light on competitive conditions in 2008, the part of the period of investigation that MOFCOM now deems to have "more evidentiary value for determining injury and causal link." China fails to address this point. Further, China's assertion that the United States "concedes … that purchasers were using *offers for subject merchandise* to negotiate for lower domestic prices" is incorrect. Moreover, the original panel and the Appellate Body both recognized that the probative value of the "pricing policy" documents was undermined by the pricing dynamic in the first quarter of 2009, when the price of the domestic like product fell by 30.25 percent, while that of the subject imports declined by only 1.25 percent.

5. Evidence of a Partial Customer Overlap Does Not Support a Finding of a Competitive Relationship Based on Price

17. The United States showed in its first submission that a partial overlap of customers does not provide any support for MOFCOM's conclusion that subject imports compete with the domestically produced product on the basis of price. China's response to this is first to accuse the United States of engaging in "speculation." This is nothing more than a disingenuous attempt to divert attention from the gap in MOFCOM's reasoning. China then conflates the customer overlap issue with MOFCOM's consideration of a different issue – namely the question of whether there were certain specialty products that the Chinese industry did not produce. Neither the partial overlap of

customers nor MOFCOM's findings that the Chinese GOES industry produces certain specialty products supports MOFCOM's conclusion that subject imports are competitive with the domestic like product.

6. Conclusion

18. MOFCOM's findings that the volume of subject imports suppressed domestic prices in 2008 and the first quarter of 2009 is not based on positive evidence, and does not reflect an objective examination of the evidence. MOFCOM has not shown that "the effect of such imports is otherwise to depress prices to a significant degree or prevent price increases, which otherwise would have occurred, to a significant degree." When confronted with the flaws and insufficiencies in each component of MOFCOM's analysis discussed above, China often resorts to arguing that the aspect of the analysis in question is only part of a multi-faceted discussion of the record as a whole, or that MOFCOM "holistically" reviewed all of the evidence. If the constituent parts of MOFCOM's analysis are unsupported by positive evidence, not based on an objective examination, or otherwise inconsistent with the WTO agreements, these appeals to the "big picture" cannot save MOFCOM's analysis. Accordingly, China has acted inconsistently with Articles 3.1 and 3.2 of the AD Agreement and Articles 15.1 and 15.2 of the SCM Agreement.

C. MOFCOM's Finding that Price Depression in the First Quarter of 2009 Was an Effect of Subject Imports Is Inconsistent with the Obligation to Base Findings on Positive Evidence and an Objective Examination

1. China's Effort to Link Price Depression in the First Quarter of 2009 to Market Share Shifts in 2008 Falls Short

19. Although China contends that MOFCOM has "significantly expanded and clarified its reasoning" of price depression in the Re-determination, this is not so. According to China, the increasing volume and market share of subject imports in 2008 constitute "evidence," and MOFCOM's conclusion that the domestic industry slashed its prices by 30.25 percent in response constitutes the requisite "analysis." However, the fact that there is no evidence that the 30.25 percent drop in the domestic industry's prices in the first quarter of 2009 was in any way related to the gain in the subject imports' market share in 2008 undermines MOFCOM's theory. MOFCOM has essentially concocted a reason to link two events with no apparent cause-effect relationship. This does not constitute "analysis." The United States explained in its first submission that MOFCOM's price depression analysis was further marred by its claim that price depression was caused by efforts of subject imports to undercut the price of the domestic product in the first quarter of 2009. China has failed to address this issue.

20. Moreover, the Appellate Body made clear that "Articles 3.2 and 15.2 contemplate an inquiry into the relationship between subject imports and domestic prices" and that "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." Notwithstanding MOFCOM's claim that it engaged in a "comprehensive" analysis, MOFCOM's consideration of the price depression issue is as unsupported as it was in the original injury determination.

2. MOFCOM's Finding That Alleged Pricing Policies Caused Price Depression in Interim 2009 Has No Foundation

21. China's assertion that "the pricing policy documents show the ways in which purchasers were using *subject import prices* to drive down domestic prices" is incorrect. The Appellate Body was clear that, in light of the pricing dynamic in the first quarter of 2009 – where the price of subject imports declined by 1.25 percent, while the price of domestic products plunged by 30.25 percent, and subject imports oversold the domestic product – there was no basis to conclude that a policy of price undercutting could explain depressive or suppressive effects on domestic prices.

22. China's contends that Panel and Appellate Body criticism of MOFCOM's reliance on pricing policy documents no longer apply because these criticisms allegedly focused on MOFCOM's old explanation involving "low price." China misreads the Appellate Body report. The Appellate Body's

analysis was not based on MOFCOM's "low price" findings in the original determination. In short, the Appellate Body's analysis is as relevant to the Re-determination as it was to MOFCOM's original injury determination.

III. CHINA CANNOT DEFEND MOFCOM'S REVISED IMPACT ANALYSIS

A. The United States Properly Challenges Revised Aspects of MOFCOM's Impact Analysis

23. China asserts that the United States improperly brings a new claim before this Panel. Specifically, China attempts to challenge on procedural grounds the U.S. demonstration that MOFCOM's Re-determination breaches Articles 3.1 and 3.4 of the AD Agreement, and Articles 15.1 and 15.4 of the SCM Agreement. China, for instance, asserts that "the introduction of a new claim at this stage of proceedings is contrary to basic principles of fairness and due process." China is incorrect. This claim, like other U.S. claims, is appropriate because the claim challenges aspects of China's compliance measures that are inconsistent with the covered agreements. Thus, China's arguments relating to claims that may be alleged under Article 21.5 of the DSU are misguided.

24. The United States raises a claim to address an aspect of China's compliance measure that is inconsistent with the covered agreements. MOFCOM's revised injury determination contains several changes. In light of these changes, the utility of the compliance proceedings would be "seriously undermined" if the Panel were unable to evaluate whether China's Re-determination on this aspect is consistent with the covered agreements.

B. China's Arguments Regarding the Impact of the Subject Imports on the Domestic Industry Fail

25. The United States showed in its first written submission that MOFCOM's examination of the factors enumerated in Articles 3.4 of the AD Agreement and 15.4 of the SCM Agreement for 2008 is highly distorted and selective.

26. Contrary to China's argument, the United States is not arguing that it is not reasonable, or that it is distortive, for an authority to focus on the latter portion of its period of investigation when assessing injury. The United States *is* arguing that – when focusing on a recent period, or any period, for that matter – data must be viewed in their proper context. MOFCOM "focused on the trends in growth rates," or on the velocity of growth, without considering the trends in their proper context.

27. The "examination" contemplated by Articles 3.4 of the AD Agreement and 15.4 of the SCM Agreement must be based on a "thorough evaluation of the state of the industry" and it must "contain a persuasive explanation as to how the evaluation of relevant factors led to the determination of injury." Additionally, an authority's factual findings under Articles 3.4 and 15.4 must comply with the "objective examination" and "positive evidence" requirements set out in Articles 3.1 of the AD Agreement and 15.1 of the SCM Agreement. MOFCOM's conclusion that the domestic industry experienced material injury in 2008 is not based on a thorough evaluation of the state of the industry in that year, is not based on a persuasive explanation, and is neither objective nor based on positive evidence.

IV. CHINA CANNOT DEFEND MOFCOM'S REVISED CAUSATION ANALYSIS

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

28. MOFCOM's price effects analysis represented an important element of its overall injury determination, notwithstanding China's suggestion that it was merely "collateral." Because MOFCOM failed to establish that subject imports had any significant price effects on the domestically produced product, a necessary element of MOFCOM's causal link analysis is compromised. Accordingly, due to its failure to demonstrate significant price effects, China has failed to demonstrate that dumped or subsidized imports are causing injury, as required by the covered agreements.

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

29. In the Re-determination, MOFCOM made a number of conclusory assertions to the effect that the increased output and capacity of the domestic industry did not produce the corresponding economies of scale. MOFCOM's assertions were not supported by any factual analysis. MOFCOM's findings about economies of scale are nothing more than conclusory assertions, unsupported by any factual analysis. MOFCOM's findings that the domestic industry was injured because it was prevented by subject imports from realizing the benefits of economies of scale does not rest on an objective examination based on positive evidence.

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

30. The United States showed in its first written submission that MOFCOM's non-attribution analysis with respect to the injury caused by the domestic industry's overexpansion and overproduction was marred by errors and unsupported, conclusory statements. Rather than addressing the flaws in MOFCOM's analysis, China, for the most part, asserts that, because the covered agreements do not specify any particular methodology, MOFCOM was free to address this issue in any manner. China's argument misses the point. The covered agreements provide that an authority's analysis must be based on positive evidence and an objective analysis. MOFCOM's analysis did not meet these fundamental standards. Thus, MOFCOM's redetermination is inconsistent with Articles 3.1 and 3.5 of the AD Agreement, and Articles 15.1 and 15.5 of the SCM Agreement by having failed to conduct an objective non-attribution analysis to ensure that it was not attributing to subject imports injury caused by the Chinese GOES industry's over-expansion and over-production.

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

31. MOFCOM's non-attribution analysis makes no commercial sense. MOFCOM failed to address the question of how the increasing quantity of subject imports in 2008 could have had injurious effects on the domestic industry while the increasing and much greater quantity of nonsubject imports in 2008, sold at lower AUVs than subject imports, could have had no injurious effects. MOFCOM also failed to explain how the smaller quantity of subject imports in the first quarter of 2009 could have had injurious effects on the domestic industry, while the much greater quantity of nonsubject imports in that period allegedly had no injurious effects. Additionally, China's argument for using market share data conflates shifts in market share with absolute market share data. Had MOFCOM examined the relative market shares of subject and nonsubject imports, it would have been apparent that nonsubject imports were a much more significant factor in the market than subject imports in 2008 and the first quarter of 2009. Because of these flaws in MOFCOM's non-attribution analysis with respect to nonsubject imports, MOFCOM failed to comply with Articles 3.1 and 3.5 of the AD Agreement, and Articles 15.1 and 15.5 of the SCM Agreement.

V. CHINA BREACHED ARTICLE 6.9 OF THE AD AGREEMENT AND ARTICLE 12.8 OF THE SCM AGREEMENT THROUGH MOFCOM'S FAILURE TO DISCLOSE THE ESSENTIAL FACTS

32. As demonstrated in the U.S. first written submission, MOFCOM acted inconsistently with Article 6.9 of the AD Agreement and Article 12.8 of the SCM Agreement by failing to disclose the "essential facts" forming the basis of MOFCOM's decision to apply definitive measures. The provisions dictate the timing of the disclosure, as such disclosure must take place "before a final determination is made." In addition, what constitutes "essential facts" are those facts that relate to the elements an authority is required to examine in the context of an injury analysis, which are set out in Articles 3.1, 3.2, 3.4, and 3.5 of the AD Agreement and Articles 15.1, 15.2, 15.4, and 15.5 of the SCM Agreement.

A. China Cannot Defend MOFCOM's Failure to Disclose the Essential Facts Underlying its Injury Re-determination

33. The United States identified categories of essential facts that must have been taken into account by MOFCOM in its price effects and causation determinations. As the United States has explained, for each category of essential facts, China's disclosure was non-existent. As a result, China breached Article 6.9 of the AD Agreement and Article 12.8 of the SCM Agreement.

MOFCOM's assertion that the trends of the prices of the subject imports and the domestic like product were the same.

34. In its response, China cannot point to anywhere in the record where MOFCOM discloses the data underlying MOFCOM's assertion that the price trends of the subject imports and the domestic like product were the same. In short, though there may be some complications presented where essential facts are based in part on confidential information, the authority is not excused from its obligation to disclose to interested parties the essential facts which formed the basis of the decision to apply definitive measures.

MOFCOM's assertion that the domestic industry was prevented by subject imports from realizing economies of scale.

35. Again, China cannot point to anywhere in the record where MOFCOM discloses the data underlying MOFCOM's assertion that the domestic industry was prevented by subject imports from realizing economies of scale.

"Sales obstacles" that allegedly prevented the domestic industry from making more sales in 2008 and the first quarter of 2009.

36. China cites a series of general statements in the preliminary disclosure that do nothing to reveal the essential facts supporting the existence of these alleged sales obstacles.

MOFCOM's conclusion that the domestic industry's loss of market share in 2008 led it to slash prices by over 30 percent in the first quarter of 2009.

37. MOFCOM fails to support its assertion that the domestic industry's loss of market share in 2008 led it to slash prices by over 30 percent in the first quarter of 2009.

MOFCOM's assertion that the price-cost differential for Wuhan decreased in 2008.

38. China points to a decline in gross profit, but it does not cite any essential facts to support its conclusion that Wuhan's price-cost differential decreased in 2008.

MOFCOM's finding that the capacity and output of the domestic GOES industry did not exceed market demand.

39. Unsupported with a citation to the record, China asserts that "it was clear that the growth in domestic capacity in 2008 was actually less than the growth in overall in overall demand." It is unclear as to what data China is referring, particularly since the available data actually show capacity and output outstripping demand.

MOFCOM's division of responsibility for the inventory overhang.

40. China claims that "MOFCOM's preliminary disclosure document included extensive discussion on the cause of the domestic industry's inventory overhand." China, however, omits the fact that nowhere in the preliminary disclosure document does MOFCOM provide the data supporting its division of responsibility for the inventory overhang.

VI. CHINA BREACHED ARTICLES 12.2 AND 12.2.2 OF THE AD AGREEMENT AND ARTICLES 22.3 AND 22.5 OF THE SCM AGREEMENT

41. As demonstrated in the U.S. first written submission, 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 in sufficient detail the matters of fact that MOFCOM took into consideration in its injury Re-determination. These issues were "material" within the meaning of Articles 12.2 of the AD Agreement and 22.3 of the SCM Agreement because they had to be resolved before MOFCOM could render an affirmative material injury Re-determination. This information also constituted "relevant information on the matters of fact and law and reasons which have led to the imposition of final measures," within the meaning of Article 12.2.2 of the AD Agreement and Article 22.5 of the SCM Agreement. In its response, China makes a series of statements that are unsupported by the record. The Re-determination does not support China's explanations. MOFCOM did not explain its findings in sufficient detail and, consequently, China has not satisfied the requirements of the covered agreements.

VII. CONCLUSION

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

ANNEX B-3

EXECUTIVE SUMMARY OF THE ORAL STATEMENTS OF THE UNITED STATES AT THE SUBSTANTIVE MEETING

1. The United States begins by noting that we have seen this scenario before. The United States has commenced three dispute settlement proceedings against China concerning antidumping and countervailing duty measures on U.S. exports. Each of the disputes we have brought addresses similar problems under the same procedural and substantive provisions of the covered agreements.

2. In this dispute, the DSB found that China imposed antidumping and countervailing duties on U.S. exports of grain oriented flat-rolled electrical steel ("GOES") in a manner that breached China's obligations under the AD Agreement and the SCM Agreement. As a result, the DSB recommended that China bring its measures into conformity with its obligations under these agreements. However, instead of complying with the DSB's recommendations and rulings, China took a different track. China issued a re-determination of duties that suffers from the same basic flaws as the original investigation, and as a result, China continues to impose antidumping and countervailing duties on imports of GOES in a WTO-inconsistent manner.

3. As the Appellate Body has indicated, "[a] panel can assess whether an authority's explanation for its determination is reasoned and adequate *only* if the panel critically examines that explanation in the light of the facts and the alternative explanations that were before that authority." Here, a critical examination reveals that China's continued reliance on evidence that the DSB specifically identified as having dubious probative value, without attempting to rectify the obvious flaws, falls far short of compliance.

I. CHINA MISINTERPRETS ARTICLES 3.1 AND 3.2 OF THE AD AGREEMENT, AND 15.1 AND 15.5 OF THE SCM AGREEMENT

4. The United States has established that when examining the "positive evidence" relating to the effect of subject imports on prices in the market, an objective authority would compare the pricing levels of imports and domestically produced products. When properly interpreted, Articles 3.1 and 3.2 of the AD Agreement, and 15.1 and 15.2 of the SCM Agreement, require an authority to consider evidence of relative prices of subject imports and the domestic products as part of an objective examination of "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."

5. China, by contrast, is promoting an untenable interpretation of the covered agreements when it argues that an authority may choose to conduct a price effects analysis that ignores the question of the relative prices of imports and domestic products. Articles 3.2 and 15.2 do not provide that an authority may limit its analysis merely to a finding that price depression or price suppression is occurring. The text states that "no one or several of these factors can necessarily give decisive guidance." Accordingly, regardless of the final basis for a finding of adverse price effects, an authority needs to look at all relevant factors.

6. Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement further reinforce that an analysis of price effects requires an analysis of relative prices. From any perspective, an obligation to conduct an "objective examination" based on "positive evidence" – when reviewing the price effects of one group of products on a second group of products – would include an examination of the relative prices of the two groups. Failing to do so would miss an important aspect of determining whether the two groups are price competitive, and whether subject imports have "explanatory force" for the occurrence of adverse price effects. This is especially true when, as in this dispute, the petitioner specifically alleged adverse price effects due to the low price of subject imports.

7. China misconstrues the Appellate Body's findings. China notes that the Appellate Body observed that one could find significant price effects either from a pricing element, a volume element, or a combination of the two. However, it does not follow from this observation that an authority is free to disregard all information regarding relative prices, even if it bases its price effects analysis on volume. If subject imports and the domestic products do not compete on price, as the evidence indicates in this dispute, then an unbiased authority would call into question the "explanatory force" of subject imports for any adverse price effects.

II. CHINA FAILS TO SHOW THAT SUBJECT IMPORTS HAD "EXPLANATORY FORCE" FOR ANY PRICE SUPPRESSION

8. Compelling evidence in the record of MOFCOM's investigation indicates an *absence* of price competition between subject imports and the domestic like product. The domestic industry's prices dropped by a staggering 30.25 percent, while the prices of subject imports declined by only 1.25 percent. Yet, this sharp divergence in prices did not translate into significant shifts in market share. If price were an important factor in purchasing decisions, the drastic decline in the domestic industry's prices should have caused a much more significant shift in sales and market share in favor of the domestic industry.

9. China's efforts to downplay the significance of what happened in the first quarter of 2009 – and to distance itself from the Appellate Body's observations – are unconvincing. China accuses the United States of "mechanically" applying the Appellate Body's findings, and argues that "the context is different" because MOFCOM's analysis of price effects in the redetermination "has been substantially revised and clarified." This is inaccurate. The only significant change in MOFCOM's price effects analysis is that MOFCOM has changed its *rationale* from the original determination by cutting out nearly all references to relative prices, and to rely now solely on the volume of subject imports.

10. Whatever changes there have been in MOFCOM's price effects analysis since the original injury determination, the fundamental facts are unchanged. MOFCOM made its re-determination on the same record as the original injury determination. The pricing and market share data in the first quarter of 2009 continue to point to an absence of price competition between subject imports and the domestic product.

A. Market Share Shifts Do Not Show Price Competition Between Subject Imports and Domestic Like Product

11. China seeks to avoid the obvious implications of the pricing and market share data for the first quarter of 2009 by suggesting the domestic industry's gain in market share in that quarter was in fact more substantial than 1.04 percent if one compares the first quarter of 2009 to full year 2008 instead of to the first quarter of 2008. China, however, provides no evidentiary basis for this assertion. Again, the record evidence strongly suggests an *absence* of price competition between subject imports and the domestic like product.

B. MOFCOM's Findings in Connection With its Like Product and Cumulation Determinations Prove Nothing

12. The comparisons that MOFCOM made for purposes of the domestic like product and cumulation analyses were at a level of extreme generality. For most of the comparisons between the subject imports and the domestic like product, MOFCOM found merely that the products were "fundamentally the same." These are nothing more than broad-brush generalizations. They are not enough to show that subject imports are sufficiently competitive with the domestic like product to be causing adverse price effects. MOFCOM's approach is not consistent with the obligation to conduct an "objective examination" based on "positive evidence."

C. The DSB Has Already Found That Any Parallel Pricing Does Not Show a Competitive Relationship Based on Price

13. China's assertion that MOFCOM's findings of "parallel pricing" were sufficient to show a competitive relationship between subject imports and the domestic like product is just as unpersuasive. MOFCOM's parallel pricing findings are essentially the same as they were in the

original injury determination, and suffer from the same defects identified by the original panel and the Appellate Body.

D. The DSB Has Already Found That Pricing Policy Documents Have No Probative Value

14. Nor are the so-called pricing policy documents relied on by MOFCOM probative of price competition between the subject imports and the domestic like product. These four documents pertain only to the first quarter of 2009. Both the original panel and the Appellate Body recognized that the probative value of these "pricing policy" documents was undermined by the pricing dynamic in the first quarter of 2009, when the prices of the domestic like product fell by 30.25 percent, while that of the subject imports declined by only 1.25 percent.

E. A Partial Customer Overlap Does Not Support a Finding of a Competitive Relationship Based on Price

15. Finally, evidence of a partial overlap in customers does not support a finding of a competitive relationship based on price.

F. Conclusion

16. In sum, none of the additional factors that China claims support MOFCOM's price effects analysis stands up to scrutiny. When confronted with specific flaws and insufficiencies in MOFCOM's analysis, China repeatedly resorts to arguing that the aspect of the analysis in question is only part of a multi-faceted discussion of the record as a whole, and that the United States somehow fails to see the big picture. If the constituent parts of MOFCOM's analysis do not hold up, these vague appeals to the big picture, or, as China puts it, to a "holistic" analysis, cannot save MOFCOM's analysis.

III. CHINA FAILS TO SHOW THAT SUBJECT IMPORTS HAD "EXPLANATORY FORCE" FOR PRICE DEPRESSION IN THE FIRST QUARTER OF 2009

17. Turning now to alleged price depression in the first quarter of 2009, there is no evidence that the sharp drop in the domestic industry's prices in that quarter was in any way related to the gain in the subject imports' market share in 2008. As with its analysis of price suppression, MOFCOM has essentially concocted a reason to link two events with no causal relationship.

IV. CHINA'S IMPACT ANALYSIS IS INCONSISTENT WITH ARTICLES 3.4 OF THE AD AGREEMENT AND 15.4 OF THE SCM AGREEMENT

18. MOFCOM's impact causation analysis is inconsistent with Articles 3.1 and 3.4 of the AD Agreement and Articles 15.1 and 15.4 of the SCM Agreement. As explained in the U.S. submissions, MOFCOM's examination of the factors enumerated in Articles 3.4 and 15.4 for 2008 is highly distorted and selective. The United States has shown that in 2008 the positive trends vastly outnumbered and outweighed the negative ones. As a result, the investigating authority was obligated to provide "a compelling explanation of why and how, in light of such apparent positive trends, the domestic industry {is}, or remain{s}, injured." China failed to do so in this dispute.

V. CHINA'S CAUSATION ANALYSIS IS INCONSISTENT WITH ARTICLES 3.1 AND 3.5 OF THE AD AGEREMENT AND ARTICLES 15.1 AND 15.5 OF THE SCM AGREEMENT

19. 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. The domestic industry's expansion of capacity and production outstripped the growth in demand for GOES in the Chinese market by wide margins. Numerous errors and unsupported, conclusory statements tarnish MOFCOM's analysis of injury caused by the domestic industry's overexpansion and overproduction.

20. In addition, MOFCOM's new disclosures show that nonsubject imports were a much more significant factor in the Chinese market than subject imports, in all parts of the period of investigation. They entered China in significantly greater quantities than cumulated subject

imports throughout the period; they continued to grow by significant amounts; and they had lower average unit values than subject imports in 2008.

21. Instead of conducting an objective non-attribution analysis, MOFCOM summarily dismissed the role of nonsubject imports. In doing so, it mischaracterized the relative importance of nonsubject imports. MOFCOM failed to ask how the increasing quantity of subject imports in 2008 could have had injurious effects on the domestic industry, while the increasing and much greater quantity of nonsubject imports sold in 2008 at lower AUVs could have had no injurious effects.

VI. CHINA'S DISCLOSURES ARE INADEQUATE

A. China Failed to Disclose the Essential Facts, Contrary to Articles 6.9 of the AD Agreement and 12.8 of the SCM Agreement

22. The United States will now turn to MOFCOM's failure to disclose the essential facts that formed the basis of its re-determination. In previous submissions, the United States showed that China failed to meet the requirements of Article 6.9 of the AD Agreement and Article 12.8 of the SCM Agreement. Accordingly, the compliance panel in this dispute should find that China acted inconsistently with Article 6.9 of the AD Agreement and Article 12.8 of the SCM Agreement by not disclosing the essential facts forming the basis for its re-determination.

B. China Failed To Explain its Re-determination, Contrary to Articles 12.2 and 12.2.2 of the AD Agreement, and 22.3 and 22.5 of the SCM Agreement

23. China also has failed to rebut the U.S. demonstration that China breached its WTO obligations by failing to explain its re-determination of material injury. The re-determination simply does not support China's explanations. Therefore, MOFCOM did not explain its findings in sufficient detail. Consequently, China has not satisfied the requirements of the covered agreements.

VII. CONCLUSION

24. For the reasons set forth above and in our submissions, the United States respectfully requests the compliance panel to find that China has failed to implement the recommendations and rulings of the DSB and its measures taken to comply are inconsistent with China's obligations under the AD Agreement and SCM Agreement.

ANNEX B-4

EXECUTIVE SUMMARY OF THE ORAL STATEMENT OF THE UNITED STATES AT THE INTERIM REVIEW MEETING

1. The United States recognizes that China has the right pursuant to Article 15.2 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") to request a meeting to discuss the requests for review of precise aspects of the interim report. Nonetheless, such meetings have become very rare in WTO dispute settlement, and the United States considers that it would have been more efficient to submit comments on each other's requests in writing.

2. As an initial matter, it may be useful to recall that the purpose of an interim review meeting under DSU Article 15.2 is to allow parties an opportunity to comment on issues identified in the requests for review of precise aspects of the interim report. This is the only appropriate topic of discussion for the interim review meeting. A party that goes beyond the issues raised in the written comments would be going beyond the review envisioned in Article 15.2. Regrettably, as we will explain, China's recent effort to introduce new evidence in this proceeding goes beyond the scope of interim review under DSU Article 15.

3. In this statement, we proceed as follows. First, the United States explains why China's attempt to submit new evidence to the Panel is incompatible with the DSU and the Panel's Working Procedures. We note that China's requests should also be rejected because they were not based on evidence before the Panel when made. We also explain why China's new evidence is in any event irrelevant under the Panel's terms of reference for purposes of the Panel's examination of China's compliance measures. Second, we note that we agree with one request by China, to delete the additional recommendation in relation to China's measure taken to comply, but for the different reason that no recommendation under DSU Article 19.1 is necessary or appropriate in a compliance proceeding. Third, we will comment on China's other requests for review of aspects of the Panel's interim report. In brief, the United States considers that the Panel report is strong and its conclusions are well-founded, and China has provided no reasons for the Panel to amend any of its findings.

I. PARAGRAPH 8 OF CHINA'S COMMENTS: CHINA'S NEW EVIDENCE IS UNTIMELY, CONTRARY TO THE DSU, AND, IN ANY EVENT, IRRELEVANT FOR PURPOSES OF THIS PROCEEDING

4. In paragraph 8 of its comments, China asserts that "China expects the expiration of these measures on April 10, 2015." China further asserted that "MOFCOM will publish a public notice of termination regarding the measures at issue on April 10, 2015, and China will submit the public notice to the Panel immediately." In light of this, China suggests that "China would like to respectfully request the Panel to take into consideration the fact of termination of the disputed measures" and requests that the Panel "issue no recommendations in its final report." On April 21, China submitted a notice to the Panel allegedly relating to the termination of the antidumping and countervailing duties on GOES from the United States. China's assertions and attempt to submit new evidence are flawed in multiple respects.

A. China's Submission of New Evidence Is Untimely and Must Be Rejected as Inconsistent with Article 15 of the DSU and with the Panel's Working Procedures

5. First, China's attempt to introduce new evidence during the interim review stage of a panel proceeding is contrary to the DSU and should be rejected. On that basis alone, as China's request is premised on the Panel's acceptance of China's exhibit as new evidence, the Panel should reject China's request to make any finding on the alleged "fact of termination".

6. The interim review stage is not the time for a panel to examine new evidence. Article 15.1 of the DSU allows parties to submit comments on the descriptive part of the panel's draft report. Following expiry of "the set time period" for receipt of comments on the draft descriptive part, "the

panel shall issue an interim report" with its findings and conclusions. Article 15.2 of the DSU permits parties to submit a written request for "the panel to review precise aspects of the interim report prior to circulation" of the report. The panel process is almost completed when the interim review stage has commenced. The parties have already provided their facts and arguments, and the panel issues the draft descriptive part under Article 15.1 "*[f]ollowing the consideration* [by the panel] of [the parties'] rebuttal submissions and oral arguments." The panel issues an interim report containing "the panel's findings and conclusions," and at this point the parties make requests to "the panel to review precise aspects of the interim report." That is, the interim report contains the panel's findings and conclusions "following the consideration" of the parties' evidence and arguments, and Article 15.2 nowhere contemplates that the parties' can submit *additional* facts for the panel to consider.

7. China's attempt to introduce new evidence thus falls outside the scope of the review contemplated by Article 15.2 of the DSU, and the panel should reject this attempt to introduce new evidence during the interim review stage. We note that this is not a new issue. We are aware of six reports in which previous panels or the Appellate Body have considered an effort by a party to introduce new evidence at the interim review stage. In every such report, the panel or the Appellate Body rejected the effort to introduce new evidence.[1] The United States respectfully requests that this panel reject China's attempt for the same reasons as previous panels and the Appellate Body. As the Appellate Body stated in *EC – Sardines*, and again in *EC – Selected Customs Matters*, "the interim review stage is not the appropriate time to introduce new evidence."[2] As explained by the Appellate Body, at the time of the interim review, "the panel process is all but completed; it is only – in the words of Article 15 – 'precise aspects' of the report that must be verified during the interim review . . . this, in our view, cannot properly include an assessment of new and unanswered evidence."[3] The same situation applies here.

8. China's untimely submission of new evidence is also inconsistent with paragraph 8 of the Working Procedures of the Panel. The Panel in its procedures set out that the parties should submit all factual evidence to the Panel "no later than during the substantive meeting, except with respect to evidence necessary for purposes of rebuttal, answers to questions or comments on answers provided by the other party." China's evidence fits none of these categories.

9. The United States further notes that, were the submission of evidence permitted at this stage, it would need to be examined and responded to by the other party, and then evaluated by the panel. Any findings by the panel would then need to be issued to the parties for review under DSU Article 15. This would lead to a reopening of the panel process, perhaps multiple times, and delay in the issuance of the panel's report, contrary to the goals of "prompt settlement" and efficient procedures reflected in DSU Articles 3.3, 12.8, and 20.1.

10. Under DSU Article 15, and as reflected in the Panel's Working Procedures, interim review is not the time for submission of new evidence by a party. For these reasons, the United States respectfully requests that the Panel reject China's attempt to introduce new evidence at this stage of the proceeding and therefore reject the request for review contingent on this untimely evidence.

B. China's Request May Also Be Rejected Because It Was not Substantiated When Made

11. The preceding basis is sufficient reason to reject China's request to consider the factual assertion made by China. The United States also notes that China's request for review may be rejected on the additional basis that it was not based on the evidence before the Panel in this proceeding. China requested "the Panel to take into consideration *the fact of termination* of the disputed measures". However, China had provided no such "fact" in this proceeding to justify its request for review. To the contrary, China's request for review was *explicit* in noting China's speculation about future events. China stated that "China *expects* the expiration of these measures on April 10, 2015." China further asserted that "MOFCOM *will publish* a public notice of

[1] *See e.g., EC – IT Products*, para. 6.48 and 7.167; *EC – Sardines (Panel),* para. 6.16; *EC – Sardines (AB)*, para. 301; *EC – Selected Customs Matters (Panel)*, paras. 6.3-6.6; *EC – Selected Customs Matters (AB)*, para. 259; *EC – Bananas III (Article 21.5 – US) (Panel)*, para. 6.18.

[2] *See EC – Sardines (AB)*, para. 301; *EC – Selected Customs Matters (AB)*, para. 259. *See also EC – IT Products*, para. 6.48 and 7.167.

[3] *EC – Sardines (AB)*, para. 301.

termination regarding the measures at issue on April 10, 2015." But possible future events do not form an adequate basis for the Panel to review and modify aspects of its interim report. Because China's request was made not based on any evidence that had been developed by the parties and considered by the Panel prior to issuance of the report, there was no need or basis for the Panel to review its findings further. China's request may be rejected for this reason as well.

C. In Addition to Being Untimely, China's New Evidence Is Irrelevant for the Panel's Legal Assessment

12. China's new evidence, in addition to being untimely, is also not relevant to the matter being examined by the Panel. In several reports, the Appellate Body has stated that, as a general rule, the measures subject to a panel's review "must be measures that are in existence at the time of the establishment of a panel,"[4] and therefore the task of the panel is to determine whether the measures at issue are consistent with the obligations at issue "*at the time the Panel was established.*"[5] The Appellate Body has also stated that a panel's review of the matter should focus on the measures identified in a panel request "as they existed and were administered at the time of establishment of the Panel."[6] This ensures that a complaining party need not "adjust its pleadings throughout dispute settlement proceedings in order to deal with a disputed measure as a 'moving target'."[7]

13. Here, China's new exhibit alleges the termination of the antidumping and countervailing duties on GOES from the United States as occurring on April 10, 2015, long after the panel was established. Previous panels and the Appellate Body have noted that evidence "that predate[s] or post-date[s] the establishment of a panel may be relevant to determining whether or not a violation of [an obligation] exists at the time of [panel] establishment."[8] However, China's exhibit has no relevancy to the legal situation that existed on the date of the Panel's establishment when the DSB referred the matter to the Panel. Thus, the new evidence, even on the terms China alleges, is not relevant to the Panel's legal assessment and its findings and conclusions in this proceeding.

II. PARAGRAPH 8 OF CHINA'S COMMENTS: THE UNITED STATES AGREES, BUT FOR A DIFFERENT REASON, THAT THE PANEL'S RECOMMENDATION IN PARAGRAPH 8.6 SHOULD BE DELETED

14. The United States and China have both requested the deletion of the recommendation contained in the Panel's interim report. Therefore, as a practical matter, we may have simplified the Panel's task with respect to this recommendation. Nonetheless, the parties have requested deletion for different reasons. As explained above, the basis China puts forward is flawed and must be rejected. Nonetheless, the recommendation may be deleted for the reason explained by the United States.

15. If this were not a compliance proceeding, the Panel would have been required under DSU Article 19.1 to make recommendations on the measure examined. However, because we are in a compliance proceeding, there is no need for the Panel to make an additional recommendation on China's measure taken to comply. As noted previously by the United States, a panel in a compliance proceeding is tasked under DSU Article 21.5 with determining whether a measure taken to comply that is within the panel's terms of reference exists, or is inconsistent with a covered agreement.

16. As noted by the second compliance panel in *US – Foreign Sales Corporations*, "an Article 21.5 compliance procedure occurs *after* the DSB has already made recommendations and rulings based on Article 19.1 of the DSU."[9] The compliance panel is examining whether the Member has brought its measure into full compliance with WTO rules through the specific inquiry

[4] *EC – Chicken Cuts (AB)*, para. 156.

[5] *EC – Selected Customs Matters (AB)*, para. 259. *See also China – Raw Materials (AB)*, para. 264; *EC – Approval and Marketing of Biotech Products (Panel)*, para. 7.456.

[6] *EC – Selected Customs Matters (AB)*, para. 187.

[7] *Chile – Price Band System (AB)*, para. 144.

[8] *EC – Selected Customs Matters (AB)*, para. 186, 188-89 (agreeing with and quoting *EC – Customs (Panel)*, para. 7.37).

[9] *US – FSC (Article 21.5 – EC II) (Panel),* para. 7.43.

set out in Article 21.5.[10] Until a Member has brought its measures found to be inconsistent by the DSB into compliance with its WTO obligations, the DSB's original recommendation will remain operative.[11]

17. The Panel has found that China's measures taken to comply are inconsistent with the covered agreements. The United States has requested that the Panel make clear that China has failed to bring its measures found by the DSB to be inconsistent with the covered agreements into compliance with the recommendations and rulings of the DSB. That is all the Panel needs to do in this proceeding. Therefore, the United States agrees that the Panel may delete the additional recommendation on China's measure taken to comply, for the reasons set out previously.

III. U.S. COMMENTS ON OTHER REQUESTS BY CHINA

18. **China's Comments on Paragraphs 7.21:** China has provided no basis for the Panel to alter its language regarding China's use of the term "unfair imports".

19. **China's Comments on Paragraphs 7.55 to 7.57, and Paragraph 7.66:** China asserts the Panel should delete any discussion of facts that could not be used to justify China's measure under the applicable standard of review. The United States disagrees with China's assertion and recalls that the standard of review stated by the Appellate Body is whether the authority's determinations are "reasoned and adequate" in "light of the evidence." The Appellate Body has explained that in order to make such a finding "a panel's examination of those conclusions must be critical and searching, and be based on the information contained in the record and the explanations given by the authority in its published report." Thus, an authority's determination is to be reviewed on the basis of information and reasoning set out in the determination.

20. The Panel found that MOFCOM's re-determination did not to set out the market share data referenced in Paragraph 7.55. The Panel properly found that MOFCOM's re-determination failed to satisfy the requirements of the covered agreements, in light of the standard of review. At the same time, the facts at issue were evidence that China submitted to the Panel and therefore it was appropriate for the Panel to examine and discuss the evidence, including its role in light of the standard of review and in light of the fact that it provided further support for the Panel's findings. Accordingly, no changes are necessary in response to China's comments.

21. **China's Comments on Paragraphs 7.58, and 7.63 to 7.65:** China offers no basis for the Panel to modify the reasoning or findings in these paragraphs.

22. **China's Comments on Paragraphs 7.72 to 7.81:** China appears to simply present its dissatisfaction with the Panel's findings. The United States has responded thoroughly to China's arguments on this issue, and the Panel has explained its findings and disagreement with China's position. Accordingly, no changes are necessary in response to China's comments.

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[10] *EC – Bananas III (Article 21.5 – US) (AB)*, para. 322.

[11] *See e.g. US – FSC (Article 21.5 – EC II) (Panel),* paras. 7.35-7.36; *US – FSC (Article 21.5 – EC II) (AB),* paras. 85-96; *EC – Bananas III (Article 21.5 – US) (Panel)*, para. 8.13.

ANNEX C

ARGUMENTS OF CHINA

ANNEX C-1

EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION OF CHINA

I. INTRODUCTION

1. When China's Ministry of Commerce ("MOFCOM") issued its redetermination in this dispute, that redetermination addressed and fully complied with all of the concerns raised by the original Panel and the Appellate Body in their reports. MOFCOM's redetermination addressed all of the findings in those reports – those on the antidumping duty margins, those on the countervailing duty margins, the procedural issues, and the injury findings. The United States has not raised any claims concerning the redetermination findings about the antidumping duty or countervailing duty margins. The United States has challenged only the injury findings, and certain disclosure issues relating to those injury findings. Most of these issues were raised in the original proceeding: (1) that the adverse price effects were not the result of subject imports; (2) that the finding of causation was flawed; (3) that certain essential facts were not disclosed; and (4) that certain findings were not sufficiently explained. The United States also raises a completely new claim under Articles 3.1 and 3.4 of the AD Agreement and Articles 15.1 and 15.4 of the SCM Agreement, which is an improper expansion of this dispute to include a wholly new claim.

2. On each of these issues, MOFCOM's redetermination fully addresses the concerns raised about MOFCOM's original determination. With the benefit of the clarification of certain legal standards by the Appellate Body, the MOFCOM redetermination addresses all the issues, provides an expanded and clarified rationale for all of the findings previously questioned, and thus has demonstrated the redetermination fully complies with the relevant WTO obligations. That the United States is not satisfied, and has brought this dispute back to the WTO, reflects two fundamental errors in the U.S. approach.

3. The first error is that the United States appears to believe MOFCOM had to change its mind, and find no material injury in this particular case. But this belief reflects a fundamental misreading of the Panel and Appellate Body decisions in this dispute. The Panel and Appellate Body identified gaps and shortcomings in the analysis and explanation provided in the original determination. MOFCOM was then asked to reconsider in light of these issues, and either to change its analysis on an issue or better explain and justify the conclusion previously reached. That is precisely what MOFCOM did.

4. The second fundamental error in the U.S. approach is that the United States appears to believe that this Panel should substitute its judgment for that of the administering authority. That the United States can think of other possible interpretations does not make the MOFCOM interpretation unreasonable or WTO inconsistent. As long as MOFCOM considered the other possibilities and explained its reasoning, the MOFCOM findings are WTO consistent. MOFCOM did so in its redetermination in this case.

II. MOFCOM'S PRICE EFFECTS FINDINGS WERE CONSISTENT WITH ARTICLES 3.1 AND 3.2 OF THE AD AGREEMENT AND ARTICLES 15.1 AND 15.2 OF THE SCM AGREEMENT

5. The U.S. claims that MOFCOM's findings with respect to the price effects of subject imports were not based on positive evidence and an objective examination of the facts within the meaning of Articles 3.1 of the AD Agreement and 15.1 of the SCM Agreement. According to the Appellate Body, the standard for price effects is whether subject imports have "explanatory force" for price suppression or depression, and this may be achieved by identifying "the relevant aspects of such imports, including the price and/or the volume of such imports." Nowhere does the text of Article 3.2 or Article 15.2, or the Appellate Body's clarification of those provisions, mandate a price comparison. The texts require only an examination of the relationship between subject imports and domestic prices and discussion of why the subject imports have "explanatory force." MOFCOM's redetermination more than meets this standard.

A. MOFCOM's Focus On The Volume And Other Aspects Of Subject Imports Does Not Reflect A "Flawed Analysis" Of Price Suppression

(1) The U.S. insistence on price comparisons reflects a misunderstanding of Articles 3.2 of the AD Agreement and 15.2 of the SCM Agreement

6. MOFCOM properly concluded that the volume of subject imports in the context of this case contributed significantly to the price suppression experienced by the domestic industry in 2008 and early 2009. In response, the United States contends that MOFCOM must perform a price comparison. Contrary to the U.S. argument, there is no requirement to undertake price comparisons. The text of Articles 3.2 and 15.2 imposes no requirement to conduct price comparisons. The Appellate Body has confirmed that such examination of domestic prices in conjunction with any aspect of subject imports may reflect the price *and/or the volume of such imports*, confirming that price comparisons themselves are not required to establish price effects. The U.S. interpretation to the contrary is simply inconsistent with both a plain reading of Articles 3.2 and 15.2, as well as the Appellate Body's further clarification of that legal standard.

(2) MOFCOM reasonably identified subject imports as a source of significant price effects

7. MOFCOM's redetermination correctly reflects that as a matter of law and as a matter of fact, the subject imports in this case had a significant effect on domestic prices. Whether the subject imports are higher priced or lower priced, if they are increasing in the market and particularly if they are increasing so much as to be gaining market share, that expansion in subject imports can affect domestic prices. In such a situation, the domestic firms need to decide whether and how to respond. A logical response is to restrain price increases that might otherwise be needed, or to lower prices. As MOFCOM found in its redetermination, that is precisely what happened in this case.

8. Contrary to the U.S. arguments, MOFCOM did not "simply assume" a linkage between subject import volumes and price effects. Rather, MOFCOM showed not only that the volume and market share of subject imports increased, but that this gain came directly at the expense of the domestic industry. As MOFCOM noted, the subject imports gained 5.56 percentage points of market share and the domestic industry lost 5.65 percentage points of market share. In other words, subject imports explained 98 percent of the loss of domestic market share in 2008. MOFCOM stressed this key point several times in its discussion, noting both that the lost domestic market share was "taken by the subject merchandise," that the amounts of the subject import gain and domestic loss were almost identical, and that the surging subject imports were "overtaking the market share of the domestic industry."

9. MOFCOM also made specific findings that subject imports and domestic products were directly competitive with each other. MOFCOM made this finding in the context of determining the like product, and the context of deciding to cumulatively assess subject imports. The United States challenged neither of these key factual findings. It is the United States that makes the unrealistic and unsupported assumption that a domestic industry can watch increasing volumes of competitive subject imports gain significant market share and do nothing in response.

B. Alternative explanations offered by the United States to suggest a different rationale for the price suppression occurring in 2008 are not persuasive

10. The United States offers a handful of alternative explanations for the price suppression seen in 2008, citing in particular the effects of Baosteel's startup costs and purported self restraint in domestic pricing. Even if there were some other price effects from other factors as the United States speculates, that does not eliminate or in any way disprove the significant contribution of subject imports to the price suppression. MOFCOM had no obligation to disprove any possible role by other factors, as the United States implies with its arguments. To the contrary, MOFCOM only needed to establish the "explanatory force" of the subject imports themselves as a significant contribution to adverse price effects. MOFCOM did so in its redetermination.

C. Attempts by the United States to discredit MOFCOM's examination of volume and market share all fail to confront the core of MOFCOM's analysis of price effects and the relevant standard

11. After its initial argument about MOFCOM's finding of adverse price effects, the United States then presents a series of arguments claiming that MOFCOM's finding that subject imports caused price suppression has no basis. But each of these U.S. arguments fails to address the core of MOFCOM's analysis that increasing subject imports took significant market share, had a restraining effect on domestic prices, and thus suppressed the domestic prices.

12. First, the United States claims a temporal error in MOFCOM's analysis, arguing that the loss of 5.65 percentage points of market share by the domestic industry in 2008 "did not fully occur until the end of 2008." The U.S. logic implies that no company reacts to market changes during the course of the year, only when those changes are quantified and totaled at the end of the year. There is simply no factual foundation for this logic, which defies even common sense. Second, the United States contends that because the domestic industry gained more market share in 2007 than it lost in 2008, this fact establishes that the increase in subject imports in 2008 would not have had the effect on prices claimed by MOFCOM. This claim is also advanced without any evidentiary foundation. Any past gain in market share is logically irrelevant to the effect of the subject imports in 2008 and how the domestic industry would react to those subject import gains in 2008. Third, the United States speculates about the impact of various non-price factors in an attempt to discredit MOFCOM's analysis. This speculation is at odds with MOFCOM's specific factual findings – unchallenged by the United States – that the subject imports and domestic products were "directly competitive" in this case, being sold in the same sales channels to the same customers.

D. Diverging price trends in the first quarter of 2009 do not disprove any connection between subject imports and price suppression in 2008 and the first quarter of 2009

13. The United States also contends that data for the first quarter of 2009 demonstrates an absence of price competition between subject imports and the domestic like product. According to the United States, if price were an important factor, the sharp decline in domestic industry prices witnessed in the first quarter of 2009 should have produced a larger shift in domestic sales and market share. We note that the U.S. argument rests on a single fact disconnected from the overall evidence before MOFCOM in this case and the various findings that MOFCOM made. Before turning to the details of the U.S. arguments about this single fact, we note a few more general points.

14. The United States cites the Appellate Body discussion of this fact, but ignores two key points about that discussion. The Appellate Body comment addressed the reasoning in the original MOFCOM determination about the effects of the "the <u>prices</u> of subject imports," and not about the effects of subject imports more generally. In other words, the criticism reflected an aspect of the original determination that has been significantly changed in the redetermination. The redetermination has substantially clarified the focus on how the subject imports was having adverse price effects, clarifications that were not before the Appellate Body.

15. Moreover, the Appellate Body questioned whether the prices of subject imports "adequately explained" the price suppression and depression. The criticism thus focused on the adequacy of the explanation. The Appellate Body was not agreeing that this single fact meant that there were no price competition. It would not have been the Appellate Body's function to make such a factual finding, which is why the focus was on the adequacy of the specific determination before the Appellate Body and the explanation provided in that determination.

16. That old determination is not the subject of this proceeding. There is a new redetermination that specifically addresses these points. The U.S. criticism that MOFCOM did not provide any explanation or reasoning is largely a repeat of the U.S. arguments from the prior Appellate Body proceedings. But MOFCOM has fully considered the issues raised by the Panel and Appellate Body, and has now fully explained its reasoning with two full pages addressing this specific point. The United States attacks this reasoning, but these attacks also have no merit.

(1) Parallel Pricing

17. The United States contends that MOFCOM's findings on parallel pricing between the domestic like product and subject merchandise from 2006 to 2008 to establish a competitive relationship remain unsupported. But MOFCOM's explanation has been expanded significantly from the more limited findings at issue before the Panel and the Appellate Body previously. MOFCOM has now more fully explained its reasoning, addressing trends both over the 2006 to 2008 period, as well as the divergence in the first quarter of 2009. Consistent trends over the 2006 to 2008 period combined with the growth in market share confirm the competitive overlap.

18. Furthermore, MOFCOM explained in much more detail how the break in parallel pricing in the first quarter of 2009 was in fact very much part of the injurious competitive dynamic: the domestic industry lowered its prices in the first quarter of 2009 precisely in reaction to the adverse effects in 2008, to which the domestic industry was reacting. The United States may have a different interpretation of the evidence, but this is not a reason to second-guess how the authority considered this evidence and explained its reasoning.

(2) Pricing Policy

19. The United States is also dismissive of evidence of pricing competition in the form of pricing policy documents obtained during verification. Yet, the United States ultimately concedes, as it must, that purchasers were using offers for subject merchandise to negotiate for lower domestic prices. Combined with the Russian offer to match whatever price changes the Chinese industry might offer, these pricing policy documents are evidence consistent with price competition. It was reasonable for MOFCOM to find that the reviewed contract meant the trading company would offer a lower price, but this finding is not necessary to show the competitive relationship with respect to price. Furthermore, MOFCOM directly addressed issues of substitutability and quality in its redetermination, finding subject imports and domestic products to be directly competitive.

(3) Overlap of Customers

20. The United States ignores MOFCOM's more comprehensive discussion not the customer overlap and its significance for this case. MOFCOM's findings on the overlap in competition and the inferences drawn from these findings were not made in isolation, but were part of overall findings on the existence of the directly competitive relationship between subject imports and domestic products. Thus, while the United States speculates that customers could have been buying different products from domestic and subject suppliers, MOFCOM in fact discussed at some length its analysis of questionnaire responses, its specific verification of the domestic industry capabilities to produce those products the exporters had alleged could not be produced by the Chinese companies, its review of evaluation reports of downstream users, *and* the overlap of customers. It was the evidence about customer overlap in conjunction with all the other evidence that together led MOFCOM to find competitive overlap.

E. MOFCOM properly concluded that the subject imports contributed significantly to sharp price depression in early 2009

21. Beyond price suppression in 2008 and first quarter of 2009, MOFCOM also found price depression in the first quarter of 2009 as domestic prices fell sharply. To this end, the United States does not dispute the existence of price depression in the first quarter of 2009. It fully acknowledges that domestic prices declined by 30.25 percent. Instead, the United States challenges only that subject imports had anything to do with that price depression.

22. In its redetermination MOFCOM explained in more detail and more completely the dynamics of the domestic industry reacting to the subject import volume and market share gains throughout 2008 by cutting prices in the first quarter of 2009. The U.S. argument largely ignores this expanded discussion, and makes translation mistakes to downplay the extent to which subject imports captured virtually all of the lost domestic market share.

23. The United States argues there is "no evidence" or "substantive analysis" that the price decline was related to the surge in market share in 2008, but then largely ignores the MOFCOM repeated discussion of this very point. MOFCOM noted this domestic industry reaction to the loss of

market share in 2008 by cutting prices in Q1 2009 to fight for the lost market share in its initial discussion of the impact of subject imports on domestic prices. MOFCOM then also explained in direct response to arguments raised by the U.S. Government and AK Steel concerning price trends in the first quarter of 2009 that the evidence reflected that the domestic industry was specifically responding to the surge in subject imports in 2008 through a reduction in prices in Q1 2009.

24. Simply stated, the United States is just wrong to argue that there was no analysis establishing a link between subject imports and price depression. The data on the increasing volume and market share of subject imports are evidence. The MOFCOM discussion of that data is analysis. More importantly, MOFCOM has explained fully its reasoning in this regard. MOFCOM has fully explained a completely reasonable interpretation of the available evidence. MOFCOM did not ignore and in fact fully discussed the issue of expanding domestic capacity and the price trends in Q1 2009, and how those facts would have affected the domestic price effects MOFCOM analyzed. That the MOFCOM interpretation is not the only possible interpretation does not make it any less reasonable.

F. MOFCOM properly concluded that the pricing policy of subject imports further contributed significantly to the sharp price depression in early 2009

25. The United States challenges MOFCOM's reliance on the pricing policy documents, again relying on the Panel and Appellate Body criticism, not the substance of the redetermination. But as the Appellate Body noted, "{e}ven in the absence of price undercutting, however, a policy that aims to undercut a competitor's prices may still be relevant to an examination of its price depressive or suppressive effects." MOFCOM's redetermination explains more fully why these pricing policy documents were relevant. The MOFCOM redetermination explained that the volume and market share of subject imports had the effect of suppressing and depressing domestic prices.

26. The pricing policy documents show the ways in which purchasers were using subject import prices to drive down domestic prices, consistent with the Appellate Body's observation that such a situation could be relevant. MOFCOM properly considered the evidence of the pricing policy in Q1 2009 along with all of the other evidence to draw its conclusion about price depression.

III. MOFCOM PROPERLY ANALYZED THE IMPACT OF SUBJECT IMPORTS CONSISTENTLY WITH CHINA'S OBLIGATIONS UNDER ARTICLES 3.1 AND 3.4 OF THE AD AGREEMENT AND ARTICLES 15.1 AND 15.4 OF THE SCM AGREEMENT

27. For the first time in this dispute, the United States is now raising a claim under Articles 3.4 and 15.4 that MOFCOM improperly found the Chinese industry to be materially injured. This new claim fails for both procedural and substantive reasons. Procedurally, the United States cannot expand the scope of the dispute in an Article 21.5 compliance proceeding to include wholly new claims not previously addressed by the Panel. The Panel made no prior rulings on Articles 3.4 or 15.4 and MOFCOM has had no opportunity to consider any such rulings and bring any problems into compliance. It would be extremely unfair – and contrary to WTO precedents – to allow such a claim.

28. But even if the Panel were to consider this claim, it would fail on the merits. The United States has not raised any points that MOFCOM did not consider in its determination. The basic outline of MOFCOM's finding of material injury is clear. The domestic industry was materially injured in 2008 and early 2009 when the large volume of subject imports captured significant market share for the first time, suppressed and depressed prices for the domestic industry, and thus led to adverse trends in financial performance. MOFCOM considered the full period of investigation, and used the domestic industry's performance early in the period as the basis for evaluating its much weaker and materially injured performance later in the period. The U.S. arguments about specific factors all ignore the downturn – either relative or absolute – at the end of the period that demonstrates material injury.

29. MOFCOM properly focused on key negative trends at the end of the period to find the domestic industry materially injured. That the industry was doing better earlier in the period, and that some trends were less adverse than others, does not mean the domestic industry was not materially injured. The U.S. claim would have this Panel reweigh the evidence and substitute its judgment for that of the administering authority – neither of which falls within the Panel's scope of

review. MOFCOM addressed all of the key factors set forth in Articles 3.4 and 15.4, weighed the conflicting evidence, and made a reasonable judgment that was fully explained. MOFCOM's findings should be affirmed.

IV. MOFCOM PROPERLY ANALYZED CAUSATION CONSISTENTLY WITH CHINA'S OBLIGATIONS UNDER ARTICLES 3.1 AND 3.5 OF THE AD AGREEMENT AND ARTICLES 15.1 AND 15.5 OF THE SCM AGREEMENT

30. MOFCOM's redetermination sets forth a straightforward and reasonable analysis of causation that fully respects its WTO requirements. Early in the period, the overall market was growing and the domestic industry was doing well. But then directly competitive subject imports surged in 2008, increasing significantly both their absolute volume and more importantly their market share, capturing 5.56 percentage points of market share in 2008. As a result of this gain in volume and market share, subject imports suppressed and depressed domestic price levels. The subject imports thus took away market share, prevented price increases needed to cover rising costs, and forced the domestic industry to lower prices to prevent further losses of market share and to win back a portion of the market share already lost.

31. China notes that the United States does not challenge the heart of this analysis - that the increasing volume and market share of the directly competitive subject imports caused material injury. Rather, the United States challenges only the linkage between those adverse volume effects and the collateral adverse price effects found by MOFCOM, price suppression in 2008 and Q1 2009 and price depression in Q1 2009, and the denial of any economies of scale. And the United States makes two non-attribution arguments. None of these U.S. arguments undermine the basic causation – the link between the subject imports and the adverse effects on the domestic industry – that MOFCOM found in this case.

32. MOFCOM properly analyzed the adverse price effects, fully addressing any concerns raised by the Panel and Appellate Body in the earlier proceedings. In particular, MOFCOM specifically linked the increasing volume and market share of subject imports to the price suppression and price depression that affected the domestic industry, relying on both those volume effects as well as the other evidence of the competition between subject imports and the domestic products.

33. MOFCOM also properly relied on the denial of economies of scale as part of its analysis. In a growing market, a domestic industry can reasonably invest in new capacity in anticipation of economies of scale from larger production that necessarily lowers per unit costs, as the preexisting fixed costs are now allocated over larger production volume. When unfairly traded imports capture a significant part of that volume through increased market share, that adverse effect reasonably supports a finding of causation.

34. MOFCOM properly separated and distinguished the effect of increased domestic capacity and production. The United States makes this argument the centerpiece of its attack, but incorrectly assumes that if domestic capacity and production were having some effect then subject imports themselves could not be having any adverse effects. Articles 3.5 and 15.5 do not require disproving any role of any other factor – only that these other facts be taken into account and separated and distinguished from the role of subject imports. In fact, MOFCOM's redetermination shows that even after controlling for the effects of domestic capacity and production, subject imports themselves were still making a significant contribution to the material injury suffered by the domestic industry over the 2008 and early 2009 period. The U.S. arguments are little more than comments about alternative approaches that in no way undermine the reasonableness of the approaches used by MOFCOM.

35. MOFCOM also properly separated and distinguished the effect of non-subject imports. Unlike subject imports, which gained significant market share, non-subject imports did not. Unlike the dumped and subsidizes subject imports, non-subject imports were fairly traded and thus did not impermissibly expand their market share. The U.S. argument that the absolute volume of non-subject imports was higher ignores the more probative evidence about market shares. And the U.S. argument about the prices of non-subject imports relies entirely on average unit value data that the United States itself strenuously argued was not reliable.

36. The Panel should therefore affirm MOFCOM's expanded and more complete redetermination as consistent with the obligations under Articles 3.1 and 3.5 of the AD Agreement and Articles 15.1 and 15.5 of the SCM Agreement.

V. MOFCOM PROPERLY DISCLOSED ALL ESSENTIAL FACTS PRIOR TO THE DETERMINATION CONSISTENTLY WITH CHINA'S OBLIGATIONS UNDER ARTICLES 6.9 OF THE AD AGREEMENT AND 12.8 OF THE SCM AGREEMENT

37. The United States asserts that MOFCOM's injury redetermination was inconsistent with Articles 6.9 of the AD Agreement and 12.8 of SCM Agreement for its failure to disclose all "essential" facts forming the basis of the redetermination before issuance of the final redetermination. The United States identifies seven facts that it claims MOFCOM failed to disclose in such a manner that interested parties would have an opportunity to defend their interests. The U.S. argument is procedurally and substantively defective: procedurally because the United States has not established a *prima facie* case that the listed facts are "essential;" and substantively because MOFCOM's injury redetermination discloses all of the listed facts in accordance with a proper balance of the necessary disclosure while still protecting the confidential information.

A. The United States Has Not Established a *Prima Facie* Case that MOFCOM Failed to Disclose All Essential Facts That Form the Basis of the Redetermination

38. A party claiming that a Member has acted *inconsistently* with WTO rules bears the burden of proving that inconsistency."[1] The United States thus has the burden of establishing a *prima facie* case that MOFCOM failed to disclose all essential facts. The United States has failed to establish a *prima facie* case. Leaving aside the legal definition of what constitutes an "essential" fact, the United States has not satisfied the evidentiary burden of proving that each of the seven facts listed are "essential" to the redetermination. Rather than relating each of the alleged facts to the legal standard, the United States uses general language and broad assertions that the facts are "absolutely indispensable" without any explanation. The United States has "simply allege[d] facts without relating them to its legal arguments,"[2] and has therefore failed to establish a *prima facie* case. As such, the Panel has no basis to rule on these claims.

B. Evaluated on the Merits, the U.S. Claims Must Fail Because MOFCOM's Preliminary Disclosure Document Disclosed the Facts in Dispute

39. Because the United States has not satisfied the evidentiary burden of establishing that the listed facts meet the definition of "essential" under the covered agreements, China does not address that issue in this submission. Rather, China focuses here on the fundamental factual error in the United States' argument: contrary to the U.S. claims, MOFCOM *did* sufficiently disclose each of the listed facts in the preliminary disclosure document. The U.S. argument is premised on an assumption – that MOFCOM did not previously disclose these facts – which is not true. Remarkably, this U.S. error is confirmed in some instances by the fact that the United States actually made arguments based on these facts for purposes of the final redetermination. Such arguments would be impossible to make if MOFCOM had not already disclosed these facts. MOFCOM properly disclosed each of the facts identified by the United States in MOFCOM's preliminary disclosure document. MOFCOM did so in a manner that provided the United States and other interested parties with the ability to defend their interests and make arguments about those facts. That the United States has concerns with the actual conclusions reached, as made clear by the United States' decision to comment on many of these facts following the preliminary disclosure, is irrelevant for these claims.

VI. MOFCOM PROPERLY PROVIDED THE MATTERS OF FACT AND LAW THAT LED TO THE IMPOSITION OF THE ANTIDUMPING AND COUNTERVAILING DUTIES CONSISTENTLY WITH CHINA'S OBLIGATIONS UNDER ARTICLES 12.2 AND 12.2.2 OF THE AD AGREEMENT AND 22.3 AND 22.5 OF THE SCM AGREEMENT

40. The United States claims that MOFCOM's redetermination failed to explain the matters of fact and law that led to the ultimate imposition of the antidumping and countervailing duties. The United States identifies five issues that it claims MOFCOM did not explain in the Redetermination.

[1] *EC – Hormones (Canada) (Article 22.6 – EC)*, para. 9.
[2] Appellate Body Report, *US – Gambling*, para. 140.

As with the U.S. claims concerning "essential facts," the claims under Articles 12.2 and 12.2.2 of the AD Agreement and 22.3 and 22.5 of the SCM Agreement fail for several reasons.

41. Here again, the United States has not established a *prima facie* case for its claim. This failure is determinative, as the Panel cannot rule on a claim for which the *prima facie* case has not been established.

42. Furthermore, as a factual matter, the United States errs in its allegation that MOFCOM did not explain the facts listed in the U.S. first written submission. The United States may disagree with the substance of MOFCOM's findings, but such a disagreement is not relevant to these claims. The United States might have preferred even more discussion or preferred that MOFCOM disclosed business confidential information, but those U.S. preferences are not WTO obligations. The question is whether or not the facts and reasoning that led to a given conclusion are sufficiently clear from the determination. MOFCOM fully complied with this obligation.

VII. CONCLUSION

43. For all of these reasons, China respectfully requests the Panel to find that: (1) the U.S. claims concerning material injury under Articles 3.1 and 3.4 of the AD Agreement and Articles 15.1 and 15.4 of the SCM Agreement should be dismissed as outside the proper scope of this Article 21.5 proceeding, (2) the U.S. claims about disclosure of essential facts under Article 6.9 of the AD Agreement and Article 12.8 of the SCM Agreement should be dismissed for failing to state a *prima facie* case; (3) the U.S. claims about adequacy of explanation under Articles 12.2 and 12.2.2 of the AD Agreement and Article 22.3 and 22.5 of the SCM Agreement should be dismissed for failing to state a *prima facie* case; and (4) regardless of the rulings on the three foregoing arguments, the MOFCOM redetermination is otherwise fully consistent with China's obligations under the AD Agreement and SCM Agreement.

ANNEX C-2

EXECUTIVE SUMMARY OF THE SECOND WRITTEN SUBMISSION OF CHINA

I. MOFCOM PROPERLY ANALYZED PRICE EFFECTS

1. MOFCOM properly analyzed the price effects of subject imports, focusing on volume-related price suppression and depression over the period concerned, but in the context of other key evidence about the competitive relationship between subject imports and domestic shipments. MOFCOM did not merely rely on volume alone to establish price effects. The volume evidence in combination with the established competitive relationship served to demonstrate the "explanatory force" of subject imports and the significant price effects MOFCOM found in the case.

2. Nothing in the WTO texts support the U.S. position that MOFCOM needed to perform a comparison of relative prices as a necessary part of its price effects analysis. First, the U.S. reading is not derived from the plain meaning of the text, but its own "common sense" presumptions. Second, nothing in the text indicates that an authority must *a priori* include such price comparisons. Third, the Appellate Body focused upon this interpretive point in *China – GOES* and has already rejected the U.S. position, finding that: (1) there are two distinct types of inquiries, including price undercutting and price depression/suppression; (2) that they each may depend on different factual elements; and (3) that they are not mutually inclusive exercises. The only U.S. response to this clear Appellate Body finding is a qualification of this language in a footnote found in the Appellate Body's report, but the U.S. selectively quotes from and ultimately misreads that footnote.

3. MOFCOM's redetermination demonstrated that subject imports had "explanatory force" for significant price suppression. In particular, MOFCOM demonstrated a linkage between subject imports and prices of the domestic like product in 2008. MOFCOM's treatment of subject import volume and market share was made in conjunction with numerous other factual findings all supporting a finding of a positive competitive relationship between subject imports and the domestic like product, as discussed below.

4. MOFCOM's like product and cumulation findings show that the subject import and domestic products were competing on price. In particular, the specific findings of substitutability strongly supports the notion of price competition. The United States has not contested these findings, which are more than just "general similarities" between subject imports and the domestic like product. Indeed, the United States now concedes "some degree of competitive overlap." So the U.S. argument is that even through products are "competitive" and "substitutable," they are not highly substitutable enough to be competing on price. Yet the United States has provided absolutely no factual, logical, or legal basis for such an assertion, and this assertion is completely at odds with the ability of subject imports to increase enough in 2008 to gain 5.56 percentage points of market share. It is hard to imagine that products that are competitive, substitutable, and gaining market share are not competing based on price. Moreover, even if the standard were in fact "highly substitutable," the U.S. argument still fails because it ignores the specific facts of this case. As MOFCOM specifically noted in its redetermination, Allegheny Ludlum in its questionnaire response stated "that the subject merchandise it produces or exports are highly substitutable and competitive with the Chinese domestic like product and the like product from other countries." MOFCOM was well within its discretion to accept as credible the Allegheny Ludlum statement that its products were "highly substitutable."

5. MOFCOM's analysis of parallel price trends noted that such trends were "fundamentally consistent" and therefore also indicated a competitive relationship. The limited number of data points does not invalidate the trends, since these data points based on annual AUVs provided a broad assessment that smoothed out potentially anomalous data. These data points over the 2006 to 2008 period constitute more probative evidence than the more limited evidence on which the United States relies. If this data over a three year period has – in the U.S. words -- "no probative value," then what is the Panel to make of the U.S. argument that relies so heavily and so repeatedly on a single data point for a single quarter? Is there something less than "no probative value?" These trends were in the same direction, and within a handful of percentage points of each

other. Given the nature of AUVs, which only broadly reflect the underlying pricing data, such small differences in the percentage point changes are not material. Finally, even assuming the U.S. argument is correct and the AUV data showing broad pricing trends is of "no probative value," there are still numerous other factual bases supporting the MOFCOM finding of adverse price effects. Yet if one subtracts the AUV data for Q1 2009 from the U.S. argument, there really is nothing else left to the U.S. argument. In sum, when looking at the record as a whole, the trends identified by MOFCOM were probative and offered reasonable support for MOFCOM's findings.

6. MOFCOM also analyzed the pricing policy documents found at verification as providing further evidence of price competition between the subject imports and the domestic like product. That these documents relate to Q1 2009 does not mean these documents have no relevance at all for other time periods, regardless of all the other facts on the record. The United States admits that these documents in fact show purchaser behavior, and that is precisely why these documents are probative for understanding how purchasers viewed the relationship between subject imports and domestic products.

7. MOFCOM's discussion of customer overlap further confirms the explanatory force of subject imports with respect to price effects. MOFCOM's notes the simple but important fact that there were common customers specifically for GOES, not just any product, and so the same customers were buying from both import and domestic sources. Allegheny Ludlum reinforced this point, when it explained in its questionnaire response "that the subject merchandise it produces or exports are highly substitutable and competitive with the Chinese domestic like product and the like product from other countries." MOFCOM went on to analyze whether there were any specialty products being supplied by subject producers that could not be supplied by the domestic industry, finding that this was not the case. Thus, MOFCOM reasonably established: (1) common customers; (2) same products sold; and (3) no attenuated competition due to specialty products. These findings are not speculation.

8. The United States attacks each of these multiple MOFCOM factual finding in isolation against its lone argument that the market share response to diverging prices in the first quarter of 2009 does not support a finding that subject imports and the domestic like product had a competitive relationship. This single (but often repeated) U.S. argument ultimately fails on two fundamental grounds.

9. First, the United States misrepresents the market share response by comparing end points – first quarter 2008 to first quarter 2009 – rather than looking, as MOFCOM did, to the full loss in market share over the entirety of 2008. This U.S. argument ignores the decline in domestic industry market share that occurred *over the course of* 2008 – the totality of which is what the industry responded to, not trends in market share between isolated periods, the first quarter of 2008 and the first quarter of 2009. MOFCOM never indicated that this recapture of market share was only 1.04 percentage points, only that the increase in first quarter 2009 was 1.04 percentage points when compared to first quarter 2008. The increase compared to 2008 as a whole was necessarily more substantial. Only a significant decline in domestic pricing could lead to this swing in market share in just one quarter, consistent with MOFCOM's conclusion that the domestic like product and subject imports competed on price. MOFCOM's analysis was "based on a *comprehensive* rather than isolated analysis of the situation in 2008 and the first quarter in 2009." Stripped to its core, the U.S. argument rests entirely on trends in a single quarter at the end of MOFCOM's period of investigation to rebut all of MOFCOM's findings over the entire period of investigation. In contrast MOFCOM considered all the evidence in reaching its determination.

10. Second, the United States fails to acknowledge the reasonable inferences to be drawn from MOFCOM's findings as a whole. The United States continues to isolate MOFCOM's volume and market share findings and never considers MOFCOM's price effects findings as a whole. The Appellate Body has recognized the importance of considering evidence as a whole: "a piece of evidence that may initially appear to be of little or no probative value, when viewed in isolation, could, when placed beside another piece of evidence of the same nature, form part of an overall picture that gives rise to a reasonable inference . . . ." The United ignores this key principle when repeatedly considering each point in isolation. But each MOFCOM finding reinforces the other and contributes to the overall demonstration of the explanatory force of subject imports. The United States cannot rebut the probative value of volume and market share trends by mechanistically considering those trends alone, ignoring the other evidence and findings.

11. The U.S. arguments concerning MOFCOM's treatment of price depression in the first quarter of 2009 mirror its arguments concerning MOFCOM's findings on price effects in general. First, the United States mischaracterizes MOFCOM's analysis as focusing solely on the increasing volume and market share of subject imports. Although those particular facts did constitute probative evidence of price effects, they were part of a broader analysis of subject imports that showed their competitive relationship with the domestic like product.

12. Second, the single piece of evidence about divergent trends in Q1 2009 sheds very little light on the true effect of the domestic industry reducing prices. The end point to end point analysis presented by the United States does not account for the market share lost by the domestic industry over the entirety of the 2008, and consequently the level of market share regained by the domestic industry from its low point to the end of the first quarter of 2009. Far from being "irrational," the price decline did allow the domestic industry to recover a substantial portion of market share loss in very short order – circumstances that might only occur in the presence of a significant drop in price. The price drop in the first quarter of 2009 was thus far from "irrational." Rather, the price drop was a rationale response by the domestic industry and it succeeded in recovering much of the lost market share.

13. Whether or not MOFCOM had written evidence of actual offers for imported merchandise or actual sales transactions does not detract from the probative value of the policies themselves. These documents are further evidence of the competitive relationship between subject imports and the domestic like product on terms directly bearing on price. Again, regardless of whether there was actual underselling or not, the pricing policy documents show the ways in which purchasers were using the growing presence of subject import prices to drive down domestic prices, consistent with the Appellate Body's specific observation that such a situation could be relevant.

II. MOFCOM PROPERLY ANALYZED ADVERSE IMPACT

14. The United States has not successfully rebutted China's argument that this claim is not properly before this Article 21.5 panel. Prior WTO precedent and fundamental fairness prevent a complaining country from not raising a claim initially, luring the defending country into reasonably believing there was nothing that needed to be changed, and only then raising that new claim in an Article 21.5 proceeding when the defending country no longer has any chance to bring that aspect of its measure into compliance. Yet that is precisely what the United States is trying to do in this case.

15. The U.S. efforts to show the MOFCOM finding on adverse impact was somehow new all fail. A comparison of the injury discussion in the original MOFCOM determination and the revised redetermination now before this Article 21.5 panel shows no additional discussion of the market conditions in 2008. Contrary to the U.S. allegation, there is no new focus on 2008 in the MOFCOM discussion of injury; the injury discussion is essentially unchanged, reciting the key facts that highlight the declines at the end of the period.

16. Thus the U.S. argument that the redetermination somehow changed reduces to a single point: that because MOFCOM deleted a few references to "low price," these minor changes somehow created a "new" determination on this issue so different that it is now properly subject to a challenge in this Article 21.5 proceeding. This U.S. argument, however, fails for three key reasons. (1) The references to "low price" in the original determination of injury were simply references to unfairly traded imports. (2) Even if one were to assume that "low price" were not just a reference to unfairly traded imports more generally, the references to "low price" refer to *the price of subject imports,* an issue that has no particular relevance when analyzing the injury suffered by a domestic industry. (3) This different focus of injury determinations under Article 3.4 and 15.4 largely explains why the U.S. argument on injury in fact says nothing at all about "low priced" subject imports.

17. This situation is essentially the same as that before the panel in *US – Countervailing Measures Concerning Certain Products from the EC*, which correctly stressed that "the utility of an Article 21.5 proceeding should not override the basic due process rights of the parties to the dispute." Nor are these conclusions in any way at odds with the Appellate Body jurisprudence. In discussing its prior jurisprudence in *Canada – Aircraft (Article 21.5 – Brazil)* and *US – FSC (Article 21.5 – EC)*, the Appellate Body in the more recent decision in *EC – Bed Linen (Article 21.5*

– *India)* stressed the requirement to raise a new claim challenging a new component of the measure taken to comply which was not part of the original measure. That is why the Appellate Body repeatedly stressed that the scope of Article 21.5 proceedings covered "a new claim challenging a new component of the measure taken to comply which was not part of the original measure," and "a new claim challenging a changed component of the measure taken to comply."

18. The U.S. claim on adverse impact also fails on its merits. MOFCOM reviewed the evidence objectively, and reached reasonable conclusions that the domestic industry that had done well early in the period suffered a number of declining indicators at the end of the period when subject imports surged. The United States now concedes there is nothing inherently unreasonable or distortive in focusing on the end of the period, as MOFCOM did in this case. Moreover, MOFCOM did not ignore the earlier part of the period. MOFCOM properly used the trends over the 2006 to 2007 period as reasonable context for evaluating the trends over the 2007 to 2008 period. There is nothing WTO inconsistent about finding injury at the end of the period, and positive trends earlier in the period do not somehow immunize the domestic industry from suffering material injury later in the period. MOFCOM reasonably considered all of the evidence, put the end of the period in proper context, and made a reasoned and objective judgment based on all the evidence.

19. The United States alleges without any support that the earlier trend may have been unsustainable, but this possibility was (1) inconsistent with the evidence of strong rates of growth in total consumption in China, increasing 22.8 percent in 2007 and another 18.1 percent in 2008, and (2) no party during the original proceedings before MOFCOM submitted any evidence contradicting this basic point. Based on the evidence before MOFCOM, the growth rates over the 2006 to 2007 were consistent with the rapidly growing Chinese market and thus provided a reasonable benchmark. The United States attempts to downplay this relatively high growth rate in overall consumption, but in doing so makes illogical comparisons of percentage changes, and does not demonstrate that MOFCOM's approach was in any way not reasonable or objective.

20. The United States also points to large increases in 2007, but in doing ignores the basic context of a growing market. Given the generally comparable rates of growth in the overall market over the 2006 to 2007 period and 2007 to 2008 period, it was reasonable for MOFCOM to compare the trends over these two periods and find that the negative trends over the 2007 to 2008 period were indicative of injury. Rather than cancelling out the injury in 2008, the more positive trends in 2007 just underscore and provide reasonable context for finding the negative trends in 2008 to be injurious. Thus, although the United States accuses MOFCOM of not putting trends into context, in fact it is the U.S. argument that seeks repeatedly to misunderstand or ignore the context.

21. Beyond this context of evaluating trends in light of the growing market, MOFCOM also properly evaluated the trends for the injury as a whole. This focus on the industry as a whole does not represent side stepping the issue. MOFCOM fully considered the relevance of Baosteel's entry into the domestic industry in its redetermination when appropriate. But for purposes of Articles 3.4 and 15.4, the focus must be on the industry as a whole. Subject imports can be injurious in all markets, whether there is a new entrant or not.

22. The United States continues to say nothing about Q1 2009 in its argument about adverse impact. Even after China pointed out this serious failing in the U.S. FWS, noting the MOFCOM focus on "trends that turned adverse in 2008 and then became worse in Q1 2009," the U.S. SWS says not one word about the negative trends in Q1 2009. The U.S. failure to say anything about Q1 2009 is far more "selective" than anything in MOFCOM's analysis.

23. Moreover, any positive trends did not "outweigh" the negative trends. MOFCOM reasonably and persuasively explained why, after considering all the factors as a whole, it found the domestic industry to be injured. That is why MOFCOM repeatedly stressed what would be reasonably expected in a growing market, and then noted the injurious trend. Thus, MOFCOM acknowledged that capacity and production were up, but then noted that these increases "did not produce the corresponding economies of scale and profits" the domestic industry expected from its investments. MOFCOM noted that "the increase in sales did not bring about the corresponding increase in profit." MOFCOM also noted for several factors the increase early in the period followed by the decrease later in the period – a decrease in the growth in 2008 and often a decrease in the actual amount in Q1 2009.

III. MOFCOM PROPERLY ANALYZED CAUSATION

24. The United States makes only two arguments about the basic causal link and they both fail. The U.S. argument about defective price effects addresses individual pieces of evidence in isolation rather than look at the totality of the record and all of MOFCOM's findings as they relate to price effects. MOFCOM did not make conclusory statements about the effects of rising subject import volumes and market share in isolation. Rather, MOFCOM made a series of well reasoned findings establishing the general competitive relationship of subject imports and the domestic like product in conjunction with rising imports volumes and market share. These findings as a whole demonstrated the "explanatory force" of subject imports and their significant effect on price. The U.S. position really reduces to making a single argument across all MOFCOM's findings, contending that the price divergence between subject imports and the domestic like product in the first quarter of 2009, relative to shifts in market share, somehow trumps all other evidence and repudiates any finding of adverse price effects. But as discussed in detail in Section II, this U.S. analysis is flawed.

25. The U.S. argument about MOFCOM's analysis of economies of scale also fails to address what MOFCOM actually found – how subject imports affected the domestic industry as a whole, and deprived the domestic industry of its ability to fully realize the potential on its investments in new capacity. The United States now acknowledges that MOFCOM's basic point is true, but dismissed the more basic point MOFCOM was making in its redetermination. China finds the U.S. criticism of an "abstract truism" rather strange, given that the U.S. initial argument on this point was itself just a list of abstract questions. Nor does this basic point change by considering each firm individually, rather than considering the industry as a whole as required by Articles 3 and 15. It was in no way a "failure" for MOFCOM not to quantify these effects, and the United States has not cited to any WTO obligation to quantify such effects. MOFCOM thus reasonably and objectively noted this qualitative connection between the growing volume of subject imports, the lack of economies of scale from new investments, and the adverse effects suffered by the domestic industry.

26. On both of these issues, the United States essentially argues that simply by articulating another way to view the evidence, it has somehow shown that MOFCOM's analysis is necessarily and unavoidably flawed. But this approach is just wrong. MOFCOM reasonably addressed all the evidence, considered these other perspectives, and reasonably concluded that subject imports were contributing to adverse effects being suffered by the domestic industry.

27. Similarly, the United States makes only two arguments about non-attribution, but these two arguments also both fail. MOFCOM properly considered and distinguished the effects of subject imports from the effect of domestic industry expansion of capacity. The entire U.S. argument on this point is really little more than a dispute over the MOFCOM methodology for showing that subject imports contributed significantly to the inventory overhang, even after taking into account the expansion of domestic capacity.

28. China had made the point in its FWS that its discussion of non-attribution regarding the expansion in the domestic industry had considered inventory expansion as only one of many factors. The United States never responds at all to any of the other points that MOFCOM had noted about this issue. In particular, the United States never responds to MOFCOM's discussion that: (1) one cannot reasonably compare percentages that are calculated by base amount of very different magnitudes, as does the U.S. argument on this point; (2) the clear link between subject import market share gains in 2008 and lost market share by the domestic industry; and (3) the fact that the domestic firms had to cut their prices in early 2009 specifically in an attempt to regain the market share that had been lost in 2008. China is not attempting to "draw attention away" from MOFCOM's analysis of inventory. China is putting the inventory discussion into context, *as part of* the overall analysis.

29. The U.S. argument thus reduces to disagreements with MOFCOM's methodology – the use of the 2007 as the base year; and the combined consideration of 2008 and Q1 2009. Since the United States did not even attempt to address China's other arguments, the U.S. claim comes down to these technical disputes about a particular methodology.

30. MOFCOM's choice of 2007 as the baseline rests on positive evidence and reflects objective examination of that evidence. MOFCOM fully explained its choice. First, MOFCOM noted that in a normal growing market "a reasonable basis for the market competitor's forecast" for its market share in the next year would be to start with its market share in the current year, absent some other factors. Second, when seeking to analyze the situation in 2008, the year 2007 would be "the most comparable and representative." Third, and more specific to this particular case, the year 2007 was a year in which subject imports had been stable (not surging like 2008), and the domestic industry "did not show any signs of an adverse situation yet" (not weakening indicators like 2008).

31. Although using 2006 would also have been reasonable, that base-line would have had the following problems. First, any market competitor at the end of 2007, trying to forecast its 2008 market share, would not normally go back to 2006. Doing so would have ignored the more recent changes in the business during 2007. Second, 2006 would also have been before the subject import surge, but it would have been more remote in time and thus more subject to other intervening factors. MOFCOM sought to understand what changed in 2008 – why the positive trends in 2007 reversed in 2008. Thus, MOFCOM chose 2007 because going back to 2006 would have introduced more uncertainty in this analysis, since the further back in time the authority goes, the greater the risk of "some other factors" playing a role.

32. The United States also makes much of MOFCOM's choice to consider 2008 and Q1 2009 as a whole, arguing that the contribution of subject imports to the inventory overhang in Q1 2009 alone would have been smaller. As with the choice of 2007 as a base year, MOFCOM fully explained its choice to consider inventory build-up over a 15 month period, and that explanation is reasonable and objective. In particular, MOFCOM address this choice of methodology at some length in its redetermination.

33. Thus, MOFCOM's choices rested on completely reasonable principles: (1) that different economic factors have different characteristics and thus may need to be treated differently in trying to understand the causal relationships; and (2) that inventory in particular has a distinctive feature in that it accumulates over time, and thus requires a different approach to understating the relative contribution of different factors to inventory build-up.

34. Instead of addressing these arguments, the United States points to a isolated comment by MOFCOM, and then twists that comment out of context. Even if the contribution of subject imports may have been less in Q1 2009, the focus on that narrow period was not the most appropriate way to consider inventory with its unique characteristic of being accumulated over time, not sold over a discrete period. Given that 2008 accounted for the vast majority of the overall 2008 and early 2009 period being considered, MOFCOM reasonably explained why it put particular weight on the contribution of subject imports to the inventory build up in 2008.

35. MOFCOM thus met its obligations under Articles 3.5 and 15.5. As China has noted, MOFCOM had no obligation to show that subject imports were the only factor. The United States does not dispute this point. MOFCOM showed – using a reasonable methodology – that subject imports accounted for about half of the inventory build up, and thus were making a significant contribution to the adverse effects being experienced by the domestic industry, even when distinguished from the effects attributable to the expansion in domestic capacity.

36. MOFCOM also properly considered and distinguished the effects of subject imports from the effects of non-subject imports. MOFCOM reasonably found that if large volumes of non-subject imports were having no effects in 2006 and 2007, and did not gain any market share in 2008, then non-subject imports were not the problem. The United States relies entirely on the argument that since non-subject imports had large volume, and allegedly had lower prices, then non-subject imports must have mattered more. This argument fails for many reasons. First, the U.S. argument still does not address and cannot explain how the larger volume and allegedly lower priced non-subject imports did not have any adverse effect in 2006 and 2007. Second, the United States incorrectly asserts that "MOFCOM did not examine market share data." MOFCOM could not have noted the shifts in the market share without examining the market share data. Third, MOFCOM focused its analysis on shifts in market share because those changes over time were more probative on understanding why the performance of the Chinese industry changed over time. The shifts in market share both took into account the growing market and allowed MOFCOM to see what supply sources were gaining and losing market share over time. Fourth, MOFCOM correctly

noted that the shift in market shares in 2008 was the key fact to consider. The year 2008 was when the domestic industry lost 5.65 percentage point of market share – this is the adverse effect to be explained. And in 2008, subject imports gained 5.56 percentage points of market share, while non-subject imports gained only 0.09 percentage point of market share.

IV. MOFCOM PROPERLY DISCLOSED ALL ESSENTAL FACTS

37. In its SWS the United States still has not set forth a *prima facie* claim. Even this expanded discussion continues to make an overarching fundamental error -- there is not a single sentence in the U.S. SWS explaining why each of the seven facts at issue should be considered "essential." Many of the U.S. arguments are basically that public summaries of facts are somehow not sufficient, and that the underlying data needed to be disclosed. When arguing for disclosure of facts that the authority has deemed (without any challenge) to be confidential, the complaining party has a particular burden to articulate clearly and explicitly why that particular fact – as opposed to its public summary – is in fact essential. Yet the United States has made no effort to do so. For these reasons, China continues to believe the Panel should reject the U.S. claim as failing to state a *prima facie* case.

38. Even if the United States has finally established a *prima facie* case, the United States still has not sufficiently demonstrated that the facts at issue were "essential" or that the facts were not sufficiently disclosed. The consistent theme in the U.S. argument is to dismiss without serious discussion what MOFCOM actually disclosed and just insist that the undisclosed confidential underlying data was somehow "essential."

39. Trends in Import Prices. The disclosure clearly describes the different sources of data for the price trends. The U.S. argument ignores the clear use of percentage changes to provide a sufficient public summary of the underlying confidential data. Nor does the United States anywhere demonstrate how the "data underlying" these percentage changes were somehow "essential," or why the percentage changes themselves were not sufficient disclosure of these facts.

40. Economies of Scale. The disclosure found that the "rise of demand gives an impetus" to capacity in China, a statement fully supported by the facts disclosed showing the percentage changes in demand and domestic industry capacity. The United States has not presented any argument why the confidential underlying data are "essential facts."

41. Sales Obstacles. The disclosure makes this reference to "sales obstacles" clear in context, and that is why this particular paragraph ends with the concluding statement that "[h]ence, the domestic industry has been seriously impacted in both production and sales due to a great deal of imports." Nowhere does the United States explain what additional facts about subject imports in this context were undisclosed "essential facts."

42. Price Reduction in Q1 2009. MOFCOM's disclosure cited to the loss of domestic industry market share in 2008 and the regaining of that share in Q1 2009, essential facts that were fully disclosed, and then drew the reasonable conclusion about the business motivation for the Chinese industry to lower its prices.

43. Price-cost differential for Wuhan. The disclosure clearly documents the decline in gross profit rate, which is the difference between average prices earned and average costs incurred -- the "price-cost differential." The U.S. argument ignores the clear use of percentage changes to provide a sufficient public summary of the underlying confidential data. The underlying data are not "essential facts," and were confidential data that did not need to be disclosed beyond these percentage changes.

44. Capacity Did Not Exceed Market Demand. The disclosure describes the trends in both capacity and consumption, using percentage changes to protect the confidentiality of the underlying data. MOFCOM disclosed sufficient facts to show that even after its growth over the 2006 to 2008 period, domestic capacity was still below the total market in China.

45. Allocation of Inventory Overhang. The disclosure clearly explains the data sources and methodology used to confirm that subject imports made a significant contribution. The U.S.

argument ignores the use of percentage changes to provide a sufficient public summary of the underlying confidential data used in the calculations.

V. MOFCOM PROPERLY DISCLOSED THE FACTUAL AND LEGAL BASIS OF ITS DETERMINATION

46. The U.S. FWS made no effort to state a *prima facie* case for this claim, offering only brief and insufficient one sentence statements that certain points were important to the final decision by MOFCOM, without any discussion of why. The United States has not responded to this argument, and instead uses its SWS in an unsuccessful attempt to state its claim for the first time. But the U.S. SWS only attempts to rehabilitate three of the five claims made initially, indicating that it has abandoned the two other sub-claims.

47. The U.S. efforts to rehabilitate the first three of these sub-claims still fail to state a *prima facie* case. The U.S. SWS does not cure this fundamental defect, and instead repeats the defect of assertion without explanation or argument. Even if the Panel itself believes these points are material, it is not the job of this Panel to make the U.S. arguments for the United States, and certainly not at this late stage of the proceeding. If the Panel cannot find any explanation of why the United States believes certain points to be material in the FWS or SWS, it is not too late for the United States to attempt to make such a showing now. But if the Panel decides to consider the merits, these claims still fail.

48. Trends in Import Prices. The entire U.S. argument is to disagree with the MOFCOM characterization of the trend in overall prices as measured by average unit values. But this U.S. argument makes too much out of too little. The U.S. argument ignores the paragraph-long explanation of why the domestic average prices fell by a larger amount in early 2009. Thus, MOFCOM disclosed and discussed the key facts. The United States might disagree with MOFCOM's assessment, but there is no basis to say this point was not discussed.

49. Economies of Scale. The entire U.S. argument is that China made a statement without citation of the redetermination, but takes this statement out of context. This statement from China's FWS was made after three preceding sentences that did cite the redetermination. The fourth sentence was simply expanding on the implications of the prior three sentences.

50. Sales Obstacles. The entire U.S. argument on this point is a one sentence disagreement with China's argument, but this one sentence largely ignores the redetermination itself. MOFCOM's redetermination drew permissible inferences based on the loss and then partial regaining of market share, MOFCOM was also aware of the explicit statement by the Chinese producers in their petition that during Q1 2009, "the petitioners had to reduce product price to maintain their market share under the impact of the unfair trade practice of the two subject countries." The United States never discusses any of these facts, and only asserts that there must have been something else that was not disclosed and something else that needed to be discussed. But an assertion is not an argument, and so this U.S. claim must fail.

ANNEX C-3

EXECUTIVE SUMMARY OF THE ORAL STATEMENTS OF CHINA AT THE SUBSTANTIVE MEETING

I. MOFCOM PROPERLY ANALYZED PRICE EFFECTS

1. Nothing in the relevant WTO texts supports the U.S. position that MOFCOM must compare relative prices as a necessary part of price effects analysis. The U.S. reading has no basis in the plain meaning of the text, which gives administering authorities discretion to choose the analytic approach. Moreover, the Appellate Body addressed precisely this interpretive point in *China – GOES*, and has already rejected the U.S. position. The United States also complains about what the absence of findings about price undercutting implies for MOFCOM's conclusions. But this argument fails. First, it incorrectly assumes there was some detailed pricing information that MOFCOM ignored. Second, this argument also incorrectly assumes more detailed information would have somehow been adverse. The U.S. argument is thus really about requiring authorities to engage in a certain type of analysis and requiring authorities to gather data to conduct that analysis. Particularly in the context of a redetermination looking back at a period of time several years old, it is completely reasonable for an authority to make a new determination based on information already on the record before the authority.

2. Turning to the factual issues, MOFCOM's redetermination properly demonstrated that subject imports had "explanatory force" for the adverse price effects found, including the findings of price suppression. Contrary to the repeated U.S. arguments, MOFCOM did not rely on volume alone to establish price effects. The volume evidence in combination with the established competitive relationship explained the nearly one-to-one relationship between subject import gains and domestic industry losses. The United States tries to dismiss the evidence of the strongly competitive relationship, but these arguments cannot be reconciled with the undisputed findings by MOFCOM.

3. Collectively, the evidence of (1) a single like product that rested on the factual finding of substitutability among different supply sources; (2) cumulation that rested on the factual findings of substitutability and a competitive relationship among subject imports sources and with the domestic products; (3) U.S. producer testimony of a "highly competitive" relationship among supply sources; (4) parallel pricing trends over the 2006 to 2008 period; (5) documents revealing how purchasers leveraged subject import prices to affect domestic prices; (6) overlapping customers that bought from both domestic and subject imports, highly their substitutability; and (7) nearly one-to-one market replacement, supports the explanatory force of subject imports. MOFCOM's demonstration of "explanatory force" thus rested on multiple, consistent, and mutually reinforcing factual findings. The U.S. argues unsuccessfully that the difference between percentage changes in AUVs over one comparison period in Q1 2009 somehow trumps the seven other factual findings made by MOFCOM. But this one fact in isolation does not undermine the collective weight of the other evidence that strongly support the existence of the competitive relationship.

4. The United States attacks each of these multiple MOFCOM factual findings in isolation with its argument that the market share responses to diverging prices in the first quarter of 2009 does not support a finding that subject imports and the domestic like product had a competitive relationship. But this repeated U.S. argument ultimately fails for several reasons. First, the United States misapplies certain comments by the Appellate Body that addressed the reasoning in the original MOFCOM determination about the effects of "the <u>prices</u> of subject imports," and not about the effects of subject imports more generally. The redetermination has substantially changed and clarified the focus on how the subject imports were having adverse price effects -- clarifications that were not before the Appellate Body. In particular, the redetermination both explained in more detail the evidence supporting the finding of competitive relationship, and addressed specifically and at some length the reasons for giving less weight to the divergent AUV trends in the first quarter of 2009. Moreover, the Appellate Body questioned whether the <u>prices</u> of subject imports "adequately explained" the price suppression and depression, and thus focused on the adequacy of the available data and explanation. The Appellate Body could not have evaluated a different set of findings from a different determination, which is why the focus was on the adequacy of the specific determination before the Appellate Body.

5. Second, the U.S. argument misrepresents the domestic industry market share response by comparing end points – first quarter 2008 to first quarter 2009 – rather than looking, as MOFCOM did, to the full loss in market share over the entirety of 2008. Third, MOFCOM never indicated that this recapture of market share was only 1.04 percentage points; the increase compared to 2008 as a whole was necessarily a more substantial 5.15 out 5.65 percentage points regained from subject imports.

6. The United States simply fails to acknowledge the reasonable inferences to be drawn from MOFCOM's findings as a whole. The Appellate Body has recognized the importance of considering the evidence as a whole, explaining that "a piece of evidence that may initially appear to be of little or no probative value, when viewed in isolation, could, when placed beside another piece of evidence of the same nature, form part of an overall picture that gives rise to a reasonable inference . . . ." The United States ignores this key principle when repeatedly considering each point in isolation, but never stepping back to consider them as a whole. But each MOFCOM finding reinforces the other and contributes to the overall demonstration of the "explanatory force" of subject imports. The United States cannot rebut the probative value of volume and market share trends by mechanically considering those trends alone, ignoring the extensive other evidence and findings that supported MOFCOM's overall determination about adverse price effects.

7. Thus, the MOFCOM findings of price suppression in 2008 and early 2009 and price depression in early 2009 both rest on a proper foundation of evidence that establishes the "explanatory force" of the subject imports. MOFCOM discussed the evidence supporting its findings and reasonably addressed the potentially contrary evidence, in the end making a reasonable and balanced judgment about all of the evidence.

II. MOFCOM PROPERLY ANALYZED ADVERSE IMPACT

8. The United States has not successfully rebutted China's argument that this new claim is not properly before this Article 21.5 panel. Prior WTO precedent and fundamental fairness do not allow a complaining country to avoid a claim initially, luring the defending country into reasonably believing there was nothing that needed to be changed regarding that aspect of a measure, and only then raising that new claim in an Article 21.5 proceeding when the defending country no longer has any chance to bring that aspect of its measure into compliance. Yet that is precisely what the United States is trying to do in this dispute with its new claim on adverse impact.

9. The U.S. efforts to show the MOFCOM finding on adverse impact was somehow "new" and thus permissible all fail. Contrary to the U.S. allegation, there is no new focus on 2008 in the MOFCOM discussion of injury; the injury discussion is essentially unchanged, reciting the same key facts that highlight the declines at the end of the period. Thus the U.S. argument that the redetermination somehow changed reduces to a single point: that because MOFCOM deleted a few references to "low priced imports," these minor changes somehow created a "new" determination on this issue. This U.S. argument, however, is wrong. First, the MOFCOM discussion of material injury was always focused on the subject imports, not on the prices of the subject imports. Second, even if one were to assume that "low priced imports" were not just a reference to unfairly traded imports more generally, which it was, the references to "low price" refer to *the price of subject imports,* an issue that has no particular relevance when analyzing the injury suffered by a domestic industry under Article 3.4 and 15.4.

10. But regardless of the Panel ruling on this important procedural issue, the U.S. claim on adverse impact also fails on its merits. First, the United States alleges without any support that the earlier trend may have been unsustainable, but this theory several problems. First, this theory is inconsistent with the evidence of strong rates of growth in total consumption in China, increasing 22.8 percent in 2007 and another 18.1 percent in 2008. Moreover, no party during the original proceedings before MOFCOM submitted any evidence contradicting this basic point about the growing market or in anyway suggesting the growth would not continue. Second, the United States also points to large increases in 2007, but in doing ignores the basic context of a growing market. Third, beyond this context of evaluating trends in light of the growing market, MOFCOM also properly evaluated the trends for the injury as a whole. Contrary to the U.S. argument, this focus on the industry as a whole does not represent side stepping the issue. Finally, any positive trends did not "outweigh" the negative trends. MOFCOM reasonably and persuasively explained why, after considering all the factors as a whole, it found the domestic industry to be injured.

III. MOFCOM PROPERLY ANALYZED CAUSATION

11. The United States makes only two arguments about the basic causal link and they both fail. As we have just discussed in some detail, the flawed U.S. argument about MOFCOM's price effects findings addresses individual pieces of evidence in isolation rather than look at the totality of the record and all of MOFCOM's findings as they relate to price effects.

12. So in fact, other than repeating its price effects arguments, the U.S. argument about causal link actually reduces to a single argument. The United States challenges MOFCOM's analysis of economies of scale, but this argument also fails to address what MOFCOM actually found. In particular, this U.S. argument does not address MOFCOM's finding that subject imports captured tonnage and market share that affected the domestic industry as a whole, and deprived the domestic industry of its ability to fully realize the potential on its investments in new capacity. MOFCOM reasonably and objectively noted this qualitative connection between the growing volume and market share of subject imports, the corresponding lack of economies of scale from new investments, and the adverse effects suffered by the domestic industry. On both of these issues, the United States essentially argues that simply by articulating another way to view the evidence, it has somehow shown that MOFCOM's analysis is necessarily and unavoidably flawed. But this approach is wrong. MOFCOM reasonably addressed all the evidence, considered these other perspectives, and reasonably concluded that subject imports were significantly contributing to adverse effects being suffered by the domestic industry.

13. MOFCOM properly considered and distinguished the effects of subject imports from the effect of domestic industry expansion of capacity. The entire U.S. argument on this point is really little more than a technical dispute over the MOFCOM methodology for showing that subject imports contributed significantly to the inventory overhang, even after taking into account the expansion of domestic capacity.

14. Before moving to the specifics of the U.S. arguments about MOFCOM's methodology and why these arguments are wrong, it is helpful to step back and put this argument into an overall context. The dispute is not about whether MOFCOM "separated and distinguished;" the United States admits as much, acknowledging that MOFCOM addressed this issue with its "non-attribution analysis" about alleged overexpansion and overproduction. Rather the dispute is entirely over <u>how</u> MOFCOM did so. But in doing so, the United States has made this issue entirely about the methodology chosen, and ignores the repeated guidance from the Appellate Body that the AD Agreement does not specify the methodology, and will not second guess any reasonable and objective method. Thus, China need not show that its method was the only way, or even the best way. China need only show that MOFCOM properly established the facts in question, and then evaluated them in an unbiased and objective manner. As we will now demonstrate, MOFCOM more than met this standard.

15. This U.S. non-attribution argument reduces to disagreements about two specific aspects of the MOFCOM methodology: first, the use of 2007 as the base year; and second, the combined consideration of 2008 and Q1 2009. Since the United States did not even attempt to address China's other arguments, the U.S. claim comes down to these technical disputes about a particular methodology. But MOFCOM's choice of 2007 as the baseline rests on positive evidence and reflects objective examination of that evidence. MOFCOM fully explained its choice. Although using 2006 would also have been reasonable, that base-line would have had several serious problems. Thus, MOFCOM chose 2007 because going back to 2006 would have introduced more uncertainty in this analysis, since the further back in time the authority goes, the greater the risk of "some other factors" playing a role. The United States also makes much of MOFCOM's choice to consider 2008 and Q1 2009 as a whole, arguing that the contribution of subject imports to the inventory overhang in Q1 2009 alone would have been smaller. As with the choice of 2007 as a base year, MOFCOM fully explained its choice to consider inventory build-up over a 15-month period, and that explanation is reasonable and objective.

16. MOFCOM also properly considered and distinguished the effects of subject imports from the effects of non-subject imports. MOFCOM reasonably found that if large volumes of non-subject imports were having no effects in 2006 and 2007, and did not gain any market share in 2008, then non-subject imports were not the problem. The United States relies entirely on the argument that since non-subject imports had large volume, and allegedly had lower prices, then non-subject imports must have mattered more. This argument fails for many reasons. First, the U.S. argument

still does not address and cannot explain how the larger volume and allegedly lower priced non-subject imports did not have any adverse effect in 2006 and 2007. Second, the United States incorrectly asserts that "MOFCOM did not examine market share data." MOFCOM could not have noted the shifts in the market share without examining the market share data. Third, MOFCOM focused its analysis on shifts in market share because those changes over time were more probative on understanding why the performance of the Chinese industry changed over time. The shifts in market share both took into account the growing market and allowed MOFCOM to see what supply sources were gaining and losing market share over time. Fourth, MOFCOM correctly noted that the shift in market shares in 2008 was the key fact to consider. The year 2008 was when the domestic industry lost 5.65 percentage point of market share – this is the adverse effect to be explained. And in 2008, subject imports gained 5.56 percentage points of market share, while non-subject imports gained only 0.09 percentage point of market share.

IV. MOFCOM PROPERLY DISCLOSED ALL ESSENTAL FACTS

17. Even after two submissions, the United States still has not set forth a *prima facie* claim about the failure to disclose "essential facts." Even the expanded discussion in the U.S. Second Written Submission continues to make an overarching fundamental error -- there is not a single sentence explaining why each of the seven facts at issue should be considered "essential." Many of the U.S. arguments are basically that public summaries of facts are somehow not sufficient, and that the underlying data needed to be disclosed. When arguing for disclosure of facts that the authority has deemed -- without any challenge -- to be confidential, the complaining party has a particular burden to articulate clearly and explicitly why that particular fact – as opposed to its public summary – is in fact essential. Yet the United States has made no effort to do so. For these reasons, China continues to believe the Panel should reject the U.S. claim as failing to state a *prima facie* case. But even if the Panel believes the United States has finally established a *prima facie* case, the United States still has not sufficiently demonstrated that the facts at issue were actually "essential" or that the facts were not sufficiently disclosed. We discussed each of the seven specific facts at issue in our written submissions. We will not repeat that level of detail now. The consistent theme in the U.S. argument is to dismiss without serious discussion what MOFCOM actually disclosed and just insist that the undisclosed confidential underlying data was somehow "essential." Our written submission documents fact by fact what MOFCOM said and why it was sufficient.

V. MOFCOM PROPERLY DISCLOSED THE FACTUAL AND LEGAL BASIS OF ITS DETERMINATION

18. The United States has also still not stated a *prima facie* case for its claim about the disclosure of the basis for the determination, offering only brief and insufficient one sentence statements that certain points were important to the final decision by MOFCOM, without any discussion of why. The United States has not actually responded to this argument, and instead uses its Second Written Submission in a still unsuccessful attempt to state its claim for the first time. But the U.S. effort fails. At the outset, we note that the United States only attempts to rehabilitate three of the five specific claims made initially, indicating that it has now abandoned the two other specific claims. The U.S. efforts to rehabilitate the first three of these specific claims still fail to state a *prima facie* case. The U.S. Second Written Submission does not cure this fundamental defect of not explaining why certain points were material, and instead repeats the defect of assertion without explanation or argument. Even if the Panel itself believes these points are material, it is not this Panel's job to make the U.S. arguments for the United States, and certainly not at this late stage of the proceeding. If the Panel cannot find any explanation of why the United States believes certain points to be material in the written submissions already made, it is now too late for the United States to attempt to make such a showing now. But if the Panel decides to consider the merits, these claims still fail. We discussed each of the three remaining claims at issue in some detail in our written submissions. We will not repeat that discussion here. We urge the Panel to consider that explanation of why MOFCOM's discussion was sufficient.

ANNEX C-4

EXECUTIVE SUMMARY OF THE ORAL STATEMENT OF CHINA AT THE INTERIM REVIEW MEETING

1. China would like to thank the Panel for arranging this meeting on the interim report. We realize such meetings are not common. But given the circumstances of this dispute, with the termination of the challenged measures occurring during the pendency of this Article 21.5 proceeding, China believes it is useful and appropriate for the parties and the Panel to meet one more time to discuss how most appropriately to take into account this important recent development.

2. As we all know, the interim report was released on 17 March 2015. It concerns measures first taken by China on 10 April 2010, specifically anti-dumping measures on imports of grain oriented flat-rolled electrical steel originating in both Russia and the United States, as well as an anti-subsidy measure on the same product originating in the United States. This Article 21.5 proceeding has concerned China's actions in seeking to bring those measures into conformity as first recommended by the Panel and Appellate Body back in 2012.

3. We now have the interim report concerning China's implementation efforts. Although China is disappointed in the Panel's findings, China nevertheless appreciates the role of WTO dispute settlement – and the efforts by Panels – in providing an orderly way to address and resolve disputes between Members. We have made some specific comments on precise aspects of the interim report that we hope the Panel will consider.

4. Beyond these specific comments, however, there is a separate issue concerning the Panel's recommendation in its interim report. We believe important events have occurred and require the Panel to reconsider of this issue. In the last paragraph of the interim report, paragraph 8.6, the Panel recommends that China "bring its measures into conformity with its obligations under the Anti-Dumping and SCM Agreements." China suggests that this paragraph be struck from the report, a change that is necessary in light of recent events and consistent with past practice.

5. As noted, the anti-dumping and anti-subsidy measures at issue are now more than five-years old. Consistent with the obligations under Article 11.3 of the Anti-Dumping Agreement and Article 21.3 of the SCM Agreement, China terminates anti-dumping and anti-subsidy measures after five years unless it is demonstrated that they remain necessary to address dumping, subsidization, and injury. China takes these obligations seriously and has implemented them into its national law as Article 48 of its AD Regulation and Article 47 of its CVD Regulation.

6. The process for determining whether an expiry review was necessary to consider the matter was initiated on 10 October 2014, as announced in Public Notice No. 67 issued by MOFCOM. Under that process, parties had 60 days prior to the five-year expiration date of the measures at issue to file a written application for an expiry review to MOFCOM. No such application was submitted by any party. As a consequence, on 10 April 2015, MOFCOM issued Public Notice No. 11 of 2015 informing the public that no application had been filed for expiry review by the domestic industry or by any natural person, legal person or organization on behalf of the domestic industry within the time limit as specified. Under these circumstances, MOFCOM decided not to launch an expiry review, but instead terminated the measures at issue effective as of 11 April 2015. China submitted this termination notice and an English translation to the Panel and the United States on 21 April 2015.

7. There are several reasons for the Panel to consider this important piece of evidence. First, the evidence simply did not exist until several days ago, and could not have been submitted, but is nevertheless highly relevant. Second, this evidence goes to the essence of this Article 21.5 proceeding – the ongoing imposition of the challenged anti-dumping and anti-subsidy measures. Those measures are no longer being imposed. Third, this Article 21.5 proceeding is still ongoing and therefore all parties have a chance to be heard and there is no unfairness to anyone.

8. The specific measures that led to this dispute have thus been terminated. Such measures once terminated cannot simply be revived. Rather new anti-dumping and anti-subsidy measures can only be imposed upon completion of a new investigation, and new affirmative findings of dumping/subsidy, injury, and causality are made. MOFCOM has never imposed anti-dumping and anti-subsidy measures absent such complete procedures.

9. Given the termination of the measures, China therefore requests that the Panel take steps to modify its interim report to reflect this reality, and that the Panel remove any recommendation that China bring its measures into conformity. China has already done so. There are no longer any "measures" in effect to which such a recommendation would apply.

10. Such action would be consistent with the limits of the Panel's mandate and past practice. China notes that panels have repeatedly found it appropriate to abstain from issuing any recommendations regarding terminated measures. And the Appellate Body has in fact distinguished the question of whether a panel can make a finding concerning an expired measure from the question of whether a panel can make a recommendation relating to an expired measure. For example, in *US – Certain EC Products*, the Appellate Body reversed the panel's decision to make a recommendation pursuant to Article 19.1 of the DSU on the grounds that the panel had already found that the measure at issue in that dispute had expired. The same principle has extended to Article 21.5 proceedings under the Dispute Settlement Understanding.

11. China believes the same facts exist here, and that the Panel should revise the interim report to reflect the recent developments. In China's view, the final report should reflect the current reality. First, the specific measures the United States challenged have been terminated. Second, given the termination of the measures, the Panel has no need to make any recommendations regarding China bringing its measures into compliance with its obligations under the WTO agreements. Third, given the termination of the measures. China in fact is now already in compliance with its obligations. Any prior recommendations relate to measures that no longer exist and therefore cease to be operative.

12. China would also like to respond to some of the U.S. comments on the interim report concerning recommendations. At paragraphs 8-12 of its comments, the United States agrees with China that there is no need for this Panel to make any recommendation and that paragraph 8.6 of the interim report should be deleted. These comments by the United States, however, imply that the original recommendations should remain operative. That is not correct.

13. China would like to make clear there is no longer any disputed measure in effect to which the original recommendations could still apply. In accordance with the normal operation of Chinese law, these measures were in effect for the five years permitted by Chinese law. No party submitted an application to renew these measures and so they have been terminated.

14. Given these facts, the measures that were the subject of this proceeding no longer exist, and will not exist upon release of the Panel's final report. That is why China requests that the Panel take steps to modify its interim report to reflect this reality, and namely that it remove any recommendation that China bring its measures into conformity. There are no longer any "measures" in effect to which such a recommendation would apply. The United States argues in paragraph 12 of its comments that the original recommendations remain in effect, but acknowledges that is true only until "a Member has brought its measures found to be inconsistent by the DSB into full compliance with its WTO obligations." Termination of the measures at issue in this dispute brings China into full compliance.

15. For the same reasons, there is no need for the new language that the United States has suggested. In paragraph 10 of its comments the United States has proposed new language that is not appropriate. Given that the measures no longer exist, there is no factual or legal basis for a statement that "China has failed to bring its measure" into compliance, as the United States has suggested.

16. We appreciate the Panel's time in considering these new facts and in reconsidering the language currently found in paragraph 8.6 of the Panel's interim report.

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ANNEX D

ARGUMENTS OF THE THIRD PARTIES

ANNEX D-1

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE EUROPEAN UNION

1. AN INVESTIGATING AUTHORITY'S PRICE EFFECTS ANALYSIS MUST MEET SUBSTANTIVE AND PROCEDURAL REQUIREMENTS LAID DOWN IN THE ADA AND SCM AGREEMENTS

1. Articles 3.2 ADA and 15.2 SCM require the investigating authority to undertake a price effects analysis as part of an injury determination. A price effects analysis under Article 3.2 ADA and Article 15.2 SCM must meet several substantive and procedural requirements: (i) the investigating authority must assess whether domestic prices are depressed or suppressed by subject imports; (ii) this assessment must be "rigorous" and entail an objective examination based on positive evidence; and (iii) the investigating authority's consideration must be disclosed to the parties so that they can know whether the authority has met these substantive, procedural and evidentiary requirements.

2. The Appellate Body explained in *China – GOES* that the analytical and evidentiary obligations under the ADA and SCM Agreements discipline an investigating authority's requirement to "consider" (i.e. to "*take something into account* in reaching its decision")[1] price effects under Articles 3.2 and 15.2. Articles 3.1 and 15.1 ensure that, although investigating authorities need not make a definitive determination in respect of price effects, this "does not diminish the rigour that is required of the inquiry under Articles 3.2 and 15.2",[2] and it "does not diminish the scope of *what* the investigating authority is required to consider".[3]

3. The text and context of Article 3.2 and Article 15.2, as clarified through jurisprudence, require an authority to examine whether any observed price depression or price suppression is attributable to subject imports. In *China – GOES*, the Appellate Body explained that "consideration of significant price depression or suppression under Articles 3.2 and 15.2 encompasses by definition an analysis of whether the domestic prices are depressed or suppressed by subject imports".[4] The Appellate Body clarified 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".[5]

2. IS THE INVESTIGATING AUTHORITY REQUIRED TO CONDUCT A PRICE COMPARISON IN ORDER TO DETERMINE WHETHER PRICE DEPRESSION OR PRICE SUPPRESSION IS THE EFFECT OF THE SUBJECT IMPORTS?

4. In the view of the European Union, an objective authority cannot conclude that price suppression or price depression is "the effect" of the subject imports without making a proper comparison of the prices of subject imports with the prices of the domestic like product.

5. In the original dispute the Appellate Body noted that panels must allow for the possibility that either the price or the volume of subject imports is sufficient by itself to sustain a finding that price suppression or depression is "the effect" of subject imports.[6] The Appellate Body also clarified that a finding that price suppression or price depression is the effect of the subject imports does not require a finding of actual price undercutting.[7] In the EU's view, however, neither of these findings has the implication that an objective investigating authority can dispense with comparing the prices of the subject imports and the domestic like products.

[1] Appellate Body Report, *China – GOES*, para. 130 (emphasis original).
[2] Ibid. para. 130.
[3] Ibid. paras 131-132 (emphasis original).
[4] Ibid. para. 142.
[5] Ibid. para. 138 (emphasis original).
[6] Ibid. para. 216.
[7] Ibid. para. 206.

6. While the Appellate Body referred to the possibility that a finding that price depression or price suppression was the effect of subject imports could be sustained by evidence relating to the volume of those imports, it recognised that

> [...] Given the inter-relationship of product volumes and prices, it is not clear that an investigating authority may in practice easily separate and assess the relative contribution of the volumes versus the prices of subject imports on domestic practices.[8]

7. Because of the inter-relationship of product volumes and prices observed by the Appellate Body, the effects of the volume of subject imports cannot be properly assessed without talking into account also the effects of the prices of such imports. In turn, the effects of the subject imports' prices on the prices of the domestic like product cannot be properly assessed in the absence of any price comparison.

8. In particular, subject imports cannot have the effect of supressing or depressing the prices of the domestic like products unless they compete on price with them. Yet, unless the investigating authority has conducted a proper price comparison, it will not be possible to ascertain the nature and the extent of competition between subject imports and the domestic like products. The original dispute illustrates this. The Appellate Body observed that:

> [...] The fact that there was a substantial divergence in pricing levels over the period could suggest that the two products were not in competition with each other, or that there were other factors work. [...][9]

9. The Appellate Body went on to quote with approval the observation made by Japan to the effect that:

> [...] the fact that the price of subject imports was higher than the price of domestic like products in the first quarter of 2009 "may rather indicate that both products are not in competition with each other, and therefore, price depression or price suppression of the domestic products could not be the effect of the imports."[10]

10. MOFCOM's Re-determination does not appear to address the issues that were raised by the Appellate Body in view of the substantial price differentials shown by the evidence relied upon by MOFCOM in its original determination. Instead, MOFCOM appears to have disregarded such evidence in its Re-determination.

11. While the European Union does not put into question that an investigating authority has a certain margin of discretion in choosing a methodology for analysing the effects of subject imports on domestic industry prices;[11] the ADA and SCM do not prescribe any precise methodology for establishing the existence of price depression and suppression. This does not mean, contrary to what appears to be China's position, that a comparison of the prices of domestic and imported products is **never required**, so that the investigative authorities enjoy complete discretion to decide whether or not to make such a comparison.

12. Second, contrary to China's position in this case, the European Union does not understand the Appellate Body in *China – GOES,* to have stated or even implied that an investigating authority has in all cases a full discretion under Article 3.2 ADA and 15.2 SCM to dispense with comparing the prices of the subject imports and the domestic like products. In the view of the European Union, rather the contrary would be true in most cases, based on the guidance provided by the Appellate Body.

[8] Appellate Body Report, *China – GOES*, footnote 346.
[9] Ibid. para. 226.
[10] Ibid. footnote 375.
[11] Panel report, *China – Autos (US)*, para. 7.255.

13. The Appellate Body noted that it "[could] conceive of ways in which an observation of parallel price trends might support a price depression or price suppression analysis"[12], despite the absence of price undercutting. For example, according to the Appellate Body,

> The fact that prices of subject imports and domestic products move in tandem might indicate the nature of competition between the products, and may explain the extent to which factors relating to the pricing behaviour of importers have an effect on domestic prices.[13]

14. MOFCOM's redetermination purports to rely in part on a finding of parallel pricing. A proper finding of parallel pricing, however, would have to be based on a price comparison at different time points during the investigation period. Yet MOFCOM did not conduct any such comparison. Merely comparing the increase or decrease rates expressed in percentage terms, without disclosing the initial price levels to which those rates refer, which is what MOFCOM appears to have done in this case, is of limited value in order to assess the nature and the extent of competition between the subject imports and the domestic like products. Where, as it appears to be the case in this dispute, there is a substantial price differential between subject imports and the domestic like product, the mere fact that prices move in the same direction at similar rates could be due to other factors and does not provide conclusive evidence of price competition. In other words, it does not have, of itself, sufficient "explanatory force".

15. Similarly, the relevance of anecdotal evidence on a supposed policy of price undercutting, such as that relied upon by MOFCOM in this case, cannot be properly assessed without taking into account also the actual differences in prices between the subject imports and the domestic like products. Again, this is confirmed by the findings of the Appellate Body in the original dispute, where the Appellate Body noted that:

> [...] Even though we consider that a policy of price undercutting can explain depressive or suppressive effects on domestic prices even in the absence of actual price undercutting, we do not see that, in the light of the price dynamic in the first quarter of 2009, there was a basis to conclude so in this case [...][14].

16. The analysis of the "price dynamic" mentioned by the Appellate Body involves a price comparison, which MOFCOM, however, refused to do in its Re-determination.

17. In *U.S. – GOES* the Appellate Body noted that, for the purpose of Articles 3.2 of the AD Agreement and 15.2 of the SCM Agreement, "the investigating authority is not required to conduct a fully fledged and exhaustive analysis of all known factors that may cause injury to the domestic industry"[15]. Nonetheless, the Appellate Body went on to stress that the Appellate Body "may not disregard evidence that calls into question the explanatory force of subject imports for significant depression or suppression of domestic prices".[16]

18. *A fortiori* the investigating authority should not be allowed to disregard evidence relating to the prices of subject imports that may call into question the "explanatory force" of the volume of subject imports. For the reasons explained above, a comparison of the prices of subject imports with the prices of the domestic like product is manifestly relevant, and indeed indispensable, in order to assess the effects of subject imports on the prices of domestic like products. Where an investigating authority deliberately omits to include in its determination any such price comparison, despite the fact that the necessary evidence is, or should have been, available in the record, it can be surmised that such price comparison would have called into question the authority's findings based on the volume of subject imports.

[12] Appellate Body Report, *China – GOES*, para. 210.
[13] Ibid. para. 210.
[14] Appellate Body Report, *China – GOES*, para. 226.
[15] Ibid. para. 151.
[16] Ibid. para. 152.

19. Selective use of data raises questions of bias and accuracy, and thus inconsistency with the requirement to conduct an "objective examination" based on "positive evidence".[17] As such, an investigating authority is obliged to consider arguments made by interested parties regarding the accuracy and relevancy of data, and the determination "must be based on an examination of *all* relevant evidence before the investigating authority".[18] An investigating authority must also adequately explain its conclusions on the issues raised.[19] A panel is therefore tasked with "examin[ing] whether the investigating authority's reasoning takes sufficient account of conflicting evidence and responds to competing plausible explanations of that evidence".[20]

[17] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 183.

[18] Panel Report, *EC – Countervailing Measures on DRAM Chips*, para. 7.397. (emphasis added) See also Appellate Body Report, *Thailand – H-Beams*, para. 107.

[19] Panel Report, *EC – Salmon (Norway)*, paras 7.644-7.645.

[20] Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 97.

ANNEX D-2

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF JAPAN

I. INTRODUCTION

1. Due to its systemic interest, as well as its direct interest stemming from the DS454 dispute, Japan addresses the proper legal interpretation of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("Anti-Dumping Agreement"),[1] and respectfully requests that the Panel take Japan's views into consideration.

II. ARGUMENTS

A. The Consistency of MOFCOM's Price Effects Analysis with Articles 3.1 and 3.2 of the Anti-Dumping Agreement

2. On the topic of the price effects analysis conducted by the Ministry of Commerce of the People's Republic of China ("MOFCOM"), the requirement under Article 3.1 of the Anti-Dumping Agreement is for an investigating authority to determine "the effect of the dumped imports on prices in the domestic market for like products", and do so "based on positive evidence and … an objective examination". Article 3.1 serves as "an overarching provision that sets forth a Member's fundamental, substantive obligation" with respect to the injury determination, and "informs the more detailed obligations in succeeding paragraphs".[2]

3. As an initial matter, "positive evidence" must be both pertinent and of reliable quality;[3] and an "objective examination" requires that an investigating authority's analysis "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".[4] MOFCOM's apparent lack of evidence and disregard for contrary evidence in its price suppression and price depression determinations appear to violate the "overarching" and "fundamental" principles of Article 3.1 to base determinations on "positive evidence" and an "objective examination".

4. Turning to the substantive inquiry regarding "the effect of the dumped imports on prices in the domestic market for like products", Article 3.2 sets forth three price effect factors that the investigating authority must consider to determine whether such an "effect" exists: price undercutting, price depression, and price suppression. Article 3.2 also makes clear that "[n]o one or several of these factors can necessarily give decisive guidance". In the current case, MOFCOM claims to have reached its price effects determination on the basis of finding price suppression and price depression, so Japan focuses on those two factors.

5. The Appellate Body has made clear that, in order to find price suppression or price depression, "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*",[5] and "*is required to consider the relationship between subject imports and prices of like domestic products, so as to*

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[1] Japan notes that while it presents its arguments in terms of the applicable provisions of the Anti-Dumping Agreement, the same arguments should apply to the corresponding provisions of the Agreement on Subsidies and Countervailing Measures ("SCM Agreement").

[2] Appellate Body Report, *China – GOES*, para. 126 (quoting Appellate Body Report, *Thailand – H-Beams*, para. 106).

[3] *See* Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 165; Panel Report, *China – X-Ray Equipment*, para. 7.32; Panel Report, *Mexico – Steel Pipes and Tubes*, para. 7.213; Panel Report, *Mexico – Anti-Dumping Measures on Rice*, para. 7.55.

[4] Appellate Body Report, *China – GOES*, para. 126 (quoting Appellate Body Report, *US – Hot-Rolled Steel*, para. 193). *See also* Appellate Body Report, *EC – Fasteners (China)*, para. 414.

[5] Appellate Body Report, *China – GOES*, para. 138 (emphasis added).

understand whether subject imports provide explanatory force for the occurrence of significant depression or suppression of domestic prices".[6]

6. Further, Japan submits that under Article 3.2, an investigating authority must find the *actual* depression or suppression of domestic prices by dumped imports, as opposed to merely the *potential* for such depression or suppression. In this regard, the text of Article 3.2 reads: "… the investigating authorities shall consider … whether the effect of such imports *is* … *to depress* prices to a significant degree or *prevent* price increases, which *otherwise would have occurred*, to a significant degree".[7] Use of the present tense phrases "is … to depress" and "is … to … prevent" indicates that price depression and suppression must be *actually* occurring. Moreover, the phrase "which otherwise would have occurred" relating to price suppression makes it clear that the prices of domestic like products must *actually* be lower than the prices that would have existed had there been no imports at dumped prices.

7. The Appellate Body has also explained that "an 'effect' is 'a result' of something else",[8] and that the provisions of Article 3 of the Anti-Dumping Agreement "contemplate a logical progression of inquiry leading to an investigating authority's ultimate injury and causation determination".[9] In the context of Article 3, Japan emphasizes that the actual depression or suppression of domestic prices found to exist by an investigating authority must be attributable to *dumping*. Article 3.2 provides that "[w]ith regard to the effect of the *dumped imports* on prices, the investigating authorities shall consider … whether the effect of *such imports* is otherwise to" depress or suppress domestic prices.[10] The reference to "such imports" is plainly a reference to "dumped imports". Article 3.1 also provides that the overall inquiry is with respect to "the effect of the *dumped imports* on prices in the domestic market for like products".[11] Thus, the required effects on domestic prices must be attributed to *dumping*; otherwise, a large volume of imports at *non-dumped* prices could justify the imposition of anti-dumping measures. As such, it should be evident that investigating authorities must consider the degree of dumping, and accordingly the prices of dumped imports, in order to conclude that dumped imports have "explanatory force" for the suppression or depression of domestic prices.

8. Japan is also of the view that, to properly find price suppression or depression by subject imports, an investigating authority must examine the *competitive relationship between the subject imports and the domestic like products*. It must find that subject imports actually compete with the domestic like products, and have evidence that subject imports actually substitute for the domestic like products. In this regard, an investigating authority must consider the degree and nature of competition along with the price differential between the subject imports and the domestic like products. It must also assess evidence that is indicative of a lack of competition, such as opposing price trends or parallel price trends of vastly different magnitudes between subject imports and domestic like products.

9. As is evident from the above explanation, to establish the required competitive relationship and price suppression or depression, an investigating authority cannot just rely on facts such as an increase in subject import volume, parallel pricing between subject imports and domestic like products, consumer overlap, or domestic pricing policies that take into account import prices.

10. To begin, with regard to China's assertion that a consideration of import volume alone may be a sufficient basis for finding price suppression or depression, China erroneously conflates the volume and price effects inquiries under Articles 3.1 and 3.2. If the volume of subject imports were a sufficient basis to find price effects, the price effects inquiry would become redundant and the second sentence of Article 3.2 would be rendered inutile. This is clearly an untenable result. Also, logically, an increase in volume or market share of subject imports does not necessarily suggest that there is price suppression or depression, because the volume and market share of subject imports may increase where the domestic industry *fails* to lower prices or restrain price increases in response to imports.

[6] Appellate Body Report, *China – GOES*, para. 154 (emphasis added).

[7] Emphases added.

[8] Appellate Body Report, *China – GOES*, para. 135. *See also The Oxford English Dictionary*, OED Online, Oxford University Press, accessed 18 June 2014, http://www.oed.com/view/Entry/59664 (defining "effect" as "[t]hat which results from the action or properties of something or someone").

[9] Appellate Body Report, *China – GOES*, para. 128.

[10] Emphases added.

[11] Emphasis added.

11. Next, on parallel pricing, prices moving in a "parallel" manner are merely evidence of a correlation between the prices of subject imports and the domestic like product, not that prices of the former are having effects on prices of the latter. The panel in *China – Autos (US)* concurred.[12] Similarly, as the same consumer may purchase different kinds of "like" products, consumer overlap does not mean that price competition exists. Nor are pricing policies alone a sufficient basis for finding price competition, because a domestic industry may naturally consider a variety of other prices – including import prices, prices of related but non-like products, and the overall price index in general – in setting its own prices.

12. Japan also disagrees with China's contention that the competitive relationship required for ascertaining price effects under Article 3.2 can simply be presumed from like product or cumulation findings. As several panels have agreed, a like product finding does not mean that the prices of subject imports and domestic like products may be appropriately compared for ascertaining price effects.[13] For example, in *China – X-Ray Equipment*, the panel explained that x-ray equipment used for scanning hand baggage at airports may be "like" x-ray equipment used for scanning rail carriages, trucks, or marine cargo containers, but the former is not in competition with or substitutable for the latter, such that prices of the latter may be considered to have effects on prices of the former. As such, a "likeness" finding or an investigating authority's consideration of competition and/or substitutability for purposes of a "likeness" finding does not automatically ensure that price competition exists.

13. In sum, only upon conducting a complete examination as outlined above can an investigating authority properly determine whether price suppression or price depression, and consequently price effects, by subject imports exists within the meaning of Articles 3.1 and 3.2 of the Anti-Dumping Agreement. Here, Japan agrees with the United States that MOFCOM appears to have failed to satisfy its obligations in this regard.

B. The Consistency of MOFCOM's Impact Analysis with Articles 3.1 and 3.4 of the Anti-Dumping Agreement

1. Whether the United States' Claim Is Properly Before the Panel

14. With regard to China's argument that this Panel may not consider the United States' Articles 3.1 and 3.4 claims concerning MOFCOM's impact analysis, Japan disagrees because MOFCOM's redetermination is a "new and different"[14] measure, as it was issued in response to the recommendations by the dispute settlement body ("DSB") and plainly separate from MOFCOM's original determination. Moreover, MOFCOM made several changes to the impact analysis in its redetermination, including elimination of references to the "low price" of subject imports. Further, MOFCOM's impact analysis in its redetermination may also be considered "new and different" in the sense that it is affected by MOFCOM's revised dumping margins[15] and MOFCOM's revised price effects analysis.

2. The Merits of the United States' Claim

15. Turning to the merits of the United States' claim, an objective examination of impact must "include[] and weigh[] *each* of the 16 injury indicia [listed in Article 3.4]",[16] and where there are "positive movements in a number of factors", the investigating authority must provide "a *compelling explanation* of why and how, in light of such apparent positive trends, the domestic industry [is], or remain[s], injured".[17] Thus, here, the Panel should examine whether MOFCOM adequately considered and weighed each of the 16 injury indicia, including the positive trends

[12] *See* Panel Report, *China – Autos (US)*, para. 7.265.

[13] *See* Panel Report, *China – X-Ray Equipment*, paras. 7.51, 7.65-7.67; Panel Report, *China – Autos (US)*, para. 7.278 and note 441.

[14] Appellate Body Report, *Canada – Aircraft (Article 21.5 – Brazil)*, paras. 41-42.

[15] *See* the first sentence of Article 3.4 of the Anti-Dumping Agreement.

[16] Panel Report, *China – X-Ray Equipment*, para. 7.216 (emphasis added). *See also* Appellate Body Report, *US – Hot-Rolled Steel*, para. 197.

[17] Panel Report, *China – X-Ray Equipment*, para. 7.195 (quoting Panel Report, *Thailand – H-Beams*, para. 7.249) (emphasis added). *See also id.*, para. 7.180; Panel Report, *EC – Bed Linen (Article 21.5 – India)*, para. 6.162; Panel Report, *EC – Tube or Pipe Fittings*, para. 7.314.

alleged by the United States,[18] and whether MOFCOM provided the required "*compelling explanation*".

C. The Consistency of MOFCOM's Causation Analysis with Articles 3.1 and 3.5 of the Anti-Dumping Agreement

1. Causal Link

16. With respect to the causal link between subject imports and material injury suffered by the domestic industry, first, Japan concurs with the United States that a price effects determination inconsistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement necessarily results in a causation determination inconsistent with Articles 3.1 and 3.5.[19]

17. Second, with respect to the United States' argument that MOFCOM improperly relied on a conclusory assertion that subject imports prevented the domestic industry from realizing the benefits of economies of scale, even if this finding had evidentiary support, it is not sufficient to establish a causal link under Articles 3.1 and 3.5 because Article 3.5 requires an investigating authority to demonstrate that "the *dumped imports* are, through the effects of dumping, as set forth in paragraphs 2 and 4, causing injury"[20] to the domestic industry. That is, an investigating authority must base its causation determination on its examination of the volume of dumped imports and their price effects, including their dumping margins. Otherwise, even a large volume of imports at non-dumped prices could justify the imposition of anti-dumping duties, which is clearly an untenable result.

18. Also, China's view that "whenever subject imports gain market share, the domestic industry necessarily suffers from … economies of scale effects" due to the "inherent" effect of the domestic industry's "total fixed costs of production … being allocated over smaller output"[21] conflates the volume analysis with the causation analysis. Under China's view, an increase in market share by subject imports would always result in lack of economies of scale for the domestic industry, and consequently always result in an affirmative causation finding, making the causation inquiry redundant. Moreover, under China's theory, an investigating authority could affirmatively find causation and impose anti-dumping duties any time import volumes increased because of the "inherent" economies of scale effects, even if such imports took place at non-dumped prices. Again, these are not tenable results.

19. Here, the Panel must consider whether MOFCOM properly found that *dumped imports*, by virtue of their volume or price effects, caused material injury to the domestic industry. MOFCOM seems to have failed to do so.

2. Non-Attribution

20. On non-attribution, an investigating authority must "separate and distinguish" the injurious effects of subject imports from those of other known factors. This entails identifying the "nature and extent" of the injurious effects of the non-attribution factor at issue and the "nature and extent" of the injurious effects of the subject imports, and distinguishing the two.[22] Accordingly, the Panel here should carefully examine whether MOFCOM assessed the precise degree of the injurious effects that may have been caused by the domestic industry's overexpansion/overproduction and non-subject imports, and separated and distinguished those injurious effects from the injurious effects of the subject imports. MOFCOM appears not to have done so.

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[18] *See* United States' first written submission, paras. 91-105.

[19] *See* Panel Report, *China – GOES*, para. 7.620; Panel Report, *China – X-Ray Equipment*, paras. 7.239-7.240; Panel Report, *China – Autos (US)*, paras. 7.327-7.328.

[20] Emphasis added.

[21] China's first written submission, para. 101.

[22] *See* Appellate Body Report, *US – Hot-Rolled Steel*, paras. 226, 228. *See also* Panel Report, *China – Autos (US)*, para. 7.323 (citing Appellate Body Report, *US – Hot-Rolled Steel*, paras. 233-236).

D. The Consistency of MOFCOM's Disclosure of Essential Facts and Notice of Final Determination with Articles 6.9, 12.2, and 12.2.2 of the Anti-Dumping Agreement

21. With respect to the United States' argument that MOFCOM violated Article 6.9 of the Anti-Dumping Agreement by failing to disclose a number of essential facts under consideration that formed the basis for its redetermination, what is required under Article 6.9 is the disclosure of "essential facts", meaning "those *facts on the record that may be taken into account* by an authority in reaching a decision as to whether or not to apply definitive … duties", or "those *facts that are significant in the process of reaching a decision* as to whether or not to apply definitive measures".[23] Moreover, "[a]n authority must disclose such facts, in a coherent way, so as to permit an interested party to understand the basis for the decision whether or not to apply definitive measures", and "disclosing the essential facts under consideration pursuant to Article[] 6.9 … is paramount for ensuring the ability of the parties concerned to defend their interests".[24] Further, "[w]hat constitutes an 'essential fact' must … be understood in the light of the content of the findings needed to satisfy the substantive obligations with respect to the application of definitive measures …, as well as the factual circumstances of each case".[25]

22. As for the United States' argument that MOFCOM violated Articles 12.2 and 12.2.2 by failing to explain the matters of fact and law and reasons that led to the imposition of duties in several respects, with respect to a final determination, Article 12.2 states that an investigating authority must provide a notice or separate report setting out "in sufficient detail the findings and conclusions reached on *all issues of fact and law considered material* by the investigating authorities",[26] and Article 12.2.2 further specifies that the authority's final report must detail "*all relevant information on the matters of fact and law and reasons* which have led to the imposition of final measures".[27] With regard to "matters of fact", Article 12.2.2 requires disclosure of "those facts that allow an understanding of the factual basis that led to the imposition of final measures",[28] and "[w]hat constitutes 'relevant information on the matters of fact' is … to be understood in the light of the content of the findings needed to satisfy the substantive requirements with respect to the imposition of final measures …, as well as the factual circumstances of each case".[29] Moreover, with regard to the obligation to disclose reasoning in Article 12.2.2, "it is particularly important that the 'reasons' for rejecting or accepting … arguments should be set forth in sufficient detail to allow … exporters and importers to understand why their arguments or claims were treated as they were, and to assess whether or not the investigating authority's treatment of the relevant issue was consistent with domestic law and/or the WTO Agreement".[30]

23. In Japan's view, the facts identified by the United States were facts taken into consideration by MOFCOM in its injury and causation determination and therefore should have been disclosed, and the reasoning behind the assertions and findings identified by the United States should have been explained in sufficient detail.[31] The Panel should carefully examine whether MOFCOM satisfied its obligations in this regard.

III. CONCLUSION

24. Japan appreciates the Panel's consideration of Japan's views with regard to the interpretation of the provisions of the Anti-Dumping Agreement addressed above.

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[23] Appellate Body Report, *China – GOES*, para. 240 (emphases added).
[24] Appellate Body Report, *China – GOES*, para. 240.
[25] Appellate Body Report, *China – GOES*, para. 241.
[26] Emphasis added.
[27] Emphasis added.
[28] Appellate Body Report, *China – GOES*, para. 256.
[29] Appellate Body Report, *China – GOES*, para. 257.
[30] Panel Report, *China – X-Ray Equipment*, para. 7.472. *See also* Panel Report, *China – Broiler Products*, para. 7.528.
[31] *See* United States' first written submission, paras. 146 and 153.