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

**AB-2012-4**

*Report of the Appellate Body*



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<i>China – GOES</i>	Panel Report, <i>China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States</i> , WT/DS414/R, circulated to WTO Members 15 June 2012
<i>China – Publications and Audiovisual Products</i>	Appellate Body Report, <i>China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products</i> , WT/DS363/AB/R, adopted 19 January 2010, DSR 2010:I, 3
<i>EC – Bed Linen (Article 21.5 – India)</i>	Appellate Body Report, <i>European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India</i> , WT/DS141/AB/RW, adopted 24 April 2003, DSR 2003:III, 965
<i>EC – Chicken Cuts</i>	Appellate Body Report, <i>European Communities – Customs Classification of Frozen Boneless Chicken Cuts</i> , WT/DS269/AB/R, WT/DS286/AB/R, adopted 27 September 2005, and Corr.1, DSR 2005:XIX, 9157
<i>EC – Countervailing Measures on DRAM Chips</i>	Panel Report, <i>European Communities – Countervailing Measures on Dynamic Random Access Memory Chips from Korea</i> , WT/DS299/R, adopted 3 August 2005, DSR 2005:XVIII, 8671
<i>EC – Fasteners (China)</i>	Panel Report, <i>European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China</i> , WT/DS397/R and Corr.1, adopted 28 July 2011, as modified by Appellate Body Report WT/DS397/AB/R
<i>EC – Hormones</i>	Appellate Body Report, <i>EC Measures Concerning Meat and Meat Products (Hormones)</i> , WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, 135
<i>EC – Salmon (Norway)</i>	Panel Report, <i>European Communities – Anti-Dumping Measure on Farmed Salmon from Norway</i> , WT/DS337/R, adopted 15 January 2008, and Corr.1, DSR 2008:I, 3
<i>EC – Tube or Pipe Fittings</i>	Appellate Body Report, <i>European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil</i> , WT/DS219/AB/R, adopted 18 August 2003, DSR 2003:VI, 2613
<i>EC and certain member States – Large Civil Aircraft</i>	Appellate Body Report, <i>European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft</i> , WT/DS316/AB/R, adopted 1 June 2011
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<i>Japan – DRAMs (Korea)</i>	Appellate Body Report, <i>Japan – Countervailing Duties on Dynamic Random Access Memories from Korea</i> , WT/DS336/AB/R and Corr.1, adopted 17 December 2007, DSR 2007:VII, 2703
<i>Korea – Certain Paper</i>	Panel Report, <i>Korea – Anti-Dumping Duties on Imports of Certain Paper from Indonesia</i> , WT/DS312/R, adopted 28 November 2005, DSR 2005:XXII, 10637

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<i>Korea – Commercial Vessels</i>	Panel Report, <i>Korea – Measures Affecting Trade in Commercial Vessels</i> , WT/DS273/R, adopted 11 April 2005, DSR 2005:VII, 2749
<i>Mexico – Anti-Dumping Measures on Rice</i>	Appellate Body Report, <i>Mexico – Definitive Anti-Dumping Measures on Beef and Rice, Complaint with Respect to Rice</i> , WT/DS295/AB/R, adopted 20 December 2005, DSR 2005:XXII, 10853
<i>Mexico – Olive Oil</i>	Panel Report, <i>Mexico – Definitive Countervailing Measures on Olive Oil from the European Communities</i> , WT/DS341/R, adopted 21 October 2008, DSR 2008:IX, 3179
<i>Mexico – Steel Pipes and Tubes</i>	Panel Report, <i>Mexico – Anti-Dumping Duties on Steel Pipes and Tubes from Guatemala</i> , WT/DS331/R, adopted 24 July 2007, DSR 2007:IV, 1207
<i>Thailand – H-Beams</i>	Appellate Body Report, <i>Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland</i> , WT/DS122/AB/R, adopted 5 April 2001, DSR 2001:VII, 2701
<i>Thailand – H-Beams</i>	Panel Report, <i>Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland</i> , WT/DS122/R, adopted 5 April 2001, as modified by Appellate Body Report WT/DS122/AB/R, DSR 2001:VII, 2741
<i>US – Carbon Steel</i>	Appellate Body Report, <i>United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany</i> , WT/DS213/AB/R and Corr.1, adopted 19 December 2002, DSR 2002:IX, 3779
<i>US – Continued Zeroing</i>	Appellate Body Report, <i>United States – Continued Existence and Application of Zeroing Methodology</i> , WT/DS350/AB/R, adopted 19 February 2009, DSR 2009:III, 1291
<i>US – Corrosion-Resistant Steel Sunset Review</i>	Appellate Body Report, <i>United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan</i> , WT/DS244/AB/R, adopted 9 January 2004, DSR 2004:I, 3
<i>US – Countervailing Duty Investigation on DRAMS</i>	Appellate Body Report, <i>United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea</i> , WT/DS296/AB/R, adopted 20 July 2005, DSR 2005:XVI, 8131
<i>US – Countervailing Duty Investigation on DRAMS</i>	Panel Report, <i>United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea</i> , WT/DS296/R, adopted 20 July 2005, as modified by Appellate Body Report WT/DS296/AB/R, DSR 2005:XVII, 8243
<i>US – Hot-Rolled Steel</i>	Appellate Body Report, <i>United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan</i> , WT/DS184/AB/R, adopted 23 August 2001, DSR 2001:X, 4697
<i>US – Lamb</i>	Appellate Body Report, <i>United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia</i> , WT/DS177/AB/R, WT/DS178/AB/R, adopted 16 May 2001, DSR 2001:IX, 4051
<i>US – Upland Cotton</i>	Appellate Body Report, <i>United States – Subsidies on Upland Cotton</i> , WT/DS267/AB/R, adopted 21 March 2005, DSR 2005:I, 3
<i>US – Upland Cotton (Article 21.5 – Brazil)</i>	Appellate Body Report, <i>United States – Subsidies on Upland Cotton – Recourse to Article 21.5 of the DSU by Brazil</i> , WT/DS267/AB/RW, adopted 20 June 2008, DSR 2008:III, 809

<b>Short Title</b>	<b>Full case title and citation</b>
<i>US – Steel Safeguards</i>	Appellate Body Report, <i>United States – Definitive Safeguard Measures on Imports of Certain Steel Products</i> , WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R, adopted 10 December 2003, DSR 2003:VII, 3117
<i>US – Wheat Gluten</i>	Appellate Body Report, <i>United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities</i> , WT/DS166/AB/R, adopted 19 January 2001, DSR 2001:II, 717

ABBREVIATIONS USED IN THIS REPORT

<b>Abbreviation</b>	<b>Description</b>
AK Steel	AK Steel Corporation
<i>Anti-Dumping Agreement</i>	<i>Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994</i>
ATI	ATI Allegheny Ludlum Corporation
AUVs	average unit values
Baosteel	Baosteel Group Corporation
DSB	Dispute Settlement Body
DSU	<i>Understanding on Rules and Procedures Governing the Settlement of Disputes</i>
Final Determination	MOFCOM Announcement No. 21 [2010] (10 April 2010) and its annexes (English translation as contained in Panel Exhibit CHN-16)
Final Injury Disclosure	MOFCOM Essential Facts Under Consideration Which Form the Basis of the Determination on Industry Injury Investigation of the Antidumping Investigation of GOES from the US and Russia and the Anti-subsidy Investigation of GOES from the US, Shang Diao Cha Han (2010) No. 67 (5 March 2010) (English translation as contained in Panel Exhibit CHN-29)
GATT 1994	<i>General Agreement on Tariffs and Trade 1994</i>
GOES	grain oriented flat-rolled electrical steel
MOFCOM	Ministry of Commerce of the People's Republic of China
Panel Report	Panel Report, <i>China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States</i> , WT/DS414/R
Preliminary Determination	MOFCOM Announcement No. 99 [2009] (10 December 2009) (English translation as contained in Panel Exhibit CHN-17)
<i>SCM Agreement</i>	<i>Agreement on Subsidies and Countervailing Measures</i>
<i>Vienna Convention</i>	<i>Vienna Convention on the Law of Treaties</i> , done at Vienna, 23 May 1969, 1155 UNTS 331; 8 International Legal Materials 679.
WISCO	Wuhan Iron and Steel (Group) Corporation
<i>Working Procedures</i>	<i>Working Procedures for Appellate Review</i> , WT/AB/WP/6, 16 August 2010
WTO	World Trade Organization

WORLD TRADE ORGANIZATION  
APPELLATE BODY

**China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States**

China, *Appellant*  
United States, *Appellee*

Argentina, *Third Participant*  
European Union, *Third Participant*  
Honduras, *Third Participant*  
India, *Third Participant*  
Japan, *Third Participant*  
Korea, *Third Participant*  
Saudi Arabia, *Third Participant*  
Viet Nam, *Third Participant*

AB-2012-4

Present:

Unterhalter, Presiding Member  
Van den Bossche, Member  
Zhang, Member

**I. Introduction**

1. China appeals certain issues of law and legal interpretations developed in the Panel Report, *China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States*<sup>1</sup> (the "Panel Report"). The Panel was established on 25 March 2011 to consider a complaint by the United States concerning China's measures imposing anti-dumping and countervailing duties on grain oriented flat-rolled electrical steel ("GOES") from the United States, as set forth in the Ministry of Commerce of the People's Republic of China ("MOFCOM") Announcement No. 21 of 10 April 2010 and its annexes<sup>2</sup> (the "Final Determination").

2. The anti-dumping and countervailing duty investigations at issue in this dispute were initiated as a result of an application filed by two Chinese steel producers, namely, Wuhan Iron and Steel (Group) Corporation ("WISCO") and Baosteel Group Corporation ("Baosteel"). The applicants alleged that 27 US federal and state laws provided countervailable subsidies to producers of GOES in the United States.<sup>3</sup> Further, the applicants alleged that dumped and subsidized imports of GOES from

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<sup>1</sup>WT/DS414/R, 15 June 2012.

<sup>2</sup>MOFCOM Announcement No. 21 [2010] (10 April 2010) and its annexes (English translation as contained in Panel Exhibit CHN-16). We note that the United States also submitted an English translation of MOFCOM's final determination as part of Panel Exhibit US-28. However, throughout its Report, the Panel cited the exhibit submitted by China (Panel Exhibit CHN-16) when referring to the Final Determination. Similarly, in this Report, we refer to the English translation as contained in Panel Exhibit CHN-16.

<sup>3</sup>Panel Report, para. 2.2. On 20 July 2009, the applicants filed an additional application challenging alleged subsidies provided under a further 10 US federal and state laws. (*Ibid.*)

the United States, and dumped imports of GOES from Russia, caused, and threatened to cause, injury to the Chinese domestic industry. MOFCOM initiated the anti-dumping and countervailing duty investigations at issue on 1 June 2009 with respect to imports of GOES from the United States.<sup>4</sup> Two exporters/producers of GOES in the United States—AK Steel Corporation ("AK Steel") and ATI Allegheny Ludlum Corporation ("ATI")—registered as respondents in both investigations. The period of anti-dumping and countervailing duty investigations was from 1 March 2008 to 28 February 2009, and the period of injury investigation was from 1 January 2006 to 31 March 2009.<sup>5</sup>

3. On 10 April 2010, MOFCOM issued its Final Determination. MOFCOM calculated *ad valorem* subsidy rates of 11.7% for AK Steel, 12% for ATI, and 44.6% for "all others", namely, US exporters/producers that did not register for the investigations and were unknown to MOFCOM. MOFCOM calculated a dumping margin of 7.8% for AK Steel, 19.9% for ATI, and 64.8% for "all others".<sup>6</sup> Moreover, MOFCOM conducted a cumulative assessment of injury and causation, and collectively took into account GOES imports from both Russia and the United States.<sup>7</sup> In the course of its injury analysis, "MOFCOM found that the effect of subject imports was to 'significantly depress[] and suppress[] the price of domestic like products.'"<sup>8</sup> MOFCOM also assessed relevant economic indicators relating to the state of the Chinese domestic industry. On the basis of its examination, MOFCOM found that there was a causal link between, on the one hand, the dumped imports of GOES from Russia and the dumped and subsidized imports of GOES from the United States, and, on the other hand, the material injury suffered by the domestic industry.<sup>9</sup> On this basis, MOFCOM imposed anti-dumping and countervailing duties on GOES from the United States at the above-mentioned rates.<sup>10</sup>

4. Before the Panel, the United States challenged various aspects of MOFCOM's investigations and Final Determination. Specifically, the United States challenged MOFCOM's decision to initiate the countervailing duty investigation with respect to 11 US federal and state programmes under

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<sup>4</sup>Panel Report, para. 2.2. The countervailing duty investigation was initiated with respect to 28 of the 37 US federal and state laws referred to in the application and additional application. On 1 June 2009, MOFCOM also initiated an anti-dumping investigation on imports of GOES from Russia. (*Ibid.*)

<sup>5</sup>United States' first written submission to the Panel, para. 17 (referring to MOFCOM Initiation of Anti-subsidy Investigation on Imported Grain Oriented Flat-rolled Electrical Steel Originating in the US, Public Notice [2009] No. 41 (1 June 2009) (Panel Exhibit US-6 (English version)), p. 2; and MOFCOM Initiation of Antidumping Investigation on Imported Grain Oriented Flat-rolled Electrical Steel Originating in the US and Russia, Public Notice [2009] No. 40 (1 June 2009) (Panel Exhibit US-7 (English version)), p. 2).

<sup>6</sup>Panel Report, paras. 2.5, 7.370, and 7.371.

<sup>7</sup>Panel Report, para. 7.475.

<sup>8</sup>Panel Report, para. 7.475 (quoting Final Determination (Panel Exhibit CHN-16 (English version)), p. 59). The Panel found that MOFCOM did not make a finding of significant price undercutting. (*Ibid.*, para. 7.553)

<sup>9</sup>Panel Report, paras. 2.5 and 7.598.

<sup>10</sup>Pursuant to the Final Determination, MOFCOM also imposed anti-dumping duties on imports of GOES from Russia. (Final Determination (Panel Exhibit CHN-16 (English version)), p. 3) These duties are not at issue in this dispute.

Articles 11.2 and 11.3 of the *Agreement on Subsidies and Countervailing Measures* (the "*SCM Agreement*").<sup>11</sup> Furthermore, the United States challenged MOFCOM's failure to require the applicants to provide adequate non-confidential summaries of confidential information under Article 6.5.1 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (the "*Anti-Dumping Agreement*") and Article 12.4.1 of the *SCM Agreement*.<sup>12</sup> The United States also challenged MOFCOM's use of "facts available" to calculate the subsidy rates for the two known US respondents, as well as the calculation of the "all others" anti-dumping and countervailing duty rates, under Article 6.8 of, and paragraph 1 of Annex II to, the *Anti-Dumping Agreement*, Article VI:2 of the *General Agreement on Tariffs and Trade 1994* (the "GATT 1994"), and Article 12.7 of the *SCM Agreement*.<sup>13</sup> In addition, the United States challenged MOFCOM's findings of price effects under Articles 3.1 and 3.2 of the *Anti-Dumping Agreement* and Articles 15.1 and 15.2 of the *SCM Agreement*<sup>14</sup>, as well as MOFCOM's causation analysis under Articles 3.1 and 3.5 of the *Anti-Dumping Agreement* and Articles 15.1 and 15.5 of the *SCM Agreement*.<sup>15</sup> Finally, the United States challenged as insufficient MOFCOM's disclosure of the essential facts under Article 6.9 of the *Anti-Dumping Agreement* and Article 12.8 of the *SCM Agreement*<sup>16</sup>, as well as MOFCOM's public notice of its preliminary and final determinations under Article 12.2.2 of the *Anti-Dumping Agreement* and Articles 22.3 and 22.5 of the *SCM Agreement*.<sup>17</sup>

5. The Panel Report was circulated to Members of the World Trade Organization (the "WTO") on 15 June 2012. In its Report, the Panel found that China acted inconsistently with:

- (a) Article 11.3 of the *SCM Agreement*, on the basis that MOFCOM initiated countervailing duty investigations into each of the 11 programmes challenged before the Panel by the United States, without sufficient evidence to justify this;
- (b) Article 12.4.1 of the *SCM Agreement* and Article 6.5.1 of the *Anti-Dumping Agreement*, on the basis that MOFCOM did not require the applicants to furnish non-confidential summaries in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence;

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<sup>11</sup>Panel Report, para. 7.11.

<sup>12</sup>Panel Report, para. 7.151.

<sup>13</sup>Panel Report, paras. 7.227, 7.372, 7.428, and 7.436.

<sup>14</sup>Panel Report, para. 7.476.

<sup>15</sup>Panel Report, para. 7.593.

<sup>16</sup>Panel Report, paras. 7.398, 7.456, 7.557, and 7.641.

<sup>17</sup>Panel Report, paras. 7.315, 7.342, 7.415, 7.469, 7.578, and 7.664.

- (c) Article 12.7 of the *SCM Agreement*, in connection with MOFCOM's use of a 100% utilization rate in calculating the subsidy rates for the two known respondents under certain procurement programmes;
- (d) Articles 6.8, 6.9, 12.2, 12.2.2 of, and paragraph 1 of Annex II to, the *Anti-Dumping Agreement*, in connection with the resort to facts available to calculate the "all others" dumping margin for unknown exporters and due to deficiencies in the related essential facts disclosure and public notice and explanation;
- (e) Articles 12.7, 12.8, 22.3, and 22.5 of the *SCM Agreement*, in connection with the resort to facts available to calculate the "all others" subsidy rate for unknown exporters and due to deficiencies in the related essential facts disclosure and public notice and explanation;
- (f) Articles 15.1, 15.2, 12.8, and 22.5 of the *SCM Agreement* and Articles 3.1, 3.2, 6.9, and 12.2.2 of the *Anti-Dumping Agreement*, in connection with MOFCOM's findings regarding the price effects of subject imports and due to deficiencies in the related essential facts disclosure and public notice and explanation;
- (g) Articles 15.1, 15.5, 12.8, and 22.5 of the *SCM Agreement* and Articles 3.1, 3.5, 6.9, and 12.2.2 of the *Anti-Dumping Agreement*, in connection with MOFCOM's finding that subject imports caused material injury to the domestic industry and due to deficiencies in the related essential facts disclosure and public notice and explanation; and
- (h) Article 10 of the *SCM Agreement* and Article 1 of the *Anti-Dumping Agreement*, as a consequence of the foregoing violations of these Agreements.<sup>18</sup>

6. The Panel also found that the United States had not established that China had acted inconsistently with:

- (a) Article 12.2.2 of the *Anti-Dumping Agreement*, by not including in a public notice or separate report the data and calculations used to determine the respondent companies' final dumping margins;
- (b) Article 12.7 of the *SCM Agreement*, due to MOFCOM's resort to facts available to calculate the subsidy rates for the two known respondents under certain procurement programmes; and

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<sup>18</sup>Panel Report, para. 8.1(a)-(h).

- (c) Article 22.3 of the *SCM Agreement*, in connection with MOFCOM's explanation of the findings and conclusions supporting its determination that the bidding process under the United States Government procurement statutes at issue did not result in prices that reflected market conditions.<sup>19</sup>

7. On 20 July 2012, China notified the Dispute Settlement Body (the "DSB") of its intention to appeal certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel, pursuant to Articles 16.4 and 17 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU"), and filed a Notice of Appeal<sup>20</sup> and an appellant's submission, pursuant to Rules 20 and 21, respectively, of the *Working Procedures for Appellate Review*<sup>21</sup> (the "*Working Procedures*"). On 7 August 2012, the United States filed an appellee's submission.<sup>22</sup> On 10 August 2012, the European Union, Japan, Korea, and Saudi Arabia each filed a third participant's submission.<sup>23</sup> Each of the remaining third participants subsequently notified its intention to appear at the oral hearing.<sup>24</sup> The oral hearing in this appeal was held on 27 and 28 August 2012. The participants and four of the third participants (the European Union, Japan, Korea, and Saudi Arabia) made oral statements. The participants and third participants responded to questions posed by the Members of the Appellate Body Division hearing the appeal.

## II. Arguments of the Participants and the Third Participants

### A. Claims of Error by China – Appellant

#### 1. Article 3.2 of the Anti-Dumping Agreement and Article 15.2 of the SCM Agreement – Interpretation and Application

8. China appeals the Panel's interpretation and application of Article 3.2 of the *Anti-Dumping Agreement* and Article 15.2 of the *SCM Agreement*. China argues that the Panel erred in interpreting the phrase "the effect of" in these provisions to mean that an investigating authority must demonstrate that adverse price effects were caused by dumped and/or subsidized imports.<sup>25</sup> Moreover, China contends that the Panel erred in its application of Articles 3.2 and 15.2 by applying the obligations

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<sup>19</sup>Panel Report, para. 8.2(a)-(c). The Panel did not consider it necessary to make findings with regard to the following claims: (a) under Article 11.2 of the *SCM Agreement*, with respect to the initiation of the countervailing duty investigations at issue; and (b) under Article VI:2 of the GATT 1994, with respect to the imposition of an "all others" anti-dumping duty greater in amount than the appropriate dumping margin. (*Ibid.*, paras. 7.50, 7.432, and 8.3(a)-(b))

<sup>20</sup>WT/DS414/5 (attached as Annex I to this Report).

<sup>21</sup>WT/AB/WP/6, 16 August 2010.

<sup>22</sup>Pursuant to Rule 22 of the *Working Procedures*.

<sup>23</sup>Pursuant to Rule 24(1) of the *Working Procedures*.

<sup>24</sup>Pursuant to Rule 24(4) of the *Working Procedures*. Notification was received from Argentina, Honduras, and India on 13 August 2012, and from Viet Nam on 15 August 2012.

<sup>25</sup>China's Notice of Appeal, para. 5 (referring to Panel Report, para. 7.520).

contained therein to findings not made by MOFCOM, and by imposing obligations on an investigating authority that do not exist in these provisions.<sup>26</sup>

(a) Interpretation of Article 3.2 of the *Anti-Dumping Agreement* and Article 15.2 of the *SCM Agreement*

9. At the outset, China submits that Article 3.1 of the *Anti-Dumping Agreement* and Article 15.1 of the *SCM Agreement* are "chapeau" provisions that place the issue of "the effect of the [dumped or subsidized] imports on prices" in the broader context of Articles 3 and 15, respectively. Articles 3.1 and 15.1 impose the broad and overarching obligation on an authority to rely on "positive evidence" and conduct an "objective examination" in its injury determination. However, these provisions "say nothing about the nature of the specific obligations to consider adverse price effects" of the subject imports.<sup>27</sup> Rather, the obligations on an investigating authority with regard to price effects are enumerated in Article 3.2 of the *Anti-Dumping Agreement* and Article 15.2 of the *SCM Agreement*, and these provisions provide "all of the substantive content" of an authority's obligation in this regard.<sup>28</sup>

10. China maintains that Articles 3.2 and 15.2 impose "only a limited obligation on authorities" to "consider" the price effects of the subject imports, that is, to "examine; look at attentively; [and] think carefully" about such price effects.<sup>29</sup> China finds support for its position in findings by panels in prior disputes that Article 3.2 requires an investigating authority to consider whether or not any of the price effects described therein are present in a given investigation, and does not require that an explicit determination be made in this regard.<sup>30</sup> China argues that, had Members intended to impose a more specific or demanding obligation—for example, to draw conclusions or to provide specific analysis—they would have used terms such as "evaluate" or "demonstrate" that appear in other paragraphs of Articles 3 and 15.

11. China further contends that Articles 3.2 and 15.2 do not use any language that suggests the need to establish a causal link between price effects and subject imports. In China's view, the term "the effect of" simply means the consequence of a certain cause, and focuses on the "consequence" rather than the cause. This is confirmed by the use of the word "effect" as a noun, rather than as a verb, because the element of causation becomes relevant only when the word is used as a verb. Used as a verb, "effect" means "to bring about". In this respect, China contrasts the noun "effect" used in

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<sup>26</sup>China's Notice of Appeal, para. 6 (referring to Panel Report, paras. 7.523-7.536).

<sup>27</sup>China's appellant's submission, para. 49.

<sup>28</sup>China's appellant's submission, para. 50.

<sup>29</sup>China's appellant's submission para. 51 (quoting *The New Shorter Oxford English Dictionary*, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), Vol. 1, p. 485).

<sup>30</sup>China's appellant's submission, paras. 53 and 54 (referring to Panel Report, *Thailand – H-Beams*, para. 7.161; and Panel Report, *Korea – Certain Paper*, para. 7.242).

Articles 3.2 and 15.2 with the verb "affect" used in Articles 3.4 and 15.4. China alleges that the noun "effect" is concerned with the present situation, but "does not imply a causal relationship between the effect itself and any particular prior event".<sup>31</sup> In contrast, the verb "affect", which means "to have an effect on", does not refer to the status quo itself, but rather is concerned with how the status quo came to be. "Affect" thus "requires a heightened showing ... that draws a connection between" a prior event and the consequence.<sup>32</sup>

12. Moreover, China argues that Articles 3.2 and 15.2 do not prescribe any specific methodology for evaluating the three price effects listed in these provisions, that is, significant price undercutting, price depression, and price suppression. Instead, an investigating authority's assessment of these price effects is guided only by the broad principles of Articles 3.1 and 15.1 to base its assessment on positive evidence and an objective examination.<sup>33</sup> Within the bounds of these principles, an authority can conduct the price effects analysis "in a manner of its choosing" and is not required to make specific findings on the evidence.<sup>34</sup>

13. Furthermore, China highlights that Articles 3.2 and 15.2 use the conjunction "or" to indicate that the three price effects are alternatives, and that "adverse price effects can be discerned through either a comparison of domestic and subject import prices, or a comparison of domestic price trends themselves in connection with cost trends."<sup>35</sup> China maintains that several panels in prior disputes have confirmed that a consideration of price undercutting is not a required step in the analysis.<sup>36</sup> China further alleges that the term "otherwise" in Articles 3.2 and 15.2 creates a distinction between price undercutting, on the one hand, and price depression and suppression, on the other hand, and "reflects the market reality that price suppression/price depression is not contingent upon price undercutting".<sup>37</sup> Finally, China emphasizes that the last sentence of Articles 3.2 and 15.2 expressly confirms that no single factor "can necessarily give decisive guidance", and that this sentence has a "limiting effect" on the weight accorded to each of the considerations enumerated in the first two sentences.<sup>38</sup>

14. Turning to the context of the term "the effect of" in Articles 3.2 and 15.2, China submits that various provisions under Articles 3 and 15 expressly distinguish between the "existence" of price

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<sup>31</sup>China's appellant's submission, para. 60.

<sup>32</sup>China's appellant's submission, para. 99.

<sup>33</sup>China's appellant's submission, paras. 61-63 (referring to Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 204).

<sup>34</sup>China's appellant's submission, para. 63.

<sup>35</sup>China's appellant's submission, para. 64.

<sup>36</sup>China's appellant's submission, para. 65 (referring to Panel Report, *US – Countervailing Duty Investigation on DRAMS*, para. 7.265; Panel Report, *Korea – Certain Paper*, para. 7.242; Panel Report, *EC – Salmon (Norway)*, para. 7.638; and Panel Report, *EC – Fasteners (China)*, para. 7.325).

<sup>37</sup>China's appellant's submission, para. 67.

<sup>38</sup>China's appellant's submission, para. 68.

effects and the "consequent impact" of the subject imports.<sup>39</sup> China notes that, under Articles 3.1 and 15.1, an authority is required to examine, on the one hand, the volume of the subject imports and the effects of such imports on domestic prices, and, on the other hand, the consequent impact of such imports on the domestic industry. Consistent with this distinction, Articles 3.2 and 15.2 elaborate on the elements in the examination of the import volume and the price effects. Articles 3.4 and 15.4 shift the focus to a broader consideration regarding the impact of the subject imports on the domestic industry. Articles 3.5 and 15.5 then further shift the focus to the requirement of finding a causal relationship between subject imports and injury to the domestic industry. Thus, China argues, the "effects" are not themselves the results of a causation determination but, rather, serve as the basis for the causation determination required under Articles 3.5 and 15.5. In China's view, this reflects the "fundamental difference" between Articles 3.2 and 15.2, on the one hand, and Articles 3.5 and 15.5, on the other hand.<sup>40</sup> Specifically, the former provisions do not require that there be a causal relationship between the effects of subject imports and subject imports themselves. In contrast, the latter provisions require the authorities to perform a causation analysis that involves "isolating the injury caused" by the subject imports from the injury caused by other factors.<sup>41</sup> China further asserts that the obligation to "consider" the price effects merely requires an authority to "think carefully" about the existence of price undercutting, price depression, or price suppression.<sup>42</sup> In contrast, the obligation to "demonstrate" a causal link requires a more rigorous analysis. Thus, China emphasizes that the distinct obligations under Articles 3.5 and 15.5 should not be grafted onto Articles 3.2 and 15.2.

15. Moreover, China contends that the object and purpose of the *Anti-Dumping Agreement* and the *SCM Agreement* is to strike a balance between setting forth obligations an authority must follow in imposing anti-dumping and countervailing measures and leaving the authority with discretion as to how to implement these obligations. China further submits that the object and purpose of a particular provision should also be taken into account "if doing so assists the interpreter in determining the treaty's object and purpose on the whole".<sup>43</sup> As regards Articles 3.2 and 15.2, China argues that their object and purpose is "to identify certain specific volume and price circumstances in the domestic market under investigation", but to leave an authority with broad discretion in ascertaining the existence of such circumstances.<sup>44</sup> Therefore, interpreting Articles 3.2 and 15.2 as setting forth more

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<sup>39</sup>China's appellant's submission, para. 73.

<sup>40</sup>China's appellant's submission, para. 77.

<sup>41</sup>China's appellant's submission, para. 77.

<sup>42</sup>China's appellant's submission, para. 78.

<sup>43</sup>China's appellant's submission, para. 82 (quoting Appellate Body Report, *EC – Chicken Cuts*, para. 238).

<sup>44</sup>China's appellant's submission, para. 84.

limited obligations properly respects the object and purpose of the *Anti-Dumping Agreement* and the *SCM Agreement* of leaving authorities with discretion as to how to ascertain price effects.

16. China criticizes the Panel for concluding that "merely showing the existence of significant price depression [and suppression] does not suffice for purposes of Article 3.2 of the *Anti-Dumping Agreement* and Article 15.2 of the *SCM Agreement*", and that "[a]n authority must also show that such price depression [and suppression] is an effect of the subject imports."<sup>45</sup> China asserts that, in so finding, the Panel appeared to read into these provisions a requirement that MOFCOM demonstrate that subject imports "affected" domestic prices, even though these provisions do not contain such a requirement.<sup>46</sup> Moreover, the Panel ignored the term "consider" in Articles 3.2 and 15.2 and, instead, created an obligation to "demonstrate" or "show" a causal link between the subject imports and the price effects, despite the absence of such an obligation under these provisions.<sup>47</sup> In China's view, the Panel's interpretive errors are revealed by the fact that, in examining MOFCOM's analysis regarding whether price suppression was an effect of the subject imports, the Panel analyzed whether MOFCOM sufficiently isolated the subject imports as the cause of the price suppression. Specifically, the Panel found that MOFCOM's analysis was not based on positive evidence and did not involve an objective examination because, on the basis of the evidence before it, MOFCOM could not have found that the subject imports were "the only reason" for the price suppression.<sup>48</sup>

17. Moreover, China argues, the Panel's interpretation does not take into account the use of different terms in different paragraphs of Articles 3 and 15, including the terms "effect", "affecting", and "causal relationship". In this respect, China refers to the statement of the panel in *Egypt – Steel Rebar* that interpreting Article 3.4 of the *Anti-Dumping Agreement* as requiring a causation and non-attribution analysis would make Article 3.5 "redundant".<sup>49</sup> Similarly, China argues that, under the Panel's interpretation, the obligations set forth in Articles 3.5 and 15.5 are duplicated in Articles 3.2 and 15.2, whereby investigating authorities effectively must determine a causal relationship between subject imports and price effects under Articles 3.2 and 15.2. In China's view, the Panel's interpretation of Articles 3.2 and 15.2 would make Articles 3.5 and 15.5 redundant.

18. Finally, China contends that the Panel misconstrued the guidance provided by the panel report in *EC – Countervailing Measures on DRAM Chips*. The panel in that dispute rejected the complainant's claim that the investigating authority erred by failing to take into account "other

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<sup>45</sup>China's appellant's submission, para. 90 and footnote 49 to para. 100 (quoting Panel Report, para. 7.520).

<sup>46</sup>China's appellant's submission, para. 92 (referring to Panel Report, paras. 7.521 and 7.522).

<sup>47</sup>China's appellant's submission, para. 93 (referring to Panel Report, paras. 7.521 and 7.522) and para. 104 (referring to Panel Report, para. 7.520).

<sup>48</sup>China's appellant's submission, para. 95 (quoting Panel Report, para. 7.550).

<sup>49</sup>China's appellant's submission, para. 101 (quoting Panel Report, *Egypt – Steel Rebar*, para. 7.64).

factors" that affected domestic prices in analyzing the price effects mentioned in Article 15.2 of the *SCM Agreement*. The panel found that Article 15.2 did not require the authority to differentiate among various causes of the price effects, noting that such an examination was part of the causation analysis under Article 15.5 of the *SCM Agreement*. China maintains that, in attempting to distinguish that dispute from the present dispute, the Panel noted that the United States was not suggesting that MOFCOM should have considered the effects of "other known factors" on domestic prices, but only that MOFCOM should have considered the effect of subject imports on prices.<sup>50</sup> In China's view, the Panel attempted to create a distinction without a difference, because the requirement to consider the effects of other known factors, and the requirement to consider the effect of subject imports on prices, both stem from the same obligation to establish a causal link.

19. For the foregoing reasons, China requests the Appellate Body to reverse the Panel's finding that MOFCOM's price effects analysis was inconsistent "with Articles 3.1 and 3.2 of the Anti-Dumping Agreement and Articles 15.1 and 15.2 of the *SCM Agreement*, as set forth in paragraphs 7.554 and 8.1(f) of the Panel Report".<sup>51</sup>

(b) Application of Article 3.2 of the *Anti-Dumping Agreement* and Article 15.2 of the *SCM Agreement*

20. China submits that, even if the Appellate Body agrees with the Panel's interpretation of Article 3.2 of the *Anti-Dumping Agreement* and Article 15.2 of the *SCM Agreement*, the Panel still erred in its application of these provisions to MOFCOM's Final Determination. According to China, the Panel "fundamentally misunderst[ood] MOFCOM's Final Determinations about the adverse price effects in this case".<sup>52</sup> The Panel's "overarching error" is that it failed to consider MOFCOM's discussion about price effects "as written and as a whole, and instead ... substitute[d] its own analytic framework for that of the authority".<sup>53</sup> In doing so, the Panel "improperly ignore[d] some aspects of the discussion, focuse[d] on certain elements that actually were not part of the discussion, and never consider[ed] the MOFCOM discussion about this issue in its entirety".<sup>54</sup> China adds that "[e]ssentially, the Panel criticize[d] price comparisons that were never the basis of MOFCOM's consideration."<sup>55</sup>

21. China asserts that MOFCOM's discussion about adverse price effects rested on several specific propositions. First, MOFCOM cited the "developing trend of price", which showed that

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<sup>50</sup>China's appellant's submission, para. 107 (quoting Panel Report, para. 7.522).

<sup>51</sup>China's appellant's submission, para. 109.

<sup>52</sup>China's appellant's submission, para. 110.

<sup>53</sup>China's appellant's submission, para. 117.

<sup>54</sup>China's appellant's submission, para. 117.

<sup>55</sup>China's appellant's submission, para. 117.

subject import prices and domestic prices followed the same price pattern of first increasing and then decreasing.<sup>56</sup> Second, MOFCOM cited a "pricing policy" whereby subject imports "aimed at setting the price" at a level below domestic prices.<sup>57</sup> Third, MOFCOM cited the increasing import volume since 2008, and that the domestic producers "lowered their price to keep the market share".<sup>58</sup> Based on these three elements, MOFCOM then noted the key facts about price suppression in 2008 and the first quarter of 2009, and price depression in the first quarter of 2009, and summarized its consideration of price effects in two concluding paragraphs that were "largely overlooked" by the Panel.<sup>59</sup>

22. China asserts that the Panel never addressed "one of the key elements of MOFCOM's discussion", that is, that both subject import prices and domestic prices followed the same trends of first increasing and then decreasing over the period of investigation.<sup>60</sup> China notes that, although MOFCOM referred to this fact twice in its analysis, the Panel referred only to the drop in subject import prices in the first quarter of 2009 without discussing "at all the parallel trend in subject import prices and domestic prices over the period".<sup>61</sup>

23. China also argues that the Panel dismissed the role of import volume effects by finding that such effects were not the primary basis for MOFCOM's Final Determination. MOFCOM never considered that subject import volume was the sole factor in its Final Determination, and instead relied on multiple factors, including the volume of subject imports. Moreover, acknowledging the relevance of subject import price should not render the subject import volume any less important to MOFCOM's analysis. The Panel found that MOFCOM's price effects finding could not be "upheld purely on the basis of MOFCOM's findings regarding the effect of the increase in the volume of subject imports".<sup>62</sup> China submits that, by the Panel's logic, "if the volume of subject imports could not explain everything, the volume of subject imports could explain nothing."<sup>63</sup> China considers that the Panel erred "[b]y dismissing and giving no weight to the effect of the volume of subject imports" in its evaluation of MOFCOM's Final Determination.<sup>64</sup>

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<sup>56</sup>China's appellant's submission, para. 118 (quoting Final Determination (Panel Exhibit CHN-16 (English version)), p. 58).

<sup>57</sup>China's appellant's submission, para. 118 (quoting Final Determination (Panel Exhibit CHN-16 (English version)), p. 58).

<sup>58</sup>China's appellant's submission, para. 118 (quoting Final Determination (Panel Exhibit CHN-16 (English version)), p. 58).

<sup>59</sup>China's appellant's submission, para. 119.

<sup>60</sup>China's appellant's submission, para. 122.

<sup>61</sup>China's appellant's submission, para. 123.

<sup>62</sup>China's appellant's submission, para. 127 (quoting Panel Report, para. 7.542). (underlining added by China)

<sup>63</sup>China's appellant's submission, para. 127.

<sup>64</sup>China's appellant's submission, para. 128.

24. China contends that the Panel mistakenly assumed that MOFCOM's reference to "low price" meant a price comparison between the subject imports and like domestic products, and erroneously found that such a price comparison was central to MOFCOM's analysis. In so finding, the Panel "misstate[d] the MOFCOM discussion and then buil[t] its findings from that mistaken premise".<sup>65</sup> As China explains, MOFCOM never stated that subject import prices were low relative to domestic prices. MOFCOM noted that subject import prices were "at a low price", but never compared subject import prices to domestic prices over the entire period.<sup>66</sup> In fact, China explains, MOFCOM subsequently affirmed that it was not making a finding in respect of price undercutting so as to emphasize that price depression and price suppression occurred for other reasons, "namely, the large increase in subject import volume and the sharp drop in average subject import prices in Q1 2009".<sup>67</sup> Although the Panel correctly recognized that MOFCOM had not made a specific finding of price undercutting, the Panel then asserted that MOFCOM nevertheless relied on the existence of price undercutting. According to China, MOFCOM's reference to "low price" is not the same thing as price undercutting, since low-priced imports can exist regardless of the level of prices of subject imports relative to the prices of domestic products. China considers that this understanding is confirmed by the text of Articles 3.2 and 15.2, which make clear that significant price depression and price suppression can exist in the absence of price undercutting. China points out that these provisions also refer to the effect of "such imports", not the "prices of such imports". In China's view, MOFCOM's price effects discussion focused on factors other than the existence of price undercutting and did not depend on price comparisons.

25. China also argues that, although MOFCOM did refer to a "pricing policy" aiming at setting subject import prices lower than domestic prices, it never said that the policy actually resulted in lower import prices. MOFCOM did not make any findings of price undercutting, and in fact noted that average domestic prices were actually lower than average subject import prices in the first quarter of 2009. Instead, MOFCOM relied on the pricing policy evidence, consisting of a contract for the sales of GOES and certain price negotiations<sup>68</sup>, to demonstrate "efforts by import sources to charge lower prices to win business"<sup>69</sup>, and that "domestic prices were being forced to react to import prices".<sup>70</sup> According to China, MOFCOM noted, and the Panel ignored, that domestic producers were reacting to subject import competition and were lowering domestic prices so as to compete more

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<sup>65</sup>China's appellant's submission, para. 129.

<sup>66</sup>China's appellant's submission, para. 130 (quoting Final Determination (Panel Exhibit CHN-16 (English version)), p. 58).

<sup>67</sup>China's appellant's submission, para. 132.

<sup>68</sup>Specifically, such evidence includes a contract between a Russian trading company and a Chinese buyer of subject imports, as well as examples of price negotiations between a Chinese supplier and its customers. (Panel Report, para. 7.532)

<sup>69</sup>China's appellant's submission, para. 143.

<sup>70</sup>China's appellant's submission, para. 142.

effectively and minimize any further loss of market share. China maintains that the erosion of market share stopped in the first quarter of 2009, but only after domestic producers "react[ed] to import prices at the end of 2008" by "lower[ing] their prices considerably".<sup>71</sup> China further faults the Panel for artificially limiting its consideration of the evidence supporting the pricing policy to the first quarter of 2009. The Panel acknowledged that the contract relied on by MOFCOM may have been of relevance regarding the broader relationship between domestic and subject import prices, but then made the observation that the contracts were only in effect starting in the first quarter of 2009. In doing so, the Panel did not recognize the distinction between a "low price policy" and price undercutting, and therefore improperly used MOFCOM's finding about the absence of any actual price undercutting in the first quarter of 2009 to ignore the other implications of this evidence. In China's view, "[s]ubject imports that are trying to set lower prices can trigger adverse price effects, whether they actually achieve prices lower than the domestic price level or not."<sup>72</sup>

26. China also contends that the Panel improperly rejected MOFCOM's use of average unit values ("AUVs") and instead imposed alternative methodologies not reflected in the text of Article 3.2 of the *Anti-Dumping Agreement* or Article 15.2 of the *SCM Agreement*. In support of this contention, China advances arguments regarding the following three aspects of the Panel's analysis. First, contrary to the Panel's conclusion, China argues that it did rebut the United States' argument that prices were not compared at the same level of trade. China points to an answer it provided in response to a question from the Panel that indicated that the AUVs relied upon reflected the "average unit revenue" received by subject import and domestic suppliers "at the same physical stage of getting the goods to the customer".<sup>73</sup> China further maintains that MOFCOM did not have evidence that would have allowed for a comparison of specific prices in specific distribution channels, and that there was no evidence to support the United States' contention that domestic prices were at the level of end-users, whereas subject import prices were at the level of importers who then resold to end-users. More fundamentally, China argues, the AUVs considered by MOFCOM did not consist of specific prices or relate to specific sales channels. Furthermore, China contends that, while investigating authorities must take account of the "level of trade" for purposes of Article 2.4 of the *Anti-Dumping Agreement*, that concept cannot simply be extrapolated to Article 3.2 of the *Anti-Dumping Agreement* and Article 15.2 of the *SCM Agreement*. China notes that, whereas Article 2.4 explicitly refers to different levels of trade, Articles 3.2 and 15.2 do not. China considers that this understanding is confirmed by

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<sup>71</sup>China's appellant's submission, para. 144.

<sup>72</sup>China's appellant's submission, para. 148.

<sup>73</sup>China's appellant's submission, para. 157 (referring to China's response to Panel Question 64 following the second Panel meeting, para. 141).

the panel's statement in *Egypt – Steel Rebar* that there is "no requirement that the price undercutting analysis must be conducted in any particular way, that is, at any particular level of trade".<sup>74</sup>

27. In addition, China challenges the Panel's conclusion that MOFCOM made no effort to take into account different grades of GOES at issue. Again, China argues, the Panel misunderstood the very nature of AUVs, and instead extrapolated a concept of "differences ... in physical characteristics" from Article 2.4 of the *Anti-Dumping Agreement* that does not necessarily apply to Articles 3.2 and 15.2.<sup>75</sup> Although the Panel was technically correct that the subject imports fell under two tariff headings, the two tariff lines represented the same product, with the only difference being that they represented GOES of different widths. China emphasizes that this is a physical difference, not a difference in grade. Moreover, virtually all of the subject imports—that is, 97% of subject import shipment quantity and 99% of subject import shipment value—were under only one of the two tariff headings. In China's view, disaggregating the analysis would have had no material effect on the analysis, and MOFCOM did not have the data to conduct such a comparison.

28. Moreover, China contests the Panel's criticism of MOFCOM's reliance on annual AUVs to capture price trends for the products at issue. In China's view, annual AUVs still allow an investigating authority to compare trends over time. A more disaggregated analysis may be an alternative approach, "[b]ut there is nothing inherently non-objective about using annual AUVs".<sup>76</sup> China further notes that MOFCOM also considered quarterly AUVs for the first quarters of 2008 and 2009. The point of a price depression analysis is to consider trends over time. A trend will be analytically valid regardless of the degree of aggregation of individual prices, as long as the aggregation is applied consistently. According to China, for a price suppression analysis in which prices are compared to costs, annual AUVs are a better approach since some costs accrue monthly or quarterly, whereas other costs accrue only annually.

29. China additionally argues that the Panel imposed multiple alternative methodologies that none of the respondents raised during the course of MOFCOM's investigation. According to China, "[t]he Panel essentially embrace[d] arguments made by the United States after the fact during the panel proceedings, not arguments the respondents had presented to MOFCOM during the underlying investigations."<sup>77</sup> China contends that, although investigating authorities have an inherent duty to investigate, they also have discretion to frame their investigations and analyses in the light of the information that they gather and the arguments presented by the parties. In particular, while respondent parties are free to propose methodologies during the course of an investigation, their

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<sup>74</sup>China's appellant's submission, para. 161 (quoting Panel Report, *Egypt – Steel Rebar*, para. 7.73).

<sup>75</sup>China's appellant's submission, para. 163.

<sup>76</sup>China's appellant's submission, para. 172.

<sup>77</sup>China's appellant's submission, para. 183.

failure to do so during the investigation is relevant for evaluating the reasonableness and objectivity of how the authority undertakes its investigation.<sup>78</sup>

30. According to China, where a covered agreement does not prescribe any methodology, the investigating authority has discretion, particularly where the respondents do not advocate a particular methodology during the investigation. Two of the alternative methodologies—ensuring price comparability by accounting for levels of trade and different product groups—were not presented in any form to MOFCOM during the investigation. MOFCOM did not have data on a grade-specific or transaction-specific basis that it considered representative, reliable, or otherwise appropriate for this investigation. China submits that "authorities must make practical choices based on the information they have available"<sup>79</sup>, and that, in cases like the current investigation, where no party argued for a more disaggregated analysis, MOFCOM did not pursue this issue.

31. For the foregoing reasons, China requests the Appellate Body to reverse the Panel's finding that MOFCOM's price effects analysis was inconsistent "with Articles 3.1 and 3.2 of the Anti-Dumping Agreement and Articles 15.1 and 15.2 of the SCM Agreement, as set forth in paragraphs 7.554 and 8.1(f) of the Panel Report".<sup>80</sup>

(c) Article 11 of the DSU

32. China submits that the Panel's misreading of MOFCOM's findings of fact and its misapplication of these findings to the legal standard "so exceeded the proper bounds of review"<sup>81</sup> that the Panel violated its obligations under Article 11 of the DSU. China notes that the Appellate Body has emphasized that it is critical for panels to consider pieces of evidence not just individually, but also in their totality. In several disputes, the Appellate Body has found an Article 11 violation based on the panel's failure to consider the totality of the evidence.<sup>82</sup> This obligation is particularly pertinent where the investigating authority itself relied on the totality of the evidence in its analysis. China argues that a panel is not to conduct a *de novo* review of the evidence gathered by the authority, but rather is required "to conduct a review based on the analysis performed by the authority".<sup>83</sup> China adds that panels must be even-handed in their review and consider all of the arguments and evidence of the parties in a balanced and consistent way.

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<sup>78</sup>China's appellant's submission, para. 185 (referring to Panel Report, *Egypt – Steel Rebar*, paras. 7.104 and 7.105).

<sup>79</sup>China's appellant's submission, para. 188.

<sup>80</sup>China's appellant's submission, para. 192.

<sup>81</sup>China's appellant's submission, para. 193.

<sup>82</sup>China's appellant's submission, para. 196 (referring to Appellate Body Report, *US – Continued Zeroing*, para. 331; Appellate Body Report, *Japan – DRAMs (Korea)*, para. 139; and Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 188).

<sup>83</sup>China's appellant's submission, para. 198.

33. China asserts that the Panel erred by improperly assuming, despite China's statements to the contrary, that references to "low price" in the Final Determination were synonymous with a comparison between the prices of subject imports and like domestic products, when they were, in fact, references to price undercutting. During the first quarter of 2009, the only period for which the Panel found the existence of price depression, MOFCOM found that subject imports were actually priced higher than the domestic like product. Thus, without evidentiary support, the Panel ignored this finding of MOFCOM and concluded the exact opposite.

34. China further argues that "[t]he egregiousness of this misunderstanding is heightened by the fact that the Panel relie[d] on this single factor to invalidate MOFCOM's price depression and price suppression findings."<sup>84</sup> China recalls that MOFCOM's discussion about adverse price effects rested on three specific propositions. First, MOFCOM cited the developing trend of price, which showed that subject import prices and domestic prices followed the same price pattern of first increasing and then decreasing. Second, MOFCOM cited a pricing policy whereby subject imports aimed at setting the price at a level below domestic prices. Third, MOFCOM cited the increasing import volume since 2008, and that domestic producers lowered their price to keep their market share. China contends that "it was an analysis of the totality of the circumstances that produced the conclusion of price depression and price suppression."<sup>85</sup> Relying on the reasoning of the Appellate Body in *US – Countervailing Duty Investigation on DRAMS and Japan – DRAMs (Korea)*, China argues that the Panel erred by conducting a *de novo* review of evidence that was directly contradicted by that conducted by MOFCOM during the investigation. China maintains that mistakes in interpreting the evidence that are determinative to a panel's conclusion of an issue are not harmless errors, but rather amount to a panel's failure to perform an objective assessment of that evidence in contravention of Article 11 of the DSU.

2. Article 6.9 of the Anti-Dumping Agreement and Article 12.8 of the SCM Agreement – Disclosure of Essential Facts

35. China appeals the Panel's finding that China acted inconsistently with its obligations under Article 6.9 of the *Anti-Dumping Agreement* and Article 12.8 of the *SCM Agreement* regarding the disclosure of essential facts relating to MOFCOM's price effects analysis. China argues that the Panel's finding rested on its erroneous interpretation and application of Article 3.2 of the *Anti-Dumping Agreement* and Article 15.2 of the *SCM Agreement*. China maintains that MOFCOM was only required to consider the existence of adverse price effects and, in this respect, MOFCOM adequately disclosed the essential facts regarding the adverse price effects it found to exist, namely,

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<sup>84</sup>China's appellant's submission, para. 202.

<sup>85</sup>China's appellant's submission, para. 204.

significant price depression and suppression. China submits that the essential facts regarding significant price depression and suppression are whether domestic prices were trending downward, and whether domestic prices were keeping up with changing costs. In particular, China submits that the essential facts regarding these price effects did not include any facts about the "comparison" between subject import prices and domestic prices, or the causal relationship between these two variables.<sup>86</sup>

36. China maintains that MOFCOM disclosed the essential facts underlying its finding of significant price depression and suppression. With regard to price depression, China alleges that MOFCOM provided the essential facts by disclosing, in MOFCOM Announcement No. 99 of 10 December 2009<sup>87</sup> (the "Preliminary Determination") and in the disclosure of essential facts<sup>88</sup> (the "Final Injury Disclosure"), that average domestic prices had fallen by 30.25% during the first quarter of 2009 compared to the first quarter of 2008.<sup>89</sup> With respect to price suppression, China contends that MOFCOM provided the essential facts when it disclosed, in its Preliminary Determination, that the price-cost differential in calendar year 2008 "dropped by 7% compared with 2007", and that the price-cost differential "dropped continually and greatly by 75%" during the first quarter of 2009 compared to the first quarter of 2008.<sup>90</sup> China submits that, in both instances, this degree of disclosure was sufficient, and that any further detail would have "compromise[d] the confidentiality" of business confidential information.<sup>91</sup>

37. China contends that, even if the Appellate Body agrees with the Panel's interpretation that Article 3.2 of the *Anti-Dumping Agreement* and Article 15.2 of the *SCM Agreement* require some assessment of the causal relationship between subject imports and adverse price effects, the Panel still

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<sup>86</sup>China's appellant's submission, paras. 210-212.

<sup>87</sup>MOFCOM Announcement No. 99 [2009] (10 December 2009) (English translation as contained in Panel Exhibit CHN-17) (the "Preliminary Determination"). We note that the United States also submitted an English translation of MOFCOM's preliminary determination as part of Panel Exhibit US-5. However, throughout its Report, the Panel cited the exhibit submitted by China (Panel Exhibit CHN-17) when referring to the Preliminary Determination. Similarly, in this Report, we refer to the English translation as contained in Panel Exhibit CHN-17.

<sup>88</sup>Essential Facts Under Consideration Which Form the Basis of the Determination on Industry Injury Investigation of the Antidumping Investigation of GOES from the US and Russia and the Anti-subsidy Investigation of GOES from the US, Shang Diao Cha Han (2010) No. 67 (5 March 2010) (English translation as contained in Panel Exhibit CHN-29). We note that the United States also submitted an English translation of MOFCOM's disclosure document as part of Panel Exhibit US-27. However, throughout its Report, the Panel cited the exhibit submitted by China (Panel Exhibit CHN-29) when referring to the Final Injury Disclosure. Similarly, in this Report, we refer to the English translation as contained in Panel Exhibit CHN-29.

<sup>89</sup>China's appellant's submission, para. 213 (referring to Preliminary Determination (Panel Exhibit CHN-17 (English version)), p. 55; and Final Injury Disclosure (Panel Exhibit CHN-29 (English version)), p. 10).

<sup>90</sup>China's appellant's submission, para. 214 (referring to Preliminary Determination (Panel Exhibit CHN-17 (English version)), p. 56; and Final Injury Disclosure (Panel Exhibit CHN-29 (English version)), p. 15).

<sup>91</sup>China's appellant's submission, para. 214.

erred in finding that MOFCOM's disclosure of the essential facts was insufficient for the purposes of Article 6.9 of the *Anti-Dumping Agreement* and Article 12.8 of the *SCM Agreement*. China contends that the Panel erroneously assumed that a comparison between subject import prices and domestic prices was "an essential part" of MOFCOM's price effects analysis<sup>92</sup>, when, in fact, such price comparison was never "essential" to MOFCOM's price effects analysis.

38. More specifically, China asserts that the Panel erred in three respects by concluding that MOFCOM's disclosure of the essential facts was "insufficient" for the purposes of Article 6.9 and Article 12.8. First, China argues that "the Panel unreasonably criticize[d] MOFCOM for not providing the same level of detail that China provided in its submissions to the Panel regarding the pricing policy."<sup>93</sup> China maintains that the "essential fact" relied on by MOFCOM in its Final Determination was the fact that the importers were *attempting* to charge lower prices than the prices of the like domestic products. Thus, MOFCOM's reasoning did not depend on the dates of the contracts submitted as evidence for such pricing policy or whether the subject imports were successful in undercutting domestic prices. Second, China claims that, in the light of the fact that MOFCOM did not make a finding of price undercutting, the Panel improperly criticized MOFCOM for not disclosing the margins of underselling during the period 2006-2008. These margins were never "essential facts" that "form[ed] the basis of the decision" to impose measures within the meaning of Articles 6.9 and 12.8.<sup>94</sup> Third, China contends that the Panel erred by only focusing on one aspect of MOFCOM's analysis—the pricing policy—without considering other elements considered by MOFCOM, namely, the significance of decreasing import prices and increasing import volumes, which were properly disclosed by MOFCOM.

39. For the foregoing reasons, China requests the Appellate Body to reverse the Panel's finding that China acted inconsistently with Article 6.9 of the *Anti-Dumping Agreement* and Article 12.8 of the *SCM Agreement*, as set forth in paragraphs 7.575 and 8.1(f) of the Panel Report.<sup>95</sup>

3. Article 12.2.2 of the *Anti-Dumping Agreement* and Article 22.5 of the *SCM Agreement* – Public Notice Requirements

40. China appeals the Panel's finding that China acted inconsistently with its obligations under Article 12.2.2 of the *Anti-Dumping Agreement* and Article 22.5 of the *SCM Agreement* regarding the public notice and explanation of MOFCOM's price effects analysis. China argues that this finding of inconsistency by the Panel rested on its improper interpretation and application of Article 3.2 of the *Anti-Dumping Agreement* and Article 15.2 of the *SCM Agreement*. China maintains that these

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<sup>92</sup>China's appellant's submission, para. 216 (quoting Panel Report, para. 7.569).

<sup>93</sup>China's appellant's submission, para. 218 (referring to Panel Report, para. 7.573).

<sup>94</sup>China's appellant's submission, para. 220 (referring to Panel Report, para. 7.574).

<sup>95</sup>China's appellant's submission, para. 222.

provisions only require an investigating authority to consider the existence of adverse price effects. In this respect, MOFCOM adequately provided public notice and explanation of its findings regarding the existence of significant price depression and suppression.

41. China asserts that both price depression and suppression were addressed in MOFCOM's Final Determination. Regarding price depression, the Final Determination established that average domestic prices fell by 30.25% during the first quarter of 2009 compared to the first quarter of 2008.<sup>96</sup> With regard to price suppression, the Final Determination indicated that the price-cost differential in calendar year 2008 dropped by 7% compared with 2007, and dropped even more substantially by 75% during the first quarter of 2009 compared to the first quarter of 2008.<sup>97</sup> According to China, the Panel did not examine any of these findings. Rather, the Panel erroneously focused on the sufficiency of the public notice regarding the existence and specific margins of price undercutting. In China's view, the evidence about price undercutting is precisely what the Appellate Body considered to be "supporting record evidence" that does not need to be disclosed pursuant to Article 22.5 of the *SCM Agreement*.<sup>98</sup>

42. In addition, China argues that, in the event the Appellate Body finds that the Panel correctly interpreted and applied Article 3.2 of the *Anti-Dumping Agreement* and Article 15.2 of the *SCM Agreement*, the Panel still erred in its finding regarding MOFCOM's public notice under Article 12.2.2 of the *Anti-Dumping Agreement* and Article 22.5 of the *SCM Agreement*. China reiterates that the Panel mistakenly treated a comparison of subject import prices to domestic prices as an "essential element" and "an important aspect" of MOFCOM's examination of price effects.<sup>99</sup> China claims that, in doing so, the Panel made three errors. First, the Panel ignored the fact that MOFCOM disclosed the relevant facts regarding the pricing policy of importers, that is, the existence of the "contracts and records of price setting" collected during an on-site verification.<sup>100</sup> Second, the Panel confused what MOFCOM discussed in the Final Determination with China's submissions before the Panel and, thus, faulted MOFCOM for not disclosing a fact that was never one of the "matters of fact" that "led to the imposition of final measures", namely, the margin by which the prices of subject imports were below the prices of domestic products.<sup>101</sup> Third, the Panel ignored relevant context found in Article 12.2 of the *Anti-Dumping Agreement* and Article 22.3 of the *SCM Agreement*, which provide that the public notice requirement extends only to those facts "considered material" by the

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<sup>96</sup>China's appellant's submission, para. 225 (referring to Final Determination (Panel Exhibit CHN-16 (English version)), p. 58).

<sup>97</sup>China's appellant's submission, para. 225 (referring to Final Determination (Panel Exhibit CHN-16 (English version)), p. 58).

<sup>98</sup>China's appellant's submission, para. 227 (referring to Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 164).

<sup>99</sup>China's appellant's submission, para. 228 (quoting Panel Report, para. 7.590).

<sup>100</sup>China's appellant's submission, para. 229.

<sup>101</sup>China's appellant's submission, para. 230.

investigating authority.<sup>102</sup> Therefore, given that MOFCOM did not make any findings of significant price undercutting, it is clear that it did not consider such facts to be "material" for its Final Determination.

43. For these reasons, China requests the Appellate Body to reverse the Panel's findings of inconsistency with Article 12.2.2 of the *Anti-Dumping Agreement* and Article 22.5 of the *SCM Agreement*, as set forth in paragraphs 7.592 and 8.1(f) of the Panel Report.

B. *Arguments of the United States – Appellee*

1. Article 3.2 of the *Anti-Dumping Agreement* and Article 15.2 of the *SCM Agreement* – Interpretation and Application

44. The United States requests the Appellate Body to reject China's appeal of the Panel's interpretation and application of Article 3.2 of the *Anti-Dumping Agreement* and Article 15.2 of the *SCM Agreement*. The United States submits that the Panel properly concluded that the phrase "the effect of the [dumped or subsidized] imports" in Article 3.2 of the *Anti-Dumping Agreement* and Article 15.2 of the *SCM Agreement* requires an authority to assess whether significant price depression or suppression is the effect of the subject imports. Moreover, the Panel, in its application of the legal standard contained in these provisions, correctly concluded that MOFCOM's findings regarding the "low price" of subject imports and the alleged "pricing policies" of importers were neither supported by positive evidence nor objectively examined by MOFCOM, as required by Article 3.1 of the *Anti-Dumping Agreement* and Article 15.1 of the *SCM Agreement*.<sup>103</sup>

(a) *Interpretation of Article 3.2 of the *Anti-Dumping Agreement* and Article 15.2 of the *SCM Agreement**

45. At the outset, the United States argues that Article 3.1 of the *Anti-Dumping Agreement* and Article 15.1 of the *SCM Agreement* provide important context for the interpretation of Articles 3.2 and 15.2. Pursuant to Articles 3.1 and 15.1, an investigating authority must base its injury determination on "positive evidence", and must conduct an "objective examination" of the volume of dumped or subsidized imports, their effect on the prices in the domestic market for the domestic like product, and their consequent impact on the domestic producers of such products. Articles 3.2 and 15.2 then elaborate on the standards for examining the effect of subject imports on domestic prices.

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<sup>102</sup>China's appellant's submission, para. 231.

<sup>103</sup>United States' appellee's submission, para. 119.

46. Turning to the text of Articles 3.2 and 15.2, the United States submits that, irrespective of whether China's interpretation of the word "consider" is correct, that interpretation would not be dispositive of whether the Panel correctly concluded that MOFCOM's price effects analysis was inconsistent with Articles 3.1 and 3.2 and Articles 15.1 and 15.2. According to the United States, MOFCOM did more than merely "consider" whether the price effects existed, because it expressly found that the subject imports caused significant price depression and suppression. Thus, there was no need for the Panel to address whether it was sufficient for MOFCOM to merely "consider" price depression or suppression, rather than to make a finding in this respect. Given that MOFCOM's price effects finding formed a significant aspect of its injury and causation analysis, the Panel properly evaluated whether the finding was consistent with the requirement, under Articles 3.1 and 15.1, that an injury and causation determination be based on positive evidence and involve an objective examination.

47. The United States recalls China's position that Articles 3.2 and 15.2 do not use any language that suggests a causal link between the price effects and the dumped or subsidized imports.<sup>104</sup> In the United States' view, the interpretation advocated by China reads these provisions as though they do not contain *any* language suggesting that price depression and suppression must be the "effect of" dumped or subsidized imports. While agreeing that the dictionary definition of the word "effect" is "[s]omething accomplished, caused or produced, a result, a consequence"<sup>105</sup>, the United States disagrees with China that this definition "does not focus on the cause" of the price effects observed in the market.<sup>106</sup> Contrary to China's claim, the dictionary definition of "effect" clearly connotes that the effect in question is a result of something else, regardless of whether it is used as a noun or as a verb. Moreover, noting that Articles 3.2 and 15.2 specifically require an authority to consider whether "the effect of the [dumped or subsidized] imports on prices" is significant price depression or suppression, the United States maintains that the text of these provisions explicitly connects a cause—that is, dumped or subsidized imports—to price depressive or suppressive effects in the market.

48. Furthermore, while agreeing that Articles 3.2 and 15.2 do not impose any specific methodology for evaluating price effects, the United States emphasizes that any methodology an authority employs must meet the requirements under Articles 3.1 and 15.1 that an injury determination be based on positive evidence and involve an objective examination. The United States adds that the Panel did not find that MOFCOM was required to use any particular methodology for

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<sup>104</sup>United States' appellee's submission, para. 29 (referring to China's appellant's submission, paras. 43-109).

<sup>105</sup>United States' appellee's submission, para. 32 (quoting *The New Shorter Oxford English Dictionary*, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), Vol. 1, p. 786).

<sup>106</sup>United States' appellee's submission, para. 32 (referring to China's appellant's submission, para. 55).

assessing the price effects under Articles 3.2 and 15.2, but rather found that MOFCOM failed to base its price effects finding on positive evidence and failed to conduct an objective examination.

49. As regards the relationship between the three types of price effects listed in Articles 3.2 and 15.2, the United States recalls China's argument that the three types of effects are entirely independent of each other, and that an authority may choose to examine price depression or suppression without providing any evaluation of price undercutting.<sup>107</sup> The United States submits that an authority can make a finding of significant price effects without finding that there has been significant price undercutting during the period of investigation. For example, the United States maintains that imports may garner a price premium over the domestically produced product because of superior quality. Thus, should import prices decline, prices for the domestic product may follow suit to maintain the price differential. Consequently, the subject imports may cause price depression or suppression even if they are not undercutting domestic prices.<sup>108</sup>

50. Nonetheless, the United States emphasizes that, as an analytical matter, this does not mean that price undercutting is entirely distinct from price depression or suppression. Rather, examining the relative price levels of the domestically produced and imported products is "typically essential to a complete analysis of price effects".<sup>109</sup> According to the United States, viewed in isolation, the fact that price depression or suppression exists does not itself establish that the dumped or subsidized imports have had an "effect" on prices of the domestically produced like product, because a number of factors in any market may cause price depression or suppression. Thus, to evaluate whether significant price depression or suppression is the effect of subject imports, an authority "will ordinarily need to examine in detail the manner in which prices of domestic and subject merchandises reacted to each [other] during the period".<sup>110</sup> The United States contends that, even in circumstances where dumped or subsidized imports cause price depression or suppression without undercutting domestic prices, an objective authority should perform a comparison of the pricing levels of imports and domestically produced products, as well as a review of their relative pricing trends, so as to ensure that it has performed an objective examination of the positive evidence before it.

51. Turning to the context of the term "the effect of" in Articles 3.2 and 15.2, the United States submits that, where Article 3 of the *Anti-Dumping Agreement* and Article 15 of the *SCM Agreement* merely instruct an investigating authority to examine the existence of a factor, these provisions use appropriate language to signify this. For example, the first sentence of Articles 3.2 and 15.2 requires

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<sup>107</sup>United States' appellee's submission, para. 46 (referring to China's appellant's submission, paras. 64-67).

<sup>108</sup>United States' appellee's submission, para. 50.

<sup>109</sup>United States' appellee's submission, para. 47.

<sup>110</sup>United States' appellee's submission, para. 49.

an authority to consider what the volumes of the subject imports are, and not what are the effects of those volumes. In contrast, the second sentence of Articles 3.2 and 15.2 explicitly requires that price depression or suppression be "the effect of such imports". Thus, under Articles 3.2 and 15.2, an authority has "differing obligations" with respect to its analysis of the volume of the subject imports, on the one hand, and their price effects, on the other hand.<sup>111</sup> Nonetheless, in the view of the United States, China incorrectly perceives Articles 3.2 and 15.2 as imposing the same obligation regarding both, whereby these provisions require only an examination of whether price suppression or depression existed during the period of investigation.

52. Furthermore, the United States maintains that Articles 3.5 and 15.5, on the one hand, and Articles 3.2 and 15.2, on the other hand, both address aspects of an authority's causation analysis, with each set of provisions containing different language regarding the nature of the causal effects to be examined. More specifically, Articles 3.2 and 15.2 require an authority to consider whether subject imports have undercut domestic prices, or whether price depression or suppression is the effect of such imports. In contrast, Articles 3.5 and 15.5 require an examination of "all relevant evidence before the authorities" and a demonstration, through a non-attribution analysis, that material injury is caused by the subject imports, as opposed to "other factors". In the United States' view, this non-attribution obligation does not exist in Articles 3.2 and 15.2, as these provisions do not require an assessment of whether "other known injury factors" break the apparent causal link between the subject imports and the price effects.

53. Moreover, noting that China seeks to support its interpretation of Articles 3.2 and 15.2 by reference to the "object and purpose" of these provisions, the United States emphasizes that, pursuant to Article 31 of the *Vienna Convention on the Law of Treaties*<sup>112</sup> (the "*Vienna Convention*"), the interpretative analysis has to be made in the light of the object and purpose of the treaty, not of individual provisions of that treaty.

54. The United States stresses that the Panel properly construed Articles 3.2 and 15.2 as requiring an investigating authority to establish a causal relationship between the dumped and subsidized imports, on the one hand, and any significant price depression or suppression, on the other hand. In the United States' view, the Panel's interpretation is consistent with the text of Articles 3.2 and 15.2, which specifically provide that an investigating authority consider whether "the effect of the [dumped or subsidized] imports on prices" is to depress prices to a significant degree or prevent price increases, which otherwise would have occurred, to a significant degree. Thus, the Panel's interpretation "follows directly from the plain language" used in Articles 3.2 and 15.2, and the United States

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<sup>111</sup>United States' appellee's submission, para. 37.

<sup>112</sup>Done at Vienna, 23 May 1969, 1155 UNTS 331; 8 International Legal Materials 679.

disagrees with China's argument that the Panel "essentially graft[ed] on the second sentence of Articles 3.2 and 15.2 legal obligations that do[] not exist in these two provisions".<sup>113</sup>

55. The United States submits that the Panel's interpretation of the term "the effect of" in Articles 3.2 and 15.2 is also consistent with the context of these provisions. According to the United States, although Articles 3.5 and 15.5 impose important requirements on an investigating authority regarding the analysis of causation, other paragraphs of Articles 3 and 15 also contain language addressing an authority's obligations to assess the causal effects of the subject imports on the domestic industry. Thus, Articles 3.5 and 15.5 do not contain the *only* causal analysis obligations in the provisions regarding injury determinations in the *Anti-Dumping Agreement* and the *SCM Agreement*. Rather, Articles 3.2 and 15.2 are also intended to embody specific aspects of an authority's causal link analysis in anti-dumping and countervailing duty investigations. The United States emphasizes, however, that, unlike Articles 3.5 and 15.5, Articles 3.2 and 15.2 do not impose an obligation to conduct a non-attribution analysis. In the United States' view, this difference explains the finding of the panel in *Egypt – Steel Rebar* that an authority need not engage in the type of non-attribution analysis required by Articles 3.5 and 15.5 when examining the impact of the imports on the domestic industry.<sup>114</sup>

56. The United States further argues that the Panel correctly distinguished the present dispute from *EC – Countervailing Measures on DRAM Chips*. In that dispute, the panel only found that an authority need not conduct a non-attribution analysis as part of its price undercutting analysis.<sup>115</sup> The United States therefore considers that the panel report in that dispute does not lend support to China's view that an investigating authority need not find any causal relationship between the subject imports and the price effects listed in Articles 3.2 and 15.2. Thus, the Panel correctly found that the panel report in *EC – Countervailing Measures on DRAM Chips* does not stand for "the proposition that an authority is not required by Article 15.2 of the SCM Agreement to show that the relevant price depression is an effect of subject imports".<sup>116</sup>

57. For the foregoing reasons, the United States submits that the Appellate Body should reject China's appeal regarding the Panel's interpretation of Articles 3.2 and 15.2, and regarding the Panel's ultimate finding that MOFCOM's price effects analysis was inconsistent with Articles 3.1 and 3.2 of the *Anti-Dumping Agreement* and Articles 15.1 and 15.2 of the *SCM Agreement*, as set forth in paragraphs 7.554 and 8.1(f) of the Panel Report.

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<sup>113</sup>United States' appellee's submission, para. 35 (quoting China's appellant's submission, para. 47).

<sup>114</sup>United States' appellee's submission, para. 42 (referring to Panel Report, *Egypt – Steel Rebar*, para. 7.62).

<sup>115</sup>United States' appellee's submission, para. 42 (referring to Panel Report, *EC – Countervailing Measures on DRAM Chips*, para. 7.338).

<sup>116</sup>United States' appellee's submission, para. 43 (quoting Panel Report, para. 7.522).

(b) Application of Article 3.2 of the *Anti-Dumping Agreement* and Article 15.2 of the *SCM Agreement*

58. The United States submits that the Panel did not, as China argues, misconstrue MOFCOM's findings about the "low price" of subject imports and the importers' pricing strategies, create findings that MOFCOM never made, or accord insufficient weight to other elements relied on by MOFCOM in its price effects analysis. According to the United States, the Panel reasonably found that MOFCOM's "low price" finding was an important component of its price effects analysis, that MOFCOM had not based this finding on "positive evidence" or performed an "objective examination", and that it therefore acted inconsistently with 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*.

59. The United States asserts that there are several problems with China's argument that MOFCOM found parallel price trends to be a key element in its price effects analysis. First, China never made this argument before the Panel, and therefore has no basis to argue that the Panel should have addressed it. Second, there is no indication in the Final Determination that a parallel pricing finding was an independent ground for its price effects analysis. Rather, MOFCOM stated that the sale of subject imports at a "low price" was one of the two causes of price depression, not parallel pricing trends. Third, the pricing information disclosed by MOFCOM does not support a finding that parallel pricing trends caused price depression. Because prices for subject imports and Chinese products both rose in 2007 and 2008, the prices did not cause any price depression. Although China claims that there was a sharp drop of subject import prices in the first quarter of 2009, the AUVs for subject imports declined by only 1.25% between the first quarters of 2008 and 2009. When this decline is compared to the 30.25% decline in domestic prices during the first quarter of 2009, it is evident that parallel pricing trends did not explain the price depression or suppression during the first quarter of 2009. Finally, the United States observes that China has not challenged the Panel's conclusion that, following a 17.57% increase in subject import prices in 2008, a 1.25% decrease in subject import prices could not have had the effect of depressing domestic prices. The United States considers that China therefore has no grounds for challenging the Panel's analysis, "[s]ince this finding goes to the heart of the analytical problems identified by the Panel concerning MOFCOM's pricing analysis".<sup>117</sup>

60. Regarding the Panel's assessment of subject import volume effects, the United States argues that the Panel correctly concluded that MOFCOM's Final Determination did not support China's argument that volume effects were the primary basis for MOFCOM's finding that price depression was an effect of subject imports. As the Panel noted, China relied on parts of MOFCOM's Final

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<sup>117</sup>United States' appellee's submission, para. 77.

Determination that appear to lend equal weight to considerations of both subject import volume and price. The United States also points to the Panel's finding that "MOFCOM refers both to the increased volume of subject imports, and the allegedly low price thereof", and that the Panel reasonably concluded that "there is nothing in MOFCOM's determination to indicate that MOFCOM relied more heavily on the increase in volume of subject imports than it did on the low price thereof for the purpose of establishing that price depression was an effect of imports."<sup>118</sup> The United States further argues that, because MOFCOM consistently and repeatedly relied on the "low prices" of the subject imports as a central basis for its finding of significant price depression and suppression, the Panel acted properly in "evaluating the final determination as MOFCOM wrote it"<sup>119</sup>, and therefore in assessing whether MOFCOM had provided "positive evidence" to support its "low price" finding and had performed an "objective examination" of that evidence.

61. Furthermore, the United States disagrees with China that MOFCOM's "low price" finding was not central to MOFCOM's analysis. According to the United States, "in no fewer than *six* instances, MOFCOM directly linked price depression and price suppression to 'low prices' and in no fewer than *five* additional instances linked 'low prices' to the material injury purportedly sustained by China's domestic GOES industry."<sup>120</sup> Thus, China's argument that price comparisons were not "central" to MOFCOM's analysis cannot be reconciled with even a "casual reading" of MOFCOM's Final Determination.<sup>121</sup> Nor does the United States see a basis for China's suggestion that MOFCOM's use of the term "low prices" does not mean that it actually compared prices of the domestically produced product with the subject imports.

62. The United States also rejects China's argument that "low prices" can exist regardless of the relationship between prices of subject imports and domestic prices. Low-priced imports, in the United States' view, must be low priced in relation to something that is higher priced, and any meaningful discussion of low-priced imports must include a comparison of subject import prices to domestic prices. As a result, and as the Panel found, MOFCOM could only have made a finding of low prices by comparing the pricing levels of the subject imports and the domestic products. In addition, according to the United States, China acknowledged before the Panel that MOFCOM made such a comparison. The United States points to, *inter alia*, China's statement that documents it had submitted at the Panel's request "support the *finding* reached by MOFCOM that *subject imports from Russia and the United States were charging prices lower than domestic prices*, and had a pricing

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<sup>118</sup>United States' appellee's submission, para. 79 (quoting Panel Report, para. 7.540).

<sup>119</sup>United States' appellee's submission, para. 81.

<sup>120</sup>United States' appellee's submission, para. 68. (original emphasis)

<sup>121</sup>United States' appellee's submission, para. 68 (referring to China's appellant's submission, paras. 34 and 117).

policy to keep their prices lower".<sup>122</sup> According to the United States, the Panel construed the Final Determination exactly as it was written and assessed its content in a reasoned and objective manner.

63. The United States further disagrees with China's argument that MOFCOM's use of the term "pricing policy" was not intended to reflect prices actually charged. In the United States' view, MOFCOM's price depression finding specifically indicated that the result of the "pricing policy" was to keep import prices at a lower level than those of domestic products and that, as a result of this policy, "the product concerned was kept at a low price."<sup>123</sup> Given the linkage of these two findings, the United States considers that it is clear that MOFCOM found that the alleged policy was effective at keeping the prices of subject imports lower than that of the domestic products. The United States adds that MOFCOM's conclusion regarding the pricing policy indicated that MOFCOM did not simply find that importers were "attempting" to set subject import prices lower than domestic prices, but rather found that they actually did so.<sup>124</sup>

64. The United States also rejects China's argument that the Panel improperly imposed specific methodologies on MOFCOM under Article 3.2 of the *Anti-Dumping Agreement* and Article 15.2 of the *SCM Agreement*. According to the United States, the Panel did not state that Articles 3.2 and 15.2 require an investigating authority to perform its price analysis and comparisons using any particular methodology. The United States adds that it did not claim before the Panel that an authority was required to use specific price comparison methodologies under Articles 3.2 and 15.2, but rather that MOFCOM's "low-price" and "pricing strategy" findings were not supported by "positive evidence" and did not reflect an "objective examination", as required by Articles 3.1 and 15.1. In the United States' view, China "largely fails to acknowledge that Articles 3.1 and 15.1 were the basis for the Panel findings in question".<sup>125</sup>

65. The United States maintains that, in any event, China's arguments do not call into question the validity of the Panel's analysis regarding MOFCOM's reliance on annual AUVs. According to the United States, the Panel reasonably concluded that the United States had established that MOFCOM's reliance on annual AUVs to make price comparisons failed to satisfy the "positive evidence" and "objective examination" requirements of Articles 3.1 and 15.1. Specifically, the United States contended that the AUV data was unreliable given the particular circumstances of the GOES market,

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<sup>122</sup>United States' appellee's submission, para. 72 (quoting China's response to the Panel's request of 18 November 2011 for certain confidential data, p. 2). (emphasis added by the United States) See also *ibid.* (referring to China's second written submission to the Panel, paras. 102 and 104; and China's response to Panel Question 69 following the second Panel meeting, para. 160).

<sup>123</sup>United States' appellee's submission, para. 69 (quoting Final Determination (Panel Exhibit CHN-16 (English version)), p. 58).

<sup>124</sup>United States' appellee's submission, para. 69.

<sup>125</sup>United States' appellee's submission, para. 84.

including a non-homogenous product that was classified under two different tariff headings and was sold in different grades with different product characteristics. Moreover, during the course of the Panel proceedings, China provided evidence showing that GOES was subject to intense price fluctuations within the course of a single year, thus calling into question MOFCOM's reliance on annual AUVs.

66. The United States takes issue with the arguments raised by China regarding three aspects of the Panel's analysis in relation to MOFCOM's reliance on AUVs. First, with regard to whether the prices of subject imports and domestic like products were compared at the same level of trade, the only information China provided to the Panel indicated that the AUVs for subject imports related to "transactions between the exporter and the first Chinese purchaser, which is typically an importer that will then resell the product—at a profit—to the end user".<sup>126</sup> The United States also contends that China acknowledged that the AUV data that MOFCOM used was "not a comparison of specific prices in specific distribution channels".<sup>127</sup> The United States further argues that China's reliance on *Egypt – Steel Rebar* is misplaced because the panel in that case did not indicate that an investigating authority could have positive evidence and conduct an objective examination of price differences when it compared prices at different levels of trade.<sup>128</sup>

67. Second, the United States argues that China did not contest that the AUV data did not account for differences in product grades, but instead confirmed that MOFCOM did not attempt to collect more precise data, or even to use the available customs data in its record. As the United States asserts, the record shows that the product covered by the investigation was a non-homogenous product that was classified under two different tariff headings and was sold in different grades with different product characteristics. According to the United States, the record also shows that there were considerable variations in the AUVs for the two tariff headings, indicating that a single comparison of the two product categories combined would likely reflect an inaccurate assessment of comparative pricing levels between the subject imports and domestic products.

68. Third, the United States considers that the Panel also reasonably concluded that MOFCOM's use of annual pricing data for its price comparisons was not sufficiently precise in terms of the time periods covered. The record shows that GOES was subject to intense price fluctuations within the course of a single year. Thus, according to the United States, the Panel properly noted that, "*given the possibility of prices varying over time*, an objective and impartial investigating authority would rather

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<sup>126</sup>United States' appellee's submission, para. 86.

<sup>127</sup>United States' appellee's submission, para. 86 (quoting China's appellant's submission, para. 158).

<sup>128</sup>United States' appellee's submission, footnote 132 to para. 86 (referring to Panel Report, *Egypt – Steel Rebar*, para. 7.73).

conduct contemporaneous price comparisons, or at least price comparisons during a relatively short period of time."<sup>129</sup>

69. Finally, the United States disagrees with China's argument that MOFCOM could not have been expected to have conducted the level of comparative analysis demanded by the Panel because such concerns were neither raised nor argued by the respondents during the investigation. The United States submits that the record shows that one of the respondents, ATI, in its comments on the Preliminary Determination, specifically raised the issue that MOFCOM had not conducted a price comparison between subject imports and domestic like products, and had also argued that MOFCOM had distorted the analysis by using price trends on an annual basis. The United States argues that, in any event, Articles 3.1 and 15.1 place no limitation on a complainant's ability to argue that an authority acted inconsistently with its obligation to conduct an objective examination of the matter before it and to have positive evidence in support of its findings. Rather, as the Appellate Body has found, the obligations under Articles 3.1 and 15.1 are "absolute" and provide for no exceptions or qualifications.<sup>130</sup> Moreover, in *Mexico – Steel Pipes and Tubes*, the panel rejected the argument that it should dismiss a claim under Article 3.1 regarding the use of a particular period of investigation merely because no party had raised a complaint in this regard during the investigation proceedings. Rather, the panel found that the selection of the investigation period was linked to the investigating authority's obligation under Article 3.1 to conduct an objective examination of positive evidence, and that the authority was bound by this obligation regardless of whether the issue was raised during the investigation.<sup>131</sup> Accordingly, the United States argues that the Panel appropriately considered the United States' claims in the present dispute.

70. For the foregoing reasons, the United States requests the Appellate Body to reject China's appeal regarding the Panel's finding that MOFCOM's price effects analysis was inconsistent with Articles 3.1 and 3.2 of the *Anti-Dumping Agreement* and Articles 15.1 and 15.2 of the *SCM Agreement*, as set forth in paragraphs 7.554 and 8.1(f) of the Panel Report.

(c) Article 11 of the DSU

71. The United States submits that China's claims under Article 11 of the DSU merely repeat arguments that China has already raised in respect of the Panel's interpretation, application, reasoning, and findings. It refers to its earlier arguments demonstrating that the Panel's analysis of MOFCOM's

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<sup>129</sup>United States' appellee's submission, para. 88 (quoting Panel Report, para. 7.528). (emphasis added by the United States)

<sup>130</sup>United States' appellee's submission, para. 92 (referring to Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 109).

<sup>131</sup>United States' appellee's submission, para. 92 (referring to Panel Report, *Mexico – Steel Pipes and Tubes*, para. 7.259).

price effects finding was correct. The United States further notes that the Appellate Body has required that a claim under Article 11 should not be made merely as a subsidiary argument or claim.<sup>132</sup> The United States adds that, to rise to the level of an Article 11 violation, a mistake on the part of the panel must constitute a "deliberate disregard of evidence or gross negligence amounting to bad faith".<sup>133</sup>

72. The United States rejects the argument that MOFCOM did not make a finding that subject imports were priced lower than domestic products. It refers to its arguments above that MOFCOM repeatedly found that subject imports were priced "low" during the investigation period, and that its analysis "made clear that this finding was based on a comparison of domestic and subject import prices".<sup>134</sup> According to the United States, China acknowledged before the Panel that MOFCOM engaged in price comparisons for domestic products and subject imports, and that MOFCOM had reached a finding that subject imports "*were charging prices lower than domestic prices*, and had a pricing policy to keep their prices lower".<sup>135</sup> In the light of these statements by China, the United States maintains that "the Panel did not commit error by evaluating MOFCOM's determination on the basis of specific findings included in the determination."<sup>136</sup>

73. The United States also argues that the Panel did not fail to give consideration to the totality of the evidence. The Panel did not mistakenly fail to give the proper weight to MOFCOM's "low price" finding or to other aspects of MOFCOM's affirmative price effects finding. According to the United States, in rejecting China's claim that the increasing volume of imports alone could support MOFCOM's finding of significant price depression and suppression, the Panel correctly pointed out that a "panel must exercise great caution in determining whether or not to engage in analyses not undertaken by the investigating authority itself."<sup>137</sup> The United States further argues that the Final Determination does not indicate that it gave greater weight to findings on parallel pricing trends and a pricing policy aimed at undercutting subject import prices than it gave to its finding of "low price" of subject imports. As a result, the United States argues, the Panel was correct in finding that it had no basis to conclude that these findings could, by themselves, support MOFCOM's pricing analysis.

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<sup>132</sup>United States' appellee's submission, para. 95 (referring to Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 761, in turn referring to Appellate Body Report, *Chile – Price Band System (Article 21.5 – Argentina)*, para. 238, in turn referring to Appellate Body Report, *US – Steel Safeguards*, para. 498; and Appellate Body Report, *China – Publications and Audiovisual Products*, para. 189).

<sup>133</sup>United States' appellee's submission, para. 96 (referring to Appellate Body Report, *EC – Hormones*, paras. 133 and 138).

<sup>134</sup>United States' appellee's submission, para. 97.

<sup>135</sup>United States' appellee's submission, para. 98 (quoting China's response to the Panel's request of 18 November 2011 for certain confidential data, p. 2). (emphasis added by the United States)

<sup>136</sup>United States' appellee's submission, para. 98.

<sup>137</sup>United States' appellee's submission, para. 100 (quoting Panel Report, para. 7.542).

2. Article 6.9 of the *Anti-Dumping Agreement* and Article 12.8 of the *SCM Agreement* – Disclosure of Essential Facts

74. The United States submits that the Panel was correct in concluding that MOFCOM failed to disclose the "essential facts" within the meaning of Article 6.9 of the *Anti-Dumping Agreement* and Article 12.8 of the *SCM Agreement*. The United States contests China's argument that the Panel erred in its interpretation of Article 3.2 of the *Anti-Dumping Agreement* and Article 15.2 of the *SCM Agreement*, leading it to make incorrect findings under Articles 6.9 and 12.8. Specifically, the United States disagrees with China that, because Articles 3.2 and 15.2 only require MOFCOM to find that price depression and suppression *existed* in the market, the only "essential facts" it needed to disclose were the declines in domestic prices (in connection with price depression) and changes in the price-cost ratio of the Chinese domestic industry (in connection with price suppression). This, in the United States' view, ignores that Articles 3.2 and 15.2 both require that price depression or suppression be the "effect" of the imports under investigation. In fact, the United States argues, MOFCOM attempted to satisfy this requirement by referring to the "low price" of subject imports.

75. Moreover, the United States submits that MOFCOM failed to disclose the essential facts supporting its conclusion of "low" subject import prices, which underpinned its finding of significant price depression and suppression. The United States agrees with the Panel that, because MOFCOM's conclusion regarding the "low price" of subject imports was essential to support its price depression and suppression finding, MOFCOM was required to disclose not only the conclusion regarding the existence of a "low price" but also the "essential facts" supporting this conclusion, in order to allow interested parties to defend their interests. The United States highlights that the only disclosure made by MOFCOM in its Final Injury Disclosure consists of AUV data for the subject imports, without including any information about, or comparison with, AUVs of the domestic product.<sup>138</sup>

76. The United States disagrees with China's argument that, even if Articles 3.2 and 15.2 impose an obligation to find some causal relationship between subject imports and adverse price effects, MOFCOM still met its obligation to disclose the essential facts underlying its price effects finding by referring to the pricing policy of importers. The United States argues, first, that the Panel correctly recognized that MOFCOM's conclusion regarding the "low price" of subject imports formed an essential part of the reasoning MOFCOM used to support its price depression and suppression finding. Second, the United States highlights that, in any event, the Panel properly found that MOFCOM's "vague references" to the "pricing policy" of the importers "did not constitute an adequate disclosure of essential facts to support MOFCOM's price effects finding".<sup>139</sup> According to the United States, the

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<sup>138</sup>United States' appellee's submission, para. 105 (referring to Panel Report, para. 7.569).

<sup>139</sup>United States' appellee's submission, para. 107 (referring to Panel Report, para. 7.573).

Panel correctly recognized that Articles 6.9 and 12.8 require disclosure of "facts", and not merely assertions. The Panel also recognized that such facts indeed existed and, once China had disclosed them to the Panel, the United States was able to challenge their relevance for MOFCOM's price depression finding.

77. In addition, the United States disagrees with China's position that "the margins of underselling over the 2006-2008 period"<sup>140</sup> and the "facts about prices of subject imports relative to domestic prices" were never essential facts that "'form[ed] the basis of the decision' to impose measures".<sup>141</sup> According to the United States, China's position is at odds with the language of the Final Determination, in which MOFCOM repeatedly referred to the "low price" of subject imports.<sup>142</sup> Finally, the United States argues that the Panel did not improperly focus its analysis on the pricing policy of exporters, thereby ignoring MOFCOM's references to decreasing import prices and increasing import volume.<sup>143</sup> Rather, it found that the references in MOFCOM's Preliminary Determination and Final Injury Disclosure to the low price strategies of the Russian and US exporters "were insufficient as a summary of the essential facts supporting the conclusion of low import prices".<sup>144</sup>

78. For these reasons, the United States requests the Appellate Body to uphold the Panel's finding of inconsistency with Article 6.9 of the *Anti-Dumping Agreement* and Article 12.8 of the *SCM Agreement*, as set forth in paragraphs 7.575 and 8.1(f) of the Panel Report.

3. Article 12.2.2 of the *Anti-Dumping Agreement* and Article 22.5 of the *SCM Agreement* – Public Notice Requirements

79. The United States argues that the Panel properly found that MOFCOM's failure to include in its Final Determination information material to its price effects analysis was inconsistent with the public notice requirements of Article 12.2.2 of the *Anti-Dumping Agreement* and Article 22.5 of the *SCM Agreement*. The United States contests China's argument that the Panel's allegedly flawed interpretation of Article 3.2 of the *Anti-Dumping Agreement* and Article 15.2 of the *SCM Agreement* led it to make incorrect findings under Article 12.2.2 of the *Anti-Dumping Agreement* and Article 22.5 of the *SCM Agreement*.<sup>145</sup> In the United States' view, China's argument that the Final Determination

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<sup>140</sup>United States' appellee's submission, para. 108.

<sup>141</sup>United States' appellee's submission, para. 108 (quoting China's appellant's submission, para. 220).

<sup>142</sup>United States' appellee's submission, para. 108.

<sup>143</sup>United States' appellee's submission, para. 109 (referring to China's appellant's submission, para. 221).

<sup>144</sup>United States' appellee's submission, para. 109 (referring to Panel Report, para. 7.573).

<sup>145</sup>United States' appellee's submission, para. 112 (referring to China's appellant's submission, paras. 223-225).

only needed to contain a reference to the existence of price depression and suppression ignores that Articles 3.2 and 15.2 require that price depression and suppression be the "effect" of subject imports.

80. The United States further argues that the Panel did not fault MOFCOM for failing to disclose specific margins of price undercutting *per se*. Rather, "the Panel referred to the existence of these margins ... to illustrate that 'MOFCOM had before it information on the prices of subject imports and the prices of the domestic product and undertook a comparative analysis of this information.'"<sup>146</sup> The United States highlights that MOFCOM's Final Determination disclosed no meaningful information comparing the prices of subject imports and domestic products, or identifying how the "pricing policy" of importers affected the prices that they charged vis-à-vis domestic products.

81. The United States also reiterates that, in the light of the repeated references to the "low price" of subject imports in the Final Determination, China's argument that prices of subject imports relative to prices of domestic products were not "matters of fact" that led to the imposition of final measures<sup>147</sup>, or that they were not considered "material" by MOFCOM, is "implausible".<sup>148</sup> Moreover, the United States contends that China's reference to the disclosure of other elements purportedly relevant to MOFCOM's price effects analysis, such as the pricing policy of importers, is "no substitute" for a disclosure of information regarding the existence of "low" import prices.<sup>149</sup>

82. For these reasons, the United States requests the Appellate Body to uphold the Panel's finding of inconsistency with Article 12.2.2 of the *Anti-Dumping Agreement* and Article 22.5 of the *SCM Agreement*, as set forth in paragraphs 7.592 and 8.1(f) of the Panel Report.

### C. *Arguments of the Third Participants*

#### 1. European Union

83. The European Union submits that, although a "literal reading" of Article 3.2 of the *Anti-Dumping Agreement* and Article 15.2 of the *SCM Agreement* could suggest that an investigating authority must consider whether the price effects listed therein are caused by subject imports, these provisions must be read together with the other paragraphs of Article 3 of the *Anti-Dumping Agreement* and Article 15 of the *SCM Agreement*.<sup>150</sup> The European Union recalls that Articles 3.5 and 15.5 lay down precise requirements for establishing the causal relationship between subject imports and injury to the domestic industry. Thus, in the European Union's view, reading into

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<sup>146</sup>United States' appellee's submission, para. 114 (quoting Panel Report, para. 7.591).

<sup>147</sup>United States' appellee's submission, para. 116 (quoting China's appellant's submission, para. 230).

<sup>148</sup>United States' appellee's submission, para. 116 (referring to China's appellant's submission, para. 231).

<sup>149</sup>United States' appellee's submission, para. 115.

<sup>150</sup>European Union's third participant's submission, para. 4.

Articles 3.2 and 15.2 an obligation to examine the existence of a causal link between the subject imports and price depression/suppression would anticipate and unnecessarily duplicate part of the overall causal analysis that the investigating authority must conduct pursuant to Articles 3.5 and 15.5. The European Union recalls that, in attempting to distinguish the requirements imposed by Articles 3.2 and 15.2 from the causation analysis mandated by Articles 3.5 and 15.5, the Panel noted that the former provisions do not require a non-attribution analysis regarding factors other than the subject imports. In the European Union's view, the Panel's approach would still lead to an overlap between these two sets of obligations, because the analysis required by Articles 3.5 and 15.5 is not limited to a non-attribution analysis, and because it may be difficult to consider the causal link between subject imports and effects on domestic prices without taking into account factors other than subject imports.

84. The European Union therefore contends that Articles 3.2 and 15.2 do not require an examination of whether there is a causal link between subject imports and price effects. Rather, these provisions require the investigating authority only to "consider" whether there is some rational connection between subject imports and the price effects listed therein. This connection is inherent in the notion of "price undercutting", which involves a price comparison between subject imports and like domestic products. As regards price depression and suppression, the investigating authority should consider whether the observed decline in the prices of the like domestic products, or their inability to increase, is consistent with the observed evolution of the prices and/or volume of the subject imports. The European Union adds that the answer to the interpretative question raised by China's appeal is "ultimately inconsequential", because the investigating authority would, in any event, be required to examine the causal link between subject imports and price effects as part of the analysis required by either: (i) Articles 3.2 and 15.2; (ii) Articles 3.5 and 15.5; or (iii) both sets of provisions.<sup>151</sup>

85. The European Union further submits that the use of the conjunction "or" in Articles 3.2 and 15.2 indicates that the investigating authority is not required to *make a positive finding* with regard to all three price effects, but that this does not mean that the authority may freely choose which type of price effect to consider. In the European Union's view, although a finding of price depression or suppression may, in theory, be independent from a finding of price undercutting, the examination of price undercutting will often shed decisive light on the causal relationship between subject imports and price depression/suppression. For example, where import prices are much higher than domestic prices, "it would in normal circumstances be implausible to argue" that subject imports have caused

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<sup>151</sup>European Union's third participant's submission, para. 9.

price depression or suppression.<sup>152</sup> Finally, the European Union maintains that, despite the absence of an express finding by MOFCOM on price undercutting, the Panel should have examined whether MOFCOM had properly "considered" the existence of that price effect, and the Panel would have found that MOFCOM had *not* done so.

86. The European Union dismisses China's allegation that the Panel erred in requiring the use of specific methodologies in order to conduct a price effects analysis. While the European Union agrees that Article 3.2 of the *Anti-Dumping Agreement* and Article 15.2 of the *SCM Agreement* do not prescribe any specific methodology for examining price effects, this does not mean that the investigating authority enjoys unfettered discretion. As the European Union states, "whatever methodology is chosen, the investigating authority must ensure that a determination of injury is made on the basis of 'positive evidence' of the effects of the dumped imports and involves an 'objective examination' of such evidence."<sup>153</sup> The European Union adds that the examination of the price effects of subject imports under Articles 3.2 and 15.2 necessarily entails some form of comparison of prices or of prices and costs. The European Union agrees with the Panel that, whenever prices are to be compared, the investigating authority must ensure that they are "properly comparable".<sup>154</sup> The European Union agrees that the obligations imposed by Article 2.4 of the *Anti-Dumping Agreement* cannot be transposed as such to the injury context. However, this does not mean that an investigating authority "is free to disregard any difference concerning the factors mentioned in Article 2.4 ... such as physical characteristics or levels of trade, when conducting an examination of price effects".<sup>155</sup>

87. The European Union states that it is "concerned with MOFCOM's apparent failure to take into account the differences in physical characteristics between the different grades of the subject product".<sup>156</sup> The European Union adds that, while single AUV comparisons may be appropriate if the product is homogeneous, doing so when there are very different product types with widely diverging prices may yield "differences between the mix of product types, rather than genuine price undercutting or price depression".<sup>157</sup> The European Union considers that the cases on which China relies do not support the position that Articles 3.1 and 3.2 impose no obligation to take into account differences between product types, models, or grades.<sup>158</sup> In particular, the European Union notes that,

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<sup>152</sup>European Union's third participant's submission, para. 12.

<sup>153</sup>European Union's third participant's submission, para. 16 (referring to Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 113).

<sup>154</sup>European Union's third participant's submission, para. 17 (quoting Panel Report, para. 7.530).

<sup>155</sup>European Union's third participant's submission, para. 18.

<sup>156</sup>European Union's third participant's submission, para. 19 (referring to Panel Report, para. 7.528).

<sup>157</sup>European Union's third participant's submission, para. 20.

<sup>158</sup>European Union's third participant's submission, para. 21 (referring to China's appellant's submission, paras. 61-63, in turn referring to Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 204; and para. 152, in turn referring to Panel Report, *Egypt – Steel Rebar*, para. 7.73, and Panel Report, *EC – Fasteners (China)*, para. 7.325).

although China seeks to rely on the panel's statement in *EC – Fasteners (China)*, the panel in that case stated that adjustments to prices in the context of a price undercutting analysis "may be a useful means of ensuring that the requirements ... in Article 3.1 are satisfied".<sup>159</sup> The European Union further notes that, when the price differentials between the various types or grades of the subject product are large, "even relatively small differences in product mix can have a substantial impact on the outcome of the price undercutting analysis".<sup>160</sup>

88. The European Union disagrees with China's argument that the use of single AUVs obviates the need to make adjustments for differences in the level of trade, because China's argument is factually incorrect. Moreover, the European Union contends that the panel report in *Egypt – Steel Rebar* should be read differently to how China reads it. According to the European Union, although the panel in that dispute held that the Egyptian authorities were not required to make a comparison "at any particular level of trade"<sup>161</sup>, the underlying assumption was that prices had nevertheless been compared at the same level of trade, albeit differently from the level preferred by Turkey. The European Union also disagrees with China's argument that MOFCOM's failure to take price differences into account is excused by the fact that such arguments were not raised during the investigation. According to the European Union, "it is well-established that the complaining party is not confined to the arguments made by the exporter during the antidumping investigation."<sup>162</sup>

89. With regard to the disclosure of "essential facts", the European Union argues that, pursuant to Article 6.9 of the *Anti-Dumping Agreement* and Article 12.8 of the *SCM Agreement*, an investigating authority is required to disclose all essential facts relating to its analysis of all price effects examined under Article 3.2 of the *Anti-Dumping Agreement* and Article 15.2 of the *SCM Agreement*. Moreover, the object and purpose of the disclosure requirement under Articles 6.9 and 12.8 is to provide interested parties in an investigation with an opportunity to effectively exercise their right of defence by commenting on the facts that are essential for the investigating authority's process of analysis and decision-making. Therefore, any disclosure of essential facts concerning the price analysis covers not only the authority's conclusions about the existence of price effects, but also the underlying data and methodology employed to reach those conclusions.

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<sup>159</sup>European Union's third participant's submission, para. 22 (quoting Panel Report, *EC – Fasteners (China)*, para. 7.328).

<sup>160</sup>European Union's third participant's submission, para. 23.

<sup>161</sup>European Union's third participant's submission, para. 24 (quoting Panel Report, *Egypt – Steel Rebar*, para. 7.73).

<sup>162</sup>European Union's third participant's submission, para. 25 (referring to Appellate Body Report, *Thailand – H-Beams*, para. 94; Appellate Body Report, *US – Lamb*, para. 113; and Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 131).

90. The European Union further argues that, while an investigating authority "enjoys a certain discretion" in adopting a methodology for examining the price effects of dumped imports, it does not enjoy "unfettered discretion".<sup>163</sup> If investigating authorities were exempt from disclosing the underlying data and methodologies employed in the context of a price analysis, their "discretion would become complete, and a verification that the examination was conducted objectively and was based on positive evidence would be nearly impossible".<sup>164</sup> Finally, the European Union agrees with the Panel that, where confidential information is an "essential fact under consideration", the disclosure obligation cannot be simply set aside, but must be met through the disclosure of meaningful non-confidential summaries.<sup>165</sup>

91. Finally, with regard to the public notice requirements, the European Union submits that, pursuant to Article 12.2.2 of the *Anti-Dumping Agreement* and Article 22.5 of the *SCM Agreement*, investigating authorities must make available in a public notice all relevant information on matters of fact and law and reasons that have led to the imposition of the final measure, including, *inter alia*, their price effects finding. In the European Union's view, since MOFCOM failed to include all relevant information concerning price undercutting in the public notice of the Final Determination, the Appellate Body should uphold the Panel's findings that China acted inconsistently with Articles 12.2.2 and 22.5.

## 2. Japan

92. Japan argues that Article 3.1 of the *Anti-Dumping Agreement* requires investigating authorities to conduct an "objective examination" of the effect of dumped imports on prices of like domestic products and to base this examination on "positive evidence". Article 3.2, in turn, clarifies this obligation by requiring the authorities to consider one of the three price effects listed therein. Japan disagrees with China's interpretation of Article 3.2, because it fails to consider the words "effect of" in conjunction with the words "the dumped imports" in Articles 3.1 and 3.2 of the *Anti-Dumping Agreement*.<sup>166</sup> Japan maintains that, under Article 3.2, investigating authorities are required to show that price undercutting, price depression, or price suppression has occurred as an effect of dumped imports. Therefore, "it is obviously normal" to consider the price of dumped imports in relation to that of the like domestic product.<sup>167</sup> In Japan's view, when the import price is higher than the domestic price, this may indicate that imported and domestic products are not in competition with

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<sup>163</sup>European Union's third participant's submission, para. 29 (referring to Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 204; Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 113; and Panel Report, *EC – Fasteners (China)*, para. 7.325).

<sup>164</sup>European Union's third participant's submission, para. 29.

<sup>165</sup>European Union's third participant's submission, para. 30 (referring to Panel Report, para. 7.571).

<sup>166</sup>Japan's third participant's submission, para. 4.

<sup>167</sup>Japan's third participant's submission, para. 4.

each other, and that price depression or price suppression could not be an effect of the dumped imports.

93. Japan submits that, under Article 3.2, investigating authorities are required to weigh the merits of positive evidence regarding whether there has been price undercutting, price depression, or price suppression as a consequence of the price of dumped imports. Thus, Japan submits that the Panel succinctly summarized the authorities' obligations under Article 3.2 in accordance with a correct interpretation of this provision. Japan adds that the authorities' deliberation in accordance with Article 3.2 "must be apparent from the documents forming the basis for [the panel's] review".<sup>168</sup>

94. With regard to the disclosure of "essential facts", Japan argues that, when investigating authorities intend to base their final injury determination on price depression or suppression, they must, under Article 6.9 of the *Anti-Dumping Agreement*, disclose facts that are essential to a finding of these price effects. Japan recalls that Article 3.2 of the *Anti-Dumping Agreement* requires authorities to consider the consequential relationship between dumped imports and prices of domestic like products. Japan submits that, if MOFCOM's finding of such relationship is based on the comparison between the prices of subject imports and the prices of like domestic products, the essential facts that MOFCOM was required to disclose include these prices.

95. Japan argues that the requirement under Article 12.2.2 of the *Anti-Dumping Agreement* that the public notice of the final determination contain "all relevant information on the matters of fact and law and reasons" must be understood in the context of Article 12.2, which requires authorities to set forth explanations on "all issues of fact and law considered material by the investigating authorities". Accordingly, the issues that are relevant to, and material in, the establishment of injury, must be explained by an investigating authority in its final determination "such that its reasons for concluding as it did can be discerned and are understood".<sup>169</sup>

96. Japan submits that, as discussed in the context of Article 6.9 of the *Anti-Dumping Agreement*, price depression or suppression would be essential facts underlying a final injury determination when investigating authorities base their determination on these issues. These issues would therefore be relevant and material to the final injury determination. Moreover, authorities must provide an explanation of sufficient detail to allow readers of the public notice to discern and understand the reasons for the conclusion that the dumped imports significantly depressed or suppressed the prices of

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<sup>168</sup>Japan's third participant's submission, para. 6 (quoting Panel Report, *Thailand – H-Beams*, para. 7.179).

<sup>169</sup>Japan's third participant's submission, para. 12 (quoting Panel Report, *EU – Footwear (China)*, para. 7.844).

domestic like products and were thus causing injury. In Japan's view, a mere statement regarding domestic prices alone would not be sufficient.

3. Korea

97. With regard to the interpretation of Article 3.2 of the *Anti-Dumping Agreement* and Article 15.2 of the *SCM Agreement*, Korea maintains that the fact that causation requirements are addressed by other provisions of these Agreements "does shed an important light" on the interpretation of Articles 3.2 and 15.2, and China's arguments in this respect should be carefully analyzed.<sup>170</sup> Korea, however, does not subscribe to the view that Articles 3.2 and 15.2 categorically exclude a causation analysis. Korea acknowledges that the word "consider" in Articles 3.2 and 15.2 imposes a lower level of obligation on the investigating authorities than the word "demonstrate" contained in Articles 3.5 and 15.5. Nonetheless, the word "consider" requires investigating authorities to take certain concrete action, and the fact that the authorities fulfilled this requirement should be proven by evidence.<sup>171</sup>

98. In Korea's view, the word "effect" arguably carries both a meaning of "causation" and a meaning of "consequence". Moreover, noting the phrase "the effect of the [dumped or subsidized] imports on prices" in Articles 3.2 and 15.2, Korea maintains that the word "effect" in these provisions should not be interpreted in isolation, but should be properly regarded as indicating a relationship between the subject imports and the price effects. According to Korea, examining this relationship would essentially be a causation discussion, though not identical to that required under Article 3.5 of the *Anti-Dumping Agreement* and Article 15.5 of the *SCM Agreement*.

99. Korea further notes that the verb "affect" in Articles 3.4 and 15.4 means "to have an effect on". Thus, in the context of Articles 3 and 15, the interpretations of "effect" and "affect" can be "virtually [the] same".<sup>172</sup> Finally, Korea recalls that the panel in *Korea – Commercial Vessels* found that the term "the effect of the subsidy" in Article 6.3 of the *SCM Agreement* requires a causation analysis, and argues that that panel's finding may provide useful context for the interpretative question in this dispute.<sup>173</sup>

100. Regarding China's claim under Article 11 of the DSU, Korea argues that, although investigating authorities possess wide latitude in evaluating evidence collected, and in adopting

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<sup>170</sup>Korea's third participant's submission, para. 8.

<sup>171</sup>Korea's third participant's submission, para. 11 (referring to Panel Report, *Thailand – H-Beams*, para. 7.161).

<sup>172</sup>Korea's third participant's submission, para. 16.

<sup>173</sup>Korea's third participant's submission, para. 18 (referring to Panel Report, *Korea – Commercial Vessels*, paras. 7.612-7.616).

specific methodologies to evaluate that evidence, such discretion "is not unbridled ... and is only permitted within the parameters of relevant provisions at issue".<sup>174</sup> Korea adds that the obligations contained in Articles 3 and 15 should be interpreted and implemented together with the overarching requirements of "positive evidence" and "objective examination" appearing in Articles 3.1 and 15.1. Viewed from this perspective, Korea argues, the assertion that an investigating authority is accorded with discretion may not be "determinative" as to whether the authority acted consistently with its obligations under Articles 3 and 15.<sup>175</sup>

101. Korea concurs with the view that, when an investigating authority has relied on the totality of the evidence, a reviewing panel is also obliged to follow the same methodology. Korea considers that the Appellate Body report in *US – Countervailing Duty Investigation on DRAMS* stands for the proposition that a panel may not conduct a *de novo* review of the evidence gathered by the authority. Rather, Korea argues, "the panel is to conduct a review using the same analytical tool adopted by the authority at issue."<sup>176</sup> Korea thus considers that a panel must assess whether an investigating authority's determination is supported by the totality of evidence on the record, but "may well reach a conclusion that, in a particular dispute at issue, such totality of evidence does not support the findings of the investigating authority as an 'unbiased and objective investigating authority'".<sup>177</sup>

#### 4. Saudi Arabia

102. Saudi Arabia submits that the *Anti-Dumping Agreement* and the *SCM Agreement* reflect a delicate balance between the interests of the parties subject to anti-dumping and countervailing duty investigations and those of the investigating authorities tasked with completing the investigations in a thorough and timely manner. Saudi Arabia requests the Appellate Body to interpret the relevant provisions of these Agreements in the light of this balance.

103. Saudi Arabia submits that the Panel's interpretation of Article 3.2 of the *Anti-Dumping Agreement* and Article 15.2 of the *SCM Agreement* is consistent with the text of the second sentence of these provisions. These sentences establish that any observed price effects must be attributable to the subject imports by stipulating that price undercutting is "by the [dumped or subsidized] imports", and that "the effect of the [dumped or subsidized] imports" is to "depress prices" or to "prevent price increases". This reading of Articles 3.2 and 15.2 is confirmed by the ordinary meaning of the word

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<sup>174</sup>Korea's third participant's submission, para. 20.

<sup>175</sup>Korea's third participant's submission, para. 21.

<sup>176</sup>Korea's third participant's submission, para. 23.

<sup>177</sup>Korea's third participant's submission, para. 25.

"effect", and by the fact that "cause and effect are correlative terms".<sup>178</sup> Moreover, Saudi Arabia argues, the fact that the first sentence of Articles 3.2 and 15.2 "establishes that volume effects must be attributed to the subject imports" further supports this reading of Articles 3.2 and 15.2, because an interpretation of the second sentence as not requiring the attribution of observed price effects to the subject imports would create "incongruous standards for volume effects and price effects".<sup>179</sup>

104. Saudi Arabia submits that settled jurisprudence by the Appellate Body supports the Panel's interpretation. Saudi Arabia recalls the Appellate Body's findings in *EC – Bed Linen (Article 21.5 – India)* that "[i]t is clear from the text of Article 3.2 that investigating authorities must consider whether there has been a significant increase in *dumped* imports, and that they must examine the effect of *dumped* imports on prices resulting from price undercutting, price depression, or price suppression"<sup>180</sup>, and that, "[i]n stipulating how to undertake the analyses of volume and prices, Article 3.2 refers consistently to 'dumped imports'."<sup>181</sup> In Saudi Arabia's view, the Appellate Body's statements "establish that Articles 3.2 and 15.2 impose on authorities a clear obligation to examine price effects that are attributed to *subject imports*".<sup>182</sup>

105. Saudi Arabia further contends that an interpretation that did not require the authorities to examine the effect of the subject imports would nullify the non-attribution requirement of Articles 3.5 and 15.5. Saudi Arabia notes that the price effects within the meaning of Articles 3.2 and 15.2 are one of the factors that the authorities must examine to determine whether the subject imports caused injury to the domestic industry under Articles 3.5 and 15.5. In carrying out the causation analysis, an investigating authority must ensure that injury caused by other known factors is not wrongly attributed to the subject imports.<sup>183</sup> This non-attribution requirement, however, would not be satisfied if an authority merely examined domestic or import prices generally, rather than examining the specific price effects of *dumped or subsidized imports*. Therefore, Saudi Arabia maintains, unless the adverse price effects are properly attributed to the subject imports, it would be impossible to determine whether such imports are responsible for the injured state of the domestic industry.

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<sup>178</sup>Saudi Arabia's third participant's submission, para. 6 (quoting *The Oxford English Dictionary Online*, OED Online (Oxford University Press), accessed 9 August 2012, available online at: <<http://www.oed.com/view/Entry/29147#eid9876036>>).

<sup>179</sup>Saudi Arabia's third participant's submission, para. 8.

<sup>180</sup>Saudi Arabia's third participant's submission, para. 9 (quoting Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 111 (original emphasis)).

<sup>181</sup>Saudi Arabia's third participant's submission, para. 9 (quoting Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 111).

<sup>182</sup>Saudi Arabia's third participant's submission, para. 9. (original emphasis)

<sup>183</sup>Saudi Arabia's third participant's submission, para. 12 (referring to Appellate Body Report, *US – Hot-Rolled Steel*, paras. 226-228; and Appellate Body Report, *EC – Tube or Pipe Fittings*, paras. 175 and 188).

106. Saudi Arabia considers that the legal standard set out by the Panel for disclosure of essential facts is consistent with the text of Article 6.9 of the *Anti-Dumping Agreement* and Article 12.8 of the *SCM Agreement*, as well as with established WTO jurisprudence. In Saudi Arabia's view, the proper legal standard should balance the interests of the parties, who must have sufficient time and information to participate meaningfully in a trade remedy investigation, with an authority's interest in efficient administration of the investigation.

107. Saudi Arabia argues that the text of Articles 6.9 and 12.8 imposes two "straightforward" obligations on an investigating authority: (i) to disclose "the essential facts under consideration which form the basis for the decision whether to apply definitive measures"; and (ii) "to do so in sufficient time so that parties can defend their interests".<sup>184</sup> In Saudi Arabia's view, the essential facts are those that "underlie the investigating authority's final findings and conclusions" in respect of the essential elements that must exist in order to apply definite measures".<sup>185</sup> Such facts also "include the 'facts necessary to the *process of analysis and decision-making* by the investigating authority, *not only those that support the decision ultimately reached*'".<sup>186</sup> Finally, Saudi Arabia submits that it should be ensured that the disciplines in Articles 6.9 and 12.8 permit interested parties to defend fully their interests by requiring authorities to disclose all record evidence relating to the essential elements that must be established before the application of definitive measures.

108. Saudi Arabia considers that the Panel's enunciation of the public notice standard under Article 12.2.2 of the *Anti-Dumping Agreement* and Article 22.5 of the *SCM Agreement* appropriately balances the transparency obligations of both Agreements with the practical concerns of the investigating authorities regarding the efficient administration of trade remedy investigations. Saudi Arabia contends that the findings of the Appellate Body in *US – Countervailing Duty Investigation on DRAMS* offer a balanced approach that imposes manageable, yet important, public notice obligations on Members' investigating authorities. In that dispute, the Appellate Body held that, although the text of Article 22.5 "does not require the agency to cite or discuss *every* piece of supporting record evidence for each fact in the final determination"<sup>187</sup>, the investigating authority "must provide a 'reasoned and adequate explanation as to: (i) how the evidence on the record

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<sup>184</sup>Saudi Arabia's third participant's submission, para. 19 (referring to Panel Report, *EC – Salmon (Norway)*, para. 7.794).

<sup>185</sup>Saudi Arabia's third participant's submission, para. 20 (quoting Panel Report, *Mexico – Olive Oil*, para. 7.110).

<sup>186</sup>Saudi Arabia's third participant's submission, para. 20 (quoting Panel Report, *EC – Salmon (Norway)*, para. 7.807). (emphasis added by Saudi Arabia)

<sup>187</sup>Saudi Arabia's third participant's submission, para. 24 (quoting Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 164 (original emphasis)).

supported its factual findings; and (ii) how those factual findings supported the overall ... determination', and this should be directly 'discernible from the published determination itself'.<sup>188</sup>

109. Finally, Saudi Arabia adds that the information that must be contained in the public notice depends on its relationship with the investigating authority's determination. In the case of injury and price effects, if an authority's injury determination relies on certain price effects information, then such information must be included in the public notice announcing that determination.

### III. Issues Raised in This Appeal

110. The following issues are raised in this appeal:

- (a) whether, in assessing MOFCOM's finding of significant price depression and suppression<sup>189</sup>, the Panel erred in finding that China acted inconsistently with Articles 3.1 and 3.2 of the *Anti-Dumping Agreement* and Articles 15.1 and 15.2 of the *SCM Agreement*, and, in particular:
  - (i) whether the Panel erred in its interpretation of Article 3.2 of the *Anti-Dumping Agreement* and Article 15.2 of the *SCM Agreement*;
  - (ii) whether the Panel erred in its application of Article 3.2 of the *Anti-Dumping Agreement* and Article 15.2 of the *SCM Agreement*, read together with Article 3.1 of the *Anti-Dumping Agreement* and Article 15.1 of the *SCM Agreement*; and
  - (iii) whether the Panel acted inconsistently with its duty to make an objective assessment under Article 11 of the DSU;
- (b) whether, in relation to MOFCOM's price effects finding, the Panel erred in finding that China acted inconsistently with Article 6.9 of the *Anti-Dumping Agreement* and Article 12.8 of the *SCM Agreement* by failing to disclose "essential facts"; and

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<sup>188</sup>Saudi Arabia's third participant's submission, para. 24 (quoting Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 186).

<sup>189</sup>In this Report, we also use the term "price effects finding" to refer to MOFCOM's finding of significant price depression and suppression. In addition, unless otherwise specified, we follow the practice of the parties and the Panel in using the term "price depression" or "significant price depression", and "price suppression" or "significant price suppression", as shorthand references to the price effects that are identified in Article 3.2 of the *Anti-Dumping Agreement* and Article 15.2 of the *SCM Agreement* as follows: "to depress prices to a significant degree or [to] prevent price increases, which otherwise would have occurred, to a significant degree".

- (c) whether, in relation to MOFCOM's price effects finding, the Panel erred in finding that China acted inconsistently with Article 12.2.2 of the *Anti-Dumping Agreement* and Article 22.5 of the *SCM Agreement* by failing to disclose "all relevant information on the matters of fact".

#### IV. The Scope of China's Appeal

111. Before commencing our analysis of the issues raised in China's appeal, we consider it useful to discuss the scope of China's appeal and the implications for our review. In its Notice of Appeal, China seeks review by the Appellate Body of the Panel's interpretation and application of Article 3.2 of the *Anti-Dumping Agreement* and Article 15.2 of the *SCM Agreement* as it relates to the finding of adverse price effects of subject imports<sup>190</sup> by the Ministry of Commerce of the People's Republic of China ("MOFCOM"), that is, significant price depression and suppression. Thus, China's Notice of Appeal does not include a request that the Appellate Body review the Panel's findings as they relate to Articles 3.1 and 15.1. Nonetheless, in its appellant's submission, China requests the Appellate Body to reverse the Panel's ultimate finding that MOFCOM's price effects finding was inconsistent with Articles 3.1 and 3.2 of the *Anti-Dumping Agreement*, and Articles 15.1 and 15.2 of the *SCM Agreement*, on the basis of the Panel's alleged errors in its interpretation and application of Articles 3.2 and 15.2.<sup>191</sup> China explains that, whereas Articles 3.1 and 15.1 set out the overarching principle that informs an investigating authority's analysis under subsequent paragraphs of Articles 3 and 15, Articles 3.2 and 15.2 provide "all of the substantive content" of an investigating authority's obligation in considering adverse price effects.<sup>192</sup> China adds that, although it is not challenging the Panel's interpretation and application of Articles 3.1 and 15.1, it nonetheless takes issue with how the Panel applied the overarching principle under Articles 3.1 and 15.1 *in characterizing the substantive content* of an authority's obligation under Articles 3.2 and 15.2.<sup>193</sup>

112. We recall that, before the Panel, the United States alleged that MOFCOM's finding of significant price depression and suppression was inconsistent with Articles 3.1 and 3.2 of the *Anti-Dumping Agreement*, and Articles 15.1 and 15.2 of the *SCM Agreement*, because MOFCOM did not base its finding on "positive evidence", and did not conduct an "objective examination", with respect to: (i) the existence of significant price depression and suppression during the period of investigation; and (ii) whether any such price depression and suppression were the effects of subject

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<sup>190</sup>We use the term "subject imports" to refer to dumped and/or subsidized imports subject to an investigation.

<sup>191</sup>China's appellant's submission, paras. 109 and 192.

<sup>192</sup>China's appellant's submission, para. 50.

<sup>193</sup>China's response to questioning at the oral hearing.

imports.<sup>194</sup> In addressing these claims, the Panel began by noting that it was called upon to determine whether the quality of the evidence relied on by MOFCOM in its price effects finding met the "positive evidence" standard set forth in Articles 3.1 and 15.1, and whether MOFCOM undertook an objective examination of the evidence as required by these provisions. Subsequently, in examining the United States' claims in respect of MOFCOM's price effects finding, the Panel applied the standard in Articles 3.2 and 15.2, *in conjunction with* the obligation set out in Articles 3.1 and 15.1, in finding that MOFCOM's price effects finding was "inconsistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement, and Articles 15.1 and 15.2 of the SCM Agreement".<sup>195</sup>

113. Thus, the Panel did not make separate findings under Articles 3.1 and 15.1, on the one hand, and Articles 3.2 and 15.2, on the other hand. Rather, given that the standard in Articles 3.1 and 15.1 informed the Panel's analysis of MOFCOM's price effects finding under Articles 3.2 and 15.2, the Panel's finding of inconsistency under these provisions was based on an integrated analysis of both sets of provisions. Therefore, even though China has not challenged the Panel's interpretation and application of Articles 3.1 and 15.1, we consider that our examination of the Panel's analysis under Articles 3.2 and 15.2 cannot be conducted in isolation from the Panel's analysis pursuant to the standard under Articles 3.1 and 15.1. It follows that we will examine the Panel's analysis of MOFCOM's price effects finding in the light of the interpretation of Articles 3.1 and 15.1 that has been developed in the Appellate Body's relevant jurisprudence.<sup>196</sup>

114. Finally, we recall that MOFCOM's price effects finding forms part of its overall determination regarding injury to the domestic industry caused by the dumped and subsidized imports of grain oriented flat-rolled electrical steel ("GOES") from Russia<sup>197</sup> and the United States. Before the Panel, the United States' challenge of this determination concerned: (i) the consistency of MOFCOM's price effects finding with Articles 3.1 and 3.2 of the *Anti-Dumping Agreement* and Articles 15.1 and 15.2 of the *SCM Agreement*; and (ii) the consistency of MOFCOM's causation finding with Articles 3.1 and 3.5 of the *Anti-Dumping Agreement* and Articles 15.1 and 15.5 of the *SCM Agreement*. The Panel upheld the United States' claims under all of these provisions. China has

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<sup>194</sup>Panel Report, paras. 7.485 and 7.490.

<sup>195</sup>Panel Report, para. 7.554.

<sup>196</sup>See Appellate Body Report, *Thailand – H-Beams*, paras. 106 and 107; Appellate Body Report, *US – Hot-Rolled Steel*, paras. 192, 193, 196, and 204-206; and Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, paras. 163-166, 180, 181, 204, and 205. See also Panel Report, para. 7.513 (referring to Appellate Body Report, *US – Hot-Rolled Steel*, para. 192; and Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, paras. 163 and 164).

<sup>197</sup>As indicated in the Introduction of this Report, MOFCOM initiated an anti-dumping investigation on imports of GOES from both Russia and the United States, and initiated a countervailing duty investigation only with respect to GOES imports from the United States. (See *supra*, para. 2 and footnote 4 thereto) Moreover, MOFCOM conducted a single injury and causation analysis relating to both the anti-dumping and countervailing duty investigations, and performed a cumulative assessment of injury by collectively taking into account GOES imports from both Russia and the United States. (See *supra*, para. 3)

limited its appeal, however, to the Panel's finding with respect to MOFCOM's price effects finding, and does not appeal the Panel's finding that MOFCOM's causation finding was inconsistent with Articles 3.1 and 3.5 of *Anti-Dumping Agreement* and Articles 15.1 and 15.5 of the *SCM Agreement*.<sup>198</sup> Thus, the Panel's finding regarding MOFCOM's causation finding stands, even if we were to reverse the Panel's finding in respect of MOFCOM's price effects finding.

115. With the above considerations in mind, we turn to review the specific errors alleged by China regarding the Panel's interpretation and application of Articles 3.2 and 15.2.

**V. Interpretation of Article 3.2 of the *Anti-Dumping Agreement* and Article 15.2 of the *SCM Agreement***

116. China claims that the Panel erred in its interpretation of Article 3.2 of the *Anti-Dumping Agreement* and Article 15.2 of the *SCM Agreement* in stating that:

... merely showing the existence of significant price depression [and suppression] does not suffice for the purposes of Article 3.2 of the *Anti-Dumping Agreement* and Article 15.2 of the *SCM Agreement*. An authority must also show that such price depression [and suppression are] an effect of the subject imports.<sup>199</sup>

China maintains that the Panel failed properly to analyze the meaning of Articles 3.2 and 15.2, and thereby imposed obligations on investigating authorities that are not found in these provisions. China submits that the Panel's interpretative errors are further revealed by aspects of its examination of MOFCOM's price effects finding.

117. In order to address China's claim regarding the alleged errors in the Panel's interpretation, we begin by recalling the Panel's relevant findings and the context in which the Panel made the above statement. We then analyze the interpretation of the relevant obligations under Articles 3.2 and 15.2, as well as China's specific arguments concerning the Panel's errors in the interpretation of these provisions.

**A. The Panel's Findings**

118. Before the Panel, the United States alleged that MOFCOM's price effects finding was inconsistent with Articles 3.1 and 3.2 of the *Anti-Dumping Agreement*, and Articles 15.1 and 15.2 of the *SCM Agreement*, because MOFCOM did not base its finding on positive evidence, and did not conduct an objective examination, with respect to: (i) the existence of significant price depression

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<sup>198</sup>Panel Report, paras. 7.638 and 8.1(g).

<sup>199</sup>Panel Report, para. 7.520. See also para. 7.547.

and suppression during the period of investigation; and (ii) whether any such price depression and suppression were the effects of subject imports.

119. With regard to the first part of the United States' claim, the Panel found that MOFCOM properly determined that there existed significant price depression and suppression "*per se*" during the period of investigation.<sup>200</sup> Specifically, the Panel found that MOFCOM's finding regarding the existence of price depression *per se* could rest on its finding that domestic prices fell by 30.25% in the first quarter of 2009.<sup>201</sup> Furthermore, the Panel found "no flaws"<sup>202</sup> in MOFCOM's reliance on changes in the price-cost ratio of like domestic products to find the existence of price suppression *per se* in 2008 and the first quarter of 2009.

120. The Panel went on to examine the second part of the United States' claim. MOFCOM found that significant price depression and suppression were the effects of subject imports, and the United States maintained that this finding of MOFCOM was not based on positive evidence and did not involve an objective examination. The Panel noted China's argument that the need to establish a link between price effects and subject imports is not contained in Articles 3.2 and 15.2, but rather is part of the broader obligations in Article 3.5 of the *Anti-Dumping Agreement* and Article 15.5 of the *SCM Agreement*.<sup>203</sup> The Panel then stated:

Having regard to the text of the relevant provisions, we note that the analysis envisaged by the second sentence of Article 3.2 of the *Anti-Dumping Agreement* and Article 15.2 of the *SCM Agreement* concerns "the effect of the [dumped/subsidized] imports on prices." Furthermore, the authority must consider whether "the effect of [dumped/subsidized] imports is ... to depress prices to a significant degree". Accordingly, merely showing the existence of significant price depression does not suffice for the purposes of Article 3.2 of the *Anti-Dumping Agreement* and Article 15.2 of the *SCM Agreement*. An authority must also show that such price depression is an effect of the subject imports.<sup>204</sup>

121. The Panel also found that "[t]he same necessarily applies in respect of an authority's finding of price suppression."<sup>205</sup> Applying this interpretation to the facts of the case, the Panel found that

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<sup>200</sup>Panel Report, paras. 7.515-7.517 and 7.546.

<sup>201</sup>Panel Report, para. 7.517.

<sup>202</sup>Panel Report, para. 7.546.

<sup>203</sup>Panel Report, para. 7.519.

<sup>204</sup>Panel Report, para. 7.520.

<sup>205</sup>Panel Report, para. 7.547.

MOFCOM's finding that significant price depression and suppression were the effects of subject imports was neither made pursuant to an objective examination, nor based on positive evidence.<sup>206</sup>

B. *Interpretation of Article 3.2 of the Anti-Dumping Agreement and Article 15.2 of the SCM Agreement*

122. Article 3.2 of the *Anti-Dumping Agreement* and Article 15.2 of the *SCM Agreement* provide:

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

123. China contends that the Panel misinterpreted Articles 3.2 and 15.2 by erroneously requiring MOFCOM to demonstrate a causal link between subject imports, on the one hand, and significant price depression and suppression, on the other hand, even though these provisions do not impose such an obligation. Rather, according to China, an investigating authority is only required to "consider" the "existence" of significant price depression or suppression.<sup>207</sup> In response, the United States contends that the Panel properly construed Articles 3.2 and 15.2 as requiring an investigating authority to assess whether significant price depression and suppression in the market are the "effect of [dumped or subsidized] imports".<sup>208</sup>

124. Thus, although three price effects are set out in Articles 3.2 and 15.2, the interpretative question raised by China on appeal concerns but two of these price effects. Specifically, China's appeal raises the question as to the scope of an investigating authority's obligations, under Articles 3.2 and 15.2, to "consider ... 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". To analyze this question, we first examine the framework for an injury determination under Article 3 of the *Anti-Dumping Agreement* and Article 15 of the *SCM Agreement*, so as to situate in

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<sup>206</sup>Panel Report, paras. 7.543 and 7.551. The Panel's application of the relevant provisions to the facts of the case and China's appeal in that regard is analyzed in section VI below.

<sup>207</sup>China's appellant's submission, para. 78.

<sup>208</sup>United States' appellee's submission, para. 30.

their context the specific obligations addressed by China's appeal. We then turn to the interpretation of specific terms in Articles 3.2 and 15.2 that are relevant to China's appeal.

1. The Framework for an Injury Determination Provided by Article 3 of the Anti-Dumping Agreement and Article 15 of the SCM Agreement

125. Article 3 of the *Anti-Dumping Agreement* and Article 15 of the *SCM Agreement* are entitled "Determination of Injury". The word "injury" is defined in these agreements as "material injury to a domestic industry, threat of material injury to a domestic industry or material retardation of the establishment of such an industry".<sup>209</sup> Articles 3 and 15 both contain several paragraphs setting out an investigating authority's obligations with regard to various aspects of an injury determination in anti-dumping and countervailing duty investigations. Articles 3.1 and 15.1 require that a determination of injury "be based on positive evidence and involve an objective examination of both (a) the volume of the [dumped or subsidized] imports and the effect of the [dumped or subsidized] imports on prices in the domestic market for like products, and (b) the consequent impact of these imports on [the] domestic producers of such products".

126. The Appellate Body has found that Article 3.1 of the *Anti-Dumping Agreement* "is 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".<sup>210</sup> According to the Appellate Body, the term "positive evidence" relates to the quality of the evidence that an investigating authority may rely upon in making a determination, and requires the evidence to be affirmative, objective, verifiable, and credible.<sup>211</sup> Furthermore, the Appellate Body has found that the term "objective examination" requires that an investigating authority's examination "conform to the dictates of the basic principles of good faith and fundamental fairness", and be conducted "in an unbiased manner, without favouring the interests of any interested party, or group of interested parties, in the investigation".<sup>212</sup>

127. In addition to setting forth the overarching obligation regarding the manner in which an investigating authority must conduct a determination of injury caused by subject imports to the domestic industry, Articles 3.1 and 15.1 also outline the content of such a determination, which consists of the following components: (i) the volume of subject imports; (ii) the effect of such imports on the prices of like domestic products; and (iii) the consequent impact of such imports on the domestic producers of the like products. The other paragraphs under Articles 3 and 15 further elaborate on the three essential components referenced in Articles 3.1 and 15.1. Articles 3.2 and 15.2

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<sup>209</sup>Footnote 9 of the *Anti-Dumping Agreement* and footnote 45 of the *SCM Agreement*.

<sup>210</sup>Appellate Body Report, *Thailand – H-Beams*, para. 106.

<sup>211</sup>Appellate Body Report, *US – Hot-Rolled Steel*, para. 192.

<sup>212</sup>Appellate Body Report, *US – Hot-Rolled Steel*, para. 193.

concern items (i) and (ii) above, and spell out the precise content of an investigating authority's consideration regarding the volume of subject imports and the effect of such imports on domestic prices. Articles 3.4 and 15.4, together with Articles 3.5 and 15.5, concern item (iii), that is, the "consequent impact" of the same imports on the domestic industry. More specifically, Articles 3.4 and 15.4 set out the economic factors that must be evaluated regarding the impact of such imports on the state of the domestic industry, and Articles 3.5 and 15.5 require an investigating authority to demonstrate that subject imports are causing injury to the domestic industry.<sup>213</sup>

128. The paragraphs of Articles 3 and 15 thus stipulate, in detail, an investigating authority's obligations in determining the injury to the domestic industry caused by subject imports. Together, these provisions provide an investigating authority with the relevant framework and disciplines for conducting an injury and causation analysis. These provisions contemplate a logical progression of inquiry leading to an investigating authority's ultimate injury and causation determination. This inquiry entails a consideration of the volume of subject imports and their price effects, and requires an examination of the impact of such imports on the domestic industry as revealed by a number of economic factors. These various elements are then linked through a causation analysis between subject imports and the injury to the domestic industry, taking into account all factors that are being considered and evaluated.<sup>214</sup> Specifically, pursuant to Articles 3.5 and 15.5, it must be demonstrated that dumped or subsidized imports are causing injury "through the effects of" dumping or subsidies "[a]s set forth in paragraphs 2 and 4".<sup>215</sup> Thus, the inquiry set forth in Articles 3.2 and 15.2, and the examination required in Articles 3.4 and 15.4, are necessary in order to answer the ultimate question in Articles 3.5 and 15.5 as to whether subject imports are causing injury to the domestic industry. The outcomes of these inquiries thus form the basis for the overall causation analysis contemplated in Articles 3.5 and 15.5. As further explained below, the interpretation of Articles 3.2 and 15.2 should be consistent with the role these provisions play in the overall framework of an injury determination under Articles 3 and 15.

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<sup>213</sup>Additionally, Articles 3.3 and 15.3 stipulate the conditions under which an investigating authority may cumulatively assess the effects of imports from more than one country. Articles 3.6 and 15.6 specify that the effect of the subject imports must be assessed in relation to the production of the like domestic product. Articles 3.7 and 3.8 of the *Anti-Dumping Agreement* and Articles 15.7 and 15.8 of the *SCM Agreement* set out the requirements regarding the determination of a threat of material injury.

<sup>214</sup>As the Appellate Body has found, "Article 3.1 and the succeeding paragraphs of Article 3 [of the *Anti-Dumping Agreement*] clearly indicate that volume and prices [of the dumped imports], and the consequent impact on the domestic industry, are closely interrelated for purposes of the injury determination." (Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 115)

<sup>215</sup>Emphasis added.

2. The Obligation to "Consider"

129. Turning to the obligations in Article 3.2 of the *Anti-Dumping Agreement* and Article 15.2 of the *SCM Agreement*, an investigating authority is instructed to "consider" a series of specific inquiries. With regard to the volume of subject imports, an investigating authority must "consider whether there has been a significant increase in [dumped or subsidized] imports". With regard to the effect of such imports on domestic prices, the authority must "consider whether there has been a significant price undercutting by the [dumped or subsidized] imports as compared with the price of a like product of the importing Member, or whether the effect of such imports is otherwise to depress prices to a significant degree or [to] prevent price increases, which otherwise would have occurred, to a significant degree".

130. The notion of the word "consider", when cast as an obligation upon a decision maker, is to oblige it to *take something into account* in reaching its decision.<sup>216</sup> By the use of the word "consider", Articles 3.2 and 15.2 do not impose an obligation on an investigating authority to make a *definitive determination* on the volume of subject imports and the effect of such imports on domestic prices.<sup>217</sup> Nonetheless, an authority's *consideration* of the volume of subject imports and their price effects pursuant to Articles 3.2 and 15.2 is also subject to the overarching principles, under Articles 3.1 and 15.1, that it be based on positive evidence and involve an objective examination. In other words, the fact that no definitive determination is required does not diminish the rigour that is required of the inquiry under Articles 3.2 and 15.2.

131. Furthermore, while the *consideration* of a matter is to be distinguished from the definitive determination of that matter, this does not diminish the scope of *what* the investigating authority is required to consider. The fact that the authority is only required to *consider*, rather than to *make a final determination*, does not change the subject matter that requires consideration under Articles 3.2 and 15.2, which includes "whether the effect of" the subject imports is to depress prices or prevent

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<sup>216</sup>The meaning of the word "consider" includes "look at attentively", "think over", and "take into account". (*Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 1, p. 496)

<sup>217</sup>This stands in contrast with the words used in other paragraphs of Articles 3 and 15. For example, the word "demonstrate" in Articles 3.5 and 15.5 requires an investigating authority to make a definitive determination regarding the causal relationship between subject imports and injury to the domestic industry. Relevant findings by panels in prior disputes also support the above understanding of the word "consider". For example, the panel in *Thailand – H-Beams* noted that the term "consider" in Article 3.2 does not require an explicit "finding" or "determination" by the investigating authority as to whether the increase in dumped imports is "significant". (Panel Report, *Thailand – H-Beams*, para. 7.161) Similarly, the panel in *Korea – Certain Paper* stated that Article 3.2 does not generally require the investigating authority to make a determination about the "significance" of price effects, or indeed as to whether there were price effects as such. (Panel Report, *Korea – Certain Paper*, para. 7.253. See also para. 7.242.)

price increases to a significant degree. We further discuss below what this requirement entails.<sup>218</sup> Finally, an investigating authority's *consideration* under Articles 3.2 and 15.2 must be reflected in relevant documentation, such as an authority's final determination, so as to allow an interested party to verify whether the authority indeed *considered* such factors.<sup>219</sup>

132. On appeal, China maintains that Articles 3.2 and 15.2 impose "only a limited obligation on authorities" to "consider" the price effects of subject imports, that is, to "examine; look at attentively; [and] think carefully about" such price effects.<sup>220</sup> China finds support for its position in the panels' findings in *Korea – Certain Paper* and *Thailand – H-Beams* that Article 3.2 of the *Anti-Dumping Agreement* requires an investigating authority to consider the price effects described therein, but does not require that a determination be made in this regard.<sup>221</sup> In our view, China is correct that an investigating authority's obligation in this respect does not require it to reach a definitive determination. However, as noted above, this does not alter the subject matter of the authority's consideration, or the fact that the authority's consideration must be based on positive evidence and involve an objective examination, and must be reflected in relevant documentation, such as an authority's final determination.

3. The Obligation to Consider "Whether the Effect of Such Imports" Is to Depress Prices or Prevent Price Increases

133. The second sentence of Article 3.2 of the *Anti-Dumping Agreement* and Article 15.2 of the *SCM Agreement* provides that, "[w]ith regard to the effect of the [dumped or subsidized] imports on prices", an investigating authority must consider "whether there has been a significant price undercutting by the [dumped or subsidized] imports as compared with the price of a like product of the importing Member, or whether the effect of such imports is otherwise to depress prices to a significant degree, or [to] prevent price increases, which otherwise would have occurred, to a significant degree". As noted above, China's appeal regarding the Panel's interpretation of Articles 3.2 and 15.2 concerns an investigating authority's obligation with respect to the last two price effects, that is, its obligation to consider whether the effect of dumped or subsidized imports is significant price depression or suppression. We turn now to examine the interpretation of Articles 3.2 and 15.2 with regard to an investigating authority's obligation to consider the effect of subject imports on domestic prices and, in particular, the last two price effects listed therein.

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<sup>218</sup>See *infra*, paras. 133-154.

<sup>219</sup>See, for example, Panel Report, *Thailand – H-Beams*, para. 7.161; and Panel Report, *Korea – Certain Paper*, para. 7.253.

<sup>220</sup>China's appellant's submission, para. 51 (quoting *The New Shorter Oxford English Dictionary*, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), Vol. 1, p. 485).

<sup>221</sup>China's appellant's submission, paras. 53 and 54 (referring to Panel Report, *Thailand – H-Beams*, para. 7.161; and Panel Report, *Korea – Certain Paper*, para. 7.242).

(a) The Text of Article 3.2 of the *Anti-Dumping Agreement* and Article 15.2 of the *SCM Agreement*

134. China contends that Articles 3.2 and 15.2 do not use any language that suggests the need to establish a link between domestic prices and subject imports. China notes that the ordinary meaning of the word "effect" is "something accomplished, caused or produced; a result, a consequence".<sup>222</sup> According to China, therefore, the term "the effect of" simply means the consequence of a certain cause, and focuses on the consequence, rather than the cause. In China's view, this is confirmed by the use of the word "effect" as a noun, rather than as a verb, because the element of causation becomes relevant only when the word is used as a verb meaning to "bring about".<sup>223</sup>

135. The definition of the word "effect" is, *inter alia*, "something accomplished, caused, or produced; a result, a consequence".<sup>224</sup> The definition of this word thus implies that an "effect" is "a result" of something else. Although the word "effect" could be used independently of the factors that produced it, this is not the case in Articles 3.2 and 15.2. Rather, these provisions postulate certain inquiries as to the "effect" of subject imports on domestic prices, and each inquiry links the subject imports with the prices of the like domestic products.

136. First, an investigating authority must consider "whether there has been a significant price undercutting *by the [dumped or subsidized] imports as compared with the price of a like product of the importing Member*".<sup>225</sup> Thus, with regard to significant price undercutting, Articles 3.2 and 15.2 expressly establish a link between the price of subject imports and that of like domestic products, by requiring that a comparison be made between the two. Second, an investigating authority is required to consider "*whether the effect of such [dumped or subsidized] imports*" on the prices of the like domestic products is to depress or suppress such prices to a significant degree.<sup>226</sup> By asking the question "*whether the effect of the subject imports is significant price depression or suppression*", the second sentence of Articles 3.2 and 15.2 specifically instructs an investigating authority to consider whether certain price effects are the consequences of subject imports. Moreover, the syntactic relation expressed by the terms "*to depress prices*" and "*[to] prevent price increases*" is of a subject (dumped or subsidized imports) doing something to an object (domestic prices). The language of Articles 3.2 and 15.2 thus expressly links significant price depression and suppression with subject imports, and contemplates an inquiry into the relationship between two variables, namely, subject

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<sup>222</sup>China's appellant's submission, para. 55 (quoting *The New Shorter Oxford English Dictionary*, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), Vol. 1, p. 786).

<sup>223</sup>China's appellant's submission, para. 58 (quoting *The New Shorter Oxford English Dictionary*, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), Vol. 1, p. 786).

<sup>224</sup>*Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 1, p. 798.

<sup>225</sup>Emphasis added.

<sup>226</sup>Emphasis added.

imports and domestic prices. More specifically, an investigating authority is required to consider whether a first variable—that is, subject imports—has explanatory force for the occurrence of significant depression or suppression of a second variable—that is, domestic prices.

137. The two inquiries set out in the second sentence of Articles 3.2 and 15.2 are separated by the words "or" and "otherwise". This indicates that the elements relevant to the consideration of significant price undercutting may differ from those relevant to the consideration of significant price depression and suppression. Thus, even if prices of subject imports do not significantly undercut those of like domestic products, subject imports could still have a price-depressing or price-suppressing effect on domestic prices.

138. Given that Articles 3.2 and 15.2 contemplate an inquiry into the relationship between subject imports and domestic prices, 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. Thus, for example, it would not be sufficient to identify a downward trend in the price of like domestic products over the period of investigation when considering significant price depression, or to note that prices have not risen, even though they would normally be expected to have risen, when analyzing significant price suppression. Rather, an investigating authority is required to examine domestic prices in conjunction with subject imports in order to understand whether subject imports have explanatory force for the occurrence of significant depression or suppression of domestic prices. Moreover, the reference to "the effect of *such [dumped or subsidized] imports*"<sup>227</sup> in Articles 3.2 and 15.2 indicates that the effect stems from the relevant aspects of such imports, including the price and/or the volume of such imports.

139. In our view, therefore, China's argument, that Articles 3.2 and 15.2 do not use any language suggesting the need to establish a link between subject imports and domestic prices, focuses on a meaning of the word "effect" abstracted from the immediate context in which this word is situated. As noted, Articles 3.2 and 15.2 expressly postulate an inquiry into the relationship between subject imports and domestic prices by requiring a consideration of *whether* the effect of subject imports is to depress or suppress domestic prices. The fact that the word "effect" is used as a noun does not mean that the link between domestic prices and subject imports expressly referenced in these provisions need not be analyzed.

140. We are also not persuaded by China's reliance on the alleged difference between the word "effect" in Articles 3.2 and 15.2, on the one hand, and the word "affecting" in Articles 3.4 and 15.4, on the other hand, in support of its interpretation. China argues that the word "effect" is concerned

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<sup>227</sup>Emphasis added.

with the present situation, but does not "imply a causal relationship between the effect itself and any particular prior event".<sup>228</sup> In contrast, the word "affect", which means "to have an effect on", does not refer to the status quo but rather is concerned with how the status quo came to be. Contrary to China's argument, Articles 3.2 and 15.2 link the "effect" on domestic prices with the "particular prior event" leading to it, that is, the subject imports, by specifically requiring the investigating authority to consider whether the effect of *subject imports* is "to depress prices" or "[to] prevent price increases".<sup>229</sup> These infinitives—"to depress" and "to prevent"—specify the way in which the subject imports may "affect" domestic prices. Therefore, the language used in Articles 3.2 and 15.2 does not simply refer to a "status quo", but rather instructs the investigating authority to consider whether subject imports have explanatory force for certain specified consequences, that is, the significant depression or suppression of domestic prices.

141. Our interpretation is reinforced by the very concepts of price depression and price suppression.<sup>230</sup> Price depression refers to a situation in which prices are pushed down, or reduced, *by something*. An examination of price depression, by definition, calls for more than a simple observation of a price *decline*, and also encompasses an analysis of *what* is pushing down the prices. With regard to price suppression, Articles 3.2 and 15.2 require the investigating authority to consider "whether the effect of" subject imports is "[to] prevent price increases, *which otherwise would have occurred*, to a significant degree".<sup>231</sup> By the terms of these provisions, price suppression cannot be properly examined without a consideration of whether, in the absence of subject imports, prices "otherwise would have" increased. The concepts of price depression and price suppression thus both implicate an analysis concerning the question of what brings about such price phenomena.

142. Therefore, a 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. As a corollary of this understanding, Articles 3.2 and 15.2 would

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<sup>228</sup>China's appellant's submission, para. 60.

<sup>229</sup>Emphasis added.

<sup>230</sup>In *US – Upland Cotton (Article 21.5 – Brazil)*, the Appellate Body recognized that the concepts of price suppression and price depression could overlap, but it also pointed out that Article 6.3(c) of the *SCM Agreement* mentions them as distinct concepts. Specifically, the Appellate Body noted that:

... price depression is a directly observable phenomenon, [whereas] price suppression is not so. Falling prices can be observed; by contrast, price suppression concerns whether prices are less than they would otherwise have been in consequence of various factors, in this case, the subsidies. The identification of price suppression, therefore, presupposes a comparison of an observable factual situation (prices) with a counterfactual situation (what prices would have been) where one has to determine whether, in the absence of the subsidies ... prices would have increased or would have increased more than they actually did.

(Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 351)

<sup>231</sup>Emphasis added.

appear to make a unitary analysis of the effect of subject imports on domestic prices more appropriate, rather than a two-step analysis that first seeks to identify the market phenomena and then, as a second step, examines whether such phenomena are an effect of subject imports. In this regard, we recall that the concepts of price depression and price suppression also exist under Article 6.3 of the *SCM Agreement*. Article 6.3 provides that, through the use of subsidies by a Member, serious prejudice to the interests of another Member may arise where the effect of the subsidies is certain market phenomena, including, *inter alia*, significant suppression or depression of the price of a like product of another Member in the same market. The Appellate Body has found that consideration of the effect of the challenged subsidies is intrinsic to the identification of those market phenomena. Thus, "[a]ny attempt to identify one of the market phenomena in Article 6.3 without considering the subsidies at issue can only be preliminary in nature since Article 6.3 requires that the market phenomenon be the effect of the challenged subsidy."<sup>232</sup> Similarly, in the context of Articles 3.2 and 15.2, we consider that a unitary approach to the analysis of significant price depression and suppression would be preferred because it "has a sound conceptual foundation".<sup>233</sup> In this dispute, therefore, we consider the Panel's finding of the "existence" of price depression and price suppression "*per se*"<sup>234</sup> as being merely of a preliminary nature. Moreover, "[t]his also means that a two-step approach simply defers the core of the analysis to the second step."<sup>235</sup> Thus, a panel does not necessarily commit a legal error if it chooses to conduct a two-step analysis, as long as the panel *also examines*, as a second step, whether "the effect of" subject imports is significant price depression or suppression.

(b) The Context of Article 3.2 of the *Anti-Dumping Agreement* and Article 15.2 of the *SCM Agreement*

143. Having analyzed the relevant text of Article 3.2 of the *Anti-Dumping Agreement* and Article 15.2 of the *SCM Agreement*, we turn to examine the interpretation of these provisions in the light of their proper context. As discussed above<sup>236</sup>, the various paragraphs under Articles 3 and 15 provide an investigating authority with the relevant framework and disciplines for conducting an injury and causation analysis. These provisions contemplate a logical progression in an authority's examination leading to the ultimate injury and causation determination. Moreover, by virtue of the phrase "*through the effects of*" dumping or subsidies "[a]s set forth in paragraphs 2 and 4"<sup>237</sup>, Articles 3.5 and 15.5 make clear that the inquiries set forth in Articles 3.2 and 15.2, and the examination required in Articles 3.4 and 15.4, are necessary in order to answer the ultimate question

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<sup>232</sup>Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1109.

<sup>233</sup>Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 354.

<sup>234</sup>Panel Report, paras. 7.515-7.517 and 7.546.

<sup>235</sup>Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1109.

<sup>236</sup>See *supra*, paras. 125-128.

<sup>237</sup>Emphasis added.

in Articles 3.5 and 15.5 as to whether subject imports are causing injury to the domestic industry. The outcomes of these inquiries thus form the basis for the overall causation analysis contemplated in Articles 3.5 and 15.5.

144. The context of Articles 3.2 and 15.2 thus makes clear that the analysis pursuant to these provisions is intended to *develop* an investigating authority's overall examination under Articles 3 and 15 *towards* a definitive determination on the injury caused by subject imports to the domestic industry. In this regard, an investigating authority's inquiry regarding the last two price effects listed in Articles 3.2 and 15.2 must provide it with a meaningful understanding of whether subject imports have explanatory force for the significant depression or suppression of domestic prices that may be occurring in the domestic market. This understanding, in turn, allows the authority to determine whether subject imports, through their price effects, are causing injury to the domestic industry within the meaning of Articles 3.5 and 15.5. Therefore, the context of Articles 3.2 and 15.2 also supports the view that, under these provisions, the authority must conduct an analysis of the relationship between subject imports and domestic prices, and, in particular, of whether such imports have explanatory force for the significant depression or suppression of domestic prices, in order to have a meaningful basis on which to conduct its causation analysis pursuant to Articles 3.5 and 15.5.

145. On appeal, China submits that various provisions under Articles 3 and 15 "expressly distinguish" between the existence of price effects and the consequent impact of subject imports.<sup>238</sup> Thus, China argues, the price effects considered under Articles 3.2 and 15.2 are not themselves the result of a causation determination. Rather, they serve as the basis for the causation determination required under Articles 3.5 and 15.5. We agree that the analysis under Articles 3.2 and 15.2 serves as a basis for the analysis under Articles 3.5 and 15.5 concerning injury caused by subject imports to the domestic industry and the non-attribution of injury caused by other factors. Nonetheless, we fail to see why this precludes an interpretation whereby an investigating authority, in carrying out the inquiry under Articles 3.2 and 15.2, is required to consider the explanatory force of the subject imports *in relation to* the significant depression or suppression of domestic prices. On the contrary, without such a consideration, the authority would not be able to ensure that its analysis regarding price depression or suppression under Articles 3.2 and 15.2 provides a meaningful basis on which it could further analyze whether, through such price effects, subject imports are causing injury to the domestic industry within the meaning of Articles 3.5 and 15.5.

146. Moreover, China's argument that Articles 3.2 and 15.2 merely concern the "existence" of price effects, and do not concern a link between such effects and the subject imports, reflects a flawed interpretation of the term "the effect of" in these provisions. As noted above, China's interpretation

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<sup>238</sup>China's appellant's submission, para. 73.

fails to situate the term "the effect of" in the context of the inquiry required under Articles 3.2 and 15.2. This inquiry expressly links the described price effects with the subject imports by requiring an investigating authority to consider "whether the effect of *such [dumped or subsidized] imports*" is to depress or suppress domestic prices to a significant degree.

147. Interpreting Articles 3.2 and 15.2 as requiring a consideration of the relationship between subject imports and domestic prices does not result in duplicating the causation analysis under Articles 3.5 and 15.5. Rather, Articles 3.5 and 15.5, on the one hand, and Articles 3.2 and 15.2, on the other hand, posit different inquiries. The analysis pursuant to Articles 3.5 and 15.5 concerns the causal relationship between *subject imports* and *injury* to the domestic industry. In contrast, the analysis under Articles 3.2 and 15.2 concerns the relationship between subject imports and a different variable, that is, *domestic prices*. As discussed, an understanding of the latter relationship serves as a basis for the injury and causation analysis under Articles 3.5 and 15.5. In addition, Articles 3.5 and 15.5 require an investigating authority to demonstrate that subject imports are causing injury "through the effects of [dumping or subsidies]", as set forth in Articles 3.2 and 15.2, as well as in Articles 3.4 and 15.4. We recall that Articles 3.4 and 15.4 require an investigating authority to examine the impact of subject imports on the domestic industry on the basis of "all relevant economic factors and indices having a bearing on the state of the industry", and provide a list of such factors and indicia that the authority must evaluate. Thus, the examination under Articles 3.5 and 15.5 encompasses "all relevant evidence" before the authority, including the volume of subject imports and their price effects listed under Articles 3.2 and 15.2, as well as all relevant economic factors concerning the state of the domestic industry listed in Articles 3.4 and 15.4. The examination under Articles 3.5 and 15.5, by definition, covers a broader scope than the scope of the elements considered in relation to price depression and suppression under Articles 3.2 and 15.2.

148. China maintains that Articles 3.2 and 15.2, like Articles 3.4 and 15.4, are concerned with the evaluation of relevant indicia concerning the domestic industry. Specifically, Articles 3.2 and 15.2 instruct an investigating authority to consider "the effect of" subject imports on domestic prices, and Articles 3.4 and 15.4 direct an investigating authority to examine relevant economic factors regarding "the impact of" such imports on the domestic industry. In China's view, therefore, if Articles 3.2 and 15.2 are interpreted as requiring a consideration of the relationship between subject imports and domestic prices, Articles 3.4 and 15.4 must also be interpreted as requiring an examination of the link between subject imports, on the one hand, and each of the economic factors listed in Articles 3.4 and 15.4, on the other hand. Such a result would lead to a duplicative analysis of causation at each

step of an investigating authority's examination under Articles 3 and 15, and grafts onto Articles 3.2 and 15.2, as well as Articles 3.4 and 15.4, an obligation that exists under Articles 3.5 and 15.5.<sup>239</sup>

149. We recall that Articles 3.4 and 15.4 require an investigating authority to examine *the impact of subject imports on the domestic industry* on the basis of "all relevant economic factors and indices having a bearing on the state of the industry". Articles 3.4 and 15.4 thus do not merely require an examination of the state of the domestic industry, but contemplate that an investigating authority must derive an understanding of *the impact of* subject imports on the basis of such an examination. Consequently, Articles 3.4 and 15.4 are concerned with the relationship between subject imports and the state of the domestic industry, and this relationship is analytically akin to the type of link contemplated by the term "the effect of" under Articles 3.2 and 15.2. In other words, Articles 3.4 and 15.4 require an examination of the explanatory force of subject imports for the state of the domestic industry. In our view, such an interpretation does not duplicate the relevant obligations in Articles 3.5 and 15.5. As noted, the inquiry set forth in Articles 3.2 and 15.2, and the examination required under Articles 3.4 and 15.4, are necessary in order to answer the ultimate question in Articles 3.5 and 15.5 as to whether subject imports are causing injury to the domestic industry. The outcomes of these inquiries form the basis for the overall causation analysis contemplated in Articles 3.5 and 15.5. Thus, similar to the consideration under Articles 3.2 and 15.2, the examination under Articles 3.4 and 15.4 *contributes to*, rather than duplicates, the overall determination required under Articles 3.5 and 15.5.

150. Moreover, an investigating authority is required to *examine* the impact of subject imports on the domestic industry pursuant to Articles 3.4 and 15.4, but is *not* required to *demonstrate* that subject imports are causing injury to the domestic industry. Rather, the latter analysis is specifically mandated by Articles 3.5 and 15.5. The demonstration of the causal relationship under Articles 3.5 and 15.5 requires an investigating authority to examine "all relevant evidence" before it, and thus covers a broader scope than the examination under Articles 3.4 and 15.4. As discussed below, Articles 3.5 and 15.5 further impose a requirement to conduct a non-attribution analysis regarding all factors causing injury to the domestic industry. Given these intrinsic differences between Articles 3.4 and 15.4, on the one hand, and Articles 3.5 and 15.5, on the other hand, we do not consider that our interpretation leads to a "duplicative analysis of causation", as China suggests.

151. Articles 3.5 and 15.5 require an investigating authority to "examine any known factors other than the [dumped or subsidized] imports which at the same time are injuring the domestic industry", and to ensure that "the injuries caused by these other factors [are not] attributed to the [dumped or

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<sup>239</sup>China's appellant's submission, para. 101; China's response to questioning at the oral hearing.

subsidized] imports".<sup>240</sup> As the Appellate Body has found, the non-attribution language of Articles 3.5 and 15.5 requires that "an assessment must involve separating and distinguishing the injurious effects of the other factors from the injurious effects of the dumped imports".<sup>241</sup> In contrast, Articles 3.2 and 15.2 require an investigating authority to consider the relationship between subject imports and *domestic prices*, so as to understand whether the former may have explanatory force for the occurrence of significant depression or suppression of the latter. For this purpose, the authority is not required to conduct a fully fledged and exhaustive analysis of all known factors that may cause *injury* to the domestic industry, or to separate and distinguish the *injury* caused by such factors.

152. This does not mean that an investigating authority may disregard evidence that calls into question the explanatory force of subject imports for significant depression or suppression of domestic prices. Rather, where an authority is faced with elements other than subject imports that may explain the significant 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. This understanding is also reinforced by the very concept of price suppression under Articles 3.2 and 15.2, which concerns prevention of price increases "which otherwise would have occurred". Moreover, by taking into account evidence pertaining to such elements, an authority also 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.

(c) The Objective of Article 3 of the *Anti-Dumping Agreement* and Article 15 of the *SCM Agreement*

153. As described above<sup>242</sup>, the various paragraphs under Article 3 of the *Anti-Dumping Agreement* and Article 15 of the *SCM Agreement* set forth, in detail, an investigating authority's obligations in determining the injury to the domestic industry caused by subject imports. Thus, it may be discerned, from the totality of these paragraphs, that Articles 3 and 15 are intended to delineate the framework and relevant disciplines for the authority's analysis in reaching a final determination on the injury caused by subject imports, and to ensure that the analysis and the conclusion drawn therefrom is robust. Thus, we are unable to agree with China's contention that interpreting Articles 3.2 and 15.2 as setting forth "more limited" obligations properly respects the "object and purpose" of "leav[ing] the

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<sup>240</sup>Pursuant to Articles 3.5 and 15.5, these other factors include the volume and prices of imports not sold at dumped or subsidized 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.

<sup>241</sup>Appellate Body Report, *US – Hot-Rolled Steel*, para. 223.

<sup>242</sup>See *supra*, paras. 125-128.

authorities with discretion on the issue of price effects".<sup>243</sup> The requirement to consider whether subject imports have explanatory force for significant price depression or suppression occurring in the domestic market, pursuant to Articles 3.2 and 15.2, is not within the "discretion" of the investigating authority. Rather, it is an obligation that stems from the language of the provisions and forms part of the framework and relevant disciplines set out in Articles 3 and 15 for the authority's injury and causation determination. The objective of Articles 3 and 15, therefore, does not place the limitation on the interpretation of Articles 3.2 and 15.2 suggested by China.

4. Summary of the Interpretation of Article 3.2 of the *Anti-Dumping Agreement* and Article 15.2 of the *SCM Agreement*

154. In sum, we reach the above interpretation on the basis of the text and context of Article 3.2 of the *Anti-Dumping Agreement* and Article 15.2 of the *SCM Agreement*, together with the objective of Articles 3 and 15 discerned from various paragraphs thereunder. Specifically, with regard to price depression and suppression under the second sentence of Articles 3.2 and 15.2, an investigating authority is required to consider the relationship between subject imports and prices of like domestic products, so as to understand whether subject imports provide explanatory force for the occurrence of significant depression or suppression of domestic prices. The outcome of this inquiry will enable the authority to advance its analysis, and to have a meaningful basis for its determination as to whether subject imports, through such price effects, are causing injury to the domestic industry. Moreover, the inquiry under Articles 3.2 and 15.2 does not duplicate the different and broader examination regarding the causal relationship between subject imports and injury to the domestic industry pursuant to Articles 3.5 and 15.5. Neither do Articles 3.2 and 15.2 require an authority to conduct an exhaustive and fully fledged non-attribution analysis regarding all possible factors that may be causing injury to the domestic industry. Rather, the investigating authority's inquiry under Articles 3.2 and 15.2 is focused on the relationship between subject imports and domestic prices, and the authority may not disregard evidence that calls into question the explanatory force of the former for significant depression or suppression of the latter.

C. The Panel's Interpretation of Article 3.2 of the *Anti-Dumping Agreement* and Article 15.2 of the *SCM Agreement*

155. Having set out the proper interpretation of the relevant elements of Article 3.2 of the *Anti-Dumping Agreement* and Article 15.2 of the *SCM Agreement*, we turn to examine China's claim that the Panel erred in its interpretation of these provisions. China maintains that the Panel failed to analyze properly the meaning of the terms "consider" and "effect" in Articles 3.2 and 15.2. Instead, the Panel erroneously incorporated the stricter standard of causation provided under Articles 3.5

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<sup>243</sup>China's appellant's submission, para. 86.

and 15.5 into Articles 3.2 and 15.2. China also submits that the Panel misconstrued guidance provided by relevant jurisprudence and wrongly rejected China's attempt to draw on such guidance. Finally, China argues that the Panel's interpretative error is manifested in its analysis of the United States' claim regarding MOFCOM's finding of significant price suppression. We briefly recall the Panel's interpretation, before addressing, in turn, each of China's arguments.

156. In interpreting Articles 3.2 and 15.2, the Panel found that:

Having regard to the text of the relevant provisions, we note that the analysis envisaged by the second sentence of Article 3.2 of the Anti-Dumping Agreement and Article 15.2 of the SCM Agreement concerns "the effect of the [dumped/subsidized] imports on prices." Furthermore, the authority *must consider* whether "the effect of [dumped/subsidized] imports is ... to depress prices to a significant degree". Accordingly, *merely showing* the existence of significant price depression does not suffice for the purposes of Article 3.2 of the Anti-Dumping Agreement and Article 15.2 of the SCM Agreement. An authority *must also show* that such price depression is an effect of the subject imports.<sup>244</sup>

The Panel also found that "[t]he same necessarily applies in respect of an authority's finding of price suppression."<sup>245</sup> The Panel thus conducted a very brief analysis regarding the interpretation of Articles 3.2 and 15.2. The Panel noted that these provisions require an investigating authority to consider "whether the effect of" subject imports is to depress or suppress domestic prices to a significant degree. On this basis, the Panel found that these provisions impose the obligation to "show" that price depression and suppression is an effect of subject imports.

157. China refers to the Panel's statement that "[a]n authority must also *show* that such price depression is an effect of the subject imports"<sup>246</sup>, quoted above, as well as its statement that "an investigating authority must *demonstrate* that price depression is an effect of subject imports".<sup>247</sup> China asserts that, in making these statements, the Panel ignored the term "consider" in Articles 3.2 and 15.2 and, instead, created an obligation to "demonstrate" or "show" a causal link between subject imports and price effects, despite the absence of such an obligation under these provisions.<sup>248</sup>

158. As discussed above, by virtue of the word "consider", an investigating authority is required to take into account the price effects listed in Articles 3.2 and 15.2 in reaching its overall injury and causation determination. Thus, the authority is not required to make a definitive determination of

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<sup>244</sup>Panel Report, para. 7.520. (emphasis added)

<sup>245</sup>Panel Report, para. 7.547.

<sup>246</sup>Panel Report, para. 7.520. (emphasis added)

<sup>247</sup>Panel Report, para. 7.547. (emphasis added)

<sup>248</sup>China's appellant's submission, paras. 93 and 104 (referring to Panel Report, para. 7.520).

significant price depression and suppression, such as the determination contemplated in Articles 3.5 and 15.5, where it must "demonstrate" the causal relationship between subject imports and injury to the domestic industry. We note that the Panel began its analysis by stating, correctly, that Articles 3.2 and 15.2 require an investigating authority to "consider" whether the effect of subject imports is price depression. The Panel nonetheless went on to use the words "show" and "demonstrate", which seem to suggest a different standard. In our view, to the extent the Panel used the words "show" and "demonstrate" to mean that an authority is required to make a definitive determination, the Panel's use of these words is not consistent with a proper understanding of the word "consider" in Articles 3.2 and 15.2. However, to the extent the Panel used the words "show" and "demonstrate" to mean that the authority's consideration of price effects must be reflected in relevant documentation produced by the authority in its investigation, and must be based on positive evidence and involve an objective examination, this is consistent with our interpretation, set out above, that the consideration of price effects must conform to the standard in Articles 3.1 and 15.1 and be reflected in relevant documentation.<sup>249</sup>

159. Whatever the ambiguity in the Panel's use of the words "show" and "demonstrate", we agree with the Panel that, because Articles 3.2 and 15.2 require an investigating authority to consider *whether the effect of* subject imports is to depress prices of like domestic products to a significant degree, "*merely showing* the existence of significant price depression does not suffice for the purposes of Article 3.2 of the Anti-Dumping Agreement and Article 15.2 of the SCM Agreement".<sup>250</sup> We recall our interpretation, set out above<sup>251</sup>, that Articles 3.2 and 15.2 contemplate an inquiry into the relationship between two variables, whereby an authority must consider whether a first variable—that is, subject imports—has explanatory force for the occurrence of depression or suppression of a second variable—that is, domestic prices. Thus, as the Panel rightly found, it is *not* sufficient for an authority to confine its consideration to what is happening to domestic prices alone for purposes of the inquiry stipulated in Articles 3.2 and 15.2.

160. China further alleges that the Panel "*appear[ed]* to interpret the word 'effect' as if it were the word 'affect'", thereby improperly reading into Articles 3.2 and 15.2 a requirement that MOFCOM demonstrate that imports "affected" domestic prices.<sup>252</sup> As support for this assertion, China relies on the following: (i) the Panel's articulation of the relevant obligation under Articles 3.2 and 15.2, as quoted above; (ii) the Panel's discussion of the finding in the panel report in *EC – Countervailing*

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<sup>249</sup>See *supra*, paras. 129-132.

<sup>250</sup>Panel Report, para. 7.520. (emphasis added)

<sup>251</sup>See *supra*, paras. 135-142.

<sup>252</sup>China's appellant's submission, para. 92 (referring to Panel Report, paras. 7.521 and 7.522). (emphasis added)

*Measures on DRAM Chips*; and (iii) as an illustration of the interpretation reached by the Panel, the Panel's analysis of MOFCOM's finding regarding significant price suppression.

161. With regard to the Panel's articulation of the relevant obligation under Articles 3.2 and 15.2, China acknowledges that the Panel's analysis amounts to "a restatement of the text of the provision".<sup>253</sup> To the extent the Panel's interpretation represents a mere restatement of the text of Articles 3.2 and 15.2, that, in itself, is not an error. Nonetheless, a mere restatement, in our view, does not do justice to the interpretative question that was before the Panel. In any event, we are also not persuaded by the argument that, under the Panel's interpretation, the obligations regarding the causation analysis between subject imports and injury to the domestic industry pursuant to Articles 3.5 and 15.5 are "duplicated" in Articles 3.2 and 15.2.<sup>254</sup> The Panel merely repeated what is expressly required under these provisions, namely, that an investigating authority must consider "whether the effect of" subject imports is to depress or suppress domestic prices to a significant degree. Moreover, as discussed above, interpreting Articles 3.2 and 15.2 as requiring a consideration of the explanatory force of subject imports for significant depression and suppression of domestic prices does not result in duplicating the causation analysis under Articles 3.5 and 15.5. Rather, the analysis under Articles 3.5 and 15.5 concerns the causal relationship between subject imports and *injury to the domestic industry*, and covers a broader scope of elements than those relevant to an analysis under Articles 3.2 and 15.2.

162. With regard to the Panel's discussion of the panel's finding in *EC – Countervailing Measures on DRAM Chips*, China submits that the Panel misconstrued the guidance provided by the panel report in that dispute. According to China, the Panel failed to recognize the panel's finding in that dispute that Article 15.2 of the *SCM Agreement* does not require the investigating authority to draw a causal link between subsidized imports and price effects.

163. In response to China's reliance on the panel report in *EC – Countervailing Measures on DRAM Chips*, the Panel distinguished that dispute from the present dispute, stating that:

... the panel in *EC – Countervailing Measures on DRAM Chips* was dealing with a different issue than the one at hand. In particular, that panel had to consider Korea's claim that the European Communities should have examined a variety of factors known to have been affecting domestic prices, in addition to subject imports. The panel reasoned that such analysis of all known factors was not required under Article 15.2 of the *SCM Agreement*, but noted that such analysis was required under Article 15.5 of the *SCM Agreement*. The Panel in the present case is not confronted with this issue. The

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<sup>253</sup>China's appellant's submission, para. 90.

<sup>254</sup>China's appellant's submission, para. 100.

United States is not suggesting that MOFCOM should have considered the effect of other known factors on domestic prices. The United States is merely suggesting that MOFCOM was required, by Article 15.2 of the *SCM Agreement*, to consider the effect of subject imports on prices.<sup>255</sup>

China takes issue with the last two sentences quoted above, arguing that the Panel "attempt[ed] to create a distinction without a difference", because the requirement to consider the effects of other known factors, and the requirement to consider the effect of subject imports on domestic prices, both stem from the same obligation to establish a causal link.<sup>256</sup>

164. We note that the issue before the panel in *EC – Countervailing Measures on DRAM Chips* was whether, in the context of a price undercutting analysis, the investigating authority was required to consider a number of other factors affecting prices of dynamic random access memory chips (DRAMs) in the domestic market.<sup>257</sup> The panel in that dispute found that, with regard to price undercutting, Article 15.2 of the *SCM Agreement* does not require an investigating authority "to establish a causal link between the subsidized imports and the domestic prices which would require it to examine all other factors affecting domestic prices at the same time".<sup>258</sup> Thus, in making this finding, the panel was of the view that the inquiry under Article 15.2 "focuse[d] on the effect of the subsidized imports on prices", rather than an exhaustive non-attribution analysis as contemplated in Article 15.5.<sup>259</sup> In any event, the panel's above finding, which concerned the consideration of significant *price undercutting*, does not affect our understanding that the explanatory force of subject imports for significant *price depression and suppression* must be seen in the light of relevant evidence indicating that other factors may explain the depression and suppression of domestic prices. Moreover, in this dispute, we are not called upon to interpret the scope and meaning of an investigating authority's obligation in considering whether there has been significant price undercutting by subject imports. In our view, therefore, the Panel in the present dispute rightly concluded that the panel report in *EC – Countervailing Measures on DRAM Chips* does *not* stand for the proposition that an investigating authority is not required by Article 15.2 of the *SCM Agreement* to consider whether significant price depression or suppression is an effect of subject imports.<sup>260</sup>

165. Finally, China contends that the Panel's interpretive errors regarding Articles 3.2 and 15.2 "can perhaps be seen most clearly ... in its discussion of MOFCOM's determination on 'whether price

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<sup>255</sup>Panel Report, para. 7.522.

<sup>256</sup>China's appellant's submission, para. 107.

<sup>257</sup>See Panel Report, *EC – Countervailing Measures on DRAM Chips*, paras. 7.327 and 7.337.

<sup>258</sup>Panel Report, *EC – Countervailing Measures on DRAM Chips*, para. 7.338. (emphasis added)

<sup>259</sup>Panel Report, *EC – Countervailing Measures on DRAM Chips*, para. 7.338.

<sup>260</sup>Panel Report, para. 7.522.

suppression was an effect of subject imports".<sup>261</sup> According to China, the Panel analyzed whether MOFCOM sufficiently isolated subject imports as the cause for significant price suppression, and found that MOFCOM's finding was not based on positive evidence and did not involve an objective examination, because MOFCOM could not have found that subject imports were "the only reason" for the price suppression.<sup>262</sup> Thus, the Panel wrongly interpreted Articles 3.2 and 15.2 as "impos[ing]" an obligation on MOFCOM to make "a determination that 'the only reason' for price suppression was 'because of' subject imports", even though such a requirement is not present in Articles 3.2 and 15.2.<sup>263</sup> China's argument is thus not directed at the Panel's *articulation* of the relevant legal standard. Rather, China contends that the Panel's error in its legal interpretation is illustrated by its examination of MOFCOM's finding of significant price suppression. Reviewing China's argument therefore requires us to examine the relevant portion of the Panel's analysis in applying Articles 3.2 and 15.2 to the facts of the case, so as to glean the legal standard that the Panel actually imposed.

166. The Panel first found that, in determining that price suppression *per se* existed in 2008 and the first quarter of 2009, MOFCOM properly relied on the changes in the price-cost ratio of like domestic products, which showed that prices did not rise despite increases in costs.<sup>264</sup> Turning to the issue of whether MOFCOM also correctly found that price suppression was an effect of subject imports, the Panel examined the United States' argument that MOFCOM failed to consider whether, in the relevant factual circumstances, changes in the price-cost ratio merely reflected changes in the underlying cost structure of the domestic industry.<sup>265</sup> In this respect, the Panel noted that a significant amount of new capacity was added in 2008 by Baosteel Group Corporation ("Baosteel"), one of the two Chinese producers comprising the domestic industry. Thus, in the Panel's view, "[a]n objective and impartial investigating authority would have recognized the need"<sup>266</sup> to "examine whether the 2008 change in the price-cost ratio was *merely a function of* the inclusion of the additional start-up costs incurred by Baosteel, *rather than* an adverse effect of subject imports on price".<sup>267</sup> Instead, the Panel found that "MOFCOM *simply assumed* that (i) prices should have been able to rise with costs, and (ii) the only reason prices were not able to rise with costs was because of the effect of subject imports."<sup>268</sup>

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<sup>261</sup>China's appellant's submission, para. 95.

<sup>262</sup>China's appellant's submission, para. 95 (referring to Panel Report, para. 7.550).

<sup>263</sup>China's appellant's submission, para. 95.

<sup>264</sup>Panel Report, para. 7.546.

<sup>265</sup>Before addressing this argument, the Panel first noted that, because MOFCOM relied on the same analysis "to show that both price depression and price suppression was an effect of subject imports, the same flaws that undermined MOFCOM's finding that price depression was an effect of subject imports also undermine MOFCOM's finding that price suppression was an effect of subject imports." (Panel Report, para. 7.547)

<sup>266</sup>Panel Report, para. 7.549.

<sup>267</sup>Panel Report, para. 7.548. (emphasis added)

<sup>268</sup>Panel Report, para. 7.550. (emphasis added)

167. Thus, contrary to China's argument, the Panel's reference to "*the only reason* prices were not able to rise with costs" does not indicate a standard that the Panel imposed.<sup>269</sup> Rather, it was a reference to what MOFCOM found in its Announcement No. 21 of 10 April 2010 and its annexes<sup>270</sup> (the "Final Determination").<sup>271</sup> Specifically, the Panel noted that, without a proper analysis or supporting evidence, "MOFCOM simply assumed" that the subject imports, alone, explained the significant suppression of domestic prices. Moreover, a review of the totality of the Panel's findings confirms that, in making the above statement, the Panel was focusing on the lack of a proper analysis, or supporting evidence, underlying MOFCOM's finding that the identified price suppression was an effect of the subject imports. For example, the Panel stated that, "because of the risk of Baosteel's start-up costs *distorting the results of a simple analysis* of changes in the price-cost ratio, MOFCOM should have considered whether the underlying cost structure of the domestic industry in 2007 was *comparable* to that in 2008 and the first quarter of 2009."<sup>272</sup> The Panel also stated that "[a]n objective and impartial investigating authority would have recognized the need to check ... the possibility that the change in the price-cost ratio between 2007 and 2008 was, at least in part, a reflection of the start-up costs associated with the commencement of Baosteel's operations in May 2008."<sup>273</sup> In addition, the Panel expressed concern regarding the quality of the evidence relied on by MOFCOM, noting that, while China argued that the cost structures in 2007 and 2008 were comparable because Baosteel would also have incurred start-up costs in 2007, MOFCOM's record only included costs booked by Baosteel as of 2008.<sup>274</sup>

168. The Panel, therefore, was concerned with the perceived lack of objectivity in MOFCOM's examination, as well as the quality of the supporting evidence underlying MOFCOM's finding that the effect of subject imports was significant price suppression. As the Panel found, although MOFCOM relied on the change in the price-cost ratio to find significant price suppression, it failed to ensure that the cost structures in 2007 and 2008 were comparable. The Panel also found that the evidence

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<sup>269</sup>Panel Report, para. 7.550. (emphasis added)

<sup>270</sup>MOFCOM Announcement No. 21 [2010] (10 April 2010) and its annexes (English translation as contained in Panel Exhibit CHN-16). We note that the United States also submitted an English translation of MOFCOM's final determination as part of Panel Exhibit US-28. However, throughout its Report, the Panel cited the exhibit submitted by China (Panel Exhibit CHN-16) when referring to the Final Determination. Similarly, in this Report, we refer to the English translation as contained in Panel Exhibit CHN-16.

<sup>271</sup>This is also confirmed by the Panel's statement that the United States was not suggesting that MOFCOM should have considered the effect of other known factors on domestic prices. (Panel Report, para. 7.522)

<sup>272</sup>Panel Report, para. 7.548. (emphasis added)

<sup>273</sup>Panel Report, para. 7.549.

<sup>274</sup>Panel Report, para. 7.548. We recall that the Panel applied the standard in Articles 3.2 and 15.2, *in conjunction with* the obligation set out in Articles 3.1 and 15.1, in order to determine whether MOFCOM's finding that the effects of subject imports were significant price depression and suppression was based on positive evidence and involved an objective examination of the evidence. Therefore, our examination of the Panel's relevant findings under Articles 3.2 and 15.2 cannot be conducted in isolation from the Panel's analysis pursuant to the standard under Articles 3.1 and 15.1. (See *supra*, paras. 112 and 113)

relating to Baosteel's start-up costs in 2008, which suggested that the cost structures might not be comparable, should have prompted MOFCOM to have considered whether the price-cost ratio was a reliable basis for finding that the effect of subject imports was to suppress domestic prices to a significant degree. Thus, the Panel's finding was directed at MOFCOM's failure to consider whether the evidence relating to the domestic industry's cost structure may have called into question the explanatory force of subject imports for the significant suppression of domestic prices. Therefore, in our view, the Panel's analysis reveals that the Panel applied a standard that is consistent with our interpretation above.

D. *Conclusion*

169. As summarized in paragraph 154 above, we consider that Articles 3.2 and 15.2 require an investigating authority to consider the relationship between subject imports and prices of like domestic products, so as to understand whether subject imports provide explanatory force for the occurrence of significant depression or suppression of domestic prices. We are therefore not persuaded by the interpretation advanced by China, before the Panel and on appeal, that Articles 3.2 and 15.2 merely require an investigating authority to consider the existence of price depression or suppression, and do not require the establishment of any link between subject imports and these price effects. We therefore also consider that the Panel did not err in not adopting China's interpretation.

**VI. The Panel's Assessment of MOFCOM's Price Effects Analysis**

170. We now turn to consider China's claims as they relate to the Panel's assessment of MOFCOM's finding of significant price depression and suppression.

A. *The Panel's Findings*

171. The Panel first addressed MOFCOM's price effects analysis as it related to significant price depression. The Panel considered that, although MOFCOM found that significant price depression was an effect of both the increase in volume of subject imports, and the low price thereof, it would limit its examination to the part of MOFCOM's Final Determination that was challenged by the United States, namely, the "effect of the low price of subject imports".<sup>275</sup> The Panel added that it would then complete its evaluation by considering whether, "even if MOFCOM's analysis of the price effects of subject imports was flawed, MOFCOM's finding that price depression was an effect of subject imports might nevertheless stand on the basis of MOFCOM's analysis of the effect of the increase in the volume of subject imports in depressing domestic prices."<sup>276</sup> The Panel then proceeded

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<sup>275</sup>Panel Report, para. 7.518.

<sup>276</sup>Panel Report, para. 7.518.

to examine whether MOFCOM's price depression finding was based on an objective examination of positive evidence, stating that it would examine the probative value of MOFCOM's findings "that subject import prices were 'low' relative to domestic prices, and that there was a 'pricing policy' of setting subject import prices lower than domestic prices."<sup>277</sup>

172. With regard to evidence of the "low price" of subject imports, the Panel considered, *inter alia*, data collected by MOFCOM, but not referred to in its Final Determination, regarding the average unit values ("AUVs") of subject imports and domestic like products.<sup>278</sup> China maintained that this data, supplied in response to a request of the Panel, reflected that AUVs of subject imports were 8 to 12% below the AUVs for domestic sales in the years 2006 to 2008.<sup>279</sup> The Panel identified "a number of misgivings" regarding the AUV data, particularly concerning "MOFCOM's failure to consider the need for adjustments to ensure price comparability".<sup>280</sup> First, the Panel considered that China failed to rebut the United States' argument that subject import and domestic AUVs were fixed at different levels of trade. Second, the Panel noted that MOFCOM did not make adjustments to account for the fact that the AUV data covered products of different grades. Third, the Panel considered that, given the possibility of prices varying over time, the determination of a single price point to represent prices throughout the course of an entire year did not provide a sufficiently precise basis for comparing prices.<sup>281</sup>

173. The Panel was not persuaded by China's argument that price comparability did not arise as an issue. The Panel considered that, although MOFCOM did not make a finding of significant price undercutting within the meaning of Articles 3.2 and 15.2, MOFCOM nevertheless relied on a finding that subject import prices undercut domestic prices. In the Panel's view, a finding as to the existence of price undercutting necessarily entails a comparison of prices, and an investigating authority should ensure that the prices it is using for its comparison are properly comparable. The Panel concluded that MOFCOM's reliance on AUVs, without considering or making adjustments to ensure price comparability, was "neither objective, nor based on positive evidence".<sup>282</sup>

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<sup>277</sup>Panel Report, para. 7.524 (referring to Final Determination (Panel Exhibit CHN-16 (English version)), pp. 58 and 59).

<sup>278</sup>The AUV data at issue represented the volume weighted average unit values for all transactions during a given calendar year. (Panel Report, footnote 497 to para. 7.527)

<sup>279</sup>Panel Report, para. 7.527 and footnote 497 thereto (referring to China's second written submission to the Panel, footnote 95 to para. 102). China explained that it provided ranges of the relevant AUVs in order to protect business confidential information (BCI) for the two domestic producers at issue. The Panel considered that, although China "failed to respond fully" to the Panel's request, it was still able to address the relevant issues using the more limited data provided by China. (*Ibid.*, para. 7.527)

<sup>280</sup>Panel Report, para. 7.528.

<sup>281</sup>Panel Report, para. 7.528.

<sup>282</sup>Panel Report, para. 7.530.

174. With regard to the evidence of a "pricing policy" aimed at setting subject import prices lower than domestic prices, the Panel reviewed the relevant contracts and records of price setting referred to in MOFCOM's Final Determination, and which were supplied by China in response to a request from the Panel. That evidence consisted of four documents. One of the documents was a contract, dated 9 January 2009<sup>283</sup>, between a Russian trading company and a Chinese buyer, which MOFCOM relied on to support its finding that Russian companies set their prices lower than Wuhan Iron and Steel (Group) Corporation ("WISCO"), one of the Chinese domestic producers. The Panel considered, however, that MOFCOM's finding that there was no price undercutting during the first quarter of 2009 "undermine[d] the probative value" of this contract.<sup>284</sup> The other three documents reflected price negotiations in December 2008 and February 2009<sup>285</sup> between a Chinese supplier and its customers and, in each of these documents, "the Chinese supplier quoted a price, the customer responded by noting the specific amount by which the Chinese offer was higher than the alternatives available from Russian or U.S. suppliers, and the Chinese supplier was then forced to lower its price".<sup>286</sup> With respect to the evidence regarding price negotiations in February 2009, the Panel considered that MOFCOM's finding that there was no price undercutting during the first quarter of 2009 "undermine[d] the probative value" of that evidence.<sup>287</sup>

175. Finally, the Panel addressed MOFCOM's reliance on a decrease in subject import prices in the first quarter of 2009. The Panel noted MOFCOM's findings regarding the price trend of subject imports during the period of investigation, and that the price of subject imports was not lower than the price of like domestic products in the first quarter of 2009. The Panel explained that it was not persuaded that MOFCOM could properly have found that, following a 17.57% increase in subject import prices in 2008, a 1.25% decrease in subject import prices in the first quarter of 2009 could have had the effect of depressing domestic prices, particularly since subject import prices remained higher than domestic prices during that period.<sup>288</sup>

176. For these reasons, the Panel did not consider "that the evidence available to MOFCOM could have allowed an objective and impartial investigating authority to determine that subject imports were priced lower than domestic products."<sup>289</sup> The Panel also considered whether, even if MOFCOM's analysis of the effect of subject import prices was flawed, MOFCOM's price depression finding might nevertheless stand on the basis of its analysis of the effect of subject import volume. The Panel

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<sup>283</sup>Panel Exhibit CHN-37 (BCI).

<sup>284</sup>Panel Report, para. 7.533.

<sup>285</sup>Panel Exhibits CHN-38 (BCI), CHN-39 (BCI), and CHN-40 (BCI).

<sup>286</sup>Panel Report, para. 7.532 (quoting China's response to the Panel's request of 18 November 2011 for certain confidential data, p. 2).

<sup>287</sup>Panel Report, para. 7.534.

<sup>288</sup>Panel Report, para. 7.535.

<sup>289</sup>Panel Report, para. 7.536.

considered that it was "not possible to conclude that MOFCOM's finding that price depression was an effect of subject imports might be upheld purely on the basis of MOFCOM's findings regarding the effect of the increase in the volume of subject imports."<sup>290</sup> Thus, the Panel found that "MOFCOM's determination that price depression was an effect of subject imports was neither made pursuant to an objective examination, nor based on positive evidence."<sup>291</sup>

177. In respect of MOFCOM's analysis of price suppression, the Panel noted that the United States relied on the same arguments as it did to challenge MOFCOM's price depression finding, and considered that "the same flaws that undermined MOFCOM's finding that price depression was an effect of subject imports also undermine MOFCOM's finding that price suppression was an effect of subject imports."<sup>292</sup> The Panel also considered, "for the sake of completeness"<sup>293</sup>, the United States' additional argument concerning alleged changes in the underlying cost structure of the domestic industry. The Panel concluded that MOFCOM should have examined the complex issue of whether domestic prices would have been able to rise to the full extent of the start-up costs incurred by the domestic industry. The Panel thus found that "MOFCOM's determination that price suppression was an effect of subject imports was not made pursuant to an objective examination, based on positive evidence."<sup>294</sup>

178. For the foregoing reasons, the Panel concluded that MOFCOM's finding regarding the price effects of subject imports was inconsistent with Articles 3.1 and 3.2 of the *Anti-Dumping Agreement* and Articles 15.1 and 15.2 of the *SCM Agreement*.

#### B. *Assessment of the Panel's Analysis*

179. We begin by examining the nature and scope of the claims that China advances to challenge the Panel's analysis of MOFCOM's finding of significant price depression and suppression.

180. China appeals the Panel's application of Article 3.2 of the *Anti-Dumping Agreement* and Article 15.2 of the *SCM Agreement*.<sup>295</sup> China submits that the Panel fundamentally misunderstood MOFCOM's analysis by considering that the reference to the "low price" of subject imports in MOFCOM's Final Determination meant that subject import prices undercut domestic prices, and that MOFCOM had relied on this factor in reaching its finding of significant price depression and suppression. China argues that, contrary to the view adopted by the Panel, MOFCOM "never

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<sup>290</sup>Panel Report, para. 7.542.

<sup>291</sup>Panel Report, para. 7.543.

<sup>292</sup>Panel Report, para. 7.547.

<sup>293</sup>Panel Report, para. 7.547.

<sup>294</sup>Panel Report, para. 7.551.

<sup>295</sup>See China's Notice of Appeal, para. 6. See also *supra*, paras. 111-115, for a discussion of the scope of China's appeal.

compared subject import prices relative to domestic prices over the entire period"<sup>296</sup>, and MOFCOM's price effects discussion did not focus on "the existence of price undercutting [and] did not depend on price comparability".<sup>297</sup> The implication of China's arguments on appeal is that, if the Panel had been wrong to insist that MOFCOM's price effects finding rested on the existence of price undercutting, its basis for rejecting the AUV data submitted by China during the Panel proceedings would have been unwarranted. In the alternative, China argues that, even if MOFCOM conducted and relied upon price comparisons constituting price undercutting for its price effects finding, the Panel nevertheless erred in finding that MOFCOM should have made certain adjustments to ensure price comparability. China maintains that such adjustments are not required by Articles 3.2 and 15.2, and that, even if they were, they were not necessary in the circumstances of this case.

181. China further contends that the Panel failed to have regard, or to have sufficient regard, to factors that *did* sustain MOFCOM's finding of significant price depression and suppression. According to China, MOFCOM's price effects finding in fact rested on three other propositions, two relating to the *prices* of subject imports, and one relating to the *volume* of subject imports.<sup>298</sup> With regard to the effect of subject import *prices*, China argues that MOFCOM relied on the following factors: (i) a "pricing policy", whereby subject imports aimed at setting prices below domestic prices; and (ii) parallel price trends, by which subject import prices and domestic prices followed the same pattern of first increasing through 2008, and then decreasing in the first quarter of 2009. Moreover, with regard to the effect of subject import *volume*, China maintains that a key element of MOFCOM's reasoning is its reliance on increases in the volume of subject imports beginning in 2008.

182. Finally, China also claims that the Panel erred by failing to make an objective assessment as required by Article 11 of the DSU. According to China, the Panel "mischaracterize[d] a fact that is fundamental and ultimately determinative to its analysis" by equating the reference to "low price" in MOFCOM's Final Determination with the existence of price undercutting by subject imports.<sup>299</sup> China further argues that the Panel erred by relying on this single factor to invalidate MOFCOM's finding of significant price depression and suppression, and thus failed to take into account "the

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<sup>296</sup>China's appellant's submission, para. 130.

<sup>297</sup>China's appellant's submission, para. 140.

<sup>298</sup>China's appellant's submission, para. 118.

<sup>299</sup>China's appellant's submission, para. 200. China also argues that this was contradicted by MOFCOM's finding that subject imports were not priced lower than domestic products in the first quarter of 2009. (*Ibid.*, para. 201)

totality of the circumstances that produced the conclusion of price depression and price suppression".<sup>300</sup>

183. In its appeal, China seeks to challenge the Panel's understanding of MOFCOM's price effects analysis in its Final Determination and, in doing so, asserts claims that the Panel erred both in its application of Articles 3.2 and 15.2, and in its duty to make an objective assessment of the facts under Article 11 of the DSU. This is now familiar yet difficult terrain in the application of the Appellate Body's standard of review. Although a panel's findings of fact, as distinguished from legal interpretations or legal conclusions, are in principle not subject to review by the Appellate Body, Article 11 of the DSU may be relied upon to challenge a panel's failure to make an objective assessment of the matter before it, including an objective assessment of the facts of the case.<sup>301</sup> In previous cases, the Appellate Body has recognized the difficulty of clearly distinguishing between issues of legal application and issues of fact. In most cases, however, the issue raised by a particular claim "will *either* be one of application of the law to the facts *or* an issue of the objective assessment of facts, and not both".<sup>302</sup> The Appellate Body has found that allegations implicating a panel's appreciation of facts and evidence fall under Article 11 of the DSU.<sup>303</sup> By contrast, "[t]he consistency or inconsistency of a given fact or set of facts with the requirements of a given treaty provision is ... a legal characterization issue" and is therefore a legal question.<sup>304</sup>

184. As we understand it, China's key contention is that the Panel erred by misunderstanding what "low price" meant in MOFCOM's Final Determination, and in determining that MOFCOM relied on that factor in its price effects analysis and conclusions. According to China, in evaluating MOFCOM's price effects analysis, the Panel improperly focused on this single factor (that is, the "low price" of subject imports in the form of price undercutting), and failed to give proper regard to other factors (that is, a pricing policy aiming at price undercutting, parallel price trends between subject import and domestic prices, and increases in subject import volume). As China puts it in its Notice of

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<sup>300</sup>China's appellant's submission, para. 204. China contends that the Panel's failure to take into account the totality of the circumstances supporting MOFCOM's price effects finding was contrary to the Appellate Body's guidance regarding a panel's proper standard of review in *US – Countervailing Duty Investigation on DRAMS* and *Japan – DRAMS (Korea)*. (*Ibid.*, paras. 205-208)

<sup>301</sup>The Appellate Body has previously explained that panels, as triers of fact, have discretion in the appreciation of the evidence, and that the Appellate Body will not interfere lightly with a panel's exercise of this discretion. The Appellate Body has noted that it will not base a finding of inconsistency under Article 11 of the DSU simply on the conclusion that it might have reached a different factual finding. Instead, for a claim regarding a panel's factual assessment to succeed under Article 11, the Appellate Body must be satisfied that the panel has exceeded its authority as the trier of facts. (Appellate Body Report, *US – Wheat Gluten*, para. 151; Appellate Body Report, *US – Carbon Steel*, para. 142)

<sup>302</sup>Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 872. (original emphasis)

<sup>303</sup>Appellate Body Report, *US – Upland Cotton*, para. 399; Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 385; Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1005.

<sup>304</sup>Appellate Body Report, *EC – Hormones*, para. 132.

Appeal, "[r]ather than apply the legal standard to MOFCOM's final determinations as written, the Panel examined findings never made by the authority and instead ignored or dismissed key factors that MOFCOM had discussed in its determinations."<sup>305</sup> Although there are arguably features of the Panel's analysis on appeal that concern facts that were before MOFCOM and before the Panel itself, we understand China's appeal to address the manner in which the Panel examined and applied Article 3.2 of the *Anti-Dumping Agreement* and Article 15.2 of the *SCM Agreement*, read together with Article 3.1 of the *Anti-Dumping Agreement* and Article 15.1 of the *SCM Agreement*, to MOFCOM's Final Determination.<sup>306</sup> Thus, we consider that, when the Panel examined the question of whether MOFCOM relied on the existence of price undercutting in 2006 to 2008 to find significant price depression and suppression, it was examining whether MOFCOM's Final Determination complied with the legal standard for a price effects analysis conducted on the basis of "positive evidence" and involving an "objective examination". In order to give proper consideration to the Panel's analysis and to China's appeal, we therefore examine this issue in the light of the Panel's application of the legal standard under Articles 3.2 and 15.2, read together with Articles 3.1 and 15.1, to MOFCOM's Final Determination. Accordingly, there is no basis separately to consider whether the Panel, in assessing the significance of "low price" in MOFCOM's Final Determination, conducted an objective assessment of the facts under Article 11 of the DSU.

185. On the basis of the foregoing discussion, we now turn to assess China's arguments concerning the Panel's analysis of each of these factors in respect of MOFCOM's Final Determination. Once we have done so, we then provide an overall assessment of China's claims on appeal.

1. The "Low Price" of Subject Imports

186. China contends that the Panel misstated MOFCOM's discussion of the "low price" of subject imports by erroneously suggesting that those prices were low *relative to domestic prices*. In China's view, MOFCOM "note[d] that subject import prices were 'at a low price', but never compared subject import prices relative to domestic prices over the entire period".<sup>307</sup> China considers that, although the Panel correctly recognized that MOFCOM had not made a specific finding of significant price undercutting, the Panel then asserted that MOFCOM nevertheless relied on the existence of price undercutting. According to China, MOFCOM's reference to "low price" is not the same thing as price undercutting since "[l]ow-priced' imports can exist regardless of the relative prices of subject imports

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<sup>305</sup>China's Notice of Appeal, para. 6(a).

<sup>306</sup>As we have explained, although China has not challenged the Panel's interpretation and application of Articles 3.1 and 15.1, we consider that our examination of the Panel's analysis under Articles 3.2 and 15.2 cannot be conducted in isolation from the Panel's analysis pursuant to the standard under Articles 3.1 and 15.1. (See *supra*, paras. 112 and 113)

<sup>307</sup>China's appellant's submission, para. 130 (quoting Final Determination (Panel Exhibit CHN-16 (English version)), p. 58).

and domestic [products]."<sup>308</sup> In China's view, MOFCOM's price effects discussion focused on factors other than the existence of price undercutting and "did not depend on price comparability".<sup>309</sup>

187. According to the United States, "China has no basis for its claims that MOFCOM did not rely on the 'low prices' of imports as a central component of its pricing analysis or that MOFCOM did not draw its conclusion about the low prices of imports from a price comparison of domestic and import prices."<sup>310</sup> The United States refers to instances in which MOFCOM linked "low price" to price depression and suppression or the material injury purportedly sustained by China's domestic GOES industry.<sup>311</sup> In addition, the United States argues that "low priced" imports must be low priced in relation to something that is higher priced. The United States also refers to statements by MOFCOM, and by China before the Panel, that MOFCOM relied on a finding that subject import prices were lower than domestic prices.<sup>312</sup>

188. As outlined above, China's appeal calls on us to consider whether the Panel properly determined that, in referring to the "low price" of subject imports, MOFCOM was referring to the existence of price undercutting, and was relying on that factor in reaching its finding of significant price depression and suppression.

189. In the price effects analysis of its Final Determination, MOFCOM's discussion of the "low price" of subject imports is set out in the following statement:

Because the sale of the product concerned was kept at a *low price*, and the import volume of the product concerned increased greatly beginning from 2008, under this impact, domestic producers lowered their price to keep the market share.<sup>313</sup> (emphasis added)

190. This sentence indicates MOFCOM's view that domestic producers lowered their prices due to two factors, namely, the "low price" and the increased volume of subject imports. We note that the reference to "low price" does not indicate in relation to what, or over what time period, the prices of subject imports were considered to be low. We further note that this section of MOFCOM's Final Determination does not provide further explanation or reasoning as to the significance of this "low price" factor.

191. China, however, sought to explain the significance of the term "low price" before the Panel. According to China, information collected by MOFCOM confirmed that, from 2006 to 2008, the

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<sup>308</sup>China's appellant's submission, para. 135.

<sup>309</sup>China's appellant's submission, para. 140.

<sup>310</sup>United States' appellee's submission, para. 72.

<sup>311</sup>United States' appellee's submission, paras. 60-63.

<sup>312</sup>United States' appellee's submission, paras. 71 and 72.

<sup>313</sup>Final Determination (Panel Exhibit CHN-16 (English version)), p. 58.

AUVs of subject imports were consistently below those of domestic products, demonstrating that the "subject import prices were both 'low' and 'lower' than domestic prices."<sup>314</sup> When China subsequently provided the Panel with annual ranges of the AUV data to which China had referred, it further explained that this record evidence "confirm[ed] the magnitude and consistency with which subject [import] AUVs were lower than domestic AUVs".<sup>315</sup>

192. The Panel then asked the parties to comment on the underlying evidence supplied by China. China stated as follows:

As China explained during the second meeting, the ranged data includes the actual AUVs. The United States is simply wrong to say the ranged data does not reflect any actual AUVs. The range includes the AUVs. China's point is simply that given the use for which the AUV data has been requested—to confirm the factual statement that subject import prices were lower than domestic prices—the range of AUVs and range of underselling margins accomplished that objective.

If MOFCOM had based its findings of adverse price effects on price undercutting, or had otherwise relied on the magnitude of the underselling margins, then perhaps the U.S. argument would have some relevance. But MOFCOM findings do not rely on the magnitude of the underselling margins, and simply note the existence of underselling as a supporting fact for the findings of price depression, price [suppression], and causation. The information China has provided is more than sufficient to confirm the existence of underselling during much of the period of investigation, until the domestic producers had to react to the large volume of low priced subject imports, and lower the domestic price.<sup>316</sup> (original underlining)

193. On the basis of this submission, the Panel considered that, although MOFCOM did not make a finding of significant price undercutting, China had nevertheless conceded that MOFCOM relied on a finding that subject import prices undercut domestic prices to support its finding of significant price depression and suppression.<sup>317</sup>

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<sup>314</sup>China's second written submission to the Panel, para. 102.

<sup>315</sup>China's response to the Panel's request of 18 November 2011 for certain confidential data, p. 1.

<sup>316</sup>China's response to Panel Question 69 following the second Panel meeting, paras. 160 and 161.

<sup>317</sup>Panel Report, paras. 7.529 and 7.530 (referring to China's response to Panel Question 69 following the second Panel meeting, para. 161). The Panel also referred to MOFCOM's statement in its Final Determination that it had made "a comparative analysis of price" consisting of "an analysis on the low-price sales" of subject imports. (*Ibid.*, footnote 505 to para. 7.530 (quoting Final Determination (Panel Exhibit CHN-16 (English version)), p. 70) Although China argued that the reference to "comparative" had been a reference to price depression and suppression, and not to price undercutting, the Panel stated that it saw "no basis on which to conclude that MOFCOM [was] referring to anything other than a comparative analysis of the price of subject imports relative to domestic sales". (*Ibid.*)

194. On appeal, China now requests the Appellate Body to conclude that the Panel, when faced with the arguments and evidence presented by the parties, was wrong to conclude that MOFCOM had relied on a comparison of subject import and domestic prices in the years 2006 to 2008, and the existence of price undercutting, to support its finding of significant price depression and suppression. Specifically, China argues that MOFCOM's use of "low price" did not refer to the existence of price undercutting, but could rather be understood either as a reference to the prices of subject imports in relation to their historical prices, or as a reference to the low price established by virtue of the sale of subject imports at dumped and/or subsidized levels.<sup>318</sup> In any event, China argues, MOFCOM did not rely on its reference to the "low price" of subject imports, as evidenced by the fact that this reference does not appear in two core paragraphs of MOFCOM's Final Determination that reflect MOFCOM's ultimate price effects finding.<sup>319</sup>

195. We are not persuaded by these arguments by China on appeal. After China had averred to the Panel that MOFCOM relied on evidence of price undercutting to support its finding that subject imports were kept at a "low price", the Panel requested China to provide the underlying evidence, and then asked the parties to comment on that evidence. Thus, when the Panel found that China had "concede[d]"<sup>320</sup> that MOFCOM relied on the existence of price undercutting from 2006 to 2008 to support its finding of significant price depression and suppression, that finding was drawn on the basis of China's representations to the Panel that MOFCOM had an evidentiary basis in the investigation record for its conclusion. In particular, as we have observed, the Panel referred to China's statement that MOFCOM "note[d] the existence of price undercutting as a supporting fact" for its finding of significant price depression and suppression.<sup>321</sup> While the statements and evidence a party provides to explain some aspect of an investigating authority's determination are not dispositive as to its meaning, a panel may place reliance on such statements in its review of that determination. If the party then advances a different position on appeal that challenges a panel's reliance on representations the party made before the panel, that party would have to explain why its previous account of the determination is no longer to be relied upon. We do not see that China has provided us with a basis upon which to disregard statements regarding the AUV data that were made by China during the Panel proceedings, and on which the Panel relied in reviewing MOFCOM's Final Determination. Accordingly, even if the reference to "low price" in MOFCOM's Final Determination could be read in different ways, we consider that it was proper for the Panel to rely on China's statements to the Panel, and for us to review the Panel's findings on the basis of that reliance.

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<sup>318</sup>China's response to questioning at the oral hearing.

<sup>319</sup>China's opening statement and response to questioning at the oral hearing (referring to Final Determination (Panel Exhibit CHN-16 (English version)), p. 59).

<sup>320</sup>Panel Report, para. 7.530.

<sup>321</sup>Panel Report, para. 7.529 (referring to China's response to Panel Question 69 following the second Panel meeting, para. 161).

196. For the foregoing reasons, we consider that the Panel was correct to conclude 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.

2. Comparisons of AUV Data to Establish "Low Price"

197. China submits that, even if MOFCOM conducted and relied upon price comparisons and the existence of price undercutting from 2006 to 2008, the Panel nevertheless erred by mandating the use of certain adjustments to ensure price comparability that are not required by Articles 3.2 and 15.2. China argues, moreover, that even if price comparability is required, the Panel imposed specific price comparison methodologies that were "not necessary at all"<sup>322</sup> in the circumstances of this case, particularly given that concerns regarding price comparability were neither raised nor argued by the respondents during the investigation. According to China, although investigating authorities have an inherent duty to investigate prices to some degree, they also "have discretion to frame their investigations and analyses in light of the information gathered by the authorities and the arguments presented to the authorities by the parties".<sup>323</sup>

198. The United States contends that the Panel never found that Articles 3.2 and 15.2 require an investigating authority to perform its price comparisons and analysis using any particular methodology. Instead, the United States argues, the Panel evaluated whether MOFCOM conducted an "objective examination" on the basis of "positive evidence". According to the United States, the Panel reasonably concluded that there were "significant evidentiary deficiencies"<sup>324</sup> in MOFCOM's findings, and China has not adequately rebutted the reasons the Panel provided for finding that MOFCOM's use of AUV data was not objective. The United States also rejects China's argument that objections to the AUV data were neither raised nor argued by the respondents during the investigation. The United States maintains that the record shows that the respondents had raised objections to MOFCOM's price comparisons, and that, in any event, there is no limitation on what arguments a respondent can bring in panel proceedings under Articles 3.1 and 15.1.<sup>325</sup>

199. We recall that the Panel identified "a number of misgivings" regarding the AUV data relied upon by MOFCOM and, in particular, "MOFCOM's failure to consider the need for adjustments to

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<sup>322</sup>China's appellant's submission, para. 155.

<sup>323</sup>China's appellant's submission, para. 184.

<sup>324</sup>United States' appellee's submission, para. 85.

<sup>325</sup>United States' appellee's submission, paras. 90-92.

ensure price comparability".<sup>326</sup> First, the Panel considered that China failed to rebut the United States' argument that subject import and domestic AUVs were fixed at different levels of trade. Second, the Panel noted that MOFCOM did not make adjustments to account for the fact that the AUV data covered products of different grades. Third, the Panel considered that, given the possibility of prices varying over time, the determination of a single price point to represent prices throughout the course of an entire year did not provide a sufficiently precise basis for comparing prices. Having concluded that MOFCOM relied on comparisons of subject import and domestic prices to find the existence of price undercutting by subject imports, the Panel considered that an investigating authority in these circumstances must "ensure that the prices it is using for its comparison are properly comparable".<sup>327</sup> As the Panel stated, "[a]s soon as price comparisons are made, price comparability necessarily arises as an issue."<sup>328</sup> The Panel thus found that, because MOFCOM relied on a comparison of subject import and domestic prices without considering the need for adjustments to ensure price comparability, MOFCOM's reasoning was "neither objective, nor based on positive evidence".<sup>329</sup>

200. In response to questioning at the oral hearing, both participants agreed that an investigating authority must ensure comparability between prices that are being compared.<sup>330</sup> Indeed, although there is no explicit requirement in Articles 3.2 and 15.2, we do not see how a failure to ensure price comparability could be consistent with the requirement under Articles 3.1 and 15.1 that a determination of injury be based on "positive evidence" and involve an "objective examination" of, *inter alia*, the effect of subject imports on the prices of domestic like products. Indeed, if subject import and domestic prices were not comparable, this would defeat the explanatory force that subject import prices might have for the depression or suppression of domestic prices.<sup>331</sup> We therefore see no reason to disagree with the Panel when it stated that "[a]s soon as price comparisons are made, price comparability necessarily arises as an issue."<sup>332</sup>

201. China further asserts that price adjustments were not necessary *in the circumstances of this case*. In this respect, China argues that the Panel did not have a basis to insist on price adjustments to ensure price comparability in this case, particularly given the limited, if any, attention such issues attracted before MOFCOM. Addressing the latter point first, we do not consider that the question of whether price adjustments are needed to ensure price comparability is to be determined by whether a respondent objects to the use of unadjusted prices. We have explained that a price effects finding is

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<sup>326</sup>Panel Report, para. 7.528.

<sup>327</sup>Panel Report, para. 7.530.

<sup>328</sup>Panel Report, para. 7.530.

<sup>329</sup>Panel Report, para. 7.530.

<sup>330</sup>China's and United States' responses to questioning at the oral hearing.

<sup>331</sup>We note that similar considerations of price comparability are reflected in Article 2.4 of the *Anti-Dumping Agreement* and Article 6.5 of the *SCM Agreement*.

<sup>332</sup>Panel Report, para. 7.530.

subject to the requirement that a determination of injury be based on "positive evidence" and involve an "objective examination". As the Appellate Body stated in *EC – Bed Linen (Article 21.5 – India)*, the obligations under Articles 3.1 and 3.2 "must be met by every investigating authority in every injury determination".<sup>333</sup> For these reasons, while we may agree with China that investigating authorities "have discretion to frame their investigations and analyses in light of the information gathered by the authorities and the arguments presented to the authorities by the parties"<sup>334</sup>, authorities remain bound by their overarching obligation to conduct an objective examination on the basis of positive evidence, irrespective of how the issues were presented or argued during the investigation.

202. Moreover, we observe that these arguments by China appear to be directed at whether the Panel had an adequate evidentiary basis for its finding that price adjustments were warranted in the circumstances of this case. China maintains, for instance, that there was "no evidence in the record" to support the United States' argument that the AUVs for subject imports and domestic products reflected transactions at different levels of trade because "imports were sold to traders while domestic products were sold to end-users".<sup>335</sup> With regard to the product grade of subject imports and domestic products, China argues that, because virtually all of the subject imports—97% of subject import quantity, and 99% of subject import value—were under one of the two tariff headings, "[d]isaggregating the analysis would have had no material effect at all on the analysis".<sup>336</sup> Finally, with regard to the use of annual AUV data, China asserts that, while further disaggregation on a monthly or quarterly basis may have been possible, annual AUVs still permit an investigating authority to compare trends over time, and that there is therefore "nothing inherently non-objective about using annual AUVs".<sup>337</sup>

203. In each of these instances, the Panel's consideration of the need for a particular price adjustment rested on factual contentions before the Panel. That is, whether the issue concerned the level of trade at which subject imports and domestic products were sold in China, the allocation of subject imports under different tariff headings, or the degree of variability of domestic prices over time, each of China's arguments is directed at whether the Panel had an adequate evidentiary basis for its finding that price adjustments were warranted. Because these issues appear largely directed at the Panel's appreciation of the evidence, they are issues that we would typically consider in evaluating whether a panel had acted consistently with its duty to make an objective assessment of the facts

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<sup>333</sup> Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 109. See also Panel Report, *Mexico – Steel Pipes and Tubes*, para. 7.259 (stating that an investigating authority is "bound to satisfy its obligations whether or not this issue is raised by an interested party in the course of an investigation").

<sup>334</sup> China's appellant's submission, para. 184.

<sup>335</sup> China's appellant's submission, para. 159.

<sup>336</sup> China's appellant's submission, para. 167.

<sup>337</sup> China's appellant's submission, para. 172.

under Article 11 of the DSU. These issues, however, were not addressed in China's Article 11 claim, and we therefore do not review them as part of China's appeal.

### 3. Pricing Policy of Subject Imports

204. China also challenges the Panel's treatment of MOFCOM's analysis regarding the existence of a "pricing policy" aimed at setting subject import prices lower than domestic prices. China argues that MOFCOM never stated that the policy actually resulted in lower import prices. Instead, China asserts that MOFCOM relied on evidence of the pricing policy to demonstrate "efforts by import sources to charge lower prices to win business"<sup>338</sup>, and "that domestic prices were being forced to react to import prices".<sup>339</sup> China considers that the Panel failed to recognize the distinction between a low price policy and price undercutting, and therefore improperly used MOFCOM's finding about the absence of actual price undercutting in the first quarter of 2009 to ignore other implications of this evidence. In China's view, "[s]ubject imports that are trying to set lower prices can trigger adverse price effects, whether they actually achieve prices lower than the domestic price level or not."<sup>340</sup>

205. According to the United States, MOFCOM found that the "pricing policy" was aimed at setting import prices lower than domestic prices and that, as a result of this policy, "the product concerned was kept at a low price."<sup>341</sup> Given this finding, the United States considers that the Panel properly concluded "that MOFCOM found that the alleged policy was effective at keeping prices lower than the domestic products."<sup>342</sup> On that basis, the United States argues, the Panel properly rejected MOFCOM's reliance on evidence concerning the first quarter of 2009 since MOFCOM found that subject imports were actually priced higher than domestic products in that quarter.<sup>343</sup>

206. We consider that the existence of a pricing policy by importers to undercut the prices of domestic producers could, when successful, lead to actual price undercutting. Even 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. Indeed, a policy aimed at price undercutting may very well depress and suppress domestic prices in instances where, as China asserts, "domestic producers were reacting to subject import competition and were lowering domestic prices so as to compete more effectively and minimize any further loss of market share."<sup>344</sup> In this respect, if an importer pursues a policy of undercutting a competitor, but that competitor anticipates or responds

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<sup>338</sup>China's appellant's submission, para. 143.

<sup>339</sup>China's appellant's submission, para. 142.

<sup>340</sup>China's appellant's submission, para. 148.

<sup>341</sup>United States' appellee's submission, para. 69 (quoting Final Determination (Panel Exhibit CHN-16 (English version)), p. 58).

<sup>342</sup>United States' appellee's submission, para. 69.

<sup>343</sup>United States' appellee's submission, footnote 90 to para. 69.

<sup>344</sup>China's appellant's submission, para. 144.

to that policy by lowering its price to win the sale, this may still reveal that subject imports have the effect of depressing, or preventing the increase of, domestic prices.

207. The Panel considered that the existence of a pricing policy was "undermine[d]" by the fact that there was no price undercutting during the first quarter of 2009.<sup>345</sup> Having examined only the question as to whether the existence of a pricing policy resulted in price undercutting by subject import prices, the Panel did not also examine whether that policy could, even in the absence of price undercutting, support a finding of significant price depression and suppression. The Panel did not address the proper question before it and therefore failed to consider the explanatory force that a policy aimed at price undercutting could have for the depression or suppression of domestic prices. That prices were higher for subject imports than domestic like products in the first quarter of 2009 does not necessarily negate the significance of a policy aimed at price undercutting for findings of price depression and suppression, and we therefore do not consider that it was appropriate for the Panel to have rejected MOFCOM's reliance on the pricing policy on the grounds that it did.

#### 4. Parallel Trends of Subject Import and Domestic Prices

208. China further asserts that the Panel never discussed "one of the key elements of MOFCOM's discussion"<sup>346</sup>, namely, that subject import prices and domestic prices followed the same trends of first increasing and then decreasing over the period of investigation. China notes that, although MOFCOM referred to this fact twice in its analysis, the Panel refers only to the drop in subject import prices in the first quarter of 2009, without ever discussing "the parallel trend in subject import prices and domestic prices over the period".<sup>347</sup>

209. The United States maintains that there is no indication in MOFCOM's Final Determination that MOFCOM relied on parallel price trends for its price effects analysis. The United States also argues that "the pricing information actually disclosed by MOFCOM does not support a finding that 'parallel' pricing trends caused price depression"<sup>348</sup> because MOFCOM did not find price depression when the trends were parallel in 2007 and 2008, and yet found price depression when the trends were not parallel in the first quarter of 2009.

210. We can conceive of ways in which an observation of parallel price trends might support a price depression or suppression analysis. For instance, 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

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<sup>345</sup>Panel Report, paras. 7.533 and 7.534.

<sup>346</sup>China's appellant's submission, para. 122.

<sup>347</sup>China's appellant's submission, para. 123.

<sup>348</sup>United States' appellee's submission, para. 76.

on domestic prices. The difficulty we have with this issue on appeal, however, is that there is no basis on which to draw any such conclusions in this case. In its Final Determination, MOFCOM referred twice to the price trends of subject imports and domestic products, in both instances noting that the "developing trend" of price for the two products was "basically the same" in that the price initially rose and then dropped.<sup>349</sup> Apart from these two references, however, MOFCOM did not provide any further description of these price trends, or set out any explanation or reasoning regarding the role such trends played in MOFCOM's price effects analysis and findings.<sup>350</sup> We note, moreover, that, although China argues that parallel price trends is "one of the key elements of MOFCOM's discussion"<sup>351</sup>, China has not explained before the Panel, or now on appeal, what the significance of this element was to the analysis set out in MOFCOM's Final Determination. In the absence of sufficient reasoning in MOFCOM's Final Determination, or an elucidation of the Final Determination by China, as to what explanatory force parallel price trends had for the depression or suppression of domestic prices, we see no basis to fault the Panel for failing to recognize or discuss the significance of these trends for MOFCOM's analysis.

#### 5. Increases in Subject Import Volume

211. China further argues that the Panel erred in finding that increases in the volume of subject imports were not the primary basis for MOFCOM's finding of significant price depression and suppression. China maintains that it never argued that subject import volume was the sole factor expressed in MOFCOM's determination, but rather that it was one of several key factors. China asserts that, by finding that MOFCOM's price effects finding could not be upheld purely on the basis of subject import volume alone, the Panel erred "[b]y dismissing and giving no weight to the effect of the volume of subject imports" as expressed in MOFCOM's Final Determination.<sup>352</sup>

212. The United States argues that the Panel addressed China's claim and properly rejected it. According to the United States, the Panel noted that China relied on extracts from MOFCOM's

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<sup>349</sup>Final Determination (Panel Exhibit CHN-16 (English version)), pp. 58 and 59.

<sup>350</sup>In the absence of such explanation or reasoning, the issue of the parallel price trends raises certain unresolved questions. We note, for instance, that the Panel questioned the significance of the price trends when it stated that it was not persuaded that, following a 17.57% increase in subject import price in 2008, a 1.25% decrease in subject import price in the first quarter of 2009 could have had the effect of depressing domestic prices. (Panel Report, para. 7.535) This also raises a question as to whether it is appropriate to consider subject import and domestic price trends in the first quarter of 2009 as "parallel" given that, although they both decreased in that period, they did so at very different rates—1.25% for subject import prices, and 30.25% for domestic prices. If parallel price trends were indeed significant for MOFCOM's analysis, then we would have expected some explanation in MOFCOM's Final Determination as to what significance the fact that a modest decrease in subject import prices followed a larger increase in those prices, and that there was a divergence in subject import and domestic price trends in the first quarter of 2009, had for MOFCOM's overall price effects analysis.

<sup>351</sup>China's appellant's submission, para. 122.

<sup>352</sup>China's appellant's submission, para. 128.

analysis that appeared to lend equal weight to considerations of subject import volume and price, and that MOFCOM referred both to the volume and price features of subject imports. The United States contends that "[a]lthough China claims that MOFCOM focused solely or primarily on the volumes of imports in its analysis, this was not at all evident on the face of MOFCOM's determination."<sup>353</sup>

213. At the outset of its analysis, the Panel explained that, although MOFCOM's price effects finding relied on "both the increase in volume of subject imports, and the low price thereof", the Panel would first focus on the United States' arguments as they relate "to MOFCOM's finding that subject imports were priced lower than domestic products".<sup>354</sup> After doing so, the Panel stated that it would "complete [its] evaluation by considering whether, even if MOFCOM's analysis of the price effects of subject imports was flawed, MOFCOM's finding that price depression was an effect of subject imports might nevertheless stand on the basis of MOFCOM's analysis of the effect of the increase in the volume of subject imports in depressing domestic prices."<sup>355</sup>

214. Following its analysis of the effect of subject import prices, the Panel turned to consider whether or not MOFCOM's Final Determination supported "China's argument that volume effects were the primary basis for MOFCOM's finding that price depression was an effect of subject imports."<sup>356</sup> The Panel considered that statements referred to by China in MOFCOM's Final Determination "appear to lend equal weight to considerations of both subject import volume and price"<sup>357</sup>, and that MOFCOM's analysis was under a heading entitled "[t]he impact of the import *price* of the product concerned on the price of domestic like products."<sup>358</sup> The Panel concluded that there was "nothing in MOFCOM's determination to indicate that MOFCOM relied more heavily on the increase in the volume of subject imports than it did on the low price thereof for the purpose of establishing that price depression was an effect of subject imports."<sup>359</sup>

215. The Panel further considered that "a panel must exercise great caution in determining whether or not to engage in analyses not undertaken by the investigating authority itself"<sup>360</sup>, and stated that there was "nothing in MOFCOM's determination to suggest that MOFCOM itself found that the volume effects of subject imports alone were sufficient to conclude that price depression was an effect of subject imports."<sup>361</sup> The Panel considered that MOFCOM's analysis of subject import prices was

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<sup>353</sup>United States' appellee's submission, para. 80.

<sup>354</sup>Panel Report, para. 7.518.

<sup>355</sup>Panel Report, para. 7.518.

<sup>356</sup>Panel Report, para. 7.538.

<sup>357</sup>Panel Report, para. 7.539.

<sup>358</sup>Panel Report, para. 7.540 (quoting Final Determination (Panel Exhibit CHN-16 (English version)), p. 58). (emphasis added by the Panel)

<sup>359</sup>Panel Report, para. 7.540.

<sup>360</sup>Panel Report, para. 7.542.

<sup>361</sup>Panel Report, footnote 522 to para. 7.542.

"so central" to its analysis that the flaws the Panel had found with that analysis "must invalidate MOFCOM's overall conclusion that price depression was an effect of subject imports".<sup>362</sup> As the Panel explained, it was therefore "not possible to conclude that MOFCOM's finding that price depression was an effect of subject imports might be upheld purely on the basis of MOFCOM's findings regarding the effect of the increase in the volume of subject imports."<sup>363</sup>

216. We see no disagreement between the participants that MOFCOM's finding of significant price depression and suppression rested on an examination of the effect of both the prices and volume of subject imports on domestic prices. This approach is consistent with the requirements of Articles 3.2 and 15.2 whereby the effect of subject imports on domestic prices may be examined through the vector of subject import prices, subject import volumes, or both. However, in circumstances where an investigating authority relies on both subject import prices and volume, a panel must still allow for the possibility that either prices or volume was sufficient by itself to sustain a finding.<sup>364</sup> We therefore do not consider that the focus of the Panel's inquiry should have been on whether the effects of either subject import volume or prices was the primary basis for MOFCOM's price effects finding.

217. In its analysis, the Panel observed that extracts on which China relied to establish the importance of subject import volume for MOFCOM's analysis showed that MOFCOM's Final Determination referred "both to the increased volume of subject imports, and the allegedly low price thereof"<sup>365</sup>, and appeared "to lend equal weight to considerations of both subject import volume and price".<sup>366</sup> We further note that, when MOFCOM referred to "low price" in its analysis of the effect of subject import prices on domestic prices, it also referred to subject import volume:

Because the sale of the product concerned was kept at a low price, and the import volume of the product concerned increased greatly beginning from 2008, under this impact, domestic producers lowered their price to keep the market share.<sup>367</sup>

218. Subsequently, when MOFCOM stated its finding of significant price depression and suppression, it also referred both to the effect of subject import prices and volume:

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<sup>362</sup>Panel Report, para. 7.542.

<sup>363</sup>Panel Report, para. 7.542.

<sup>364</sup>As a logical matter, the fact that an investigating authority relies more heavily on one of two potential factors does not support the inference that the lesser factor was by itself necessarily insufficient to sustain that finding, or that both factors together were insufficient to sustain it. In any event, we recognize 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 prices.

<sup>365</sup>Panel Report, para. 7.540.

<sup>366</sup>Panel Report, para. 7.539.

<sup>367</sup>Final Determination (Panel Exhibit CHN-16 (English version)), p. 58.

To be more specific, the sharp increase of the import volume of the product concerned since the beginning of 2008 and the drop of the import price of the product concerned in Q1 2009 significantly depressed and suppressed the price of domestic like products.<sup>368</sup>

219. However, while MOFCOM's Final Determination referred to *both* the prices and volume of subject imports, there is no explanation or reasoning as to whether or how the prices and volume of subject imports interacted to produce an effect on domestic prices. We recall that, under the heading in MOFCOM's Final Determination that referred to the "import quantity" of subject imports, MOFCOM identified increases in the volume of subject imports of 0.91% from 2006 to 2007, 60.64% from 2007 to 2008, and 23.57% when comparing quantities in the first quarter of 2009 with the first quarter of 2008.<sup>369</sup> We also recall that, under the heading in MOFCOM's Final Determination that referred to the "import price" of subject imports, MOFCOM identified price increases of 2.97% from 2006 to 2007, and 17.57% from 2007 to 2008, followed by a price drop of 1.25% in the first quarter of 2009 as compared to the first quarter of 2008.<sup>370</sup> Without further explanation or reasoning, however, MOFCOM's Final Determination does not indicate how these two factors may have interacted, or whether the effect of either prices or volume alone could have sustained MOFCOM's finding of significant price depression or suppression.

220. In this respect, we further recall the Panel's conclusion that "[t]here [was] nothing in MOFCOM's determination to suggest that MOFCOM itself found that the volume effects of subject imports alone were sufficient to conclude that price depression was an effect of subject imports."<sup>371</sup> Without further explanation or reasoning in MOFCOM's Final Determination regarding the manner in which the effects of the prices and volume of subject imports operated either independently or together to depress domestic prices, we understand the Panel to have concluded that it was itself unable to disentangle the relative contribution of these effects in MOFCOM's Final Determination without substituting its judgement for that of the authority. The Panel therefore refrained from conducting an analysis that, in its view, MOFCOM itself had not conducted. To have done so would have put the Panel at risk of engaging in a *de novo* review, which would have been inconsistent with a panel's standard of review in assessing determinations of national authorities.

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<sup>368</sup>Final Determination (Panel Exhibit CHN-16 (English version)), p. 59.

<sup>369</sup>Final Determination (Panel Exhibit CHN-16 (English version)), p. 57.

<sup>370</sup>Final Determination (Panel Exhibit CHN-16 (English version)), p. 58.

<sup>371</sup>Panel Report, footnote 522 to para. 7.542.

221. We therefore agree with the Panel that it was "not possible to conclude that MOFCOM's finding that price depression was an effect of subject imports might be upheld purely on the basis of MOFCOM's findings regarding the effect of the increase in the volume of subject imports."<sup>372</sup>

6. Overall Assessment of China's Application Claim

222. Having reviewed the specific arguments of China, we turn now to an overall assessment of China's claim that the Panel erred in its application of the legal standard.

223. Above, we considered that the Panel was correct to conclude that MOFCOM's finding as to the "low price" of subject imports referred to the existence of price undercutting between 2006 and 2008, and that MOFCOM relied on this factor to support its finding of significant price depression and suppression. Moreover, in reviewing China's claim in the alternative that the Panel nevertheless erred in imposing certain price comparison methodologies, we found no reason to disturb the Panel's criticism of the AUV data on which MOFCOM relied. For these reasons, we consider that it was proper for the Panel to conclude that "MOFCOM's reliance on AUVs, without any consideration of the need for adjustments to ensure price comparability, is neither objective, nor based on positive evidence."<sup>373</sup> We further note that, given that the Panel had reason to consider that MOFCOM's price effects finding did not involve an "objective examination" on the basis of "positive evidence", this would appear also to affirm the Panel's ultimate finding of inconsistency on these grounds under Articles 3.1 and 3.2 of the *Anti-Dumping Agreement* and Articles 15.1 and 15.2 of the *SCM Agreement*.

224. The remaining elements of China's claim regarding the effect of the prices of subject imports rested on China's contentions that the Panel ignored the role of parallel price trends, and misconceived the role of a pricing policy aimed at price undercutting by subject imports in the first quarter of 2009. As we have explained, although MOFCOM's Final Determination referred to the fact that subject import and domestic prices first went up and then down over the period of investigation, no explanation or reasoning was provided by MOFCOM in its Final Determination, or by China before the Panel on the basis of the Final Determination, as to how these trends contributed to the price depressive and suppressive effects of subject import prices. With regard to the Panel's assessment of a pricing policy aimed at undercutting domestic prices, we have expressed the view that it was not appropriate for the Panel to have dismissed the pricing policy on the grounds that it did because it failed to consider whether, even in the absence of actual price undercutting, MOFCOM could have concluded that the policy had the effect of depressing or suppressing domestic prices. We note,

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<sup>372</sup>Panel Report, para. 7.542.

<sup>373</sup>Panel Report, para. 7.530.

however, that notwithstanding our disagreement with the Panel's treatment of the pricing policy, that factor was, even under China's argument, one of several factors on which MOFCOM relied to determine the effect of subject import prices on domestic prices. Accordingly, without a foundation to conclude that MOFCOM's analysis of the effect of subject import prices could have been sustained on the basis of the pricing policy alone, we cannot conclude that rejecting the Panel's analysis would lead to reversal of the Panel's ultimate finding of inconsistency under Articles 3.1 and 3.2 of the *Anti-Dumping Agreement* and Articles 15.1 and 15.2 of the *SCM Agreement*.

225. In evaluating the implications of these conclusions for China's claims, we also recall the Panel's analysis of the effects observed in the first quarter of 2009 as set out in paragraph 7.535 of its Report. In that paragraph, the Panel stated:

Finally, we note that MOFCOM also relied on "the drop of the import price of the product concerned in Q1 2009" when finding that price depression was an effect of subject imports. In this regard, we note MOFCOM's finding that subject import prices fell by 1.25% from the first quarter of 2008 to the first quarter of 2009. However, MOFCOM also found that subject import prices increased by 2.97% and 17.57% in 2007 and 2008 respectively. In addition, MOFCOM also found that the subject import price was not lower than the domestic price in the first quarter of 2009. In the absence of any further clarification by MOFCOM, we are not persuaded that an objective and impartial investigating authority could properly have found that, following a 17.57% increase in subject import price in 2008, a 1.25% decrease in subject import price in the first quarter of 2009 could have had the effect of depressing domestic prices, particularly as subject imports prices in any event remained higher than domestic prices in that period.<sup>374</sup> (footnotes omitted)

226. Here, the Panel expressed its scepticism that, following several years of increases in subject import prices, a 1.25% decrease in those prices in the first quarter of 2009 could have had the effect of depressing domestic prices, which MOFCOM had found fell by 30.25% during that same period. As we understand it, however, the thrust of this critique is broader in the sense that, whether the contributing factors are argued to be parallel pricing trends, a policy aimed at undercutting domestic prices, and/or a 1.25% decrease in the price of subject imports, it is nevertheless anomalous that in the only period for which domestic prices actually went down—that is, the first quarter of 2009—there was substantial divergence between the extent of the price decrease for subject imports versus that for domestic products. Indeed, one would normally expect that under the conditions of price competition indicated by these factors, there would be a closer correlation in the movements in subject import and domestic prices. Moreover, although China underscores the importance of the increase in subject import volume to MOFCOM's finding of significant price depression and suppression, we would

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<sup>374</sup>Panel Report, para. 7.535.

expect that such a factor would also have had the same or similar effects on the price trends of subject imports and domestic products. The fact that there was a substantial divergence in pricing levels over that period could suggest that the two products were not in competition with each other<sup>375</sup>, or that there were other factors at work.<sup>376</sup> Therefore, even though we consider that a policy of price undercutting can explain depressive or suppressive effects on domestic prices even in the absence of actual price undercutting, we do not see that, in the light of the pricing dynamic in the first quarter of 2009, there was a basis to conclude so in this case. That pricing dynamic also calls into question whether the prices of subject imports adequately explain the depression or suppression of domestic prices.

227. Finally, we take note of the Panel's consideration that "the same flaws that undermined MOFCOM's finding that price depression was an effect of subject imports also undermine MOFCOM's finding that price suppression was an effect of subject imports."<sup>377</sup> Because China challenges the same elements of the Panel's analysis as it relates to the price effects of depression and suppression, our conclusions regarding the Panel's analysis of MOFCOM's Final Determination as it relates to significant price depression do not lead to a different result with respect to the Panel's analysis as it relates to significant price suppression.

228. For the foregoing reasons, we find that the Panel did not err in its application of Article 3.2 of the *Anti-Dumping Agreement* and Article 15.2 of the *SCM Agreement*, read together with Article 3.1 of the *Anti-Dumping Agreement* and Article 15.1 of the *SCM Agreement*.

## 7. Overall Assessment of China's Article 11 Claim

229. We explained that, although China claimed that the Panel's treatment of MOFCOM's "low price" discussion constituted both an error in the Panel's application of the legal standard, and in its duty to make an objective assessment of the facts under Article 11 of the DSU, we would examine the issue in the light of the Panel's application of the legal standard to MOFCOM's Final Determination. By contrast, we considered that certain of China's arguments regarding the need for price adjustments to ensure price comparability were more clearly directed at the Panel's appreciation of the evidence, and that, because these issues were not addressed in China's Article 11 claim, we would not review them as part of China's appeal.

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<sup>375</sup>In this connection, we note Japan's observation 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 an effect of the imports". (Japan's third participant's submission, para. 4)

<sup>376</sup>In other parts of its analysis, the Panel addresses the effects of Baosteel's entry into the market in 2008 (Panel Report, paras. 7.548 to 7.550), and the effects of domestic capacity and production levels (Panel Report, paras. 7.629 to 7.637).

<sup>377</sup>Panel Report, para. 7.547.

230. As we have noted, China also challenges whether the Panel, in examining MOFCOM's Final Determination, applied a proper standard of review under Article 11 of the DSU. As was the case in respect of China's application claim, this aspect of China's Article 11 claim also rests on China's contention that the Panel relied on the "low price" of subject imports in the form of price undercutting, and disregarded the totality of factors that formed the basis for MOFCOM's finding of significant price depression and suppression. In considering China's application claim, we have examined the Panel's consideration of these factors and found that the Panel did not err in its application of Article 3.2 of the *Anti-Dumping Agreement* and Article 15.2 of the *SCM Agreement*, read together with Article 3.1 of the *Anti-Dumping Agreement* and Article 15.1 of the *SCM Agreement*. Given the particular focus of China's claims in this case, we therefore consider that, through our examination and disposition of China's application claim, we have also resolved China's claim that the Panel did not apply a proper standard of review under Article 11 of the DSU.

231. For the foregoing reasons, we therefore find that the Panel did not act inconsistently with its duty to make an objective assessment under Article 11 of the DSU.

### C. *Conclusion*

232. We have evaluated and rejected China's claims regarding the Panel's interpretation and application of Article 3.2 of the *Anti-Dumping Agreement* and Article 15.2 of the *SCM Agreement*, as well as China's claim that the Panel failed to make an objective assessment within the meaning of Article 11 of the DSU. Having reviewed these claims, we further consider that the Panel's application of the legal standard under Articles 3.2 and 15.2, read together with Articles 3.1 and 15.1, is consistent with the interpretation we have developed with respect to Articles 3.2 and 15.2. Accordingly, we uphold the finding of the Panel, at paragraphs 7.554 and 8.1(f) of its Report, that MOFCOM's finding regarding the price effects of subject imports was inconsistent with Articles 3.1 and 3.2 of the *Anti-Dumping Agreement* and Articles 15.1 and 15.2 of the *SCM Agreement*.

## VII. **Article 6.9 of the *Anti-Dumping Agreement* and Article 12.8 of the *SCM Agreement***

233. We now turn to examine China's claim regarding the Panel's assessment under Article 6.9 of the *Anti-Dumping Agreement* and Article 12.8 of the *SCM Agreement*. Following a summary of the Panel's findings, we interpret these provisions before addressing China's specific arguments on appeal.

### A. *The Panel's Findings*

234. The Panel commenced its analysis by examining the United States' claim that, in its price effects analysis, MOFCOM failed to disclose adequately the "essential facts" concerning the price

comparisons between domestically produced and imported products, as required by Article 6.9 of the *Anti-Dumping Agreement* and Article 12.8 of the *SCM Agreement*.<sup>378</sup> The Panel considered that the "essential facts" that an investigating authority must disclose to interested parties pursuant to Article 6.9 of the *Anti-Dumping Agreement* and Article 12.8 of the *SCM Agreement* are those that underlie its findings of dumping or subsidization, injury, and causal link, because these elements form the basis for the decision to apply definitive measures.<sup>379</sup>

235. Before the Panel, China argued that MOFCOM's injury analysis was based on its finding of significant price depression and suppression, and that MOFCOM did not make a finding of significant price undercutting. The Panel found that, even accepting China's argument that MOFCOM did not make a finding of significant price undercutting, the "low price" of subject imports formed an essential part of the reasoning MOFCOM used to support its finding of significant price depression and suppression. Therefore, MOFCOM was required to disclose not only the conclusion regarding the existence of a "low price", but also the essential facts supporting this conclusion, in order to allow interested parties to defend their interests.<sup>380</sup>

236. Acknowledging China's argument that the price comparison data at issue is confidential, the Panel reviewed the following non-confidential summaries provided by MOFCOM that, according to China, included information underlying the finding of "low price" of subject imports:

- (i) The preliminary determination announces significant margins of dumping, demonstrating that United States exporters were charging lower prices in China than in their home market;
- (ii) The preliminary determination and the final injury disclosure document state that a "pricing policy aiming at setting the price to a level lower than that of the domestic like product was adopted when selling the product concerned in China";
- (iii) The preliminary determination states that "there was no evidence supporting the claim" that Russian prices were not causing price suppression. According to China, this is a reference to the evidence that the parties had submitted;
- (iv) The final injury disclosure document refers to "data obtained from investigation" to highlight that Russian producers had a pricing

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<sup>378</sup>We note that, before the Panel, the United States additionally argued that the following aspects of MOFCOM's price effects analysis were not accompanied by adequate disclosure of the "essential facts under consideration" in accordance with Article 6.9 of the *Anti-Dumping Agreement* and Article 12.8 of the *SCM Agreement*: (i) the price levels for the domestically produced product; (ii) the source of the information on pricing trends for the domestically produced product; (iii) information regarding the purported low price "strategies" adopted by the US and Russian exporters of GOES; and (iv) the levels or trends of the domestic industry's costs. (Panel Report, para. 7.567)

<sup>379</sup>Panel Report, para. 7.568.

<sup>380</sup>Panel Report, para. 7.569.

policy of "setting the price to a lower level than that of the domestic like product"; and

(v) The preliminary determination notes that the United States sales were below normal value and were supported by subsidies. It also notes the declining trend in subject import average unit values.<sup>381</sup> (footnotes omitted)

237. The Panel found that these non-confidential summaries did not provide a summary of the essential facts supporting MOFCOM's finding of "low price" of subject imports, as they did not refer to the prices of subject imports relative to the prices of GOES produced by the domestic Chinese industry. In particular, the Panel considered that: (i) the existence of dumping or subsidization could not be used to infer the relative prices of subject imports and the domestically produced product; (ii) information on the trends in subject import AUVs did not indicate that these values were lower than the values of domestically produced GOES; and (iii) the references to the low pricing strategies of the Russian and US exporters were also insufficient as a summary of the essential facts supporting the conclusion of "low price" of subject imports, because they merely stated that such a strategy existed.<sup>382</sup>

238. The Panel noted certain instances in which China provided more specific, albeit still non-confidential, information to the Panel supporting MOFCOM's finding of "low price" of subject imports. In particular, the Panel referred to: (i) China's explanation of the price setting behaviour that MOFCOM relied on to conclude that a "low price strategy existed"<sup>383</sup>; (ii) information regarding the dates of the transactions in which the "pricing strategies" were allegedly employed<sup>384</sup>; and (iii) information on the percentage difference between the AUVs of subject imports and domestic products for 2006, 2007, and 2008.<sup>385</sup> In the Panel's view, information of this type reflected essential facts supporting MOFCOM's finding of "low price" of subject imports, and should have been included in MOFCOM Announcement No. 99 of 10 December 2009<sup>386</sup> (the "Preliminary Determination") or

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<sup>381</sup>Panel Report, para. 7.570.

<sup>382</sup>Panel Report, paras. 7.572 and 7.573.

<sup>383</sup>Panel Report, para. 7.573. In relation to the price setting behaviour, China explained to the Panel that "the Chinese supplier quoted a price, the customer responded by noting the specific amount by which the Chinese offer was higher than the alternatives available from Russian or US suppliers, and the Chinese supplier was then forced to lower its price." (Panel Report, para. 7.573 (quoting China's response to the Panel's request of 18 November 2011 for certain confidential data, p. 2))

<sup>384</sup>Panel Report, para. 7.573 (referring to China's response to the Panel's request of 18 November 2011 for certain confidential data, p. 2).

<sup>385</sup>Panel Report, para. 7.574.

<sup>386</sup>MOFCOM Announcement No. 99 [2009] (10 December 2009) (English translation as contained in Panel Exhibit CHN-17) (the "Preliminary Determination"). We note that the United States also submitted an English translation of MOFCOM's preliminary determination as part of Panel Exhibit US-5. However, throughout its Report, the Panel cited the exhibit submitted by China (Panel Exhibit CHN-17) when referring to the Preliminary Determination. Similarly, in this Report, we refer to the English translation as contained in Panel Exhibit CHN-17.

the disclosure of essential facts<sup>387</sup> (the "Final Injury Disclosure") to allow interested parties to defend their interests. The Panel concluded that MOFCOM's failure to do so was inconsistent with Article 6.9 of the *Anti-Dumping Agreement* and Article 12.8 of the *SCM Agreement*.<sup>388</sup>

B. *Interpretation*

239. Article 6.9 of the *Anti-Dumping Agreement* and Article 12.8 of the *SCM Agreement* provide:

The authorities shall, before a final determination is made, inform all [interested Members and] interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures. Such disclosure should take place in sufficient time for the parties to defend their interests.<sup>389</sup>

240. At the heart of Articles 6.9 and 12.8 is the requirement to disclose, before a final determination is made, the essential facts under consideration *which form the basis for* the decision whether or not to apply definitive measures. As to the type of information that must be disclosed, these provisions cover "facts under consideration", that is, 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 anti-dumping and/or countervailing duties. We highlight that, unlike Articles 12.2.2 of the *Anti-Dumping Agreement* and 22.5 of the *SCM Agreement*, which govern the disclosure of matters of fact and law and reasons at the conclusion of anti-dumping and countervailing duty investigations, Articles 6.9 and 12.8 concern the disclosure of "facts" in the course of such investigations "before a final determination is made". Moreover, we note that Articles 6.9 and 12.8 do not require the disclosure of *all* the facts that are before an authority but, instead, those that are "essential"; a word that carries a connotation of significant, important, or salient. In considering which facts are "essential", the following question arises: essential for what purpose? The context provided by the latter part of Articles 6.9 and 12.8 clarifies that such facts are, first, those that "form the basis for the decision whether to apply definitive measures" and, second, those that ensure the ability of interested

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<sup>387</sup>Essential Facts Under Consideration Which Form the Basis of the Determination on Industry Injury Investigation of the Antidumping Investigation of GOES from the US and Russia and the Anti-subsidy Investigation of GOES from the US, Shang Diao Cha Han (2010) No. 67 (5 March 2010) (English translation as contained in Panel Exhibit CHN-29). We note that the United States also submitted an English translation of MOFCOM's disclosure document as part of Panel Exhibit US-27. However, throughout its Report, the Panel cited the exhibit submitted by China (Panel Exhibit CHN-29) when referring to the Final Injury Disclosure. Similarly, in this Report, we refer to the English translation as contained in Panel Exhibit CHN-29.

<sup>388</sup>We observe that, given its conclusion with respect to MOFCOM's failure to disclose the "essential facts" underlying the finding of "low price" of subject imports, the Panel did not consider it necessary to examine whether MOFCOM's disclosure on other matters described *supra*, in footnote 378, was also inconsistent with these provisions. (Panel Report, para. 7.575)

<sup>389</sup>The bracketed text is included in Article 12.8 of the *SCM Agreement*, and not in Article 6.9 of the *Anti-Dumping Agreement*.

parties to defend their interests.<sup>390</sup> Thus, we understand the "essential facts" to refer to those facts that are significant in the process of reaching a decision as to whether or not to apply definitive measures. Such facts are those that are salient for a decision to apply definitive measures, as well as those that are salient for a contrary outcome. An 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. In our view, disclosing the essential facts under consideration pursuant to Articles 6.9 and 12.8 is paramount for ensuring the ability of the parties concerned to defend their interests.

241. We agree with the Panel that, "[i]n order to apply definitive measures at the conclusion of countervailing and anti-dumping investigations, an investigating authority must find dumping or subsidization, injury and a causal link"<sup>391</sup> between the dumping or subsidization and the injury to the domestic industry.<sup>392</sup> What constitutes an "essential fact" must therefore be understood in the light of the content of the findings needed to satisfy the substantive obligations with respect to the application of definitive measures under the *Anti-Dumping Agreement* and the *SCM Agreement*, as well as the factual circumstances of each case. These findings each rest on an analysis of various elements that an authority is required to examine, which, in the context of an injury analysis, are set out in, *inter alia*, Articles 3.1, 3.2, 3.4, and 3.5 of the *Anti-Dumping Agreement* and Articles 15.1, 15.2, 15.4, and 15.5 of the *SCM Agreement*. Articles 3.2 and 15.2 require investigating authorities to consider the effect of subject imports on prices. In particular, under the second sentence of these provisions, authorities must consider whether there has been a significant price undercutting by the dumped or subsidized imports as compared with the price of a like domestic product, 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.

242. Hence, in the context of the second sentence of Articles 3.2 and 15.2, we consider that the essential facts that investigating authorities need to disclose are those that are required to understand the basis for their price effects examination, leading to the decision whether or not to apply definitive

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<sup>390</sup>An effective right for parties to defend their interests requires that, before a final determination is made, the authority explains, in the light of the substantive obligations of the *Anti-Dumping Agreement* and the *SCM Agreement*, how the essential facts serve as the basis for the decision whether to apply definitive measures. We agree with the panel in *EC – Salmon (Norway)* that these provisions are therefore intended "to provide the interested parties with the necessary information to enable them to comment on the completeness and correctness of the facts being considered by the investigating authority, provide additional information or correct perceived errors, and comment on or make arguments as to the proper interpretation of those facts." (Panel Report, *EC – Salmon (Norway)*, para. 7.805)

<sup>391</sup>Panel Report, para. 7.569.

<sup>392</sup>We note that, in *Mexico – Olive Oil*, the panel similarly found that, in the context of the *SCM Agreement*, the "essential facts" are "the specific facts that underlie the investigating authority's final findings and conclusions in respect of the three essential elements—subsidization, injury and causation—that must be present for application of definitive measures." (Panel Report, *Mexico – Olive Oil*, para. 7.110)

measures, so that interested parties can defend their interests. We now turn to assess the Panel's analysis under Articles 6.9 and 12.8.

C. *Assessment of the Panel's Analysis under Article 6.9 of the Anti-Dumping Agreement and Article 12.8 of the SCM Agreement*

243. China challenges the Panel's finding that MOFCOM failed to disclose the essential facts underlying its finding of "low price" of subject imports. China argues that MOFCOM adequately disclosed, pursuant to Article 6.9 of the *Anti-Dumping Agreement* and Article 12.8 of the *SCM Agreement*, the essential facts regarding the existence of significant price depression and suppression. China submits that, contrary to the Panel's view, the essential facts for price depression and suppression do not include any facts about the comparison of domestic prices to subject import prices, or the causal relationship between these two variables.<sup>393</sup>

244. We recall our finding that the Panel was correct to conclude 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.<sup>394</sup> Thus, in the context of this aspect of MOFCOM's reasoning, the essential facts included those facts underlying the existence of price undercutting that would have allowed for an understanding of this element of MOFCOM's finding of significant price depression and suppression.

245. We observe that, before the Panel, China argued that the essential facts were disclosed in the Preliminary Determination and the Final Injury Disclosure.<sup>395</sup> These documents contain weighted average prices for subject imports for the years 2006, 2007, 2008, and the first quarter of 2009.<sup>396</sup> The Preliminary Determination additionally includes percentages reflecting the changes in these prices during the relevant periods.<sup>397</sup> As to the price of domestic like products, the Preliminary Determination and the Final Injury Disclosure only contain *percentages reflecting price variations* for the years 2006, 2007, 2008, and the first quarter of 2009, without including *the prices* of domestic products.<sup>398</sup> At a descriptive level, the Preliminary Determination states that one of the factors that led to the determination of significant price depression and suppression was "the constant sales of the

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<sup>393</sup>China's appellant's submission, paras. 211 and 212.

<sup>394</sup>See *supra*, para. 196.

<sup>395</sup>Panel Report, para. 7.561 (referring to China's first written submission, para. 306; and China's opening statement at the first Panel meeting, para. 51).

<sup>396</sup>Preliminary Determination (Panel Exhibit CHN-17 (English version)), p. 55; Final Injury Disclosure (Panel Exhibit CHN-29 (English version)), p. 9.

<sup>397</sup>Preliminary Determination (Panel Exhibit CHN-17 (English version)), p. 55.

<sup>398</sup>Preliminary Determination (Panel Exhibit CHN-17 (English version)), p. 55; Final Injury Disclosure (Panel Exhibit CHN-29 (English version)), p. 10.

product concerned at a *low price*."<sup>399</sup> Importantly, as found by the Panel, MOFCOM did *not* include, in the Preliminary Determination or in the Final Injury Disclosure, the AUV data mentioned above nor any other information about price comparisons between subject import prices and domestic prices.<sup>400</sup>

246. On appeal, China argues that "MOFCOM's findings of adverse price effects rested on its finding of price depression and price suppression, and MOFCOM appropriately disclosed the essential facts necessary to support those conclusions."<sup>401</sup> Regarding price depression, China asserts that MOFCOM provided the essential facts by disclosing, in the Preliminary Determination and in the Final Injury Disclosure, that average domestic prices had fallen by 30.25% during the first quarter of 2009 compared to the first quarter of 2008.<sup>402</sup> With respect to price suppression, China further asserts that MOFCOM provided the essential facts when it disclosed in the Preliminary Determination that the "price-cost differential" in 2008 "dropped by 7% compared with 2007", and "dropped continually and greatly by 75%" during the first quarter of 2009 compared to the first quarter of 2008.<sup>403</sup> China submits that, in both instances, this degree of disclosure is sufficient and that any further detail would compromise the confidentiality of business confidential information.<sup>404</sup>

247. First, we note that the Preliminary Determination and the Final Injury Disclosure indeed contain the information referred to by China.<sup>405</sup> However, the question before us is whether such disclosure was sufficient to discharge MOFCOM's obligations under Article 6.9 and 12.8. In particular, did MOFCOM disclose the essential facts concerning the "low price" of subject imports? We recall our finding that the Panel was correct to conclude that MOFCOM's finding as to the "low price" of subject imports referred to the existence of price undercutting between 2006 and 2008, and that MOFCOM relied on this factor to support its finding of significant price depression and suppression. Hence, given that MOFCOM relied on this factor to support its finding of significant price depression and suppression, we do not consider that MOFCOM discharged its obligations under Article 6.9 of the *Anti-Dumping Agreement* and Article 12.8 of the *SCM Agreement* by merely disclosing, with respect to price depression, that average domestic prices had fallen, and, with respect to price suppression, that the "price-cost differential" dropped during the period of investigation.

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<sup>399</sup>Preliminary Determination (Panel Exhibit CHN-17 (English version)), p. 57. (emphasis added)

<sup>400</sup>Panel Report, para. 7.574.

<sup>401</sup>China's appellant's submission, para. 215.

<sup>402</sup>China's appellant's submission, para. 213 (referring to Preliminary Determination (Panel Exhibit CHN-17 (English version)), p. 55; and Final Injury Disclosure (Panel Exhibit CHN-29 (English version)), p. 10).

<sup>403</sup>China's appellant's submission, para. 214 (quoting Preliminary Determination (Panel Exhibit CHN-17 (English version)), p. 56).

<sup>404</sup>China's appellant's submission, para. 214.

<sup>405</sup>See Preliminary Determination (Panel Exhibit CHN-17 (English version)), p.p. 55-56; and Final Injury Disclosure (Panel Exhibit CHN-29 (English version)), pp. 10 and 15.

Indeed, the essential facts that MOFCOM should have disclosed in respect of the "low price" of subject imports include the price comparisons between subject imports and the like domestic products. We note that, as found by the Panel, MOFCOM did not provide, in its Preliminary Determination or in its Final Injury Disclosure, the essential facts relating to the price comparisons upon which the finding of "low price" of subject imports was based.<sup>406</sup> Such facts should have been disclosed because they were required for an understanding of the occurrence of price undercutting, which served as a basis for MOFCOM's price effects finding. With respect to China's argument that disclosing further details would have compromised business confidential information, we agree with the Panel that, when confidential information constitutes "essential facts" within the meaning of Articles 6.9 and 12.8, the disclosure obligations under these provisions should be met by disclosing non-confidential summaries of those facts.<sup>407</sup>

248. China further submits that "the Panel improperly criticize[d] MOFCOM for not disclosing the margins of underselling during the 2006-2008 period"<sup>408</sup>, given that "[t]hese facts ... were never facts that 'form the basis of the decision' to impose measures."<sup>409</sup> As found above, the essential facts include the price comparisons that substantiate the existence of price undercutting, such as the AUV data provided by China to the Panel. Therefore, we consider that the Panel correctly found that this information should have been included in the Preliminary Determination or the Final Injury Disclosure.

249. Additionally, China argues that "the Panel unreasonably criticizes MOFCOM for not providing the same level of detail that China provided in its submissions to the Panel regarding the pricing policy."<sup>410</sup> In particular, China argues that, although the elements disclosed before the Panel might be useful facts, they were not "essential facts" for MOFCOM's reasoning in its Final Determination. In China's view, "MOFCOM's reasoning did not depend on the dates of the transactions at issue, or whether they were successful in undercutting domestic prices."<sup>411</sup> We are not persuaded by this argument. First, we note that the Panel examined the "pricing policy" under Articles 6.9 and 12.8 because China argued that, by revealing information regarding this policy, MOFCOM disclosed a non-confidential summary of the information underlying its finding of "low price" of subject imports. Before the Panel, China also provided information "regarding the price setting behaviour it was relying upon to conclude that a 'low price strategy existed'"<sup>412</sup> and the "dates

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<sup>406</sup>Panel Report, para. 7.574.

<sup>407</sup>Panel Report, para. 7.571.

<sup>408</sup>China's appellant's submission, para. 220 (referring to Panel Report, para. 7.574).

<sup>409</sup>China's appellant's submission, para. 220.

<sup>410</sup>China's appellant's submission, para. 218 (referring to Panel Report, para. 7.573).

<sup>411</sup>China's appellant's submission, para. 218.

<sup>412</sup>Panel Report, para. 7.573.

of the transactions in which the 'pricing strategies' were allegedly employed".<sup>413</sup> Contrary to China's position, we do not read the Panel as ascribing importance to the additional information that China provided, merely because this information was *more detailed* than the descriptions in the Preliminary Determination and the Final Injury Disclosure. To the contrary, the Panel stated that "[i]n order to allow the respondents to defend their interests, a summary of the 'essential facts' supporting the finding of a 'low price strategy' was required, rather than merely stating the conclusion that such a strategy existed."<sup>414</sup> In our view, the Panel was thus focusing on the need to disclose the essential facts *supporting* the finding concerning the pricing policy in order to comply with Articles 6.9 and 12.8. We therefore see no error in the Panel's assessment in this regard.

250. Moreover, China argues that the Panel improperly focused its analysis on the pricing policy and did not acknowledge the other factors considered in MOFCOM's Final Determination, namely, the significance of decreasing import prices and increasing import volume.<sup>415</sup> We fail to see how the Panel's alleged failure to acknowledge "the significance of decreasing import prices and increasing import volume" shows that, contrary to the Panel's finding, MOFCOM did disclose the essential facts supporting the finding that "the sale of the product concerned was kept at a *low price*".<sup>416</sup> As we have found, the Panel correctly found that MOFCOM failed to disclose information on the price comparisons relating to the finding of "low price" of subject imports as required by Articles 6.9 and 12.8.

251. In sum, MOFCOM was required to disclose the "essential facts" relating to the "low price" of subject imports on which it relied for its finding of significant price depression and suppression. This means that, in addition to the finding regarding the "low price" of subject imports, MOFCOM was also required to disclose the facts of price undercutting that were required to understand that finding. As the Panel found, the Preliminary Determination and the Final Injury Disclosure only state that subject imports were at a "low price", without providing any facts relating to the price comparisons of subject imports and domestic products.<sup>417</sup> We consider that these facts constituted "essential facts" within the meaning of Articles 6.9 and 12.8, which should have been disclosed to all interested parties. Consequently, we *uphold* the Panel's finding in paragraphs 7.575 and 8.1(f) of the Panel Report that China acted inconsistently with Article 6.9 of the *Anti-Dumping Agreement* and Article 12.8 of the *SCM Agreement*.

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<sup>413</sup>Panel Report, para. 7.573.

<sup>414</sup>Panel Report, para. 7.573.

<sup>415</sup>China's appellant's submission, para. 221 (referring to Final Determination (Panel Exhibit CHN-16 (English version)), p. 59).

<sup>416</sup>Preliminary Determination (Panel Exhibit CHN-17 (English version)), p. 56. (emphasis added)

<sup>417</sup>Panel Report, para. 7.574.

**VIII. Article 12.2.2 of the *Anti-Dumping Agreement* and Article 22.5 of the *SCM Agreement***

252. We now turn to examine China's claim regarding the Panel's assessment under Article 12.2.2 of the *Anti-Dumping Agreement* and Article 22.5 of the *SCM Agreement*. After a summary of the Panel's findings, we interpret these provisions before addressing China's specific arguments on appeal.

A. *The Panel's Findings*

253. The Panel commenced its analysis by examining the United States' claim that, with regard to its price effects analysis, MOFCOM failed to provide adequate public notice and explanation regarding its finding that the prices of GOES from the United States and Russia were lower than prices for the domestically produced product.<sup>418</sup> The Panel then observed that, when confidential information also forms part of the "relevant information on matters of fact and law" within the meaning of Article 12.2.2 of the *Anti-Dumping Agreement* and Article 22.5 of the *SCM Agreement*, an investigating authority can meet its dual obligations to disclose the relevant information while also protecting its confidentiality, by providing a non-confidential summary in the public notice or in a separate report.<sup>419</sup>

254. The Panel reiterated its conclusion that the "low price" of subject imports was an important aspect of MOFCOM's reasoning leading to the imposition of final measures, and found that the Final Determination did not include any indication that a comparative analysis of prices had been performed, or provide the factual information arising from such a comparison. While the Panel agreed with the Appellate Body's finding in *US – Countervailing Duty Investigation on DRAMS* that "Article 22.5 does not require the agency to cite or discuss every piece of supporting record evidence for each fact in the final determination"<sup>420</sup>, it nevertheless considered that the significance of the conclusion regarding the "low price" of subject imports in MOFCOM's analysis made it necessary to include further information on the matters of fact leading to this conclusion.<sup>421</sup> The Panel noted that "MOFCOM had before it information on the prices of subject imports and the prices of the domestic product and undertook a comparative analysis of this information."<sup>422</sup> Consequently, the Panel found that China acted inconsistently with Article 12.2.2 of the *Anti-Dumping Agreement* and Article 22.5 of

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<sup>418</sup>We note that, before the Panel, the United States also claimed that MOFCOM acted inconsistently with Article 12.2.2 of the *Anti-Dumping Agreement* and Article 22.5 of the *SCM Agreement* by not including in the Final Determination facts supporting its finding that the United States and Russia had a strategy of charging low prices, and by not providing reasons for the acceptance or rejection of arguments submitted by exporters and importers. (Panel Report, para. 7.587)

<sup>419</sup>Panel Report, para. 7.589.

<sup>420</sup>Panel Report, para. 7.591 (quoting Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 164).

<sup>421</sup>Panel Report, paras. 7.590 and 7.591.

<sup>422</sup>Panel Report, para. 7.591.

the *SCM Agreement* by failing adequately to disclose all relevant information on the matters of fact underlying MOFCOM's conclusion regarding the existence of "low" subject import prices.<sup>423</sup>

B. *Interpretation*

255. Article 12.2.2 of the *Anti-Dumping Agreement* and Article 22.5 of the *SCM Agreement* provide in relevant part:

A public notice of conclusion or suspension of an investigation in the case of an affirmative determination providing for the imposition of a definitive duty ... shall contain, or otherwise make available through a separate report, all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures ... due regard being paid to the requirement for the protection of confidential information. In particular, the notice or report shall contain the information described in [Article 12.2.1 of the *Anti-Dumping Agreement*/Article 22.4 of the *SCM Agreement*].

256. Relevant to this dispute is the requirement in Articles 12.2.2 and 22.5 that a public notice contain "all relevant information" on "matters of fact" "which have led to the imposition of final measures".<sup>424</sup> With regard to "matters of fact", these provisions do not require authorities to disclose *all* the factual information that is before them, but rather those facts that allow an understanding of the factual basis that led to the imposition of final measures.<sup>425</sup> The inclusion of this information should therefore give a reasoned account of the factual support for an authority's decision to impose final measures. Moreover, we note that the obligations under Articles 12.2.2 and 22.5 come at a later stage in the process than the requirement to disclose the essential facts pursuant to Articles 6.9 and 12.8. While the disclosure of essential facts must take place "before a final determination is made", the obligation to give public notice of the conclusion of an investigation within the meaning of Articles 12.2.2 and 22.5 is triggered once there is an affirmative determination providing for the imposition of definitive duties.

257. As noted in our examination of Articles 6.9 and 12.8, the imposition of final anti-dumping or countervailing duties requires that an authority finds dumping or subsidization, injury, and a causal

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<sup>423</sup>Panel Report, para. 7.592. We note that, given its conclusion with respect to the failure to disclose adequately all relevant information on the matters of fact underlying MOFCOM's conclusion regarding the "low price" of subject imports, the Panel did not consider it necessary to address the United States' arguments described *supra*, in footnote 418. (Panel Report, para. 7.592)

<sup>424</sup>We note that, in addition to matters of fact, Articles 12.2.2 and 22.5 also require that the public notice contain all relevant information on the matters of law and reasons which have led to the imposition of final measures.

<sup>425</sup>We observe that, in *US – Countervailing Duty Investigation on DRAMS*, the Appellate Body held that Article 22.5 of the *SCM Agreement* "does not require the agency to cite or discuss every piece of supporting record evidence for each fact in the final determination". (Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 164)

link between the dumping or subsidization and the injury to the domestic industry. What constitutes "relevant information on the matters of fact" is therefore 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 under the *Anti-Dumping Agreement* and the *SCM Agreement*, as well as the factual circumstances of each case. These findings each rest on an analysis of various elements that an authority is required to examine, which, in the context of an injury analysis, are set out in, *inter alia*, Articles 3.1, 3.2, 3.4, and 3.5 of the *Anti-Dumping Agreement* and Articles 15.1, 15.2, 15.4, and 15.5 of the *SCM Agreement*. Articles 3.2 and 15.2 require, *inter alia*, an investigating authority to consider the effect of the subject imports on prices by considering whether there has been significant price undercutting, 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. We note that Articles 12.2.2 and 22.5 further underscore the requirement of public notice of these elements by cross-referencing, respectively, to Articles 12.2.1 of the *Anti-Dumping Agreement* and 22.4 of the *SCM Agreement*, which require that the public notice or report contain considerations relevant to the injury determination as set out in Articles 3 and 15.

258. Articles 12.2.2 and 22.5 are both situated in the context of provisions that concern the public notice and explanation of determinations in anti-dumping and countervailing duty investigations. In the case of an affirmative determination providing for the imposition of a definitive duty, Articles 12.2.2 and 22.5 provide that such notice shall contain all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures. Articles 12.2.2 and 22.5 capture the principle that those parties whose interests are affected by the imposition of final anti-dumping and countervailing duties are entitled to know, as a matter of fairness and due process, the facts, law and reasons that have led to the imposition of such duties. The obligation of disclosure under Articles 12.2.2 and 22.5 is framed by the requirement of "relevance", which entails the disclosure of the matrix of facts, law and reasons that logically fit together to render the decision to impose final measures. By requiring the disclosure of "all relevant information" regarding these categories of information, Articles 12.2.2 and 22.5 seek to guarantee that interested parties are able to pursue judicial review of a final determination as provided in Article 13 of the *Anti-Dumping Agreement* and Article 23 of the *SCM Agreement*.

259. With respect to the form in which the relevant information must be disclosed, Articles 12.2.2 and 22.5 allow authorities to decide whether to include the information in the public notice itself "or otherwise make [it] available through a separate report". We note that Articles 12.2.2 and 22.5 also provide that the notice or report shall pay "due regard ... to the requirement for the protection of confidential information". When confidential information is part of the relevant information on the

matters of fact within the meaning of Articles 12.2.2 and 22.5, the disclosure obligations under these provisions should be met by disclosing non-confidential summaries of that information.

260. In sum, in the context of the second sentence of Articles 3.2 and 15.2, we consider that "all relevant information on the matters of fact" consists of those facts that are required to understand an investigating authority's price effects examination leading to the imposition of final measures. We now turn to assess the Panel's analysis under Articles 12.2.2 and 22.5.

C. *Assessment of the Panel's Analysis under Article 12.2.2 of the Anti-Dumping Agreement and Article 22.5 of the SCM Agreement*

261. China challenges the Panel's finding that MOFCOM failed adequately to disclose "all relevant information on the matters of fact" underlying MOFCOM's conclusion regarding the "low price" of subject imports, as required by Article 12.2.2 of the *Anti-Dumping Agreement* and Article 22.5 of the *SCM Agreement*. China argues that MOFCOM adequately provided public notice of its finding of significant price depression and suppression, which, contrary to the Panel's view, does not require a causal relationship between subject imports and these adverse price effects.<sup>426</sup> China highlights that the Panel did not examine this finding and, rather, focused on the existence and magnitude of price undercutting, thereby making a comparison of subject import prices to domestic prices "essential elements" and "an important aspect" of MOFCOM's price effects examination.<sup>427</sup>

262. We recall our finding that the Panel was correct to conclude 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.<sup>428</sup> Accordingly, in the context of this aspect of MOFCOM's reasoning, the "relevant information on the matters of fact" included those facts underlying the existence of price undercutting that would have allowed for an understanding of this element of MOFCOM's finding of significant price depression and suppression.

263. Against this background, we note that the Final Determination<sup>429</sup> contains weighted average prices for subject imports for the years 2006, 2007, 2008, and the first quarter of 2009, as well as the percentages reflecting the changes in these prices during these periods.<sup>430</sup> With respect to the price of

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<sup>426</sup>China's appellant's submission, para. 224.

<sup>427</sup>China's appellant's submission, para. 228.

<sup>428</sup>See *supra*, para. 196.

<sup>429</sup>The Final Determination was the document examined by the Panel in the context of the United States' claim under Article 12.2.2 of the *Anti-Dumping Agreement* and Article 22.5 of the *SCM Agreement*.

<sup>430</sup>Final Determination (Panel Exhibit CHN-16 (English version)), p. 58.

the like domestic products, the Final Determination only contains *percentages reflecting price variations* for the years 2006, 2007, 2008, and the first quarter of 2009, without including *the prices* of domestic products.<sup>431</sup> Regarding the impact of subject import prices on the prices of like domestic products, the Final Determination states that, "[b]ecause the sale of the product concerned was kept at a *low price*, and the import volume of the product concerned increased greatly beginning from 2008, under this impact, domestic producers lowered their price to keep the market share."<sup>432</sup> As noted in the context of our examination of Articles 6.9 and 12.8, China argued before the Panel that the existence of price undercutting supported MOFCOM's finding that subject imports were at a "low price", and, for this purpose, submitted to the Panel data regarding AUVs of subject imports and domestic products between 2006 and 2008.<sup>433</sup> As found by the Panel, MOFCOM's Final Determination does not, however, include this AUV data.<sup>434</sup>

264. On appeal, China argues that MOFCOM adequately provided public notice of its finding regarding the existence of significant price depression and suppression in the Final Determination by stating, respectively, that "average prices dropped", and that the "price-cost differential" dropped.<sup>435</sup> China further argues that the Panel erred by "focus[ing] entirely on the degree of public notice not just about the existence of price undercutting ... but also the specific magnitude of the price undercutting."<sup>436</sup> In China's view, given that the Panel determined that MOFCOM made a finding of price depression and suppression, and not of price undercutting, the evidence about price undercutting during the 2006-2008 period is the type of "supporting record evidence" that the Appellate Body considered would not need to be disclosed under Article 22.5 of the *SCM Agreement*.<sup>437</sup> We disagree with this argument for the following reasons. As found above, the Panel was correct to conclude that MOFCOM's Final Determination relied on evidence of price undercutting to establish that the effects of subject imports were to depress and suppress prices to a significant degree.<sup>438</sup> Notably, as found by the Panel, MOFCOM did not disclose information relating to the price comparisons between subject

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<sup>431</sup>Final Determination (Panel Exhibit CHN-16 (English version)), p. 58.

<sup>432</sup>Final Determination (Panel Exhibit CHN-16 (English version)), p. 58. (emphasis added)

<sup>433</sup>Panel Report, para. 7.591 (referring to China's second written submission to the Panel, footnote 95 to para. 102).

<sup>434</sup>Panel Report, para. 7.591.

<sup>435</sup>In particular, similar to its argument in the context of Article 6.9 of the *Anti-Dumping Agreement* and Article 12.8 of the *SCM Agreement*, China asserts that, with respect to price depression, the Final Determination established that average domestic prices dropped by 30.25% during the first quarter of 2009 compared to the first quarter of 2008. Regarding price suppression, China further submits that the Final Determination stated that the "price-cost differential" dropped by 7% during calendar year 2008 compared to calendar year 2007, and dropped even more substantially by 75% in the first quarter of 2009 compared to the first quarter of 2008. (China's appellant's submission, para. 225)

<sup>436</sup>China's appellant's submission, para. 226.

<sup>437</sup>China's appellant's submission, para. 227 (referring to Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 164).

<sup>438</sup>See *supra*, para. 196.

imports and domestic products.<sup>439</sup> Thus, MOFCOM's disclosure that "average domestic prices dropped" and that the "price-cost differential dropped" is insufficient to convey all the relevant information on the matters of fact relating to MOFCOM's finding that subject imports were at a "low price".

265. China further argues that the Panel erred in three respects in considering a comparison of subject import prices to domestic prices "essential elements" and "an important aspect" of MOFCOM's Final Determination. First, China submits that the Panel erred in faulting MOFCOM for not disclosing the margin by which the prices of subject imports were below the prices of domestic producers. China highlights that this fact—or any facts about such relative prices—was never a "matter of fact" on which MOFCOM actually based its decision to impose final measures.<sup>440</sup> Second, China argues that, pursuant to Articles 12.2 of the *Anti-Dumping Agreement* and 22.3 of the *SCM Agreement*, the public notice requirement only extends to those facts "considered material" by the investigating authority. China adds that, given that the Final Determination does not contain any finding of price undercutting, such facts were not material to MOFCOM's Final Determination. Consequently, argues China, these facts need not have been disclosed in the Final Determination.<sup>441</sup> At the outset, we note that the facts that an investigating authority may consider material to its determinations are circumscribed by the framework of the substantive provisions of the *Anti-Dumping Agreement* and the *SCM Agreement*. Moreover, we recall our finding, in the context of Articles 3.2 and 15.2, that the Panel was correct to conclude that MOFCOM's finding as to the "low price" of subject imports referred to the existence of price undercutting between 2006 and 2008, and that MOFCOM relied on this factor to support its finding of significant price depression and suppression.<sup>442</sup> Accordingly, we disagree with China's arguments, as they are premised on its contention that MOFCOM did not rely on the existence of price undercutting for its finding of significant price depression and suppression.

266. Finally, China asserts that the Panel ignored MOFCOM's finding on the pricing policy of producers of the product concerned, even though MOFCOM disclosed the basic facts underlying this finding, namely, the existence of such a policy, its analytic relevance, and the fact that the "contracts and records of price setting" were collected during an onsite verification. China further contends that the Panel did not take into consideration MOFCOM's disclosure of the other two elements discussed in the Final Determination, namely, decreasing import prices and increasing import volume.<sup>443</sup> We fail to see how asserting that the Panel ignored MOFCOM's finding on the pricing policy and "the

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<sup>439</sup>Panel Report, para. 7.591.

<sup>440</sup>China's appellant's submission, para. 230.

<sup>441</sup>China's appellant's submission, para. 231.

<sup>442</sup>See *supra*, para. 196.

<sup>443</sup>China's appellant's submission, para. 229.

significance of decreasing import prices and increasing import volume" demonstrates that MOFCOM included in the Final Determination "all relevant information on the matters of fact" with respect to the "low price" of subject imports. We are therefore not persuaded by China's argument.

267. In sum, MOFCOM was required to disclose "all relevant information on the matters of fact" relating to the "low price" of subject imports on which it relied for its finding of significant price depression and suppression. Consequently, in addition to the finding in its Final Determination that subject imports were at a "low price", MOFCOM was also required to disclose the facts of price undercutting that were required to understand that finding. As the Panel found, the Final Determination only states that subject imports were at a "low price", without providing any facts relating to the price comparisons of subject imports and domestic products.<sup>444</sup> We consider that these facts constituted "relevant information on the matters of fact" within the meaning of Articles 12.2.2 and 22.5, which should have been included in MOFCOM's Final Determination. Consequently, we *uphold* the Panel's finding in paragraphs 7.592 and 8.1(f) of the Panel Report that China acted inconsistently with Article 12.2.2 of the *Anti-Dumping Agreement* and Article 22.5 of the *SCM Agreement*.

## **IX. Findings and Conclusions**

268. For the reasons set out in this Report, the Appellate Body:

- (a) with respect to the Panel's interpretation of Article 3.2 of the *Anti-Dumping Agreement* and Article 15.2 of the *SCM Agreement*:
  - (i) finds that Article 3.2 of the *Anti-Dumping Agreement* and Article 15.2 of the *SCM Agreement* require an investigating authority to consider the relationship between subject imports and the prices of the like domestic products, so as to understand whether subject imports provide explanatory force for the occurrence of significant depression or suppression of domestic prices; and
  - (ii) finds that the Panel did not err in not adopting China's interpretation of Articles 3.2 of the *Anti-Dumping Agreement* and Article 15.2 of the *SCM Agreement*;

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<sup>444</sup>Panel Report, para. 7.591.

- (b) with respect to the Panel's assessment of MOFCOM's price effects analysis:
  - (i) finds that the Panel did not err in its application of Article 3.2 of the *Anti-Dumping Agreement* and Article 15.2 of the *SCM Agreement*, read together with Article 3.1 of the *Anti-Dumping Agreement* and Article 15.1 of the *SCM Agreement*;
  - (ii) finds that the Panel did not act inconsistently with its duty to make an objective assessment under Article 11 of the DSU; and
  - (iii) upholds the Panel's finding, at paragraphs 7.554 and 8.1(f) of its Report, that MOFCOM's finding regarding the price effects of subject imports was inconsistent with Articles 3.1 and 3.2 of the *Anti-Dumping Agreement* and Articles 15.1 and 15.2 of the *SCM Agreement*;
- (c) with respect to the Panel's finding under Article 6.9 of the *Anti-Dumping Agreement* and Article 12.8 of the *SCM Agreement*:
  - (i) upholds the Panel's finding, at paragraphs 7.575 and 8.1(f) of its Report, that China acted inconsistently with Article 6.9 of the *Anti-Dumping Agreement* and Article 12.8 of the *SCM Agreement*; and
- (d) with respect to the Panel's finding under Article 12.2.2 of the *Anti-Dumping Agreement* and Article 22.5 of the *SCM Agreement*:
  - (i) upholds the Panel's finding, at paragraphs 7.592 and 8.1(f) of its Report, that China acted inconsistently with Article 12.2.2 of the *Anti-Dumping Agreement* and Article 22.5 of the *SCM Agreement*.

Signed in the original in Geneva this 5th day of October 2012 by:

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David Unterhalter  
Presiding Member

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Peter Van den Bossche  
Member

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Yuejiao Zhang  
Member



ANNEX I

**WORLD TRADE  
ORGANIZATION**

**WT/DS414/5**  
23 July 2012

(12-4026)

Original: English

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

Notification of an Appeal by China  
under Article 16.4 and Article 17 of the Understanding on Rules  
and Procedures Governing the Settlement of Disputes (DSU),  
and under Rule 20(1) of the Working Procedures for Appellate Review

The following notification, dated 20 July 2012, from the Delegation of the People's Republic of China, is being circulated to Members.

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1. Pursuant to Article 16.4 and Article 17 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU") and Rule 20 of the Working Procedures for Appellate Review, the People's Republic of China hereby notifies the Dispute Settlement Body of its decision to appeal to the Appellate Body certain issues of law and legal interpretation covered in the Panel Report in *China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States* (WT/DS414) ("Panel Report"). Pursuant to Rule 20(1) of the *Working Procedures for Appellate Review*, China is simultaneously filing this Notice of Appeal with the Appellate Body Secretariat.

2. The measures at issue in this dispute imposed countervailing duties and anti-dumping duties on grain oriented flat-rolled electrical steel ("GOES") from the United States. An application for the initiation of an anti-dumping and countervailing duty investigation was filed by Chinese petitioners, alleging the existence of countervailable subsidies and dumping margins that caused or threatened to cause injury to the domestic Chinese industry. The Ministry of Commerce for the People's Republic of China ("MOFCOM") issued an affirmative final determination in each of these investigations. MOFCOM calculated *ad valorem* subsidy rates of 11.7% and 12% for the respondent companies, and dumping margins of 7.8% and 19.9%. Furthermore, MOFCOM determined that the domestic industry was suffering from material injury, and that the injury was caused by the dumped imports of GOES from Russia and the dumped and subsidized imports of GOES from the United States. MOFCOM made these determinations in its final determination, *Final Determination [2010] No. 21 (10 April 2010)*.

3. The issues that China raises in this appeal relate to the Panel's findings and conclusions in respect of the consistency of the challenged measures with the Anti-Dumping Agreement and the Agreement on Subsidies and Countervailing Measures ("SCM Agreement").

4. For the reasons stated below, and as will be developed in its submissions and oral statements to the Appellate Body, China appeals the following errors of law and legal interpretation contained in the Panel Report and requests the Appellate Body to reverse or modify the related findings and conclusions of the Panel. In doing so, China makes five specific claims, delineated below and to be detailed in its submissions to the Appellate Body.<sup>1</sup>

5. First, China seeks review by the Appellate Body of the Panel's interpretation of Article 3.2 of the Anti-Dumping Agreement and Article 15.2 of the SCM Agreement as it relates to MOFCOM's discussion of the existence of adverse price effects. In particular, the Panel erred in interpreting the phrase "the effect of" from Article 3.2 of the Anti-Dumping Agreement and Article 15.2 of the SCM Agreement as meaning that an authority must demonstrate that adverse price effects were caused by dumped or subsidized imports.<sup>2</sup> In doing so, the Panel did not consider the text, context, and object and purpose of those provisions and those agreements.<sup>3</sup>

6. Second, China seeks review by the Appellate Body of the Panel's application of Article 3.2 of the Anti-Dumping Agreement and Article 15.2 of the SCM Agreement as it relates to MOFCOM's final determinations with respect to price effects.<sup>4</sup> The Panel's application of the legal standard erred in several fundamental aspects.<sup>5</sup> The Panel's errors of law and legal application include:

- (a) The Panel erred in interpreting MOFCOM's final determinations in a manner that caused the Panel to apply the obligations of Article 3.2 and Article 15.2 to facts not found by MOFCOM. Rather than apply the legal standard to MOFCOM's final determinations as written, the Panel examined findings never made by the authority and instead ignored or dismissed key factors that MOFCOM had discussed in its determinations.<sup>6</sup>
- (b) The Panel erred in requiring specific methodologies to satisfy the obligations of Article 3.2 and Article 15.2.<sup>7</sup> Instead of deferring to the discretion of the authority when considering price effects, the Panel imposed several methodological requirements for evaluating price effects that do not exist in the text of the agreements and were not raised by the parties to the underlying investigation.

7. Third, China seeks review by the Appellate Body under Article 11 of the DSU of how the Panel proceeded in this dispute. The Panel acted inconsistently with Article 11 of the DSU in conducting its analysis of price depression and price suppression by failing to conduct an objective assessment of the matter. Specifically, the Panel misinterpreted a fundamental MOFCOM finding of fact, the result of which caused the Panel to find MOFCOM's price depression and price suppression findings inconsistent with Article 3.2 and 15.2.<sup>8</sup> In doing so, the Panel also erred in failing to consider the totality of the evidence. The Panel approached individual pieces of evidence in isolation instead of addressing the ways in which MOFCOM's evidence interrelated.<sup>9</sup> Ultimately, the Panel erred in failing to focus on the MOFCOM decision as written. The Panel went beyond the rationale

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<sup>1</sup>Pursuant to Rule 20(2)(d)(iii) of the *Working Procedures for Appellate Review* this Notice of Appeal includes citations to the paragraphs of the Panel Report containing the alleged errors. These citations, however, do not prejudice to the ability of China to refer to other paragraphs of the Panel Report in its appeal.

<sup>2</sup>Panel Report, para. 7.520.

<sup>3</sup>Ibid. paras. 7.519-7.522, 8.1(f).

<sup>4</sup>Ibid. paras. 7.536, 8.1(f).

<sup>5</sup>Ibid. paras. 7.523-7.536.

<sup>6</sup>Ibid.

<sup>7</sup>Ibid. paras. 7.528-7.530.

<sup>8</sup>Ibid. para. 7.542.

<sup>9</sup>Panel Report, paras. 7.523-7.543.

contained in the determination itself and relied upon the interpretation advocated by the United States and the Panel's own new price effects analysis.<sup>10</sup>

8. Fourth, China seeks review by the Appellate Body of the Panel's finding that China acted inconsistently with its obligations under Article 6.9 of the Anti-Dumping Agreement and Article 12.8 of the SCM Agreement regarding the disclosure of essential facts relating to MOFCOM's price effects analysis.<sup>11</sup> The Panel's finding rested entirely on its erroneous understanding of the legal obligations of Article 3.2 of the Anti-Dumping Agreement and Article 15.2 of the SCM Agreement.<sup>12</sup> The Panel adopted a misguided understanding of "essential facts"<sup>13</sup> because the Panel misunderstood the underlying obligations at issue.

9. Fifth, China seeks review by the Appellate Body of the Panel's finding that China acted inconsistently with its obligations under Article 12.2.2 of the Anti-Dumping Agreement and Article 22.5 of the SCM Agreement regarding the public notice and explanation of MOFCOM's price effects analysis.<sup>14</sup> As with China's fourth claim, this Panel finding rested entirely on the Panel's erroneous understanding of the legal obligations of Article 3.2 of the Anti-Dumping Agreement and Article 15.2 of the SCM Agreement.<sup>15</sup> In light of a proper interpretation of Article 3.2 and Article 15.2, MOFCOM adequately provided public notice of its findings regarding the existence of price depression and price suppression.

10. China respectfully requests that the Appellate Body reverse the findings and conclusions of the Panel that are based on the errors of law and legal interpretation identified above.

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<sup>10</sup>Ibid.

<sup>11</sup>Ibid. paras. 7.575, 8.1(f).

<sup>12</sup>Ibid. paras. 7.573-7.574.

<sup>13</sup>Ibid. para. 7.575.

<sup>14</sup>Ibid. paras. 7.592, 8.1(f).

<sup>15</sup>Ibid. paras. 7.591-7.592.