



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

RECOURSE TO ARTICLE 21.5 OF THE DSU BY THE UNITED STATES

REPORT OF THE PANEL

*Addendum*

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

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**LIST OF ANNEXES**  
**ANNEX A**

WORKING PROCEDURES OF THE PANEL

<b>Contents</b>		<b>Page</b>
Annex A-1	Working Procedures of the Panel	A-2
Annex A-2	Additional Working Procedures on Business Confidential Information	A-6

**ANNEX B**

ARGUMENTS OF THE UNITED STATES

<b>Contents</b>		<b>Page</b>
Annex B-1	Executive summary of the first written submission of the United States	B-2
Annex B-2	Executive summary of the second written submission of the United States	B-9
Annex B-3	Executive summary of the oral statements of the United States at the Substantive Meeting	B-17
Annex B-4	Executive summary of the oral statement of the United States at the Interim Review Meeting	B-21

**ANNEX C**

ARGUMENTS OF CHINA

<b>Contents</b>		<b>Page</b>
Annex C-1	Executive summary of the first written submission of China	C-2
Annex C-2	Executive summary of the second written submission of China	C-10
Annex C-3	Executive summary of the oral statements of China at the Substantive Meeting	C-18
Annex C-4	Executive summary of the oral statement of China at the Interim Review Meeting	C-22

**ANNEX D**

ARGUMENTS OF THE THIRD PARTIES

<b>Contents</b>		<b>Page</b>
Annex D-1	Integrated executive summary of the arguments of the European Union	D-2
Annex D-2	Integrated executive summary of the arguments of Japan	D-6

**ANNEX A**

WORKING PROCEDURES OF THE PANEL

<b>Contents</b>		<b>Page</b>
Annex A-1	Working Procedures of the Panel	A-2
Annex A-2	Additional Working Procedures on Business Confidential Information	A-6

## **ANNEX A-1**

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

#### **WORKING PROCEDURES OF THE PANEL**

1. In its proceedings, the Panel shall follow the relevant provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). In addition, the following Working Procedures shall apply.

#### **General**

2. The deliberations of the Panel and the documents submitted to it shall be kept confidential. Nothing in the DSU or in these Working Procedures shall preclude a party to the dispute (hereafter "party") from disclosing statements of its own positions to the public. Members shall treat as confidential information submitted by another Member to the Panel which the submitting Member has designated as confidential. Where a party submits a confidential version of its written submissions to the Panel, it shall also, upon request of a Member, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public.

3. The parties shall treat business confidential information in accordance with the procedures set forth in the Additional Working Procedures of the Panel Concerning Business Confidential Information.

4. The Panel shall meet in closed session. The parties, and Members having notified their interest in the dispute to the Dispute Settlement Body in accordance with Article 10 of the DSU (hereafter "third parties"), shall be present at the meetings only when invited by the Panel to appear before it.

5. Each party and third party has the right to determine the composition of its own delegation when meeting with the Panel. Each party and third party shall have responsibility for all members of its own delegation and shall ensure that each member of such delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceedings.

#### **Submissions**

6. Before the substantive meeting of the Panel with the parties, each party shall transmit to the Panel a first written submission, and subsequently a written rebuttal, in which it presents the facts of the case and its arguments, and counter-arguments, respectively, in accordance with the timetable adopted by the Panel.

7. A party shall submit any request for a preliminary ruling at the earliest possible opportunity and in any event no later than in its first written submission to the Panel. If the United States requests such a ruling, China shall submit its response to the request in its first written submission. If China requests such a ruling, the United States shall submit its response to the request prior to the substantive meeting of the Panel, at a time to be determined by the Panel in light of the request. Exceptions to this procedure shall be granted upon a showing of good cause.

8. Each party shall submit all factual evidence to the Panel no later than during the substantive meeting, except with respect to evidence necessary for purposes of rebuttal, answers to questions or comments on answers provided by the other party. Exceptions to this procedure shall be granted upon a showing of good cause. Where such exception has been granted, the Panel shall accord the other party a period of time for comment, as appropriate, on any new factual evidence submitted after the substantive meeting.

9. Where the original language of exhibits is not a WTO working language, the submitting party or third party shall submit a translation into the WTO working language of the submission at the same time. The Panel may grant reasonable extensions of time for the translation of such exhibits upon a showing of good cause. Any objection as to the accuracy of a translation should be raised promptly in writing, preferably no later than the next filing or meeting (whichever occurs earlier) following the submission which contains the translation in question. Any objection shall be accompanied by a detailed explanation of the grounds of objection and an alternative translation.

10. To facilitate the maintenance of the record of the dispute, and maximize the clarity of submissions, each party and third party shall sequentially number its exhibits throughout the course of the dispute. For example, exhibits submitted by the United States could be numbered US-1, US-2, etc. If the last exhibit in connection with the first submission was numbered US-5, the first exhibit of the next submission thus would be numbered US-6.

### **Questions**

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

### **Substantive meeting**

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

13. The substantive meeting of the Panel shall be conducted as follows:

- a. The Panel shall invite the United States to make an opening statement to present its case first. Subsequently, the Panel shall invite China to present its point of view. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. In the event that interpretation is needed, each party shall provide additional copies to the interpreters. Each party shall make available to the Panel and the other party the final version of its opening statement as well as its closing statement, if any, preferably at the end of the meeting, and in any event no later than 5.00 p.m. on the first working day following the meeting.
- b. After the conclusion of the statements, the Panel shall give each party the opportunity to ask questions or make comments, through the Panel. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to the other party to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the other party's questions within a deadline to be determined by the Panel.
- c. The Panel may subsequently pose questions to the parties. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.
- d. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with the United States presenting its statement first.

### **Third parties**

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

15. Each third party shall also be invited to present its views orally during a session of the substantive meeting, set aside for that purpose. Each third party shall provide to the Panel the list of members of its delegation in advance of this session and no later than 5.00 p.m. the previous working day.

16. The third party session shall be conducted as follows:
- a. All third parties may be present during the entirety of this session.
  - b. The Panel shall first hear the arguments of the third parties in alphabetical order. Third parties present at the third-party session and intending to present their views orally at that session, shall provide the Panel, the parties and other third parties with provisional written versions of their statements before they take the floor. Third parties shall make available to the Panel, the parties and other third parties the final versions of their statements, preferably at the end of the session, and in any event no later than 5.00 p.m. of the first working day following the session.
  - c. After the third parties have made their statements, the parties may be given the opportunity, through the Panel, to ask the third parties questions for clarification on any matter raised in the third parties' submissions or statements. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to a third party to which it wishes to receive a response in writing.
  - d. The Panel may subsequently pose questions to the third parties. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the third parties to which it wishes to receive a response in writing. Each third party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

#### **Descriptive part**

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

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

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

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

#### **Interim review**

21. Following issuance of the interim report, each party may submit a written request to review precise aspects of the interim report and request a further meeting with the Panel in accordance with the timetable adopted by the Panel. The right to request such a meeting shall be exercised no later than at the time the written request for review is submitted.

22. In the event that no further meeting with the Panel is requested, each party may submit written comments on the other party's written request for review in accordance with the timetable adopted by the Panel. Such comments shall be limited to commenting on the other party's written request for review.

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

**Service of documents**

24. The following procedures regarding service of documents shall apply:

- a. Each party and third party shall submit all documents to the Panel by filing them with the DS Registry (office No. 2047).
- b. Each party and third party shall file 4 paper copies of all documents it submits to the Panel. However, when exhibits are provided on CD-ROMS/DVDs, 2 CD-ROMS/DVDs and 2 paper copies of those exhibits shall be filed. The DS Registrar shall stamp the documents with the date and time of the filing. The paper version shall constitute the official version for the purposes of the record of the dispute.
- c. Each party and third party shall also provide an electronic copy of all documents it submits to the Panel at the same time as the paper versions, in Microsoft Word format, either on a CD-ROM, a DVD or as an e-mail attachment. If the electronic copy is provided by e-mail, it should be addressed to DSRegistry@wto.org, and cc'd to XXXXXX and XXXXXX. If a CD-ROM or DVD is provided, it shall be filed with the DS Registry.
- d. Each party shall serve any document submitted to the Panel directly on the other party. Each party shall, in addition, serve on all third parties its written submissions in advance of the substantive meeting with the Panel. Each third party shall serve any document submitted to the Panel directly on the parties and all other third parties. Each party and third party shall confirm, in writing, that copies have been served as required at the time it provides each document to the Panel.
- e. Each party and third party shall file its documents with the DS Registry and serve copies on the other party (and third parties where appropriate) by 5.00 p.m. (Geneva time) on the due dates established by the Panel.
- f. The Panel shall provide the parties with an electronic version of the descriptive part, the interim report and the final report, as well as of other documents as appropriate. When the Panel transmits to the parties or third parties both paper and electronic versions of a document, the paper version shall constitute the official version for the purposes of the record of the dispute.

**ANNEX A-2**

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

**ADDITIONAL WORKING PROCEDURES ON BUSINESS CONFIDENTIAL INFORMATION**

1. These procedures apply to any business confidential information (BCI) that a party wishes to submit to the Panel that was previously treated by China's Ministry of Commerce ("MOFCOM") as BCI in the anti-dumping and countervailing duty investigations at issue in this dispute. However, these procedures do not apply to information that is available in the public domain. In addition, these procedures do not apply to any BCI if the person who provided the information in the course of the aforementioned investigations agrees in writing to make the information publicly available.
  2. The first time that a party submits to the Panel BCI as defined above from an entity that submitted that information in one of the investigations at issue, the party shall also provide, with a copy to the other party, an authorizing letter from the entity. That letter shall authorize both the United States and China to submit in this dispute, in accordance with these procedures, any confidential information submitted by that entity in the course of those investigations.
  3. No person may have access to BCI except a member of the Secretariat or the Panel, an employee of a party or third party, and an outside advisor for the purposes of this dispute to a party or third party. However, an outside advisor is not permitted access to BCI if that advisor is an officer or employee of an enterprise engaged in the production, export, or import of the products that were the subject of the investigations at issue in this dispute.
  4. A party or third party having access to BCI shall treat it as confidential, i.e., shall not disclose that information other than to those persons authorized to receive it pursuant to these procedures. Each party and third party shall have responsibility in this regard for its employees as well as any outside advisors used for the purposes of this dispute. BCI obtained under these procedures may be used only for the purpose of providing information and argumentation in this dispute and for no other purpose.
  5. The party submitting BCI shall mark the cover and/or first page of the document containing BCI, and each page of the document, to indicate the presence of such information. The specific information in question shall be placed between double brackets, as follows: [[xx,xxx.xx]]. The first page or cover of the document shall state "Contains business confidential information on pages xxxxxx", and each page of the document shall contain the notice "Contains Business Confidential Information" at the top of the page.
  6. Where a party submits a document containing BCI to the Panel, the other party or any third party referring to that BCI in its documents, including written submissions and oral statements, shall clearly identify all such information in those documents. All such documents shall be marked as described in paragraph 5. In the case of an oral statement containing BCI, the party or third party making such a statement shall inform the Panel before making it that the statement will contain BCI, and the Panel will ensure that only persons authorized to have access to BCI pursuant to these procedures are in the room to hear that statement.
  7. The Panel will not disclose BCI, in its report or in any other way, to persons not authorized under these procedures to have access to BCI. The Panel may, however, make statements of conclusion drawn from such information. Before the Panel circulates its final report to the Members, the Panel will give each party an opportunity to review the report to ensure that it does not contain any information that the party has designated as BCI.
  8. Submissions containing BCI will be included in the record forwarded to the Appellate Body in the event of an appeal of the Panel's Report.
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**ANNEX B**

ARGUMENTS OF THE UNITED STATES

<b>Contents</b>		<b>Page</b>
Annex B-1	Executive summary of the first written submission of the United States	B-2
Annex B-2	Executive summary of the second written submission of the United States	B-9
Annex B-3	Executive summary of the oral statements of the United States at the Substantive Meeting	B-17
Annex B-4	Executive summary of the oral statement of the United States at the Interim Review Meeting	B-21

**ANNEX B-1****EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION OF THE UNITED STATES****I. INTRODUCTION**

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

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

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

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

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

**II. REVIEW UNDER ARTICLE 21.5 OF THE DSU**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**d. MOFCOM's Reliance on Parallel Pricing is Unsubstantiated**

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

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

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

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

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

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

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

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

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

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

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

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

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

**5. Conclusion**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**IV. CONCLUSION**

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

**ANNEX B-2****EXECUTIVE SUMMARY OF THE SECOND WRITTEN SUBMISSION OF THE UNITED STATES****I. INTRODUCTION**

1. In its first written submission, the United States demonstrated that a number of aspects of the Determination on the Re-investigation of Antidumping and Countervailing Duties on Grain Oriented Flat-Rolled Electrical Steel Imports from the United States ("Re-determination") that the Government of the People's Republic of China ("China") has adopted with respect to imports of grain oriented flat-rolled electrical steel ("GOES") from the United States are inconsistent with China's obligations under the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("AD Agreement"), and the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement"). Accordingly, China has failed to comply with the recommendations and rulings of the Dispute Settlement Body ("DSB") to bring its measures into conformity with China's obligations under the AD and SCM Agreements.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## **6. Conclusion**

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

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

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

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

20. Moreover, the Appellate Body made clear that "Articles 3.2 and 15.2 contemplate an inquiry into the relationship between subject imports and domestic prices" and that "an investigating authority is required to examine domestic prices in conjunction with subject imports in order to understand whether subject imports have explanatory force for the occurrence of significant depression or suppression of domestic prices." Notwithstanding MOFCOM's claim that it engaged in a "comprehensive" analysis, MOFCOM's consideration of the price depression issue is as unsupported as it was in the original injury determination.

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

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

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

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

### **III. CHINA CANNOT DEFEND MOFCOM'S REVISED IMPACT ANALYSIS**

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

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

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

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

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

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

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

### **IV. CHINA CANNOT DEFEND MOFCOM'S REVISED CAUSATION ANALYSIS**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

*MOFCOM's division of responsibility for the inventory overhang.*

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

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

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

**VII. CONCLUSION**

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

**ANNEX B-3****EXECUTIVE SUMMARY OF THE ORAL STATEMENTS OF THE UNITED STATES  
AT THE SUBSTANTIVE MEETING**

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

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

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

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

4. The United States has established that when examining the "positive evidence" relating to the effect of subject imports on prices in the market, an objective authority would compare the pricing levels of imports and domestically produced products. When properly interpreted, Articles 3.1 and 3.2 of the AD Agreement, and 15.1 and 15.2 of the SCM Agreement, require an authority to consider evidence of relative prices of subject imports and the domestic products as part of an objective examination of "whether the effect of such imports is otherwise to depress prices to a significant degree or prevent price increases, which otherwise would have occurred, to a significant degree."

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**F. Conclusion**

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

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

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

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

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

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

19. MOFCOM's causation analysis is inconsistent with Articles 3.1 and 3.5 of the AD Agreement and Articles 15.1 and 15.5 of the SCM Agreement. The domestic industry's expansion of capacity and production outstripped the growth in demand for GOES in the Chinese market by wide margins. Numerous errors and unsupported, conclusory statements tarnish MOFCOM's analysis of injury caused by the domestic industry's overexpansion and overproduction.

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

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

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

## **VI. CHINA'S DISCLOSURES ARE INADEQUATE**

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

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

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

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

## **VII. CONCLUSION**

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

**ANNEX B-4****EXECUTIVE SUMMARY OF THE ORAL STATEMENT OF THE UNITED STATES  
AT THE INTERIM REVIEW MEETING**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

<sup>3</sup> *EC – Sardines (AB)*, para. 301.

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

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

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

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

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

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

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

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

<sup>4</sup> *EC – Chicken Cuts (AB)*, para. 156.

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

<sup>6</sup> *EC – Selected Customs Matters (AB)*, para. 187.

<sup>7</sup> *Chile – Price Band System (AB)*, para. 144.

<sup>8</sup> *EC – Selected Customs Matters (AB)*, para. 186, 188-89 (agreeing with and quoting *EC – Customs (Panel)*, para. 7.37).

<sup>9</sup> *US – FSC (Article 21.5 – EC II) (Panel)*, para. 7.43.

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

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

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

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

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

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

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

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

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<sup>10</sup> *EC – Bananas III (Article 21.5 – US) (AB)*, para. 322.

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

**ANNEX C**

ARGUMENTS OF CHINA

<b>Contents</b>		<b>Page</b>
Annex C-1	Executive summary of the first written submission of China	C-2
Annex C-2	Executive summary of the second written submission of China	C-10
Annex C-3	Executive summary of the oral statements of China at the Substantive Meeting	C-18
Annex C-4	Executive summary of the oral statement of China at the Interim Review Meeting	C-22

**ANNEX C-1****EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION OF CHINA****I. INTRODUCTION**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### **(1) Parallel Pricing**

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

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

### **(2) Pricing Policy**

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

### **(3) Overlap of Customers**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

<sup>1</sup> EC – Hormones (Canada) (Article 22.6 – EC), para. 9.

<sup>2</sup> Appellate Body Report, US – Gambling, para. 140.

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

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

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

## **VII. CONCLUSION**

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

**ANNEX C-2****EXECUTIVE SUMMARY OF THE SECOND WRITTEN SUBMISSION OF CHINA****I. MOFCOM PROPERLY ANALYZED PRICE EFFECTS**

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

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

3. MOFCOM's redetermination demonstrated that subject imports had "explanatory force" for significant price suppression. In particular, MOFCOM demonstrated a linkage between subject imports and prices of the domestic like product in 2008. MOFCOM's treatment of subject import volume and market share was made in conjunction with numerous other factual findings all supporting a finding of a positive competitive relationship between subject imports and the domestic like product, as discussed below.

4. MOFCOM's like product and cumulation findings show that the subject import and domestic products were competing on price. In particular, the specific findings of substitutability strongly supports the notion of price competition. The United States has not contested these findings, which are more than just "general similarities" between subject imports and the domestic like product. Indeed, the United States now concedes "some degree of competitive overlap." So the U.S. argument is that even through products are "competitive" and "substitutable," they are not highly substitutable enough to be competing on price. Yet the United States has provided absolutely no factual, logical, or legal basis for such an assertion, and this assertion is completely at odds with the ability of subject imports to increase enough in 2008 to gain 5.56 percentage points of market share. It is hard to imagine that products that are competitive, substitutable, and gaining market share are not competing based on price. Moreover, even if the standard were in fact "highly substitutable," the U.S. argument still fails because it ignores the specific facts of this case. As MOFCOM specifically noted in its redetermination, Allegheny Ludlum in its questionnaire response stated "that the subject merchandise it produces or exports are highly substitutable and competitive with the Chinese domestic like product and the like product from other countries." MOFCOM was well within its discretion to accept as credible the Allegheny Ludlum statement that its products were "highly substitutable."

5. MOFCOM's analysis of parallel price trends noted that such trends were "fundamentally consistent" and therefore also indicated a competitive relationship. The limited number of data points does not invalidate the trends, since these data points based on annual AUVs provided a broad assessment that smoothed out potentially anomalous data. These data points over the 2006 to 2008 period constitute more probative evidence than the more limited evidence on which the United States relies. If this data over a three year period has – in the U.S. words -- "no probative value," then what is the Panel to make of the U.S. argument that relies so heavily and so repeatedly on a single data point for a single quarter? Is there something less than "no probative value?" These trends were in the same direction, and within a handful of percentage points of each

other. Given the nature of AUVs, which only broadly reflect the underlying pricing data, such small differences in the percentage point changes are not material. Finally, even assuming the U.S. argument is correct and the AUV data showing broad pricing trends is of "no probative value," there are still numerous other factual bases supporting the MOFCOM finding of adverse price effects. Yet if one subtracts the AUV data for Q1 2009 from the U.S. argument, there really is nothing else left to the U.S. argument. In sum, when looking at the record as a whole, the trends identified by MOFCOM were probative and offered reasonable support for MOFCOM's findings.

6. MOFCOM also analyzed the pricing policy documents found at verification as providing further evidence of price competition between the subject imports and the domestic like product. That these documents relate to Q1 2009 does not mean these documents have no relevance at all for other time periods, regardless of all the other facts on the record. The United States admits that these documents in fact show purchaser behavior, and that is precisely why these documents are probative for understanding how purchasers viewed the relationship between subject imports and domestic products.

7. MOFCOM's discussion of customer overlap further confirms the explanatory force of subject imports with respect to price effects. MOFCOM's notes the simple but important fact that there were common customers specifically for GOES, not just any product, and so the same customers were buying from both import and domestic sources. Allegheny Ludlum reinforced this point, when it explained in its questionnaire response "that the subject merchandise it produces or exports are highly substitutable and competitive with the Chinese domestic like product and the like product from other countries." MOFCOM went on to analyze whether there were any specialty products being supplied by subject producers that could not be supplied by the domestic industry, finding that this was not the case. Thus, MOFCOM reasonably established: (1) common customers; (2) same products sold; and (3) no attenuated competition due to specialty products. These findings are not speculation.

8. The United States attacks each of these multiple MOFCOM factual finding in isolation against its lone argument that the market share response to diverging prices in the first quarter of 2009 does not support a finding that subject imports and the domestic like product had a competitive relationship. This single (but often repeated) U.S. argument ultimately fails on two fundamental grounds.

9. First, the United States misrepresents the market share response by comparing end points – first quarter 2008 to first quarter 2009 – rather than looking, as MOFCOM did, to the full loss in market share over the entirety of 2008. This U.S. argument ignores the decline in domestic industry market share that occurred *over the course of* 2008 – the totality of which is what the industry responded to, not trends in market share between isolated periods, the first quarter of 2008 and the first quarter of 2009. MOFCOM never indicated that this recapture of market share was only 1.04 percentage points, only that the increase in first quarter 2009 was 1.04 percentage points when compared to first quarter 2008. The increase compared to 2008 as a whole was necessarily more substantial. Only a significant decline in domestic pricing could lead to this swing in market share in just one quarter, consistent with MOFCOM's conclusion that the domestic like product and subject imports competed on price. MOFCOM's analysis was "based on a *comprehensive* rather than isolated analysis of the situation in 2008 and the first quarter in 2009." Stripped to its core, the U.S. argument rests entirely on trends in a single quarter at the end of MOFCOM's period of investigation to rebut all of MOFCOM's findings over the entire period of investigation. In contrast MOFCOM considered all the evidence in reaching its determination.

10. Second, the United States fails to acknowledge the reasonable inferences to be drawn from MOFCOM's findings as a whole. The United States continues to isolate MOFCOM's volume and market share findings and never considers MOFCOM's price effects findings as a whole. The Appellate Body has recognized the importance of considering evidence as a whole: "a piece of evidence that may initially appear to be of little or no probative value, when viewed in isolation, could, when placed beside another piece of evidence of the same nature, form part of an overall picture that gives rise to a reasonable inference . . . ." The United ignores this key principle when repeatedly considering each point in isolation. But each MOFCOM finding reinforces the other and contributes to the overall demonstration of the explanatory force of subject imports. The United States cannot rebut the probative value of volume and market share trends by mechanistically considering those trends alone, ignoring the other evidence and findings.

11. The U.S. arguments concerning MOFCOM's treatment of price depression in the first quarter of 2009 mirror its arguments concerning MOFCOM's findings on price effects in general. First, the United States mischaracterizes MOFCOM's analysis as focusing solely on the increasing volume and market share of subject imports. Although those particular facts did constitute probative evidence of price effects, they were part of a broader analysis of subject imports that showed their competitive relationship with the domestic like product.

12. Second, the single piece of evidence about divergent trends in Q1 2009 sheds very little light on the true effect of the domestic industry reducing prices. The end point to end point analysis presented by the United States does not account for the market share lost by the domestic industry over the entirety of the 2008, and consequently the level of market share regained by the domestic industry from its low point to the end of the first quarter of 2009. Far from being "irrational," the price decline did allow the domestic industry to recover a substantial portion of market share loss in very short order – circumstances that might only occur in the presence of a significant drop in price. The price drop in the first quarter of 2009 was thus far from "irrational." Rather, the price drop was a rationale response by the domestic industry and it succeeded in recovering much of the lost market share.

13. Whether or not MOFCOM had written evidence of actual offers for imported merchandise or actual sales transactions does not detract from the probative value of the policies themselves. These documents are further evidence of the competitive relationship between subject imports and the domestic like product on terms directly bearing on price. Again, regardless of whether there was actual underselling or not, the pricing policy documents show the ways in which purchasers were using the growing presence of subject import prices to drive down domestic prices, consistent with the Appellate Body's specific observation that such a situation could be relevant.

## **II. MOFCOM PROPERLY ANALYZED ADVERSE IMPACT**

14. The United States has not successfully rebutted China's argument that this claim is not properly before this Article 21.5 panel. Prior WTO precedent and fundamental fairness prevent a complaining country from not raising a claim initially, luring the defending country into reasonably believing there was nothing that needed to be changed, and only then raising that new claim in an Article 21.5 proceeding when the defending country no longer has any chance to bring that aspect of its measure into compliance. Yet that is precisely what the United States is trying to do in this case.

15. The U.S. efforts to show the MOFCOM finding on adverse impact was somehow new all fail. A comparison of the injury discussion in the original MOFCOM determination and the revised redetermination now before this Article 21.5 panel shows no additional discussion of the market conditions in 2008. Contrary to the U.S. allegation, there is no new focus on 2008 in the MOFCOM discussion of injury; the injury discussion is essentially unchanged, reciting the key facts that highlight the declines at the end of the period.

16. Thus the U.S. argument that the redetermination somehow changed reduces to a single point: that because MOFCOM deleted a few references to "low price," these minor changes somehow created a "new" determination on this issue so different that it is now properly subject to a challenge in this Article 21.5 proceeding. This U.S. argument, however, fails for three key reasons. (1) The references to "low price" in the original determination of injury were simply references to unfairly traded imports. (2) Even if one were to assume that "low price" were not just a reference to unfairly traded imports more generally, the references to "low price" refer to *the price of subject imports*, an issue that has no particular relevance when analyzing the injury suffered by a domestic industry. (3) This different focus of injury determinations under Article 3.4 and 15.4 largely explains why the U.S. argument on injury in fact says nothing at all about "low priced" subject imports.

17. This situation is essentially the same as that before the panel in *US – Countervailing Measures Concerning Certain Products from the EC*, which correctly stressed that "the utility of an Article 21.5 proceeding should not override the basic due process rights of the parties to the dispute." Nor are these conclusions in any way at odds with the Appellate Body jurisprudence. In discussing its prior jurisprudence in *Canada – Aircraft (Article 21.5 – Brazil)* and *US – FSC (Article 21.5 – EC)*, the Appellate Body in the more recent decision in *EC – Bed Linen (Article 21.5*

- *India*) stressed the requirement to raise a new claim challenging a new component of the measure taken to comply which was not part of the original measure. That is why the Appellate Body repeatedly stressed that the scope of Article 21.5 proceedings covered "a new claim challenging a new component of the measure taken to comply which was not part of the original measure," and "a new claim challenging a changed component of the measure taken to comply."

18. The U.S. claim on adverse impact also fails on its merits. MOFCOM reviewed the evidence objectively, and reached reasonable conclusions that the domestic industry that had done well early in the period suffered a number of declining indicators at the end of the period when subject imports surged. The United States now concedes there is nothing inherently unreasonable or distortive in focusing on the end of the period, as MOFCOM did in this case. Moreover, MOFCOM did not ignore the earlier part of the period. MOFCOM properly used the trends over the 2006 to 2007 period as reasonable context for evaluating the trends over the 2007 to 2008 period. There is nothing WTO inconsistent about finding injury at the end of the period, and positive trends earlier in the period do not somehow immunize the domestic industry from suffering material injury later in the period. MOFCOM reasonably considered all of the evidence, put the end of the period in proper context, and made a reasoned and objective judgment based on all the evidence.

19. The United States alleges without any support that the earlier trend may have been unsustainable, but this possibility was (1) inconsistent with the evidence of strong rates of growth in total consumption in China, increasing 22.8 percent in 2007 and another 18.1 percent in 2008, and (2) no party during the original proceedings before MOFCOM submitted any evidence contradicting this basic point. Based on the evidence before MOFCOM, the growth rates over the 2006 to 2007 were consistent with the rapidly growing Chinese market and thus provided a reasonable benchmark. The United States attempts to downplay this relatively high growth rate in overall consumption, but in doing so makes illogical comparisons of percentage changes, and does not demonstrate that MOFCOM's approach was in any way not reasonable or objective.

20. The United States also points to large increases in 2007, but in doing ignores the basic context of a growing market. Given the generally comparable rates of growth in the overall market over the 2006 to 2007 period and 2007 to 2008 period, it was reasonable for MOFCOM to compare the trends over these two periods and find that the negative trends over the 2007 to 2008 period were indicative of injury. Rather than cancelling out the injury in 2008, the more positive trends in 2007 just underscore and provide reasonable context for finding the negative trends in 2008 to be injurious. Thus, although the United States accuses MOFCOM of not putting trends into context, in fact it is the U.S. argument that seeks repeatedly to misunderstand or ignore the context.

21. Beyond this context of evaluating trends in light of the growing market, MOFCOM also properly evaluated the trends for the injury as a whole. This focus on the industry as a whole does not represent side stepping the issue. MOFCOM fully considered the relevance of Baosteel's entry into the domestic industry in its redetermination when appropriate. But for purposes of Articles 3.4 and 15.4, the focus must be on the industry as a whole. Subject imports can be injurious in all markets, whether there is a new entrant or not.

22. The United States continues to say nothing about Q1 2009 in its argument about adverse impact. Even after China pointed out this serious failing in the U.S. FWS, noting the MOFCOM focus on "trends that turned adverse in 2008 and then became worse in Q1 2009," the U.S. SWS says not one word about the negative trends in Q1 2009. The U.S. failure to say anything about Q1 2009 is far more "selective" than anything in MOFCOM's analysis.

23. Moreover, any positive trends did not "outweigh" the negative trends. MOFCOM reasonably and persuasively explained why, after considering all the factors as a whole, it found the domestic industry to be injured. That is why MOFCOM repeatedly stressed what would be reasonably expected in a growing market, and then noted the injurious trend. Thus, MOFCOM acknowledged that capacity and production were up, but then noted that these increases "did not produce the corresponding economies of scale and profits" the domestic industry expected from its investments. MOFCOM noted that "the increase in sales did not bring about the corresponding increase in profit." MOFCOM also noted for several factors the increase early in the period followed by the decrease later in the period – a decrease in the growth in 2008 and often a decrease in the actual amount in Q1 2009.

### III. MOFCOM PROPERLY ANALYZED CAUSATION

24. The United States makes only two arguments about the basic causal link and they both fail. The U.S. argument about defective price effects addresses individual pieces of evidence in isolation rather than look at the totality of the record and all of MOFCOM's findings as they relate to price effects. MOFCOM did not make conclusory statements about the effects of rising subject import volumes and market share in isolation. Rather, MOFCOM made a series of well reasoned findings establishing the general competitive relationship of subject imports and the domestic like product in conjunction with rising imports volumes and market share. These findings as a whole demonstrated the "explanatory force" of subject imports and their significant effect on price. The U.S. position really reduces to making a single argument across all MOFCOM's findings, contending that the price divergence between subject imports and the domestic like product in the first quarter of 2009, relative to shifts in market share, somehow trumps all other evidence and repudiates any finding of adverse price effects. But as discussed in detail in Section II, this U.S. analysis is flawed.

25. The U.S. argument about MOFCOM's analysis of economies of scale also fails to address what MOFCOM actually found – how subject imports affected the domestic industry as a whole, and deprived the domestic industry of its ability to fully realize the potential on its investments in new capacity. The United States now acknowledges that MOFCOM's basic point is true, but dismissed the more basic point MOFCOM was making in its redetermination. China finds the U.S. criticism of an "abstract truism" rather strange, given that the U.S. initial argument on this point was itself just a list of abstract questions. Nor does this basic point change by considering each firm individually, rather than considering the industry as a whole as required by Articles 3 and 15. It was in no way a "failure" for MOFCOM not to quantify these effects, and the United States has not cited to any WTO obligation to quantify such effects. MOFCOM thus reasonably and objectively noted this qualitative connection between the growing volume of subject imports, the lack of economies of scale from new investments, and the adverse effects suffered by the domestic industry.

26. On both of these issues, the United States essentially argues that simply by articulating another way to view the evidence, it has somehow shown that MOFCOM's analysis is necessarily and unavoidably flawed. But this approach is just wrong. MOFCOM reasonably addressed all the evidence, considered these other perspectives, and reasonably concluded that subject imports were contributing to adverse effects being suffered by the domestic industry.

27. Similarly, the United States makes only two arguments about non-attribution, but these two arguments also both fail. MOFCOM properly considered and distinguished the effects of subject imports from the effect of domestic industry expansion of capacity. The entire U.S. argument on this point is really little more than a dispute over the MOFCOM methodology for showing that subject imports contributed significantly to the inventory overhang, even after taking into account the expansion of domestic capacity.

28. China had made the point in its FWS that its discussion of non-attribution regarding the expansion in the domestic industry had considered inventory expansion as only one of many factors. The United States never responds at all to any of the other points that MOFCOM had noted about this issue. In particular, the United States never responds to MOFCOM's discussion that: (1) one cannot reasonably compare percentages that are calculated by base amount of very different magnitudes, as does the U.S. argument on this point; (2) the clear link between subject import market share gains in 2008 and lost market share by the domestic industry; and (3) the fact that the domestic firms had to cut their prices in early 2009 specifically in an attempt to regain the market share that had been lost in 2008. China is not attempting to "draw attention away" from MOFCOM's analysis of inventory. China is putting the inventory discussion into context, *as part of* the overall analysis.

29. The U.S. argument thus reduces to disagreements with MOFCOM's methodology – the use of the 2007 as the base year; and the combined consideration of 2008 and Q1 2009. Since the United States did not even attempt to address China's other arguments, the U.S. claim comes down to these technical disputes about a particular methodology.

30. MOFCOM's choice of 2007 as the baseline rests on positive evidence and reflects objective examination of that evidence. MOFCOM fully explained its choice. First, MOFCOM noted that in a normal growing market "a reasonable basis for the market competitor's forecast" for its market share in the next year would be to start with its market share in the current year, absent some other factors. Second, when seeking to analyze the situation in 2008, the year 2007 would be "the most comparable and representative." Third, and more specific to this particular case, the year 2007 was a year in which subject imports had been stable (not surging like 2008), and the domestic industry "did not show any signs of an adverse situation yet" (not weakening indicators like 2008).

31. Although using 2006 would also have been reasonable, that base-line would have had the following problems. First, any market competitor at the end of 2007, trying to forecast its 2008 market share, would not normally go back to 2006. Doing so would have ignored the more recent changes in the business during 2007. Second, 2006 would also have been before the subject import surge, but it would have been more remote in time and thus more subject to other intervening factors. MOFCOM sought to understand what changed in 2008 – why the positive trends in 2007 reversed in 2008. Thus, MOFCOM chose 2007 because going back to 2006 would have introduced more uncertainty in this analysis, since the further back in time the authority goes, the greater the risk of "some other factors" playing a role.

32. The United States also makes much of MOFCOM's choice to consider 2008 and Q1 2009 as a whole, arguing that the contribution of subject imports to the inventory overhang in Q1 2009 alone would have been smaller. As with the choice of 2007 as a base year, MOFCOM fully explained its choice to consider inventory build-up over a 15 month period, and that explanation is reasonable and objective. In particular, MOFCOM address this choice of methodology at some length in its redetermination.

33. Thus, MOFCOM's choices rested on completely reasonable principles: (1) that different economic factors have different characteristics and thus may need to be treated differently in trying to understand the causal relationships; and (2) that inventory in particular has a distinctive feature in that it accumulates over time, and thus requires a different approach to understating the relative contribution of different factors to inventory build-up.

34. Instead of addressing these arguments, the United States points to a isolated comment by MOFCOM, and then twists that comment out of context. Even if the contribution of subject imports may have been less in Q1 2009, the focus on that narrow period was not the most appropriate way to consider inventory with its unique characteristic of being accumulated over time, not sold over a discrete period. Given that 2008 accounted for the vast majority of the overall 2008 and early 2009 period being considered, MOFCOM reasonably explained why it put particular weight on the contribution of subject imports to the inventory build up in 2008.

35. MOFCOM thus met its obligations under Articles 3.5 and 15.5. As China has noted, MOFCOM had no obligation to show that subject imports were the only factor. The United States does not dispute this point. MOFCOM showed – using a reasonable methodology – that subject imports accounted for about half of the inventory build up, and thus were making a significant contribution to the adverse effects being experienced by the domestic industry, even when distinguished from the effects attributable to the expansion in domestic capacity.

36. MOFCOM also properly considered and distinguished the effects of subject imports from the effects of non-subject imports. MOFCOM reasonably found that if large volumes of non-subject imports were having no effects in 2006 and 2007, and did not gain any market share in 2008, then non-subject imports were not the problem. The United States relies entirely on the argument that since non-subject imports had large volume, and allegedly had lower prices, then non-subject imports must have mattered more. This argument fails for many reasons. First, the U.S. argument still does not address and cannot explain how the larger volume and allegedly lower priced non-subject imports did not have any adverse effect in 2006 and 2007. Second, the United States incorrectly asserts that "MOFCOM did not examine market share data." MOFCOM could not have noted the shifts in the market share without examining the market share data. Third, MOFCOM focused its analysis on shifts in market share because those changes over time were more probative on understanding why the performance of the Chinese industry changed over time. The shifts in market share both took into account the growing market and allowed MOFCOM to see what supply sources were gaining and losing market share over time. Fourth, MOFCOM correctly

noted that the shift in market shares in 2008 was the key fact to consider. The year 2008 was when the domestic industry lost 5.65 percentage point of market share – this is the adverse effect to be explained. And in 2008, subject imports gained 5.56 percentage points of market share, while non-subject imports gained only 0.09 percentage point of market share.

#### **IV. MOFCOM PROPERLY DISCLOSED ALL ESSENTIAL FACTS**

37. In its SWS the United States still has not set forth a *prima facie* claim. Even this expanded discussion continues to make an overarching fundamental error -- there is not a single sentence in the U.S. SWS explaining why each of the seven facts at issue should be considered "essential." Many of the U.S. arguments are basically that public summaries of facts are somehow not sufficient, and that the underlying data needed to be disclosed. When arguing for disclosure of facts that the authority has deemed (without any challenge) to be confidential, the complaining party has a particular burden to articulate clearly and explicitly why that particular fact – as opposed to its public summary – is in fact essential. Yet the United States has made no effort to do so. For these reasons, China continues to believe the Panel should reject the U.S. claim as failing to state a *prima facie* case.

38. Even if the United States has finally established a *prima facie* case, the United States still has not sufficiently demonstrated that the facts at issue were "essential" or that the facts were not sufficiently disclosed. The consistent theme in the U.S. argument is to dismiss without serious discussion what MOFCOM actually disclosed and just insist that the undisclosed confidential underlying data was somehow "essential."

39. Trends in Import Prices. The disclosure clearly describes the different sources of data for the price trends. The U.S. argument ignores the clear use of percentage changes to provide a sufficient public summary of the underlying confidential data. Nor does the United States anywhere demonstrate how the "data underlying" these percentage changes were somehow "essential," or why the percentage changes themselves were not sufficient disclosure of these facts.

40. Economies of Scale. The disclosure found that the "rise of demand gives an impetus" to capacity in China, a statement fully supported by the facts disclosed showing the percentage changes in demand and domestic industry capacity. The United States has not presented any argument why the confidential underlying data are "essential facts."

41. Sales Obstacles. The disclosure makes this reference to "sales obstacles" clear in context, and that is why this particular paragraph ends with the concluding statement that "[h]ence, the domestic industry has been seriously impacted in both production and sales due to a great deal of imports." Nowhere does the United States explain what additional facts about subject imports in this context were undisclosed "essential facts."

42. Price Reduction in Q1 2009. MOFCOM's disclosure cited to the loss of domestic industry market share in 2008 and the regaining of that share in Q1 2009, essential facts that were fully disclosed, and then drew the reasonable conclusion about the business motivation for the Chinese industry to lower its prices.

43. Price-cost differential for Wuhan. The disclosure clearly documents the decline in gross profit rate, which is the difference between average prices earned and average costs incurred -- the "price-cost differential." The U.S. argument ignores the clear use of percentage changes to provide a sufficient public summary of the underlying confidential data. The underlying data are not "essential facts," and were confidential data that did not need to be disclosed beyond these percentage changes.

44. Capacity Did Not Exceed Market Demand. The disclosure describes the trends in both capacity and consumption, using percentage changes to protect the confidentiality of the underlying data. MOFCOM disclosed sufficient facts to show that even after its growth over the 2006 to 2008 period, domestic capacity was still below the total market in China.

45. Allocation of Inventory Overhang. The disclosure clearly explains the data sources and methodology used to confirm that subject imports made a significant contribution. The U.S.

argument ignores the use of percentage changes to provide a sufficient public summary of the underlying confidential data used in the calculations.

**V. MOFCOM PROPERLY DISCLOSED THE FACTUAL AND LEGAL BASIS OF ITS DETERMINATION**

46. The U.S. FWS made no effort to state a *prima facie* case for this claim, offering only brief and insufficient one sentence statements that certain points were important to the final decision by MOFCOM, without any discussion of why. The United States has not responded to this argument, and instead uses its SWS in an unsuccessful attempt to state its claim for the first time. But the U.S. SWS only attempts to rehabilitate three of the five claims made initially, indicating that it has abandoned the two other sub-claims.

47. The U.S. efforts to rehabilitate the first three of these sub-claims still fail to state a *prima facie* case. The U.S. SWS does not cure this fundamental defect, and instead repeats the defect of assertion without explanation or argument. Even if the Panel itself believes these points are material, it is not the job of this Panel to make the U.S. arguments for the United States, and certainly not at this late stage of the proceeding. If the Panel cannot find any explanation of why the United States believes certain points to be material in the FWS or SWS, it is not too late for the United States to attempt to make such a showing now. But if the Panel decides to consider the merits, these claims still fail.

48. Trends in Import Prices. The entire U.S. argument is to disagree with the MOFCOM characterization of the trend in overall prices as measured by average unit values. But this U.S. argument makes too much out of too little. The U.S. argument ignores the paragraph-long explanation of why the domestic average prices fell by a larger amount in early 2009. Thus, MOFCOM disclosed and discussed the key facts. The United States might disagree with MOFCOM's assessment, but there is no basis to say this point was not discussed.

49. Economies of Scale. The entire U.S. argument is that China made a statement without citation of the redetermination, but takes this statement out of context. This statement from China's FWS was made after three preceding sentences that did cite the redetermination. The fourth sentence was simply expanding on the implications of the prior three sentences.

50. Sales Obstacles. The entire U.S. argument on this point is a one sentence disagreement with China's argument, but this one sentence largely ignores the redetermination itself. MOFCOM's redetermination drew permissible inferences based on the loss and then partial regaining of market share, MOFCOM was also aware of the explicit statement by the Chinese producers in their petition that during Q1 2009, "the petitioners had to reduce product price to maintain their market share under the impact of the unfair trade practice of the two subject countries." The United States never discusses any of these facts, and only asserts that there must have been something else that was not disclosed and something else that needed to be discussed. But an assertion is not an argument, and so this U.S. claim must fail.

**ANNEX C-3****EXECUTIVE SUMMARY OF THE ORAL STATEMENTS OF CHINA AT THE SUBSTANTIVE MEETING****I. MOFCOM PROPERLY ANALYZED PRICE EFFECTS**

1. Nothing in the relevant WTO texts supports the U.S. position that MOFCOM must compare relative prices as a necessary part of price effects analysis. The U.S. reading has no basis in the plain meaning of the text, which gives administering authorities discretion to choose the analytic approach. Moreover, the Appellate Body addressed precisely this interpretive point in *China – GOES*, and has already rejected the U.S. position. The United States also complains about what the absence of findings about price undercutting implies for MOFCOM's conclusions. But this argument fails. First, it incorrectly assumes there was some detailed pricing information that MOFCOM ignored. Second, this argument also incorrectly assumes more detailed information would have somehow been adverse. The U.S. argument is thus really about requiring authorities to engage in a certain type of analysis and requiring authorities to gather data to conduct that analysis. Particularly in the context of a redetermination looking back at a period of time several years old, it is completely reasonable for an authority to make a new determination based on information already on the record before the authority.

2. Turning to the factual issues, MOFCOM's redetermination properly demonstrated that subject imports had "explanatory force" for the adverse price effects found, including the findings of price suppression. Contrary to the repeated U.S. arguments, MOFCOM did not rely on volume alone to establish price effects. The volume evidence in combination with the established competitive relationship explained the nearly one-to-one relationship between subject import gains and domestic industry losses. The United States tries to dismiss the evidence of the strongly competitive relationship, but these arguments cannot be reconciled with the undisputed findings by MOFCOM.

3. Collectively, the evidence of (1) a single like product that rested on the factual finding of substitutability among different supply sources; (2) cumulation that rested on the factual findings of substitutability and a competitive relationship among subject imports sources and with the domestic products; (3) U.S. producer testimony of a "highly competitive" relationship among supply sources; (4) parallel pricing trends over the 2006 to 2008 period; (5) documents revealing how purchasers leveraged subject import prices to affect domestic prices; (6) overlapping customers that bought from both domestic and subject imports, highly their substitutability; and (7) nearly one-to-one market replacement, supports the explanatory force of subject imports. MOFCOM's demonstration of "explanatory force" thus rested on multiple, consistent, and mutually reinforcing factual findings. The U.S. argues unsuccessfully that the difference between percentage changes in AUVs over one comparison period in Q1 2009 somehow trumps the seven other factual findings made by MOFCOM. But this one fact in isolation does not undermine the collective weight of the other evidence that strongly support the existence of the competitive relationship.

4. The United States attacks each of these multiple MOFCOM factual findings in isolation with its argument that the market share responses to diverging prices in the first quarter of 2009 does not support a finding that subject imports and the domestic like product had a competitive relationship. But this repeated U.S. argument ultimately fails for several reasons. First, the United States misapplies certain comments by the Appellate Body that addressed the reasoning in the original MOFCOM determination about the effects of "the prices of subject imports," and not about the effects of subject imports more generally. The redetermination has substantially changed and clarified the focus on how the subject imports were having adverse price effects -- clarifications that were not before the Appellate Body. In particular, the redetermination both explained in more detail the evidence supporting the finding of competitive relationship, and addressed specifically and at some length the reasons for giving less weight to the divergent AUV trends in the first quarter of 2009. Moreover, the Appellate Body questioned whether the prices of subject imports "adequately explained" the price suppression and depression, and thus focused on the adequacy of the available data and explanation. The Appellate Body could not have evaluated a different set of findings from a different determination, which is why the focus was on the adequacy of the specific determination before the Appellate Body.

5. Second, the U.S. argument misrepresents the domestic industry market share response by comparing end points – first quarter 2008 to first quarter 2009 – rather than looking, as MOFCOM did, to the full loss in market share over the entirety of 2008. Third, MOFCOM never indicated that this recapture of market share was only 1.04 percentage points; the increase compared to 2008 as a whole was necessarily a more substantial 5.15 out 5.65 percentage points regained from subject imports.

6. The United States simply fails to acknowledge the reasonable inferences to be drawn from MOFCOM's findings as a whole. The Appellate Body has recognized the importance of considering the evidence as a whole, explaining that "a piece of evidence that may initially appear to be of little or no probative value, when viewed in isolation, could, when placed beside another piece of evidence of the same nature, form part of an overall picture that gives rise to a reasonable inference . . . ." The United States ignores this key principle when repeatedly considering each point in isolation, but never stepping back to consider them as a whole. But each MOFCOM finding reinforces the other and contributes to the overall demonstration of the "explanatory force" of subject imports. The United States cannot rebut the probative value of volume and market share trends by mechanically considering those trends alone, ignoring the extensive other evidence and findings that supported MOFCOM's overall determination about adverse price effects.

7. Thus, the MOFCOM findings of price suppression in 2008 and early 2009 and price depression in early 2009 both rest on a proper foundation of evidence that establishes the "explanatory force" of the subject imports. MOFCOM discussed the evidence supporting its findings and reasonably addressed the potentially contrary evidence, in the end making a reasonable and balanced judgment about all of the evidence.

## **II. MOFCOM PROPERLY ANALYZED ADVERSE IMPACT**

8. The United States has not successfully rebutted China's argument that this new claim is not properly before this Article 21.5 panel. Prior WTO precedent and fundamental fairness do not allow a complaining country to avoid a claim initially, luring the defending country into reasonably believing there was nothing that needed to be changed regarding that aspect of a measure, and only then raising that new claim in an Article 21.5 proceeding when the defending country no longer has any chance to bring that aspect of its measure into compliance. Yet that is precisely what the United States is trying to do in this dispute with its new claim on adverse impact.

9. The U.S. efforts to show the MOFCOM finding on adverse impact was somehow "new" and thus permissible all fail. Contrary to the U.S. allegation, there is no new focus on 2008 in the MOFCOM discussion of injury; the injury discussion is essentially unchanged, reciting the same key facts that highlight the declines at the end of the period. Thus the U.S. argument that the redetermination somehow changed reduces to a single point: that because MOFCOM deleted a few references to "low priced imports," these minor changes somehow created a "new" determination on this issue. This U.S. argument, however, is wrong. First, the MOFCOM discussion of material injury was always focused on the subject imports, not on the prices of the subject imports. Second, even if one were to assume that "low priced imports" were not just a reference to unfairly traded imports more generally, which it was, the references to "low price" refer to *the price of subject imports*, an issue that has no particular relevance when analyzing the injury suffered by a domestic industry under Article 3.4 and 15.4.

10. But regardless of the Panel ruling on this important procedural issue, the U.S. claim on adverse impact also fails on its merits. First, the United States alleges without any support that the earlier trend may have been unsustainable, but this theory several problems. First, this theory is inconsistent with the evidence of strong rates of growth in total consumption in China, increasing 22.8 percent in 2007 and another 18.1 percent in 2008. Moreover, no party during the original proceedings before MOFCOM submitted any evidence contradicting this basic point about the growing market or in anyway suggesting the growth would not continue. Second, the United States also points to large increases in 2007, but in doing ignores the basic context of a growing market. Third, beyond this context of evaluating trends in light of the growing market, MOFCOM also properly evaluated the trends for the injury as a whole. Contrary to the U.S. argument, this focus on the industry as a whole does not represent side stepping the issue. Finally, any positive trends did not "outweigh" the negative trends. MOFCOM reasonably and persuasively explained why, after considering all the factors as a whole, it found the domestic industry to be injured.

### III. MOFCOM PROPERLY ANALYZED CAUSATION

11. The United States makes only two arguments about the basic causal link and they both fail. As we have just discussed in some detail, the flawed U.S. argument about MOFCOM's price effects findings addresses individual pieces of evidence in isolation rather than look at the totality of the record and all of MOFCOM's findings as they relate to price effects.

12. So in fact, other than repeating its price effects arguments, the U.S. argument about causal link actually reduces to a single argument. The United States challenges MOFCOM's analysis of economies of scale, but this argument also fails to address what MOFCOM actually found. In particular, this U.S. argument does not address MOFCOM's finding that subject imports captured tonnage and market share that affected the domestic industry as a whole, and deprived the domestic industry of its ability to fully realize the potential on its investments in new capacity. MOFCOM reasonably and objectively noted this qualitative connection between the growing volume and market share of subject imports, the corresponding lack of economies of scale from new investments, and the adverse effects suffered by the domestic industry. On both of these issues, the United States essentially argues that simply by articulating another way to view the evidence, it has somehow shown that MOFCOM's analysis is necessarily and unavoidably flawed. But this approach is wrong. MOFCOM reasonably addressed all the evidence, considered these other perspectives, and reasonably concluded that subject imports were significantly contributing to adverse effects being suffered by the domestic industry.

13. MOFCOM properly considered and distinguished the effects of subject imports from the effect of domestic industry expansion of capacity. The entire U.S. argument on this point is really little more than a technical dispute over the MOFCOM methodology for showing that subject imports contributed significantly to the inventory overhang, even after taking into account the expansion of domestic capacity.

14. Before moving to the specifics of the U.S. arguments about MOFCOM's methodology and why these arguments are wrong, it is helpful to step back and put this argument into an overall context. The dispute is not about whether MOFCOM "separated and distinguished;" the United States admits as much, acknowledging that MOFCOM addressed this issue with its "non-attribution analysis" about alleged overexpansion and overproduction. Rather the dispute is entirely over how MOFCOM did so. But in doing so, the United States has made this issue entirely about the methodology chosen, and ignores the repeated guidance from the Appellate Body that the AD Agreement does not specify the methodology, and will not second guess any reasonable and objective method. Thus, China need not show that its method was the only way, or even the best way. China need only show that MOFCOM properly established the facts in question, and then evaluated them in an unbiased and objective manner. As we will now demonstrate, MOFCOM more than met this standard.

15. This U.S. non-attribution argument reduces to disagreements about two specific aspects of the MOFCOM methodology: first, the use of 2007 as the base year; and second, the combined consideration of 2008 and Q1 2009. Since the United States did not even attempt to address China's other arguments, the U.S. claim comes down to these technical disputes about a particular methodology. But MOFCOM's choice of 2007 as the baseline rests on positive evidence and reflects objective examination of that evidence. MOFCOM fully explained its choice. Although using 2006 would also have been reasonable, that base-line would have had several serious problems. Thus, MOFCOM chose 2007 because going back to 2006 would have introduced more uncertainty in this analysis, since the further back in time the authority goes, the greater the risk of "some other factors" playing a role. The United States also makes much of MOFCOM's choice to consider 2008 and Q1 2009 as a whole, arguing that the contribution of subject imports to the inventory overhang in Q1 2009 alone would have been smaller. As with the choice of 2007 as a base year, MOFCOM fully explained its choice to consider inventory build-up over a 15-month period, and that explanation is reasonable and objective.

16. MOFCOM also properly considered and distinguished the effects of subject imports from the effects of non-subject imports. MOFCOM reasonably found that if large volumes of non-subject imports were having no effects in 2006 and 2007, and did not gain any market share in 2008, then non-subject imports were not the problem. The United States relies entirely on the argument that since non-subject imports had large volume, and allegedly had lower prices, then non-subject imports must have mattered more. This argument fails for many reasons. First, the U.S. argument

still does not address and cannot explain how the larger volume and allegedly lower priced non-subject imports did not have any adverse effect in 2006 and 2007. Second, the United States incorrectly asserts that "MOFCOM did not examine market share data." MOFCOM could not have noted the shifts in the market share without examining the market share data. Third, MOFCOM focused its analysis on shifts in market share because those changes over time were more probative on understanding why the performance of the Chinese industry changed over time. The shifts in market share both took into account the growing market and allowed MOFCOM to see what supply sources were gaining and losing market share over time. Fourth, MOFCOM correctly noted that the shift in market shares in 2008 was the key fact to consider. The year 2008 was when the domestic industry lost 5.65 percentage point of market share – this is the adverse effect to be explained. And in 2008, subject imports gained 5.56 percentage points of market share, while non-subject imports gained only 0.09 percentage point of market share.

#### **IV. MOFCOM PROPERLY DISCLOSED ALL ESSENTIAL FACTS**

17. Even after two submissions, the United States still has not set forth a *prima facie* claim about the failure to disclose "essential facts." Even the expanded discussion in the U.S. Second Written Submission continues to make an overarching fundamental error -- there is not a single sentence explaining why each of the seven facts at issue should be considered "essential." Many of the U.S. arguments are basically that public summaries of facts are somehow not sufficient, and that the underlying data needed to be disclosed. When arguing for disclosure of facts that the authority has deemed -- without any challenge -- to be confidential, the complaining party has a particular burden to articulate clearly and explicitly why that particular fact – as opposed to its public summary – is in fact essential. Yet the United States has made no effort to do so. For these reasons, China continues to believe the Panel should reject the U.S. claim as failing to state a *prima facie* case. But even if the Panel believes the United States has finally established a *prima facie* case, the United States still has not sufficiently demonstrated that the facts at issue were actually "essential" or that the facts were not sufficiently disclosed. We discussed each of the seven specific facts at issue in our written submissions. We will not repeat that level of detail now. The consistent theme in the U.S. argument is to dismiss without serious discussion what MOFCOM actually disclosed and just insist that the undisclosed confidential underlying data was somehow "essential." Our written submission documents fact by fact what MOFCOM said and why it was sufficient.

#### **V. MOFCOM PROPERLY DISCLOSED THE FACTUAL AND LEGAL BASIS OF ITS DETERMINATION**

18. The United States has also still not stated a *prima facie* case for its claim about the disclosure of the basis for the determination, offering only brief and insufficient one sentence statements that certain points were important to the final decision by MOFCOM, without any discussion of why. The United States has not actually responded to this argument, and instead uses its Second Written Submission in a still unsuccessful attempt to state its claim for the first time. But the U.S. effort fails. At the outset, we note that the United States only attempts to rehabilitate three of the five specific claims made initially, indicating that it has now abandoned the two other specific claims. The U.S. efforts to rehabilitate the first three of these specific claims still fail to state a *prima facie* case. The U.S. Second Written Submission does not cure this fundamental defect of not explaining why certain points were material, and instead repeats the defect of assertion without explanation or argument. Even if the Panel itself believes these points are material, it is not this Panel's job to make the U.S. arguments for the United States, and certainly not at this late stage of the proceeding. If the Panel cannot find any explanation of why the United States believes certain points to be material in the written submissions already made, it is now too late for the United States to attempt to make such a showing now. But if the Panel decides to consider the merits, these claims still fail. We discussed each of the three remaining claims at issue in some detail in our written submissions. We will not repeat that discussion here. We urge the Panel to consider that explanation of why MOFCOM's discussion was sufficient.

**ANNEX C-4****EXECUTIVE SUMMARY OF THE ORAL STATEMENT OF CHINA AT THE INTERIM REVIEW MEETING**

1. China would like to thank the Panel for arranging this meeting on the interim report. We realize such meetings are not common. But given the circumstances of this dispute, with the termination of the challenged measures occurring during the pendency of this Article 21.5 proceeding, China believes it is useful and appropriate for the parties and the Panel to meet one more time to discuss how most appropriately to take into account this important recent development.

2. As we all know, the interim report was released on 17 March 2015. It concerns measures first taken by China on 10 April 2010, specifically anti-dumping measures on imports of grain oriented flat-rolled electrical steel originating in both Russia and the United States, as well as an anti-subsidy measure on the same product originating in the United States. This Article 21.5 proceeding has concerned China's actions in seeking to bring those measures into conformity as first recommended by the Panel and Appellate Body back in 2012.

3. We now have the interim report concerning China's implementation efforts. Although China is disappointed in the Panel's findings, China nevertheless appreciates the role of WTO dispute settlement – and the efforts by Panels – in providing an orderly way to address and resolve disputes between Members. We have made some specific comments on precise aspects of the interim report that we hope the Panel will consider.

4. Beyond these specific comments, however, there is a separate issue concerning the Panel's recommendation in its interim report. We believe important events have occurred and require the Panel to reconsider of this issue. In the last paragraph of the interim report, paragraph 8.6, the Panel recommends that China "bring its measures into conformity with its obligations under the Anti-Dumping and SCM Agreements." China suggests that this paragraph be struck from the report, a change that is necessary in light of recent events and consistent with past practice.

5. As noted, the anti-dumping and anti-subsidy measures at issue are now more than five-years old. Consistent with the obligations under Article 11.3 of the Anti-Dumping Agreement and Article 21.3 of the SCM Agreement, China terminates anti-dumping and anti-subsidy measures after five years unless it is demonstrated that they remain necessary to address dumping, subsidization, and injury. China takes these obligations seriously and has implemented them into its national law as Article 48 of its AD Regulation and Article 47 of its CVD Regulation.

6. The process for determining whether an expiry review was necessary to consider the matter was initiated on 10 October 2014, as announced in Public Notice No. 67 issued by MOFCOM. Under that process, parties had 60 days prior to the five-year expiration date of the measures at issue to file a written application for an expiry review to MOFCOM. No such application was submitted by any party. As a consequence, on 10 April 2015, MOFCOM issued Public Notice No. 11 of 2015 informing the public that no application had been filed for expiry review by the domestic industry or by any natural person, legal person or organization on behalf of the domestic industry within the time limit as specified. Under these circumstances, MOFCOM decided not to launch an expiry review, but instead terminated the measures at issue effective as of 11 April 2015. China submitted this termination notice and an English translation to the Panel and the United States on 21 April 2015.

7. There are several reasons for the Panel to consider this important piece of evidence. First, the evidence simply did not exist until several days ago, and could not have been submitted, but is nevertheless highly relevant. Second, this evidence goes to the essence of this Article 21.5 proceeding – the ongoing imposition of the challenged anti-dumping and anti-subsidy measures. Those measures are no longer being imposed. Third, this Article 21.5 proceeding is still ongoing and therefore all parties have a chance to be heard and there is no unfairness to anyone.

8. The specific measures that led to this dispute have thus been terminated. Such measures once terminated cannot simply be revived. Rather new anti-dumping and anti-subsidy measures can only be imposed upon completion of a new investigation, and new affirmative findings of dumping/subsidy, injury, and causality are made. MOFCOM has never imposed anti-dumping and anti-subsidy measures absent such complete procedures.

9. Given the termination of the measures, China therefore requests that the Panel take steps to modify its interim report to reflect this reality, and that the Panel remove any recommendation that China bring its measures into conformity. China has already done so. There are no longer any "measures" in effect to which such a recommendation would apply.

10. Such action would be consistent with the limits of the Panel's mandate and past practice. China notes that panels have repeatedly found it appropriate to abstain from issuing any recommendations regarding terminated measures. And the Appellate Body has in fact distinguished the question of whether a panel can make a finding concerning an expired measure from the question of whether a panel can make a recommendation relating to an expired measure. For example, in *US - Certain EC Products*, the Appellate Body reversed the panel's decision to make a recommendation pursuant to Article 19.1 of the DSU on the grounds that the panel had already found that the measure at issue in that dispute had expired. The same principle has extended to Article 21.5 proceedings under the Dispute Settlement Understanding.

11. China believes the same facts exist here, and that the Panel should revise the interim report to reflect the recent developments. In China's view, the final report should reflect the current reality. First, the specific measures the United States challenged have been terminated. Second, given the termination of the measures, the Panel has no need to make any recommendations regarding China bringing its measures into compliance with its obligations under the WTO agreements. Third, given the termination of the measures. China in fact is now already in compliance with its obligations. Any prior recommendations relate to measures that no longer exist and therefore cease to be operative.

12. China would also like to respond to some of the U.S. comments on the interim report concerning recommendations. At paragraphs 8-12 of its comments, the United States agrees with China that there is no need for this Panel to make any recommendation and that paragraph 8.6 of the interim report should be deleted. These comments by the United States, however, imply that the original recommendations should remain operative. That is not correct.

13. China would like to make clear there is no longer any disputed measure in effect to which the original recommendations could still apply. In accordance with the normal operation of Chinese law, these measures were in effect for the five years permitted by Chinese law. No party submitted an application to renew these measures and so they have been terminated.

14. Given these facts, the measures that were the subject of this proceeding no longer exist, and will not exist upon release of the Panel's final report. That is why China requests that the Panel take steps to modify its interim report to reflect this reality, and namely that it remove any recommendation that China bring its measures into conformity. There are no longer any "measures" in effect to which such a recommendation would apply. The United States argues in paragraph 12 of its comments that the original recommendations remain in effect, but acknowledges that is true only until "a Member has brought its measures found to be inconsistent by the DSB into full compliance with its WTO obligations." Termination of the measures at issue in this dispute brings China into full compliance.

15. For the same reasons, there is no need for the new language that the United States has suggested. In paragraph 10 of its comments the United States has proposed new language that is not appropriate. Given that the measures no longer exist, there is no factual or legal basis for a statement that "China has failed to bring its measure" into compliance, as the United States has suggested.

16. We appreciate the Panel's time in considering these new facts and in reconsidering the language currently found in paragraph 8.6 of the Panel's interim report.

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**ANNEX D**

ARGUMENTS OF THE THIRD PARTIES

<b>Contents</b>		<b>Page</b>
Annex D-1	Integrated executive summary of the arguments of the European Union	D-2
Annex D-2	Integrated executive summary of the arguments of Japan	D-6

**ANNEX D-1****INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE EUROPEAN UNION****1. AN INVESTIGATING AUTHORITY'S PRICE EFFECTS ANALYSIS MUST MEET SUBSTANTIVE AND PROCEDURAL REQUIREMENTS LAID DOWN IN THE ADA AND SCM AGREEMENTS**

1. Articles 3.2 ADA and 15.2 SCM require the investigating authority to undertake a price effects analysis as part of an injury determination. A price effects analysis under Article 3.2 ADA and Article 15.2 SCM must meet several substantive and procedural requirements: (i) the investigating authority must assess whether domestic prices are depressed or suppressed by subject imports; (ii) this assessment must be "rigorous" and entail an objective examination based on positive evidence; and (iii) the investigating authority's consideration must be disclosed to the parties so that they can know whether the authority has met these substantive, procedural and evidentiary requirements.

2. The Appellate Body explained in *China – GOES* that the analytical and evidentiary obligations under the ADA and SCM Agreements discipline an investigating authority's requirement to "consider" (i.e. to "*take something into account* in reaching its decision")<sup>1</sup> price effects under Articles 3.2 and 15.2. Articles 3.1 and 15.1 ensure that, although investigating authorities need not make a definitive determination in respect of price effects, this "does not diminish the rigour that is required of the inquiry under Articles 3.2 and 15.2",<sup>2</sup> and it "does not diminish the scope of *what* the investigating authority is required to consider".<sup>3</sup>

3. The text and context of Article 3.2 and Article 15.2, as clarified through jurisprudence, require an authority to examine whether any observed price depression or price suppression is attributable to subject imports. In *China – GOES*, the Appellate Body explained that "consideration of significant price depression or suppression under Articles 3.2 and 15.2 encompasses by definition an analysis of whether the domestic prices are depressed or suppressed by subject imports".<sup>4</sup> The Appellate Body clarified that "it is *not* sufficient for an investigating authority to confine its consideration to what is happening to domestic prices for purposes of considering significant price depression or suppression".<sup>5</sup>

**2. IS THE INVESTIGATING AUTHORITY REQUIRED TO CONDUCT A PRICE COMPARISON IN ORDER TO DETERMINE WHETHER PRICE DEPRESSION OR PRICE SUPPRESSION IS THE EFFECT OF THE SUBJECT IMPORTS?**

4. In the view of the European Union, an objective authority cannot conclude that price suppression or price depression is "the effect" of the subject imports without making a proper comparison of the prices of subject imports with the prices of the domestic like product.

5. In the original dispute the Appellate Body noted that panels must allow for the possibility that either the price or the volume of subject imports is sufficient by itself to sustain a finding that price suppression or depression is "the effect" of subject imports.<sup>6</sup> The Appellate Body also clarified that a finding that price suppression or price depression is the effect of the subject imports does not require a finding of actual price undercutting.<sup>7</sup> In the EU's view, however, neither of these findings has the implication that an objective investigating authority can dispense with comparing the prices of the subject imports and the domestic like products.

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<sup>1</sup> Appellate Body Report, *China – GOES*, para. 130 (emphasis original).

<sup>2</sup> *Ibid.* para. 130.

<sup>3</sup> *Ibid.* paras 131-132 (emphasis original).

<sup>4</sup> *Ibid.* para. 142.

<sup>5</sup> *Ibid.* para. 138 (emphasis original).

<sup>6</sup> *Ibid.* para. 216.

<sup>7</sup> *Ibid.* para. 206.

6. While the Appellate Body referred to the possibility that a finding that price depression or price suppression was the effect of subject imports could be sustained by evidence relating to the volume of those imports, it recognised that

[...] Given the inter-relationship of product volumes and prices, it is not clear that an investigating authority may in practice easily separate and assess the relative contribution of the volumes versus the prices of subject imports on domestic practices.<sup>8</sup>

7. Because of the inter-relationship of product volumes and prices observed by the Appellate Body, the effects of the volume of subject imports cannot be properly assessed without talking into account also the effects of the prices of such imports. In turn, the effects of the subject imports' prices on the prices of the domestic like product cannot be properly assessed in the absence of any price comparison.

8. In particular, subject imports cannot have the effect of suppressing or depressing the prices of the domestic like products unless they compete on price with them. Yet, unless the investigating authority has conducted a proper price comparison, it will not be possible to ascertain the nature and the extent of competition between subject imports and the domestic like products. The original dispute illustrates this. The Appellate Body observed that:

[...] The fact that there was a substantial divergence in pricing levels over the period could suggest that the two products were not in competition with each other, or that there were other factors work. [...] <sup>9</sup>

9. The Appellate Body went on to quote with approval the observation made by Japan to the effect that:

[...] the fact that the price of subject imports was higher than the price of domestic like products in the first quarter of 2009 "may rather indicate that both products are not in competition with each other, and therefore, price depression or price suppression of the domestic products could not be the effect of the imports."<sup>10</sup>

10. MOFCOM's Re-determination does not appear to address the issues that were raised by the Appellate Body in view of the substantial price differentials shown by the evidence relied upon by MOFCOM in its original determination. Instead, MOFCOM appears to have disregarded such evidence in its Re-determination.

11. While the European Union does not put into question that an investigating authority has a certain margin of discretion in choosing a methodology for analysing the effects of subject imports on domestic industry prices;<sup>11</sup> the ADA and SCM do not prescribe any precise methodology for establishing the existence of price depression and suppression. This does not mean, contrary to what appears to be China's position, that a comparison of the prices of domestic and imported products is **never required**, so that the investigative authorities enjoy complete discretion to decide whether or not to make such a comparison.

12. Second, contrary to China's position in this case, the European Union does not understand the Appellate Body in *China – GOES*, to have stated or even implied that an investigating authority has in all cases a full discretion under Article 3.2 ADA and 15.2 SCM to dispense with comparing the prices of the subject imports and the domestic like products. In the view of the European Union, rather the contrary would be true in most cases, based on the guidance provided by the Appellate Body.

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<sup>8</sup> Appellate Body Report, *China – GOES*, footnote 346.

<sup>9</sup> Ibid. para. 226.

<sup>10</sup> Ibid. footnote 375.

<sup>11</sup> Panel report, *China – Autos (US)*, para. 7.255.

13. The Appellate Body noted that it "[could] conceive of ways in which an observation of parallel price trends might support a price depression or price suppression analysis"<sup>12</sup>, despite the absence of price undercutting. For example, according to the Appellate Body,

The fact that prices of subject imports and domestic products move in tandem might indicate the nature of competition between the products, and may explain the extent to which factors relating to the pricing behaviour of importers have an effect on domestic prices.<sup>13</sup>

14. MOFCOM's redetermination purports to rely in part on a finding of parallel pricing. A proper finding of parallel pricing, however, would have to be based on a price comparison at different time points during the investigation period. Yet MOFCOM did not conduct any such comparison. Merely comparing the increase or decrease rates expressed in percentage terms, without disclosing the initial price levels to which those rates refer, which is what MOFCOM appears to have done in this case, is of limited value in order to assess the nature and the extent of competition between the subject imports and the domestic like products. Where, as it appears to be the case in this dispute, there is a substantial price differential between subject imports and the domestic like product, the mere fact that prices move in the same direction at similar rates could be due to other factors and does not provide conclusive evidence of price competition. In other words, it does not have, of itself, sufficient "explanatory force".

15. Similarly, the relevance of anecdotal evidence on a supposed policy of price undercutting, such as that relied upon by MOFCOM in this case, cannot be properly assessed without taking into account also the actual differences in prices between the subject imports and the domestic like products. Again, this is confirmed by the findings of the Appellate Body in the original dispute, where the Appellate Body noted that:

[...] Even though we consider that a policy of price undercutting can explain depressive or suppressive effects on domestic prices even in the absence of actual price undercutting, we do not see that, in the light of the price dynamic in the first quarter of 2009, there was a basis to conclude so in this case [...]<sup>14</sup>.

16. The analysis of the "price dynamic" mentioned by the Appellate Body involves a price comparison, which MOFCOM, however, refused to do in its Re-determination.

17. In *U.S. – GOES* the Appellate Body noted that, for the purpose of Articles 3.2 of the AD Agreement and 15.2 of the SCM Agreement, "the investigating authority is not required to conduct a fully fledged and exhaustive analysis of all known factors that may cause injury to the domestic industry"<sup>15</sup>. Nonetheless, the Appellate Body went on to stress that the Appellate Body "may not disregard evidence that calls into question the explanatory force of subject imports for significant depression or suppression of domestic prices".<sup>16</sup>

18. *A fortiori* the investigating authority should not be allowed to disregard evidence relating to the prices of subject imports that may call into question the "explanatory force" of the volume of subject imports. For the reasons explained above, a comparison of the prices of subject imports with the prices of the domestic like product is manifestly relevant, and indeed indispensable, in order to assess the effects of subject imports on the prices of domestic like products. Where an investigating authority deliberately omits to include in its determination any such price comparison, despite the fact that the necessary evidence is, or should have been, available in the record, it can be surmised that such price comparison would have called into question the authority's findings based on the volume of subject imports.

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<sup>12</sup> Appellate Body Report, *China – GOES*, para. 210.

<sup>13</sup> Ibid. para. 210.

<sup>14</sup> Appellate Body Report, *China – GOES*, para. 226.

<sup>15</sup> Ibid. para. 151.

<sup>16</sup> Ibid. para. 152.

19. Selective use of data raises questions of bias and accuracy, and thus inconsistency with the requirement to conduct an "objective examination" based on "positive evidence".<sup>17</sup> As such, an investigating authority is obliged to consider arguments made by interested parties regarding the accuracy and relevancy of data, and the determination "must be based on an examination of *all* relevant evidence before the investigating authority".<sup>18</sup> An investigating authority must also adequately explain its conclusions on the issues raised.<sup>19</sup> A panel is therefore tasked with "examin[ing] whether the investigating authority's reasoning takes sufficient account of conflicting evidence and responds to competing plausible explanations of that evidence".<sup>20</sup>

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<sup>17</sup> Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 183.

<sup>18</sup> Panel Report, *EC – Countervailing Measures on DRAM Chips*, para. 7.397. (emphasis added) See also Appellate Body Report, *Thailand – H-Beams*, para. 107.

<sup>19</sup> Panel Report, *EC – Salmon (Norway)*, paras 7.644-7.645.

<sup>20</sup> Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 97.

**ANNEX D-2****INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF JAPAN****I. INTRODUCTION**

1. Due to its systemic interest, as well as its direct interest stemming from the DS454 dispute, Japan addresses the proper legal interpretation of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("Anti-Dumping Agreement"),<sup>1</sup> and respectfully requests that the Panel take Japan's views into consideration.

**II. ARGUMENTS****A. The Consistency of MOFCOM's Price Effects Analysis with Articles 3.1 and 3.2 of the Anti-Dumping Agreement**

2. On the topic of the price effects analysis conducted by the Ministry of Commerce of the People's Republic of China ("MOFCOM"), the requirement under Article 3.1 of the Anti-Dumping Agreement is for an investigating authority to determine "the effect of the dumped imports on prices in the domestic market for like products", and do so "based on positive evidence and ... an objective examination". Article 3.1 serves as "an overarching provision that sets forth a Member's fundamental, substantive obligation" with respect to the injury determination, and "informs the more detailed obligations in succeeding paragraphs".<sup>2</sup>

3. As an initial matter, "positive evidence" must be both pertinent and of reliable quality;<sup>3</sup> and an "objective examination" requires that an investigating authority's analysis "conform to the dictates of the basic principles of good faith and fundamental fairness", and be conducted "in an unbiased manner, without favouring the interests of any interested party, or group of interested parties, in the investigation".<sup>4</sup> MOFCOM's apparent lack of evidence and disregard for contrary evidence in its price suppression and price depression determinations appear to violate the "overarching" and "fundamental" principles of Article 3.1 to base determinations on "positive evidence" and an "objective examination".

4. Turning to the substantive inquiry regarding "the effect of the dumped imports on prices in the domestic market for like products", Article 3.2 sets forth three price effect factors that the investigating authority must consider to determine whether such an "effect" exists: price undercutting, price depression, and price suppression. Article 3.2 also makes clear that "[n]o one or several of these factors can necessarily give decisive guidance". In the current case, MOFCOM claims to have reached its price effects determination on the basis of finding price suppression and price depression, so Japan focuses on those two factors.

5. The Appellate Body has made clear that, in order to find price suppression or price depression, "an investigating authority *is required to examine domestic prices in conjunction with subject imports in order to understand whether subject imports have explanatory force for the occurrence of significant depression or suppression of domestic prices*",<sup>5</sup> and "is required to consider the relationship between subject imports and prices of like domestic products, so as to

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<sup>1</sup> Japan notes that while it presents its arguments in terms of the applicable provisions of the Anti-Dumping Agreement, the same arguments should apply to the corresponding provisions of the Agreement on Subsidies and Countervailing Measures ("SCM Agreement").

<sup>2</sup> Appellate Body Report, *China – GOES*, para. 126 (quoting Appellate Body Report, *Thailand – H-Beams*, para. 106).

<sup>3</sup> See Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 165; Panel Report, *China – X-Ray Equipment*, para. 7.32; Panel Report, *Mexico – Steel Pipes and Tubes*, para. 7.213; Panel Report, *Mexico – Anti-Dumping Measures on Rice*, para. 7.55.

<sup>4</sup> Appellate Body Report, *China – GOES*, para. 126 (quoting Appellate Body Report, *US – Hot-Rolled Steel*, para. 193). See also Appellate Body Report, *EC – Fasteners (China)*, para. 414.

<sup>5</sup> Appellate Body Report, *China – GOES*, para. 138 (emphasis added).

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*understand whether subject imports provide explanatory force for the occurrence of significant depression or suppression of domestic prices".*<sup>6</sup>

6. Further, Japan submits that under Article 3.2, an investigating authority must find the *actual* depression or suppression of domestic prices by dumped imports, as opposed to merely the *potential* for such depression or suppression. In this regard, the text of Article 3.2 reads: "... the investigating authorities shall consider ... whether the effect of such imports *is ... to depress* prices to a significant degree or *prevent* price increases, which *otherwise would have occurred*, to a significant degree".<sup>7</sup> Use of the present tense phrases "is ... to depress" and "is ... to ... prevent" indicates that price depression and suppression must be *actually* occurring. Moreover, the phrase "which otherwise would have occurred" relating to price suppression makes it clear that the prices of domestic like products must *actually* be lower than the prices that would have existed had there been no imports at dumped prices.

7. The Appellate Body has also explained that "an 'effect' is 'a result' of something else",<sup>8</sup> and that the provisions of Article 3 of the Anti-Dumping Agreement "contemplate a logical progression of inquiry leading to an investigating authority's ultimate injury and causation determination".<sup>9</sup> In the context of Article 3, Japan emphasizes that the actual depression or suppression of domestic prices found to exist by an investigating authority must be attributable to *dumping*. Article 3.2 provides that "[w]ith regard to the effect of the *dumped imports* on prices, the investigating authorities shall consider ... whether the effect of *such imports* is otherwise to" depress or suppress domestic prices.<sup>10</sup> The reference to "such imports" is plainly a reference to "dumped imports". Article 3.1 also provides that the overall inquiry is with respect to "the effect of the *dumped imports* on prices in the domestic market for like products".<sup>11</sup> Thus, the required effects on domestic prices must be attributed to *dumping*; otherwise, a large volume of imports at *non-dumped* prices could justify the imposition of anti-dumping measures. As such, it should be evident that investigating authorities must consider the degree of dumping, and accordingly the prices of dumped imports, in order to conclude that dumped imports have "explanatory force" for the suppression or depression of domestic prices.

8. Japan is also of the view that, to properly find price suppression or depression by subject imports, an investigating authority must examine the *competitive relationship between the subject imports and the domestic like products*. It must find that subject imports actually compete with the domestic like products, and have evidence that subject imports actually substitute for the domestic like products. In this regard, an investigating authority must consider the degree and nature of competition along with the price differential between the subject imports and the domestic like products. It must also assess evidence that is indicative of a lack of competition, such as opposing price trends or parallel price trends of vastly different magnitudes between subject imports and domestic like products.

9. As is evident from the above explanation, to establish the required competitive relationship and price suppression or depression, an investigating authority cannot just rely on facts such as an increase in subject import volume, parallel pricing between subject imports and domestic like products, consumer overlap, or domestic pricing policies that take into account import prices.

10. To begin, with regard to China's assertion that a consideration of import volume alone may be a sufficient basis for finding price suppression or depression, China erroneously conflates the volume and price effects inquiries under Articles 3.1 and 3.2. If the volume of subject imports were a sufficient basis to find price effects, the price effects inquiry would become redundant and the second sentence of Article 3.2 would be rendered inutile. This is clearly an untenable result. Also, logically, an increase in volume or market share of subject imports does not necessarily suggest that there is price suppression or depression, because the volume and market share of subject imports may increase where the domestic industry *fails* to lower prices or restrain price increases in response to imports.

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<sup>6</sup> Appellate Body Report, *China – GOES*, para. 154 (emphasis added).

<sup>7</sup> Emphases added.

<sup>8</sup> Appellate Body Report, *China – GOES*, para. 135. See also *The Oxford English Dictionary*, OED Online, Oxford University Press, accessed 18 June 2014, <http://www.oed.com/view/Entry/59664> (defining "effect" as "[t]hat which results from the action or properties of something or someone").

<sup>9</sup> Appellate Body Report, *China – GOES*, para. 128.

<sup>10</sup> Emphases added.

<sup>11</sup> Emphasis added.

11. Next, on parallel pricing, prices moving in a "parallel" manner are merely evidence of a correlation between the prices of subject imports and the domestic like product, not that prices of the former are having effects on prices of the latter. The panel in *China – Autos (US)* concurred.<sup>12</sup> Similarly, as the same consumer may purchase different kinds of "like" products, consumer overlap does not mean that price competition exists. Nor are pricing policies alone a sufficient basis for finding price competition, because a domestic industry may naturally consider a variety of other prices – including import prices, prices of related but non-like products, and the overall price index in general – in setting its own prices.

12. Japan also disagrees with China's contention that the competitive relationship required for ascertaining price effects under Article 3.2 can simply be presumed from like product or cumulation findings. As several panels have agreed, a like product finding does not mean that the prices of subject imports and domestic like products may be appropriately compared for ascertaining price effects.<sup>13</sup> For example, in *China – X-Ray Equipment*, the panel explained that x-ray equipment used for scanning hand baggage at airports may be "like" x-ray equipment used for scanning rail carriages, trucks, or marine cargo containers, but the former is not in competition with or substitutable for the latter, such that prices of the latter may be considered to have effects on prices of the former. As such, a "likeness" finding or an investigating authority's consideration of competition and/or substitutability for purposes of a "likeness" finding does not automatically ensure that price competition exists.

13. In sum, only upon conducting a complete examination as outlined above can an investigating authority properly determine whether price suppression or price depression, and consequently price effects, by subject imports exists within the meaning of Articles 3.1 and 3.2 of the Anti-Dumping Agreement. Here, Japan agrees with the United States that MOFCOM appears to have failed to satisfy its obligations in this regard.

## **B. The Consistency of MOFCOM's Impact Analysis with Articles 3.1 and 3.4 of the Anti-Dumping Agreement**

### **1. Whether the United States' Claim Is Properly Before the Panel**

14. With regard to China's argument that this Panel may not consider the United States' Articles 3.1 and 3.4 claims concerning MOFCOM's impact analysis, Japan disagrees because MOFCOM's redetermination is a "new and different"<sup>14</sup> measure, as it was issued in response to the recommendations by the dispute settlement body ("DSB") and plainly separate from MOFCOM's original determination. Moreover, MOFCOM made several changes to the impact analysis in its redetermination, including elimination of references to the "low price" of subject imports. Further, MOFCOM's impact analysis in its redetermination may also be considered "new and different" in the sense that it is affected by MOFCOM's revised dumping margins<sup>15</sup> and MOFCOM's revised price effects analysis.

### **2. The Merits of the United States' Claim**

15. Turning to the merits of the United States' claim, an objective examination of impact must "include[] and weigh[] each of the 16 injury indicia [listed in Article 3.4]",<sup>16</sup> and where there are "positive movements in a number of factors", the investigating authority must provide "a *compelling explanation* of why and how, in light of such apparent positive trends, the domestic industry [is], or remain[s], injured".<sup>17</sup> Thus, here, the Panel should examine whether MOFCOM adequately considered and weighed each of the 16 injury indicia, including the positive trends

<sup>12</sup> See Panel Report, *China – Autos (US)*, para. 7.265.

<sup>13</sup> See Panel Report, *China – X-Ray Equipment*, paras. 7.51, 7.65-7.67; Panel Report, *China – Autos (US)*, para. 7.278 and note 441.

<sup>14</sup> Appellate Body Report, *Canada – Aircraft (Article 21.5 – Brazil)*, paras. 41-42.

<sup>15</sup> See the first sentence of Article 3.4 of the Anti-Dumping Agreement.

<sup>16</sup> Panel Report, *China – X-Ray Equipment*, para. 7.216 (emphasis added). See also Appellate Body Report, *US – Hot-Rolled Steel*, para. 197.

<sup>17</sup> Panel Report, *China – X-Ray Equipment*, para. 7.195 (quoting Panel Report, *Thailand – H-Beams*, para. 7.249) (emphasis added). See also *id.*, para. 7.180; Panel Report, *EC – Bed Linen (Article 21.5 – India)*, para. 6.162; Panel Report, *EC – Tube or Pipe Fittings*, para. 7.314.

alleged by the United States,<sup>18</sup> and whether MOFCOM provided the required "*compelling explanation*".

### **C. The Consistency of MOFCOM's Causation Analysis with Articles 3.1 and 3.5 of the Anti-Dumping Agreement**

#### **1. Causal Link**

16. With respect to the causal link between subject imports and material injury suffered by the domestic industry, first, Japan concurs with the United States that a price effects determination inconsistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement necessarily results in a causation determination inconsistent with Articles 3.1 and 3.5.<sup>19</sup>

17. Second, with respect to the United States' argument that MOFCOM improperly relied on a conclusory assertion that subject imports prevented the domestic industry from realizing the benefits of economies of scale, even if this finding had evidentiary support, it is not sufficient to establish a causal link under Articles 3.1 and 3.5 because Article 3.5 requires an investigating authority to demonstrate that "*the dumped imports are, through the effects of dumping, as set forth in paragraphs 2 and 4, causing injury*"<sup>20</sup> to the domestic industry. That is, an investigating authority must base its causation determination on its examination of the volume of dumped imports and their price effects, including their dumping margins. Otherwise, even a large volume of imports at non-dumped prices could justify the imposition of anti-dumping duties, which is clearly an untenable result.

18. Also, China's view that "whenever subject imports gain market share, the domestic industry necessarily suffers from ... economies of scale effects" due to the "inherent" effect of the domestic industry's "total fixed costs of production ... being allocated over smaller output"<sup>21</sup> conflates the volume analysis with the causation analysis. Under China's view, an increase in market share by subject imports would always result in lack of economies of scale for the domestic industry, and consequently always result in an affirmative causation finding, making the causation inquiry redundant. Moreover, under China's theory, an investigating authority could affirmatively find causation and impose anti-dumping duties any time import volumes increased because of the "inherent" economies of scale effects, even if such imports took place at non-dumped prices. Again, these are not tenable results.

19. Here, the Panel must consider whether MOFCOM properly found that *dumped imports*, by virtue of their volume or price effects, caused material injury to the domestic industry. MOFCOM seems to have failed to do so.

#### **2. Non-Attribution**

20. On non-attribution, an investigating authority must "separate and distinguish" the injurious effects of subject imports from those of other known factors. This entails identifying the "nature and extent" of the injurious effects of the non-attribution factor at issue and the "nature and extent" of the injurious effects of the subject imports, and distinguishing the two.<sup>22</sup> Accordingly, the Panel here should carefully examine whether MOFCOM assessed the precise degree of the injurious effects that may have been caused by the domestic industry's overexpansion/overproduction and non-subject imports, and separated and distinguished those injurious effects from the injurious effects of the subject imports. MOFCOM appears not to have done so.

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<sup>18</sup> See United States' first written submission, paras. 91-105.

<sup>19</sup> See Panel Report, *China – GOES*, para. 7.620; Panel Report, *China – X-Ray Equipment*, paras. 7.239-7.240; Panel Report, *China – Autos (US)*, paras. 7.327-7.328.

<sup>20</sup> Emphasis added.

<sup>21</sup> China's first written submission, para. 101.

<sup>22</sup> See Appellate Body Report, *US – Hot-Rolled Steel*, paras. 226, 228. See also Panel Report, *China – Autos (US)*, para. 7.323 (citing Appellate Body Report, *US – Hot-Rolled Steel*, paras. 233-236).

**D. The Consistency of MOFCOM's Disclosure of Essential Facts and Notice of Final Determination with Articles 6.9, 12.2, and 12.2.2 of the Anti-Dumping Agreement**

21. With respect to the United States' argument that MOFCOM violated Article 6.9 of the Anti-Dumping Agreement by failing to disclose a number of essential facts under consideration that formed the basis for its redetermination, what is required under Article 6.9 is the disclosure of "essential facts", meaning "those *facts on the record that may be taken into account* by an authority in reaching a decision as to whether or not to apply definitive ... duties", or "those *facts that are significant in the process of reaching a decision* as to whether or not to apply definitive measures".<sup>23</sup> Moreover, "[a]n authority must disclose such facts, in a coherent way, so as to permit an interested party to understand the basis for the decision whether or not to apply definitive measures", and "disclosing the essential facts under consideration pursuant to Article[] 6.9 ... is paramount for ensuring the ability of the parties concerned to defend their interests".<sup>24</sup> Further, "[w]hat constitutes an 'essential fact' must ... be understood in the light of the content of the findings needed to satisfy the substantive obligations with respect to the application of definitive measures ..., as well as the factual circumstances of each case".<sup>25</sup>

22. As for the United States' argument that MOFCOM violated Articles 12.2 and 12.2.2 by failing to explain the matters of fact and law and reasons that led to the imposition of duties in several respects, with respect to a final determination, Article 12.2 states that an investigating authority must provide a notice or separate report setting out "in sufficient detail the findings and conclusions reached on *all issues of fact and law considered material* by the investigating authorities",<sup>26</sup> and Article 12.2.2 further specifies that the authority's final report must detail "*all relevant information on the matters of fact and law and reasons* which have led to the imposition of final measures".<sup>27</sup> With regard to "matters of fact", Article 12.2.2 requires disclosure of "those facts that allow an understanding of the factual basis that led to the imposition of final measures",<sup>28</sup> and "[w]hat constitutes 'relevant information on the matters of fact' is ... to be understood in the light of the content of the findings needed to satisfy the substantive requirements with respect to the imposition of final measures ..., as well as the factual circumstances of each case".<sup>29</sup> Moreover, with regard to the obligation to disclose reasoning in Article 12.2.2, "it is particularly important that the 'reasons' for rejecting or accepting ... arguments should be set forth in sufficient detail to allow ... exporters and importers to understand why their arguments or claims were treated as they were, and to assess whether or not the investigating authority's treatment of the relevant issue was consistent with domestic law and/or the WTO Agreement".<sup>30</sup>

23. In Japan's view, the facts identified by the United States were facts taken into consideration by MOFCOM in its injury and causation determination and therefore should have been disclosed, and the reasoning behind the assertions and findings identified by the United States should have been explained in sufficient detail.<sup>31</sup> The Panel should carefully examine whether MOFCOM satisfied its obligations in this regard.

**III. CONCLUSION**

24. Japan appreciates the Panel's consideration of Japan's views with regard to the interpretation of the provisions of the Anti-Dumping Agreement addressed above.

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<sup>23</sup> Appellate Body Report, *China – GOES*, para. 240 (emphases added).

<sup>24</sup> Appellate Body Report, *China – GOES*, para. 240.

<sup>25</sup> Appellate Body Report, *China – GOES*, para. 241.

<sup>26</sup> Emphasis added.

<sup>27</sup> Emphasis added.

<sup>28</sup> Appellate Body Report, *China – GOES*, para. 256.

<sup>29</sup> Appellate Body Report, *China – GOES*, para. 257.

<sup>30</sup> Panel Report, *China – X-Ray Equipment*, para. 7.472. See also Panel Report, *China – Broiler Products*, para. 7.528.

<sup>31</sup> See United States' first written submission, paras. 146 and 153.