



WORLD TRADE  
ORGANIZATION

WT/DS440/R

23 May 2014

(14-3073)

Page: 1/104

Original: English

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

REPORT OF THE PANEL

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**TABLE OF CONTENTS**

<b>1 INTRODUCTION .....</b>	<b>10</b>
1.1 Complaint by the United States .....	10
1.2 Panel establishment and composition .....	10
1.3 Panel proceedings.....	10
1.3.1 General .....	10
1.3.2 Working procedures concerning Business Confidential Information ("BCI") .....	11
1.3.3 Additional comments of the United States following the second Panel meeting .....	11
<b>2 FACTUAL ASPECTS.....</b>	<b>11</b>
<b>3 PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS .....</b>	<b>13</b>
3.1 United States.....	13
3.2 China.....	15
<b>4 ARGUMENTS OF THE PARTIES .....</b>	<b>15</b>
<b>5 ARGUMENTS OF THE THIRD PARTIES .....</b>	<b>15</b>
<b>6 INTERIM REVIEW.....</b>	<b>15</b>
6.1 Introduction.....	15
6.2 Parties' requests for changes to the interim report.....	16
<b>7 FINDINGS .....</b>	<b>20</b>
7.1 General principles regarding treaty interpretation, the applicable standard of review, and the burden of proof .....	20
7.1.1 Treaty interpretation .....	20
7.1.2 Standard of review.....	20
7.1.3 Burden of proof .....	21
7.2 Whether the non-confidential summary of the petition was consistent with Article 6.5.1 of the Anti-Dumping Agreement and Article 12.4.1 of the SCM Agreement .....	21
7.2.1 Provisions at issue .....	21
7.2.2 Factual background.....	21
7.2.3 Arguments of the parties .....	22
7.2.3.1 United States .....	22
7.2.3.2 China .....	23
7.2.4 Arguments of the third parties .....	25
7.2.5 Evaluation by the Panel .....	25
7.2.5.1 Horizontal assessment .....	26
7.2.5.2 Confidential information in respect of which data in tables is redacted, but percentage changes are provided .....	28
7.2.5.3 Confidential information in respect of which data in tables is wholly redacted, and no percentage changes are provided.....	30
7.2.6 Conclusion.....	31
7.3 Whether MOFCOM disclosed the "essential facts" as required by Article 6.9 of the Anti-Dumping Agreement.....	32
7.3.1 Provision at issue.....	32

7.3.2	Factual background .....	32
7.3.3	Arguments of the parties .....	32
7.3.3.1	United States .....	32
7.3.3.2	China .....	33
7.3.4	Arguments of the third parties .....	34
7.3.5	Evaluation by the Panel .....	34
7.3.6	Conclusion .....	39
7.4	Determination of "residual" AD and CVD rates .....	39
7.4.1	Factual background .....	39
7.4.2	Introduction .....	41
7.4.3	Determination of the residual AD duty rate: Alleged violations of Articles 6.8, 6.9, 12.2 and 12.2.2 and Paragraph 1 of Annex II of the Anti-Dumping Agreement.....	42
7.4.3.1	Provisions at issue.....	42
7.4.3.2	Arguments of the parties.....	43
7.4.3.3	Arguments of the third parties .....	46
7.4.3.4	Evaluation by the Panel.....	47
7.4.4	Determination of the residual CVD rate: Alleged violations of Articles 12.7, 12.8, 22.3, and 22.5 of the SCM Agreement .....	56
7.4.4.1	Provisions at issue.....	56
7.4.4.2	Arguments of the parties.....	57
7.4.4.3	Arguments of the third parties .....	58
7.4.4.4	Evaluation by the Panel.....	58
7.5	Whether MOFCOM properly defined the domestic industry for the purposes of its injury determination.....	60
7.5.1	Provisions at issue .....	60
7.5.2	Factual background .....	61
7.5.3	Arguments of the parties .....	62
7.5.3.1	United States .....	62
7.5.3.2	China .....	63
7.5.4	Arguments of the third parties .....	65
7.5.5	Evaluation by the Panel .....	66
7.5.5.1	Whether MOFCOM's domestic industry definition was distorted .....	67
7.5.5.2	Whether the domestic industry defined by MOFCOM included producers accounting for a major proportion of total domestic production .....	72
7.5.6	Conclusion .....	73
7.6	Whether MOFCOM's price effects analysis was consistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement and Articles 15.1 and 15.2 of the SCM Agreement.....	73
7.6.1	Provisions at issue .....	73
7.6.2	Factual background .....	74
7.6.3	Arguments of the parties .....	75
7.6.3.1	United States .....	75
7.6.3.2	China .....	76

7.6.4	Arguments of the third parties .....	78
7.6.5	Evaluation by the Panel .....	79
7.6.5.1	Whether MOFCOM's findings on parallel pricing were supported by the evidence.....	79
7.6.5.2	Whether MOFCOM's finding of price depression was warranted in light of evidence of overselling by subject imports.....	82
7.6.5.3	Whether MOFCOM's reliance on unadjusted AUVs in its price effects analysis was justified.....	83
7.6.5.4	Whether MOFCOM's findings on market share supported its finding of price depression .....	85
7.6.5.5	Whether MOFCOM's domestic industry definition resulted in a flawed price effects analysis.....	88
7.6.6	Conclusion.....	88
7.7	Whether MOFCOM's causation determination was consistent with Articles 3.1 and 3.5 of the Anti-Dumping Agreement and Articles 15.1 and 15.5 of the SCM Agreement.....	88
7.7.1	Provisions at issue .....	88
7.7.2	Factual background.....	89
7.7.3	Arguments of the parties .....	89
7.7.3.1	United States .....	89
7.7.3.2	China .....	91
7.7.4	Arguments of the third parties .....	93
7.7.5	Evaluation by the Panel .....	94
7.7.5.1	Whether MOFCOM's domestic industry definition and price effects analysis resulted in a flawed causation determination.....	95
7.7.5.2	Whether MOFCOM erred in failing to consider the market share of Chinese producers not part of the domestic industry and third country imports in its causation analysis.....	95
7.7.5.3	Whether MOFCOM erred in failing to consider industry productivity and labor costs in its causation analysis .....	96
7.7.5.4	Whether MOFCOM erred in failing to consider the alleged lack of competitive overlap between domestic and imported automobiles in its causation analysis .....	98
7.7.5.5	Whether MOFCOM erred in failing to properly examine known factors other than subject imports causing injury to the domestic industry, and failed to ensure that the injuries caused by these other factors were not attributed to subject imports .....	99
7.7.6	Conclusion.....	102
7.8	Consequential violations .....	103
7.8.1	Provisions at issue .....	103
7.8.2	Arguments of the parties .....	103
7.8.3	Evaluation by the Panel .....	103
<b>8</b>	<b>CONCLUSIONS AND RECOMMENDATION .....</b>	<b>104</b>

**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 BCI	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 opening statement of the United States at the first Panel meeting	B-9
Annex B-3	Closing statement of the United States at the first Panel meeting	B-18
Annex B-4	Executive summary of the second written submission of the United States	B-19
Annex B-5	Executive summary of the opening statement of the United States at the second Panel meeting	B-29
Annex B-6	Closing statement of the United States at the second Panel meeting	B-38

**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 opening statement of China at the first Panel meeting	C-10
Annex C-3	Closing statement of China at the first Panel meeting	C-18
Annex C-4	Executive summary of the second written submission of China	C-20
Annex C-5	Executive summary of the opening statement of China at the second Panel meeting	C-28
Annex C-6	Closing statement of China at the second Panel meeting	C-36

**ANNEX D****ARGUMENTS OF THIRD PARTIES**

<b>Contents</b>		<b>Page</b>
Annex D-1	Executive summary of the third party written submission of the European Union	D-2
Annex D-2	Executive summary of the third party written submission of Japan	D-6
Annex D-3	Executive summary of the third party oral statement of Japan	D-11
Annex D-4	Executive summary of the third party oral statement of Korea	D-13
Annex D-5	Executive summary of the third party written submission of Saudi Arabia	D-15
Annex D-6	Executive summary of the third party oral statement of Saudi Arabia	D-18
Annex D-7	Executive summary of the third party written submission of Turkey	D-21
Annex D-8	Executive summary of the third party oral statement of Turkey	D-27

### CASES CITED IN THIS REPORT

Short title	Full case title and citation
<i>Argentina – Poultry Anti-Dumping Duties</i>	Panel Report, <i>Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil</i> , WT/DS241/R, adopted 19 May 2003, DSR 2003:V, p. 1727
<i>Argentina – Textiles and Apparel</i>	Appellate Body Report, <i>Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items</i> , WT/DS56/AB/R and Corr.1, adopted 22 April 1998, DSR 1998:III, p. 1003
<i>Argentina – Textiles and Apparel</i>	Panel Report, <i>Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items</i> , WT/DS56/R, adopted 22 April 1998, as modified by Appellate Body Report WT/DS56/AB/R, DSR 1998:III, p. 1033
<i>China – Broiler Products</i>	Panel Report, <i>China – Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States</i> , WT/DS427/R and Add.1, adopted 25 September 2013
<i>China – GOES</i>	Appellate Body Report, <i>China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States</i> , WT/DS414/AB/R, adopted 16 November 2012
<i>China – GOES</i>	Panel Report, <i>China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States</i> , WT/DS414/R and Add.1, adopted 16 November 2012, upheld by Appellate Body Report WT/DS414/AB/R
<i>China – X-Ray Equipment</i>	Panel Report, <i>China – Definitive Anti-Dumping Duties on X-Ray Security Inspection Equipment from the European Union</i> , WT/DS425/R and Add.1, adopted 24 April 2013
<i>EC – Bed Linen</i>	Panel Report, <i>European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India</i> , WT/DS141/R, adopted 12 March 2001, as modified by Appellate Body Report WT/DS141/AB/R, DSR 2001:VI, p. 2077
<i>EC – Bed Linen (Article 21.5 – India)</i>	Appellate Body Report, <i>European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India</i> , WT/DS141/AB/RW, adopted 24 April 2003, DSR 2003:III, p. 965
<i>EC – Export Subsidies on Sugar</i>	Appellate Body Report, <i>European Communities – Export Subsidies on Sugar</i> , WT/DS265/AB/R, WT/DS266/AB/R, WT/DS283/AB/R, adopted 19 May 2005, DSR 2005:XIII, p. 6365
<i>EC – Fasteners (China)</i>	Appellate Body Report, <i>European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China</i> , WT/DS397/AB/R, adopted 28 July 2011, DSR 2011:VII, p. 3995
<i>EC – Fasteners (China)</i>	Panel Report, <i>European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China</i> , WT/DS397/R and Corr.1, adopted 28 July 2011, as modified by Appellate Body Report WT/DS397/AB/R, DSR 2011:VIII, p. 4289
<i>EC – Hormones</i>	Appellate Body Report, <i>EC Measures Concerning Meat and Meat Products (Hormones)</i> , WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, p. 135
<i>EC – Salmon (Norway)</i>	Panel Report, <i>European Communities – Anti-Dumping Measure on Farmed Salmon from Norway</i> , WT/DS337/R, adopted 15 January 2008, and Corr.1, DSR 2008:I, p. 3
<i>Egypt – Steel Rebar</i>	Panel Report, <i>Egypt – Definitive Anti-Dumping Measures on Steel Rebar from Turkey</i> , WT/DS211/R, adopted 1 October 2002, DSR 2002:VII, p. 2667
<i>EU – Footwear (China)</i>	Panel Report, <i>European Union – Anti-Dumping Measures on Certain Footwear from China</i> , WT/DS405/R, adopted 22 February 2012

Short title	Full case title and citation
<i>Korea – Certain Paper</i>	Panel Report, <i>Korea – Anti-Dumping Duties on Imports of Certain Paper from Indonesia</i> , WT/DS312/R, adopted 28 November 2005, DSR 2005:XXII, p. 10637
<i>Korea – Commercial Vessels</i>	Panel Report, <i>Korea – Measures Affecting Trade in Commercial Vessels</i> , WT/DS273/R, adopted 11 April 2005, DSR 2005:VII, p. 2749
<i>Mexico – Anti-Dumping Measures on Rice</i>	Appellate Body Report, <i>Mexico – Definitive Anti-Dumping Measures on Beef and Rice, Complaint with Respect to Rice</i> , WT/DS295/AB/R, adopted 20 December 2005, DSR 2005:XXII, p. 10853
<i>Mexico – Anti-Dumping Measures on Rice</i>	Panel Report, <i>Mexico – Definitive Anti-Dumping Measures on Beef and Rice, Complaint with Respect to Rice</i> , WT/DS295/R, adopted 20 December 2005, as modified by Appellate Body Report WT/DS295/AB/R, DSR 2005:XXIII, p. 11007
<i>Mexico – Olive Oil</i>	Panel Report, <i>Mexico – Definitive Countervailing Measures on Olive Oil from the European Communities</i> , WT/DS341/R, adopted 21 October 2008, DSR 2008:IX, p. 3179
<i>Mexico – Steel Pipes and Tubes</i>	Panel Report, <i>Mexico – Anti-Dumping Duties on Steel Pipes and Tubes from Guatemala</i> , WT/DS331/R, adopted 24 July 2007, DSR 2007:IV, p. 1207
<i>Thailand – Cigarettes (Philippines)</i>	Appellate Body Report, <i>Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines</i> , WT/DS371/AB/R, adopted 15 July 2011, DSR 2011:IV, p. 2203
<i>Thailand – Cigarettes (Philippines)</i>	Panel Report, <i>Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines</i> , WT/DS371/R, adopted 15 July 2011, as modified by Appellate Body Report WT/DS371/AB/R, DSR 2011:IV, p. 2299
<i>Thailand – H-Beams</i>	Panel Report, <i>Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland</i> , WT/DS122/R, adopted 5 April 2001, as modified by Appellate Body Report WT/DS122/AB/R, DSR 2001:VII, p. 2741
<i>US – Anti-Dumping and Countervailing Duties (China)</i>	Appellate Body Report, <i>United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China</i> , WT/DS379/AB/R, adopted 25 March 2011, DSR 2011:V, p. 2869
<i>US – Countervailing Duty Investigation on DRAMS</i>	Appellate Body Report, <i>United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea</i> , WT/DS296/AB/R, adopted 20 July 2005, DSR 2005:XVI, p. 8131
<i>US – Hot-Rolled Steel</i>	Appellate Body Report, <i>United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan</i> , WT/DS184/AB/R, adopted 23 August 2001, DSR 2001:X, p. 4697
<i>US – Hot-Rolled Steel</i>	Panel Report, <i>United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan</i> , WT/DS184/R, adopted 23 August 2001 modified by Appellate Body Report WT/DS184/AB/R, DSR 2001:X, p. 4769
<i>US – Lamb</i>	Appellate Body Report, <i>United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia</i> , WT/DS177/AB/R, WT/DS178/AB/R, adopted 16 May 2001, DSR 2001:IX, p. 4051
<i>US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)</i>	Panel Report, <i>United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina – Recourse to Article 21.5 of the DSU by Argentina</i> , WT/DS268/RW, adopted 11 May 2007, as modified by Appellate Body Report WT/DS268/AB/RW, DSR 2007:IX, p. 3609
<i>US – Softwood Lumber IV</i>	Appellate Body Report, <i>United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada</i> , WT/DS257/AB/R, adopted 17 February 2004, DSR 2004:II, p. 571
<i>US – Softwood Lumber VI (Article 21.5 – Canada)</i>	Appellate Body Report, <i>United States – Investigation of the International Trade Commission in Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada</i> , WT/DS277/AB/RW, adopted 9 May 2006, and Corr.1, DSR 2006:XI, p. 4865

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Short title	Full case title and citation
<i>US – Steel Plate</i>	Panel Report, <i>United States – Anti-Dumping and Countervailing Measures on Steel Plate from India</i> , WT/DS206/R and Corr.1, adopted 29 July 2002, DSR 2002:VI, p. 2073
<i>US – Wheat Gluten</i>	Appellate Body Report, <i>United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities</i> , WT/DS166/AB/R, adopted 19 January 2001, DSR 2001:II, p. 717
<i>US – Wool Shirts and Blouses</i>	Appellate Body Report, <i>United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India</i> , WT/DS33/AB/R, adopted 23 May 1997, and Corr.1, DSR 1997:I, p. 323



**ABBREVIATIONS USED IN THIS REPORT**

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

## 1 INTRODUCTION

### 1.1 Complaint by the United States

1.1. On 5 July 2012, the United States requested consultations with China pursuant to Articles 1 and 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU"), Article XXIII:1 of the General Agreement on Tariffs and Trade 1994 ("GATT 1994"), Article 30 of the Agreement on Subsidies and Countervailing Measures ("SCM Agreement") (to the extent that Article 30 incorporates Article XXIII of the GATT 1994), and Article 17.3 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("Anti-Dumping Agreement") with respect to the measures and claims set out below.<sup>1</sup>

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

### 1.2 Panel establishment and composition

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

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

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

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

Chairperson: Mr Pierre Pettigrew  
Members: Ms Andrea Marie Brown  
Ms Enie Neri De Ross<sup>5</sup>

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

### 1.3 Panel proceedings

#### 1.3.1 General

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

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

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<sup>1</sup> WT/DS440/1.

<sup>2</sup> WT/DS440/2.

<sup>3</sup> WT/DSB/M/323.

<sup>4</sup> WT/DS440/3.

<sup>5</sup> WT/DS440/3.

<sup>6</sup> See the Panel's Working Procedures in Annex A-1.

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

1.9. On 28 February 2013, the Panel adopted additional working procedures concerning BCI.<sup>7</sup>

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

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

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

## 2 FACTUAL ASPECTS

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

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

<sup>7</sup> Additional Working Procedures of the Panel Concerning Business Confidential Information, Annex A-2.

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

<sup>9</sup> Notice No. 20, Exhibit USA-01, p. 2.

<sup>10</sup> *Anti-Dumping and Anti-Subsidy Investigation Application*, 9 September 2009 ("original petition")(Exhibit USA-04).

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

USA") as known exporters of the subject product.<sup>12</sup> MOFCOM initiated AD and CVD investigations on 6 November 2009.<sup>13</sup>

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

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

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

<sup>12</sup> Original petition, Exhibit USA-04, p. 15.

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

<sup>14</sup> AD notice of initiation, Exhibit USA-06, p. 1; CVD notice of initiation, Exhibit USA-07, p. 2.

<sup>15</sup> AD notice of initiation, Exhibit USA-06, p. 2; CVD notice of initiation, Exhibit USA-07, p. 4.

<sup>16</sup> Final determination, Exhibit CHN-07, pp. 7-8, 10.

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

<sup>18</sup> Final determination, Exhibit CHN-07, pp. 18-20. See AD injury registration notice, Exhibit CHN-02 and CVD injury registration notice, Exhibit CHN-11.

<sup>19</sup> Final determination, Exhibit CHN-07, pp. 18-20.

<sup>20</sup> AD injury registration notice, Exhibit CHN-02, p. 1.

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

<sup>22</sup> Final determination, Exhibit CHN-07, p. 27.

<sup>23</sup> Final determination, Exhibit CHN-07, pp. 23-24.

<sup>24</sup> Final determination, Exhibit CHN-07, p. 48.

<sup>25</sup> Final determination, Exhibit CHN-07, p. 27.

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

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

**Table 1: Preliminary Duty Rates**

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

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

**Table 2: Final Duty Rates**

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

### 3 PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

#### 3.1 United States

3.1. The United States requests that the Panel find as follows<sup>29</sup>:

- a. With respect to the alleged procedural violations, that:
  - i. MOFCOM acted inconsistently with Article 6.5.1 of the Anti-Dumping Agreement and Article 12.4.1 of the SCM Agreement by failing to require the petitioner to provide adequate non-confidential summaries of allegedly confidential information.

<sup>27</sup> Preliminary determination, Exhibit CHN-05, p. 107.

<sup>28</sup> Final determination, Exhibit CHN-07, p. 170.

<sup>29</sup> US first written submission, paras. 2-5, 176-177. The United States dropped its consequential claim under Article VI of the GATT 1994 in its second written submission. See US second written submission, fn. 153.

- ii. MOFCOM acted inconsistently with Article 6.9 of the Anti-Dumping Agreement by failing to disclose essential facts to US respondents, particularly the data and calculations underlying their respective dumping margins.
- b. With respect to MOFCOM's reasoning and conclusions for its AD determinations, that:
- i. MOFCOM acted inconsistently with Articles 6.8, 6.9, 12.2, 12.2.2, and paragraph 1 of Annex II of the Anti-Dumping Agreement by: (i) imposing an "all others" rate based on facts available to producers that MOFCOM did not notify of the information required of them, and that did not refuse to provide necessary information or otherwise impede the dumping investigation; (ii) failing to inform the United States and other interested parties of the essential facts under consideration that formed the basis for the application of facts available or the margin calculation; and (iii) failing to disclose in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by MOFCOM, or all relevant information on matters of fact and law and reasons which led to the imposition of final measures.
- c. With respect to MOFCOM's reasoning and conclusions for its CVD determinations, that:
- i. MOFCOM acted inconsistently with Articles 12.7, 12.8, 22.3, and 22.5 of the SCM Agreement by: (i) imposing an "all others" rate based on facts available to producers that MOFCOM did not notify of the information required of them, and that did not refuse to provide necessary information or otherwise impede the CVD investigation; (ii) failing to inform the United States and other interested parties of the essential facts under consideration that formed the basis for this calculation; and (iii) failing to disclose in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by MOFCOM, or all relevant information on matters of fact and law and reasons which have led to the imposition of final measures.
- d. With respect to MOFCOM's reasoning and conclusions for its injury determinations, that:
- i. MOFCOM acted inconsistently with Articles 3.1 and 4.1 of the Anti-Dumping Agreement and Articles 15.1 and 16.1 of the SCM Agreement by defining the domestic industry to include only those firms that supported the AD and CVD investigations and by failing to ensure that the domestic industry, as MOFCOM defined it, was capable of providing ample data that would ensure an accurate injury analysis.
  - ii. MOFCOM acted inconsistently with Articles 3.1 and 3.2 of the Anti-Dumping Agreement and Articles 15.1 and 15.2 of the SCM Agreement because its price effects finding was not based on positive evidence and did not involve an objective examination, as: (i) MOFCOM's finding of parallel pricing was contradicted by record evidence and, in any event, MOFCOM failed to explain the relevance of parallel pricing; (ii) MOFCOM failed to address evidence that subject imports oversold the domestic like product during the period in which MOFCOM identified price depression; (iii) MOFCOM failed to make needed adjustments to average unit values that it used in its price effects analysis; (iv) MOFCOM failed to consider or address evidence that the market share of domestic products increased along with that of subject imports; and (v) MOFCOM's price effects analysis was compromised by its flawed domestic industry definition.
  - iii. MOFCOM acted inconsistently with Articles 3.1 and 3.5 of the Anti-Dumping Agreement and Articles 15.1 and 15.5 of the SCM Agreement because its causation analysis was neither objective nor based on positive evidence, as: (i) MOFCOM's causation analysis was premised on its flawed domestic industry definition and its flawed price effects analysis; (ii) MOFCOM failed to examine evidence indicating that subject imports took market share from non-subject imports and not from domestic like products; (iii) MOFCOM failed to examine evidence regarding the Chinese industry's sharp decline in productivity throughout the period of investigation; (iv) MOFCOM failed to examine the lack of competition between subject imports and the

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

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

- i. MOFCOM's conduct in the AD investigation violated Article 1 of the Anti-Dumping Agreement.
- ii. MOFCOM's conduct in the CVD investigation violated Article 10 of the SCM Agreement.

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

### **3.2 China**

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

## **4 ARGUMENTS OF THE PARTIES**

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

## **5 ARGUMENTS OF THE THIRD PARTIES**

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

## **6 INTERIM REVIEW**

### **6.1 Introduction**

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

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

<sup>30</sup> US first written submission, para. 178 (as modified by US second written submission, fn. 153).

<sup>31</sup> China's first written submission, para. 272.

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

## 6.2 Parties' requests for changes to the interim report

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## 7 FINDINGS

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

#### 7.1.1 Treaty interpretation

7.1. Article 3.2 of the DSU provides that the WTO dispute settlement system serves to clarify the existing provisions of the covered agreements "in accordance with customary rules of interpretation of public international law". Likewise, Article 17.6(ii) of the Anti-Dumping Agreement requires panels to interpret that Agreement's provisions in accordance with the customary rules of interpretation of public international law. It is generally accepted that the principles codified in Articles 31 and 32 of the Vienna Convention on the Law of Treaties are such customary rules.

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

#### 7.1.2 Standard of review

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

[a] panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements.

7.4. The Appellate Body has explained that where a panel is reviewing an investigating authority's ("IA"'s) determination, the "objective assessment" standard in Article 11 of the DSU requires a panel to review whether the authorities have provided a reasoned and adequate explanation as to (i) how the evidence on the record supported its factual findings; and (ii) how those factual findings support the overall determination.<sup>32</sup> Furthermore, in addition to the obligation to conduct an objective assessment under Article 11 of the DSU, in AD disputes, Article 17.6(i) of the Anti-Dumping Agreement provides that:

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

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

### 7.1.3 Burden of proof

7.6. The general principles applicable to the allocation of the burden of proof in WTO dispute settlement require that a party claiming a violation of a provision of a WTO Agreement must assert and prove its claim.<sup>35</sup> Therefore, as the complaining party, the United States bears the burden of demonstrating that certain aspects of the AD and CVD measures at issue are inconsistent with the Anti-Dumping Agreement and the SCM Agreement. The Appellate Body has stated that a complaining party will satisfy its burden when it establishes a *prima facie* case, namely a case which, in the absence of effective refutation by the defending party, requires a panel, as a matter of law, to rule in favour of the complaining party.<sup>36</sup> Finally, it is generally for each party asserting a fact to provide proof thereof.<sup>37</sup>

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

### 7.2.1 Provisions at issue

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

[t]he authorities shall require [interested Members or] interested parties providing confidential information to furnish non confidential summaries thereof. These summaries shall be in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence. In exceptional circumstances, such [Members or] parties may indicate that such information is not susceptible of summary. In such exceptional circumstances, a statement of the reasons why summarization is not possible must be provided.<sup>38</sup>

### 7.2.2 Factual background

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

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<sup>32</sup> Appellate Body Reports, *US – Countervailing Duty Investigation on DRAMS*, para. 186; *US – Lamb*, para. 103.

<sup>33</sup> Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, paras. 187-188.

<sup>34</sup> Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93.

<sup>35</sup> Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14.

<sup>36</sup> Appellate Body Report, *EC – Hormones*, paras. 98, 104.

<sup>37</sup> Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14.

<sup>38</sup> The SCM Agreement includes the reference to "Members".

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

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

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

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

### 7.2.3 Arguments of the parties

#### 7.2.3.1 United States

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

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

<sup>39</sup> Original petition, Exhibit USA-04.

<sup>40</sup> Amended petition, Exhibit CHN-01.

<sup>41</sup> Amended petition, Exhibit CHN-01, p. 60.

<sup>42</sup> Amended petition, Exhibit CHN-01, pp. 38-52.

<sup>43</sup> Amended petition, Exhibit CHN-01, p. 59.

<sup>44</sup> See for example amended petition, Exhibit CHN-01, p. 38 (in relation to data for production capacity).

<sup>45</sup> US first written submission, para. 35.

<sup>46</sup> See for instance US first written submission, para. 39.

<sup>47</sup> See for instance US first written submission, para. 42.

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

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

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

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

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

### 7.2.3.2 China

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

<sup>48</sup> See for instance US second written submission, paras. 11-12.

<sup>49</sup> US first written submission, paras. 42-45.

<sup>50</sup> See for instance US first written submission, para. 43.

<sup>51</sup> See for instance US comments on China's response to Panel question No. 25.a.

<sup>52</sup> See for instance US comments on China's responses to Panel questions Nos. 25.a and 25.c.

<sup>53</sup> See for instance US comments on China's response to Panel question No. 25.a.

<sup>54</sup> See for instance US opening statement at the second Panel meeting, para. 12.

<sup>55</sup> See for instance US second written submission, paras. 17, 22.

<sup>56</sup> See for instance US opening statement at the second Panel meeting, paras. 7-8.

<sup>57</sup> China's second written submission, para. 24.

<sup>58</sup> See for instance China's first written submission, para. 39.

<sup>59</sup> China's first written submission, para. 40.

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

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

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

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

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

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<sup>60</sup> China's second written submission, para. 16.

<sup>61</sup> See for instance China's second written submission, paras. 14-15.

<sup>62</sup> See for instance China's first written submission, para. 47.

<sup>63</sup> See for instance China's first written submission, para. 57.

<sup>64</sup> See for instance China's first written submission, para. 48.

<sup>65</sup> China's first written submission, para. 46.

<sup>66</sup> See for instance China's response to Panel questions Nos. 25.a and 25.b.

<sup>67</sup> See for instance China's opening statement at the first Panel meeting, para. 4.

<sup>68</sup> China's first written submission, paras. 42-43.

<sup>69</sup> By multiplying the average data by the number of domestic industry producers who provided the data contained in the petition. See China's second written submission, paras. 25-27.

<sup>70</sup> China's first written submission, para. 48.

<sup>71</sup> China's first written submission, para. 55, referring to the discussion of "Demand of Domestic Market" in the amended petition, Exhibit CHN-01, pp. 55-56.

<sup>72</sup> See for instance China's first written submission, para. 72.

<sup>73</sup> China's second written submission, para. 30.



#### 7.2.4 Arguments of the third parties

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

#### 7.2.5 Evaluation by the Panel

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

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

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

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

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

<sup>74</sup> Japan's third party submission, para. 6.

<sup>75</sup> Appellate Body Report, *EC – Fasteners (China)*, paras. 541-542. See also Panel Reports, *China – GOES*, para. 7.188; *China – Broiler Products*, para. 7.50.

<sup>76</sup> Panel Report, *Mexico – Olive Oil*, para. 7.101.

<sup>77</sup> Panel Report, *China – GOES*, para. 7.202.

<sup>78</sup> Panel Reports, *China – GOES*, para. 7.202; *China – Broiler Products*, para. 7.60.

<sup>79</sup> Panel Report, *China – GOES*, paras. 7.216-7.220, 7.224.

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

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

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

#### 7.2.5.1 Horizontal assessment

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

<sup>80</sup> China's second written submission, para. 16.

<sup>81</sup> Panel Report, *EU – Footwear (China)*, para. 7.730.

<sup>82</sup> China's second written submission, para. 30.

<sup>83</sup> In that CVD dispute, in presenting its evidence concerning the existence of a benefit to the panel, the EC had constructed a market benchmark on the basis of data for certain periods. Korea did not originally object the EC approach, but subsequently argued that the EC methodology was flawed. The Panel accepted the EC approach, rejecting Korea's objection as "lack[ing] conviction". Panel Report, *Korea – Commercial Vessels*, para. 7.272.

<sup>84</sup> Tables do not present this information in the same format.

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

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

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

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

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

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

<sup>87</sup> See for instance US response to Panel question No. 2.

<sup>88</sup> See for instance China's first written submission, para. 57.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

<sup>93</sup> Amended petition, Exhibit CHN-01, p. 38.

<sup>94</sup> Amended petition, Exhibit CHN-01, pp. 38-39.

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

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

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

#### 7.2.5.2.2 Apparent consumption

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

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

<sup>95</sup> Amended petition, Exhibit CHN-01, pp. 39-40.

<sup>96</sup> Amended petition, Exhibit CHN-01, p. 44.

<sup>97</sup> Amended petition, Exhibit CHN-01, pp. 46-47.

<sup>98</sup> Amended petition, Exhibit CHN-01, pp. 48-49.

<sup>99</sup> Amended petition, Exhibit CHN-01, pp. 50-51.

<sup>100</sup> Amended petition, Exhibit CHN-01, pp. 51-52.

<sup>101</sup> See for instance US comments on China's response to Panel question No. 25.a.

<sup>102</sup> China's response to Panel question No. 3.

<sup>103</sup> See in this regard Panel Report, *China – GOES*, para. 7.210.

<sup>104</sup> See para. 7.34 of this Report.

<sup>105</sup> See paras. 7.36 and 7.38 (on the horizontal assessment of the trend lines and texts, respectively) of this Report.

<sup>106</sup> The table indicates that apparent consumption equals "total domestic production + total import volume - total export volume". Amended petition, Exhibit CHN-01, p. 43.

<sup>107</sup> The table indicates that market share equals "sales volumes / apparent consumption". Amended petition, Exhibit CHN-01, p. 43.

<sup>108</sup> See for instance US second written submission, para. 22.

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

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

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

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

#### 7.2.5.3.1 Return on investment and salary

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

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

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<sup>109</sup> China's first written submission, para. 55, referring to the discussion of "Demand of Domestic Market" in amended petition, Exhibit CHN-01, pp. 55-56.

<sup>110</sup> See para. 7.34 of this Report.

<sup>111</sup> China's first written submission, fn. 47.

<sup>112</sup> See, in this regard, Panel Report, *China – GOES*, paras. 7.216-7.220, 7.224.

<sup>113</sup> Amended petition, Exhibit CHN-01, pp. 55-56.

<sup>114</sup> Panel Reports, *China – GOES*, para. 7.202; *China – Broiler Products*, para. 7.60. The second table does not affect our conclusion. This table reports information on market shares. Neither it, nor the text accompanying both tables, does anything to remedy the data gap in the table setting out year-on-year percentage changes in apparent consumption, and thus does not add anything to the understanding of the substance of the confidential information in question. Amended petition, Exhibit CHN-01, p. 39. See, in this regard, para. 7.38 of this Report.

<sup>115</sup> Amended petition, Exhibit CHN-01, pp. 47-48.

<sup>116</sup> Amended petition, Exhibit CHN-01, pp. 49-50.

<sup>117</sup> While the trend line for return on investment does not contain the term "change" in the heading, we note that the heading for the non-confidential summary for return on investment reads "Change in Rate of Return on Investment of the Domestic Product".

<sup>118</sup> See paras. 7.36 and 7.38 (on the horizontal assessment of the trend lines and texts, respectively) of this Report.



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

#### 7.2.5.3.2 Sales-to-output ratio

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

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

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

#### 7.2.6 Conclusion

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

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

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<sup>119</sup> Amended petition, Exhibit CHN-01, pp. 40-41.

<sup>120</sup> Amended petition, Exhibit CHN-01, p. 41.

<sup>121</sup> See for instance US second written submission, para. 17.

<sup>122</sup> China's first written submission, para. 48.

<sup>123</sup> See paras. 7.36 and 7.38 (on the horizontal assessment of the trends lines and texts, respectively) of this Report.

<sup>124</sup> Amended petition, Exhibit CHN-01, p. 41.

<sup>125</sup> Panel Reports, *China – GOES*, para. 7.202; *China – Broiler Products*, para. 7.60.

<sup>126</sup> See para 7.46 of this Report.

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

#### 7.3.1 Provision at issue

7.55. Article 6.9 provides:

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

#### 7.3.2 Factual background

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

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

#### 7.3.3 Arguments of the parties

##### 7.3.3.1 United States

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

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

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

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

<sup>129</sup> Final disclosure (AD/CVD), Exhibit USA-11, p. 25.

<sup>130</sup> See for instance US first written submission, para. 47.

<sup>131</sup> US first written submission, para. 55.

<sup>132</sup> See for instance US first written submission, fn. 80.

<sup>133</sup> See for instance US second written submission, para. 28.



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

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

### 7.3.3.2 China

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

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

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

<sup>134</sup> See for instance US comments on China's response to Panel questions Nos. 27.a and 27.b.

<sup>135</sup> See for instance US opening statement at the second Panel meeting, para. 15.

<sup>136</sup> In the view of the United States, such an adverse inference would be consistent with the position taken by China in other disputes relating to the non-disclosure of certain data and calculations underlying dumping margins. See US comments on China's response to Panel questions Nos. 27.a and 27.b.

<sup>137</sup> Mercedes-Benz comment on MOFCOM final disclosure, Exhibit USA-20. Exhibit USA-20 contains the original Chinese version of the letter and a partial translation in English. At our request, the United States submitted a full English translation of the Chinese version as Comments of Mercedes-Benz on the U.S. Portion of the Final Disclosure in Imported Auto AD and CVD Investigations, Exhibit USA-21. We note that Exhibit USA-20, the original Chinese version, is dated 28 April 2011. Exhibit USA-21 is however dated 28 April 2013. We assume "2013" is a typographical error.

<sup>138</sup> See for instance US response to Panel question No. 28.

<sup>139</sup> See for instance China's opening statement at the second Panel meeting, para. 17.

<sup>140</sup> See for instance China's response to Panel questions Nos. 27.a and 27.b.

<sup>141</sup> China's second written submission, para. 34.

<sup>142</sup> China points to the proceedings in the *China – Broiler Products* dispute. See China's response to Panel questions Nos. 27.a and 27.b.

<sup>143</sup> See for instance China's response to Panel question No. 6.a.

<sup>144</sup> China's response to Panel question No. 5.

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

### 7.3.4 Arguments of the third parties

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

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

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

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

### 7.3.5 Evaluation by the Panel

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

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

<sup>145</sup> See for instance China's comments on the US response to Panel question No. 28.

<sup>146</sup> EU third party submission, para. 5.

<sup>147</sup> EU third party submission, para. 6.

<sup>148</sup> Japan's third party submission, para. 11.

<sup>149</sup> Japan's third party submission, para. 13.

<sup>150</sup> Saudi Arabia's third party submission, para. 11.

<sup>151</sup> Saudi Arabia's third party submission, para. 12.

<sup>152</sup> Turkey's third party submission, paras. 26-28.

<sup>153</sup> Turkey's third party submission, para. 29.

<sup>154</sup> Panel Report, *US - Oil Country Tubular Goods Sunset Reviews (Article 21.5 - Argentina)*, para. 7.148.

<sup>155</sup> Panel Report, *EC - Salmon (Norway)*, para. 7.797.

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

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

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

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

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

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

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

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<sup>156</sup> Panel Reports, *Mexico – Olive Oil*, para. 7.110; *China – GOES*, para. 7.652; *China – Broiler Products*, para. 7.86.

<sup>157</sup> Panel Report, *EC – Salmon (Norway)*, para. 7.807.

<sup>158</sup> Panel Report, *China – Broiler Products*, para. 7.89.

<sup>159</sup> Panel Report, *China – Broiler Products*, paras. 7.91–7.92 (distinguishing from Panel Report, *China – X-Ray Equipment*, para. 7.420).

<sup>160</sup> Panel Report, *China – Broiler Products*, para. 7.91.

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

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

7.76. We recall that the general principles applicable to the allocation of the burden of proof in WTO dispute settlement require that a party claiming a violation of a provision of a WTO Agreement must assert and prove its claim. It is thus clear that the United States, as complainant, bears the burden of demonstrating the violations it alleges, both legally and as a matter of fact.<sup>162</sup> However, we also recall that it is generally for each party asserting a fact to provide proof thereof.<sup>163</sup>

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

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

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

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<sup>162</sup> See para. 7.6 of this Report.

<sup>163</sup> Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14.

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

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

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

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

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

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

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

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

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

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<sup>167</sup> Final determination, Exhibit CHN-07, p. 30.

<sup>168</sup> Panel Report, *Thailand – Cigarettes (Philippines)*, para. 6.125 (upheld by Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 161).

<sup>169</sup> Appellate Body Report, *Argentina – Textiles and Apparel*, para. 79.

<sup>170</sup> Appellate Body Report, *Argentina – Textiles and Apparel*, para. 80.

<sup>171</sup> US opening statement at the second Panel meeting, para. 17.

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

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

[f]inally, [Mercedes-Benz USA] reiterates MOFCOM did not provide sufficient information in the final disclosure. [Mercedes-Benz USA] cannot fully understand the related measures and methodology MOFCOM adopted in the final disclosure. Regarding the sufficiency of the information disclosure, MOFCOM says:

*"The investigating authority determines that the investigating authority has already fully disclosed all the facts including data, source of data and detailed calculation in the disclosure after the preliminary determination. The investigating authority does not accept this position".*

However, the actual situation was not as described above. The insufficiency of the information disclosure appeared most obvious in the adjustment MOFCOM made to the indirect sales costs and profits in the calculation of China export price. This is the most important adjustment to the data [Mercedes-Benz USA] submitted, a key factor leading to the dumping margin. MOFCOM failed to explain in detail how it generated the margins in the final disclosure and did not provide the calculation steps, detailed descriptions, formulas and program language, nor did MOFCOM describe the relevant calculation process in the final disclosure. Though [Mercedes-Benz USA] made great efforts, MOFCOM still has not taken into account the data it provided or put forward a detailed explanation of the information relevant to the margin calculation. Therefore, MOFCOM did not provide meaningful disclosure to this most important adjustment item.<sup>175</sup> (original emphasis)

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

<sup>172</sup> China's response to Panel questions Nos. 27.a and 27.

<sup>173</sup> China's response to Panel question No. 28.

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

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

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

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

### 7.3.6 Conclusion

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

## 7.4 Determination of "residual" AD and CVD rates

### 7.4.1 Factual background

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

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

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

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

<sup>177</sup> AD notice of initiation, Exhibit USA-06.

<sup>178</sup> CVD notice of initiation, Exhibit USA-07.

<sup>179</sup> See AD notice of initiation, Exhibit USA-06, p.2; CVD notice of initiation, Exhibit USA-07, p. 4.

<sup>180</sup> Final determination, Exhibit CHN-07, p. 5.

<sup>181</sup> See AD notice of initiation, Exhibit USA-06, p.3; and CVD notice of initiation, Exhibit USA-07, p. 4.

<sup>182</sup> AD notice of initiation, Exhibit USA-06, p. 2; CVD notice of initiation, Exhibit USA-07, p. 4.

<sup>183</sup> See AD registration form, Exhibit CHN-09; CVD registration form, Exhibit CHN-10.

<sup>184</sup> Final determination, Exhibit CHN-07, pp. 7-12.

<sup>185</sup> See Mitsubishi withdrawal letter (AD), Exhibit CHN-03; Mitsubishi withdrawal letter (CVD), Exhibit CHN-04.

<sup>186</sup> Final determination, Exhibit CHN-07, p. 9.

<sup>187</sup> Preliminary determination, Exhibit CHN-05, p. 60. MOFCOM did not determine an individual dumping margin for Ford USA.

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

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

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

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

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

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

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

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

[a]fter the preliminary determination, the U.S. Government claimed in its comments that, the investigating authority adopted adverse data to determine the dumping margin of other American companies in the preliminary determination without providing the reasons, and did not explain how the exporters did not cooperate in this investigation. The U.S. Government requested the investigating authority to apply weighted average duty rates to the companies which were not uncooperative clearly in this investigation.

In this regard, the investigating authority finds that: before and after the initiation, the investigating authority had informed all exporters or producers listed in the petition, and also required the U.S. Government to inform all exporters or producers. The public notice of initiation can also be obtained on the website of MOFCOM. After the initiation, the investigating authority set the procedures of registration for participating in the investigation; meanwhile, the investigating authority also issued the investigation questionnaire to the companies filing for participating in this investigation. Besides, the investigation questionnaire can also be obtained by public

<sup>188</sup> Preliminary determination, Exhibit CHN-05, p. 88.

<sup>189</sup> Preliminary determination, Exhibit CHN-05, p. 60.

<sup>190</sup> Preliminary determination, Exhibit CHN-05, p. 59.

<sup>191</sup> Preliminary determination, Exhibit CHN-05, p. 88.

<sup>192</sup> Preliminary determination, Exhibit CHN-05, p. 88.

<sup>193</sup> Final disclosure (AD/CVD), Exhibit USA-11, pp. 25, 41.

<sup>194</sup> Since MOFCOM did not calculate an individual dumping margin for Ford USA, this company's exports to China were subjected to the residual duty rate of 21.5%. This, however, is not at issue in this dispute.

<sup>195</sup> Final determination, Exhibit CHN-07, pp. 86, 127.



on the website of MOFCOM. The investigating authority holds that within the best of its abilities, all exporters have obtained the opportunities to cooperate in the investigation through the aforesaid procedures; any exporter willing to cooperate in the investigation should have made the proper response. As to any exporter who did not make clear response, the investigating authority may certainly and reasonably believe that it did not have the intention of cooperation, and determined the dumping margin in accordance with the best information available rather than the adverse information. Therefore, the investigating authority decides not to accept the claims of the U.S. Government and maintain its finding in the preliminary determination.

After the preliminary determination, Ford Company claimed in its comments that, although it did not export during the POI, the investigating authority shall determine the dumping margin for it due to its cooperation in the investigation. Upon examination, the investigating authority holds that, the dumping margin shall be established based on the comparison between the normal value and the export price, and since Ford Company did not export during the POI, there was no export price for it. Therefore, this claim has no factual and legal basis. The investigating authority does not accept this claim. When complying with conditions, Ford Company may apply to the investigating authority for the new exporter review in order to obtain an individual duty rate.<sup>196</sup>

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

#### 7.4.2 Introduction

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

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

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

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

<sup>197</sup> Final determination, Exhibit CHN-07, p. 126.

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

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

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

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

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

##### **7.4.3.1 Provisions at issue**

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

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

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

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

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

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

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

[p]ublic notice shall be given of any preliminary or final determination, whether affirmative or negative, of any decision to accept an undertaking pursuant to Article 8, of the termination of such an undertaking, and of the termination of a definitive anti-dumping duty. Each such notice shall set forth, or otherwise make available through a separate report, in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities. All such notices and reports shall be forwarded to the Member or Members the products of which are subject to such determination or undertaking and to other interested parties known to have an interest therein.

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

[a] public notice of conclusion or suspension of an investigation in the case of an affirmative determination providing for the imposition of a definitive duty or the acceptance of a price undertaking shall contain, or otherwise make available through a separate report, all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures or the acceptance of a price undertaking, due regard being paid to the requirement for the protection of confidential information. In particular, the notice or report shall contain the information described in subparagraph 2.1, as well as the reasons for the acceptance or rejection of relevant arguments or claims made by the exporters and importers, and the basis for any decision made under subparagraph 10.2 of Article 6.

#### **7.4.3.2 Arguments of the parties**

##### **7.4.3.2.1 United States**

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

<sup>199</sup> See para. 7.55 of this Report.

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

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

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

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

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

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

<sup>201</sup> US second written submission, para. 35.

<sup>202</sup> US second written submission, paras. 41-43.

<sup>203</sup> See US response to Panel question No. 32:

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

<sup>204</sup> US first written submission, para. 71.

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

#### 7.4.3.2.2 China

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

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

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

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

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<sup>205</sup> US first written submission, para. 77.

<sup>206</sup> China's first written submission, paras. 100-101.

<sup>207</sup> China's second written submission, para. 44.

<sup>208</sup> China's second written submission, para. 40.

<sup>209</sup> China's second written submission, para. 46.

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

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

#### 7.4.3.3 Arguments of the third parties

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

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

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

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

<sup>210</sup> See for instance China's second written submission, para. 56.

<sup>211</sup> EU oral statement, para. 9.



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

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

#### 7.4.3.4 Evaluation by the Panel

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

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

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

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

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<sup>212</sup> Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 259.

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

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

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

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

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

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

<sup>214</sup> Original petition, Exhibit USA-04, p. 15.

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

<sup>216</sup> Final determination, Exhibit CHN-07, p. 8. Mitsubishi subsequently withdrew from the proceedings.



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

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

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

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

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

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

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

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

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<sup>217</sup> Preliminary determination, Exhibit CHN-05, p. 59.

<sup>218</sup> Final determination, Exhibit CHN-07, p. 83.

<sup>219</sup> AD notice of initiation, Exhibit USA-06, p. 2.

<sup>220</sup> AD registration form, Exhibit CHN-09.

<sup>221</sup> We note that although this case revolves around the question of the use of facts available to determine a residual duty rate, the Anti-Dumping Agreement does not set out any guidance for the determination of the amount or level of such duty, although as discussed above, we consider it clear that such a duty is permitted. There may be other ways to determine a residual duty rate. In our view, however, the IA must not act inconsistently with a relevant provision of the Anti-Dumping Agreement in making that determination.

<sup>222</sup> In this regard, we note that, in addressing a claim that was almost identical to the claim before us both factually and in terms of its legal basis, the panel in *China – GOES* refrained from discussing whether notice of the information required could be given publicly. Panel Report, *China – GOES*, para. 7.386.

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

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

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

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

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

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

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

<sup>224</sup> "Accordingly, an IA that uses the facts available in the application for the initiation of the investigation against an exporter that was not given notice of the information the investigating authority requires, acts in a manner inconsistent with paragraph 1 of Annex II to the Anti-Dumping Agreement and, therefore, with Article 6.8 of that Agreement." Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 259.

<sup>225</sup> We note that there is no claim with respect to the notice of initiation in this dispute.

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

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

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

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

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

<sup>227</sup> AD notice of initiation, Exhibit USA-06, p.2.

<sup>228</sup> AD registration form, Exhibit CHN-09, p.2.

<sup>229</sup> China's response to Panel question No. 29.

<sup>230</sup> In any event, there is no claim to the contrary in this dispute.

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

<sup>232</sup> China's response to Panel question No. 29.

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

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

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

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

<sup>235</sup> With respect to an identical issue, the panel in *China – GOES* also found that MOFCOM had acted inconsistently with Article 6.8 of the Agreement and paragraph 1 of its Annex II. Panel Report, *China – GOES*, para. 7.394. That panel stated: "[w]hile the notice of initiation requested interested parties to provide some general information at the time of registering with MOFCOM, namely 'the volume and value of exports to China from March 2008 to February 2009', MOFCOM replaced more information than this with 'facts available' for the purposes of arriving at an 'all others' anti-dumping rate. Therefore, it is clear that MOFCOM should have provided detailed notice of this further required information[.]" Panel Report, *China – GOES*, para. 7.386. By contrast, the panel in the subsequent *China – Broiler Products* dispute came to the opposite conclusion and reasoned: "[i]n our view, in the case of a failure by an interested party to provide some initial information necessary for the determination of a producer's margin of dumping, the authority is justified in replacing other information that it cannot collect as a result of that failure, even if it did not specifically request the other information. Such information initially required may include the producer's contact details and information necessary for the authority to decide on sampling." Panel Report, *China – Broiler Products*, fn. 501. For the reasons explained above, we disagree with the latter point of view.

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

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

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

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

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

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

##### **6. Other U.S. companies (All Others)**

For other U.S. companies, in accordance with Article 21 of the Antidumping Regulations of the P.R.C., the Investigating Authority decided to use the available facts and the best information available and to apply the dumping margin claimed in the petition.

After the preliminary determination, the USG commented that in making its preliminary determination, the Investigating Authority adopted adverse data for determining the dumping margin for other U.S. companies and failed to explain the reasoning behind its use of adverse inferences in calculating the rate for "all other" companies. Further, the Investigating Authority has not explained how other exporters that would be subject to this "all-others" rate have failed to cooperate in this investigation. The USG urges the Investigating Authority to apply the weighted average of the rates calculated for firms that have not expressly been un-cooperative in the investigation [.]

The Investigating Authority believes that before initiation, the Investigating Authority notified relevant exporters and producers listed in the petition; also, it urged the USG to notify the relevant exporters or producers. The initiation notice was publicly available on the MOFCOM website. After initiation, the Investigating Authority set up the registration procedure; meanwhile, it issued questionnaires to registered respondents, which were also available on the MOFCOM website. The Investigating Authority believes that within the best of its ability, all exporters were given sufficient opportunities through the above mentioned procedures, and they could appropriately respond if they were willing to cooperate with the investigation. Regarding exporters that did not clearly respond to the investigation, the Investigating Authority could reasonably believe they had no intention to cooperate with the investigation, so the

<sup>236</sup> See paras. 7.69-7.71 of this Report.

<sup>237</sup> Panel Report, *EC – Salmon (Norway)*, para. 7.807.

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Investigation Authority decided their dumping margin based on best information available, not adverse information.<sup>238</sup>

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

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

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

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

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

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

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<sup>238</sup> Final disclosure (AD/CVD), Exhibit USA-11, p. 24.

<sup>239</sup> US response to Panel question No. 9.

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

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

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

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

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

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

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

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

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

<sup>240</sup> See for instance US second written submission, paras. 49-50.

<sup>241</sup> Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 164 (addressing the corresponding provision of the SCM Agreement, Article 22.5).

<sup>242</sup> China's first written submission, para. 124.

<sup>243</sup> Final determination, Exhibit CHN-07, p. 83.

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

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

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

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

##### **7.4.4.1 Provisions at issue**

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

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

7.160. Article 12.8 of the SCM Agreement requires that:

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

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

22.3. Public notice shall be given of any preliminary or final determination, whether affirmative or negative, of any decision to accept an undertaking pursuant to Article 18, of the termination of such an undertaking, and of the termination of a definitive countervailing duty. Each such notice shall set forth, or otherwise make available through a separate report, in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities. All such notices and reports shall be forwarded to the Member or Members the products of which are subject to such determination or undertaking and to other interested parties known to have an interest therein. . .

22.5. A public notice of conclusion or suspension of an investigation in the case of an affirmative determination providing for the imposition of a definitive duty or the acceptance of an undertaking shall contain, or otherwise make available through a separate report, all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures or the acceptance of an

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<sup>244</sup> US response to Panel question No. 10.a.



undertaking, due regard being paid to the requirement for the protection of confidential information. In particular, the notice or report shall contain the information described in paragraph 4, as well as the reasons for the acceptance or rejection of relevant arguments or claims made by interested Members and by the exporters and importers.

#### 7.4.4.2 Arguments of the parties

##### 7.4.4.2.1 United States

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

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

##### 7.4.4.2.2 China

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

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

<sup>246</sup> US first written submission, para. 87.

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

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

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

#### 7.4.4.3 Arguments of the third parties

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

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

#### 7.4.4.4 Evaluation by the Panel

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

##### 7.4.4.4.1 Alleged violation of Article 12.7 of the SCM Agreement

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

<sup>247</sup> China's first written submission, paras. 127-131.

<sup>248</sup> China's first written submission, para. 133.

<sup>249</sup> China's first written submission, para. 135.

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

7.172. Previous panels and the Appellate Body have concluded that the SCM Agreement establishes the same general requirements regarding the use of facts available as the Anti-Dumping Agreement, despite the lack of an analogue to Annex II. Thus, in *Mexico – Anti-Dumping Measures on Rice*, the Appellate Body interpreted the provisions of the SCM Agreement regarding the use of facts available in conjunction with the corresponding provisions of the Anti-Dumping Agreement. In doing so, the Appellate Body noted that the SCM Agreement did not have an annex similar to Annex II of the Anti-Dumping Agreement, but concluded that this did not mean "that no such conditions exist[ed] in the SCM Agreement."<sup>250</sup> On this basis, the Appellate Body concluded that "it would be anomalous if Article 12.7 of the SCM Agreement were to permit the use of "facts available" in countervailing duty investigations in a manner markedly different from that in anti-dumping investigations."<sup>251</sup> We also note that the panels in *China – GOES*<sup>252</sup> and *China – Broiler Products*<sup>253</sup> took the same approach. Such an interpretation is also consistent with the *Ministerial Declaration on Dispute Settlement Pursuant to the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 or Part V of the Agreement on Subsidies and Countervailing Measures*, in which Ministers underlined "the need for the consistent resolution of disputes arising from anti-dumping and countervailing duty measures."<sup>254</sup>

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

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

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

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<sup>250</sup> Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 291.

<sup>251</sup> Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 295.

<sup>252</sup> Panel Report, *China – GOES*, paras. 7.446-7.447.

<sup>253</sup> Panel Report, *China – Broiler Products*, para. 7.355.

<sup>254</sup> We also asked the parties their views on the implication of the absence of a corollary to Annex II in the SCM Agreement. While the parties' views in this regard in no way are determinative, both responded that, despite the absence of such an annex in the SCM Agreement, the same disciplines should apply to the use of facts available in CVD investigations as are set forth in Annex II of the Anti-Dumping Agreement. See China's and US responses to Panel question No. 13.

<sup>255</sup> See paras. 7.121–7.140 of this Report.

#### 7.4.4.4.2 Alleged violation of Article 12.8 of the SCM Agreement

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

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

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

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

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

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

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

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

#### 7.5.1 Provisions at issue

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

[a] determination of injury for purposes of Article VI of GATT 1994 shall be based on positive evidence and involve an objective examination of both (a) the volume of the

<sup>256</sup> Final disclosure, Exhibit USA-11, pp. 40-41.

<sup>257</sup> US response to Panel question No. 9.

<sup>258</sup> See paras. 7.141-7.150 of this Report.

<sup>259</sup> Final determination, Exhibit CHN-07, pp. 126-127.

<sup>260</sup> US response to Panel question No. 10.a.

<sup>261</sup> See paras. 7.151-7.158 of this Report.

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

7.183. Article 4.1 of the Anti-Dumping Agreement provides in pertinent part<sup>262</sup>:

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

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

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

### 7.5.2 Factual background

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

7.186. In its notices of initiation, MOFCOM stated:

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

<sup>262</sup> Paragraphs (i) and (ii) of Article 4.1 are not at issue in this dispute.

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

<sup>264</sup> See AD notice of initiation, Exhibit USA-06; AD injury registration notice, Exhibit CHN-02; and CVD notice of initiation, Exhibit USA-07; CVD injury registration notice, Exhibit CHN-11.

<sup>265</sup> AD notice of initiation, Exhibit USA-06, p. 2; CVD notice of initiation, Exhibit USA-07, p. 4.

<sup>266</sup> AD notice of initiation, Exhibit USA-06, p. 1; CVD notice of initiation, Exhibit USA-07, p. 1.

<sup>267</sup> CVD notice of initiation, Exhibit USA-07, p.4. The wording of the AD notice of initiation is substantially the same:

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

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

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

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

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

### 7.5.3 Arguments of the parties

#### 7.5.3.1 United States

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

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

<sup>268</sup> AD injury registration form, Exhibit CHN-12; CVD injury registration form, Exhibit CHN-13.

<sup>269</sup> AD injury registration form, Exhibit CHN-12, p. 1; CVD injury registration form, Exhibit CHN-13, p. 1.

<sup>270</sup> Final determination, Exhibit CHN-07, p. 19.

<sup>271</sup> Preliminary determination, Exhibit CHN-05, pp. 20-21; final determination, Exhibit CHN-07, pp. 21-22.

<sup>272</sup> Preliminary determination, Exhibit CHN-05, p. 35; final determination, Exhibit CHN-07, pp. 48-49.

<sup>273</sup> Final determination, Exhibit CHN-07, p. 132; supplemental injury submission, Exhibit CHN-08.

<sup>274</sup> Final determination, Exhibit CHN-07, p. 48.

<sup>275</sup> The United States does not ask the Panel to find violations of Articles 4.1 of the Anti-Dumping Agreement and 16.1 of the SCM Agreement, which contain the definition of the domestic industry. See US response to Panel question No. 40.

<sup>276</sup> See for instance US comments on China's response to Panel question No. 36.c.

<sup>277</sup> See for instance US opening statement at the second Panel meeting, paras. 34-35.

<sup>278</sup> See for instance US comments on China's response to Panel question No. 35.



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

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

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

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

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

### 7.5.3.2 China

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

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

<sup>279</sup> US first written submission, paras. 116-117.

<sup>280</sup> US comments on China's response to Panel question No. 36.c.

<sup>281</sup> See for instance US second written submission, paras. 61-62.

<sup>282</sup> US second written submission, para. 63.

<sup>283</sup> See for instance US comments on China's response to Panel question No. 36.c.

<sup>284</sup> See for instance US first written submission, para. 124.

<sup>285</sup> See for instance US comments on China's response to Panel question No. 36.c.

<sup>286</sup> See for instance US opening statement at the second Panel meeting, para. 40.

<sup>287</sup> See for instance US opening statement at the first Panel meeting, para. 69.

<sup>288</sup> See for instance China's first written submission, paras. 162, 169.

<sup>289</sup> China's second written submission, para. 73.

<sup>290</sup> China's first written submission, paras. 145-146.

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

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

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

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

<sup>291</sup> China's second written submission, para. 81.

<sup>292</sup> China's first written submission, para. 169.

<sup>293</sup> See for instance China's second written submission, para. 71.

<sup>294</sup> China's first written submission, para. 151.

<sup>295</sup> See for instance China's response to Panel questions Nos. 15.a and 15.b.

<sup>296</sup> China's second written submission, para. 69.

<sup>297</sup> China's response to Panel question No. 37.

<sup>298</sup> See for instance China's second written submission, para. 74.

<sup>299</sup> See for instance China's second written submission, para. 75.

<sup>300</sup> See for instance China's first written submission, paras. 164, 168.

<sup>301</sup> See for instance China's second written submission, para. 68.



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

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

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

#### 7.5.4 Arguments of the third parties

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

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

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<sup>302</sup> China's response to Panel question No. 36.c.

<sup>303</sup> China's response to Panel question No. 36.a.

<sup>304</sup> China's response to Panel question No. 15.c.

<sup>305</sup> China's second written submission, para. 79.

<sup>306</sup> See for instance China's comments on the US response to Panel question No. 39.

<sup>307</sup> China's first written submission, para. 141.

<sup>308</sup> China's second written submission, para. 80.

<sup>309</sup> China's first written submission, para. 219.

<sup>310</sup> China's first written submission, para. 220.

<sup>311</sup> Korea's third party submission, paras. 6-7.

<sup>312</sup> Korea's third party submission, para. 8.

<sup>313</sup> Saudi Arabia's third party submission, paras. 33-34.

<sup>314</sup> Saudi Arabia's third party submission, para. 35.

### 7.5.5 Evaluation by the Panel

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

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

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

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

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

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

<sup>315</sup> Panel Report, *China – Broiler Products*, paras. 7.415-7.420.

<sup>316</sup> Panel Report, *EC – Fasteners (China)*, para. 7.219.

<sup>317</sup> Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.341.

<sup>318</sup> Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.344.

<sup>319</sup> Appellate Body Report, *EC – Fasteners (China)*, para. 415.

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

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

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

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

The panel went on to conclude that:

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

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

#### 7.5.5.1 Whether MOFCOM's domestic industry definition was distorted

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

<sup>320</sup> Appellate Body Report, *China – GOES*, para. 127.

<sup>321</sup> Appellate Body Report, *China – GOES*, para. 127.

<sup>322</sup> Appellate Body Report, *China – GOES*, para. 126.

<sup>323</sup> Panel Report, *EC – Salmon (Norway)*, para. 7.118.

<sup>329</sup> Panel Report, *EC – Salmon (Norway)*, para. 7.124.

<sup>325</sup> "Like product" is defined in Article 2.6 of the Anti-Dumping Agreement and footnote 46 to the SCM Agreement as:

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

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

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

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

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<sup>326</sup> AD notice of initiation, Exhibit USA-06, p. 2; CVD notice of initiation, Exhibit USA-07, p. 2.

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

<sup>328</sup> Or forms of the like product.

<sup>329</sup> See para. 7.206 of this Report.

<sup>330</sup> Panel Report, *EC – Salmon (Norway)*, fn. 283.

<sup>331</sup> See para. 7.206 of this Report.

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

<sup>333</sup> See for instance US comments on China's response to Panel questions Nos. 35 and 36.c.

<sup>334</sup> See for instance US second written submission, paras. 61-62.

<sup>335</sup> See for instance US opening statement at the second Panel meeting, paras. 34-35.

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

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

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

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

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<sup>336</sup> Panel Reports, *EC – Fasteners (China)*, para. 7.219; *China – Broiler Products*, para. 7.428; Appellate Body Report, *EC – Fasteners (China)*, para. 460.

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

<sup>338</sup> China's response to Panel questions Nos. 34-35.

<sup>339</sup> See AD injury registration form, Exhibit CHN-12, p. 1; CVD injury registration form, Exhibit CHN-13, p. 1.

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

<sup>341</sup> See in this regard US comments on China's response to Panel question No. 35.

<sup>342</sup> China's response to Panel question No. 36.c.

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

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

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

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

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

<sup>343</sup> See for instance US second written submission, paras. 61-62.

<sup>344</sup> Panel Report, *EC – Fasteners (China)*, paras. 7.213-7.216.

<sup>345</sup> Appellate Body Report, *EC – Fasteners (China)*, para. 425.

<sup>346</sup> Appellate Body Report, *EC – Fasteners (China)*, para. 427.

<sup>347</sup> Appellate Body Report, *EC – Fasteners (China)*, para. 429.

<sup>348</sup> See in this regard on a similar factual pattern, Panel Report, *China – Broiler Products*, paras. 7.427-7.430.

without reference to any benchmark that they accounted for a major proportion of that production.<sup>349</sup>

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

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

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

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

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

<sup>350</sup> Panel Report, *EC – Fasteners (China)*, para. 7.219; Appellate Body Report, *EC – Fasteners (China)*, para. 460.

<sup>351</sup> See paras. 7.211–7.216 of this Report.

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



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

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

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

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

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

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

<sup>353</sup> US response to Panel question No. 39.

<sup>354</sup> See para. 7.226 of this Report.

<sup>355</sup> See for instance US response to Panel question No. 39.



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

### 7.5.6 Conclusion

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

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

### 7.6.1 Provisions at issue

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

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

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

<sup>356</sup> See para. 7.212 of this Report.

<sup>357</sup> Panel Report, *China – Broiler Products*, para. 7.416.

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

### 7.6.2 Factual background

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

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

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

In conclusion, the investigation evidence indicates that, during the POI, the import volume of the product under investigation as well as its market shares in Chinese domestic market increased continually. Especially at the end of the POI, the market share of the product under investigation significantly increased and its price decreased at the same time, which depressed the price of the domestic like product, and affected the profitability of the domestic industry.<sup>361</sup>

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

[t]he fact is that compared to the very large investigation rises in (1) non-subject imports and (2) production of the types of vehicles under investigation by China's JVs, the presence of subject imports in the Chinese market has always been minor. Indeed, the data cited in the Preliminary Determination show that, throughout the period of review, sales of sedans and SUVs produced by Chinese manufacturers not included in the domestic industry and by producers in non-subject (or "third") countries have always accounted for at least 71 per cent of total apparent domestic consumption.

[Table 3 omitted]

More to the point, however, is the fact that MOFCOM's own data demonstrate that the overlap of competition between subject imports and the domestic like product is minuscule, if it exists at all. The data relied on by MOFCOM show that subject imports oversold the domestic like product during the period of investigation, and oversold to a far greater degree toward the end of the period of investigation.

[Table 4 omitted]

<sup>359</sup> Final determination, Exhibit CHN-07, pp. 128-140.

<sup>360</sup> Preliminary determination, Exhibit CHN-05, pp. 89-101.

<sup>361</sup> Final determination, Exhibit CHN-07, pp. 130-131.

<sup>362</sup> Preliminary determination, Exhibit CHN-05, pp. 91-92.

This rules out any possibility that the pricing of subject imports suppressed or depressed prices of the domestic like product. Indeed, this large a margin of overselling is evidence that there is no meaningful overlap of competition between subject imports and the domestic like product.

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

7.237. MOFCOM noted Chrysler USA's arguments, and dismissed each of them in its discussion of causation in the final determination.<sup>364</sup>

### 7.6.3 Arguments of the parties

#### 7.6.3.1 United States

7.238. The United States contends that MOFCOM's finding of price depression in the investigations at issue was inconsistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement and Articles 15.1 and 15.2 of the SCM Agreement in five respects.

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

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

<sup>363</sup> US respondent comments on the preliminary determination, Exhibit USA-12, pp. 26-28.

<sup>364</sup> Final determination, Exhibit CHN-07, pp. 155-162. We discuss causation below at section 7.7 of this Report.

<sup>365</sup> See for instance US first written submission, para. 135.

<sup>366</sup> US second written submission, para. 78.

<sup>367</sup> US opening statement at the second Panel meeting, para. 51.

<sup>368</sup> US opening statement at the first Panel meeting, para. 77.

<sup>369</sup> See for instance US opening statement at the first Panel meeting, paras. 71-72.

<sup>370</sup> US opening statement at the first Panel meeting, para. 72.

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

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

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

### 7.6.3.2 China

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

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

<sup>371</sup> US first written submission, para. 141.

<sup>372</sup> See for instance US first written submission, para. 144.

<sup>373</sup> US first written submission, para. 142, referring to the US respondent comments on the preliminary determination, Exhibit USA-12, Table 6, pp. 50-51.

<sup>374</sup> See for instance US opening statement at the second Panel meeting, paras. 63-70.

<sup>375</sup> US first written submission, para. 145, referring to the final determination, p. 62 in Exhibit USA-02 (pp. 129-130 in Exhibit CHN-07).

<sup>376</sup> US first written submission, para. 147.

<sup>377</sup> US opening statement at the second Panel meeting, paras. 66-69.

<sup>378</sup> See for instance US second written submission, para. 85.

<sup>379</sup> See for instance US first written submission, para. 148.

<sup>380</sup> US second written submission, para. 92.

<sup>381</sup> See for instance China's second written submission, para. 83.

<sup>382</sup> See for instance China's opening statement at the first Panel meeting, paras. 49-51.

<sup>383</sup> See for instance China's opening statement at the second Panel meeting, para. 54.

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

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

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

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

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

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<sup>384</sup> China's second written submission, para. 106.

<sup>385</sup> See for instance China's second written submission, para. 105.

<sup>386</sup> See for instance China's first written submission, para. 189.

<sup>387</sup> China's response to Panel question No. 18.

<sup>388</sup> China's first written submission, para. 201.

<sup>389</sup> China's second written submission, paras. 116-120.

<sup>390</sup> China's second written submission, para. 131.

<sup>391</sup> See for instance China's response to Panel question No. 41.

<sup>392</sup> See for instance China's response to Panel question No. 19.

<sup>393</sup> See for instance China's first written submission, paras. 214-215.

<sup>394</sup> China's second written submission, para. 114.

<sup>395</sup> See for instance China's second written submission, paras. 111-112.

<sup>396</sup> See for instance China's second written submission, para. 110.

attribute to it before the Panel.<sup>397</sup> China asks the Panel to consider this lack of objection in its decision.

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

#### 7.6.4 Arguments of the third parties

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

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

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

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<sup>397</sup> US first written submission, para. 217.

<sup>398</sup> China's first written submission, paras. 172-174.

<sup>399</sup> China's first written submission, para. 173.

<sup>400</sup> Japan's third party submission, paras. 25, 29.

<sup>401</sup> Japan's third party submission, para. 27.

<sup>402</sup> Japan's third party submission, para. 28.

<sup>403</sup> EU third party submission, para. 47.

<sup>404</sup> EU third party submission, para. 48.

<sup>405</sup> EU third party submission, para. 49.

<sup>406</sup> EU third party submission, para. 59.

<sup>407</sup> EU third party submission, para. 62.

<sup>408</sup> Saudi Arabia's third party submission, para. 37.

<sup>409</sup> Saudi Arabia's third party submission, paras. 38-39.



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

### 7.6.5 Evaluation by the Panel

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

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

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

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

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

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

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

<sup>410</sup> Saudi Arabia's third party submission, para. 40.

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

<sup>412</sup> Appellate Body Report, *China – GOES*, para. 136.

<sup>413</sup> Appellate Body Report, *China – GOES*, para. 137.

<sup>414</sup> Appellate Body Report, *China – GOES*, para. 154.

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

<sup>416</sup> Panel Reports, *China – X-Ray Equipment*, para. 7.65; *China – Broiler Products*, para. 7.483.

**Table 3: Changes in AUVs (in %)**<sup>417</sup>

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

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

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

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

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

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

<sup>417</sup> Final determination, Exhibit CHN-07, pp. 129-130.

<sup>418</sup> Final determination, Exhibit CHN-07, p. 130.

<sup>419</sup> Final determination, Exhibit CHN-07, pp. 129-130.

<sup>420</sup> Statements that prices of subject imports and the domestic like product were "consistent basically" throughout the POI and "increased in general" from 2006 and 2008. See para. 7.260 of this Report.

<sup>421</sup> Final determination, Exhibit CHN-07, pp. 129-130.



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

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

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

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

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

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

<sup>422</sup> New Shorter Oxford English Dictionary, Clarendon Press 1993.

<sup>423</sup> See for instance Appellate Body Report, *China – GOES*, para. 210.

<sup>424</sup> Final determination, Exhibit CHN-07, pp. 130-131.

<sup>425</sup> Appellate Body Report, *China – GOES*, para. 136.

<sup>426</sup> See for instance China's second written submission, para. 83.

<sup>427</sup> China's first written submission, paras. 178-179.

<sup>428</sup> Appellate Body Report, *China – GOES*, paras. 220-221.

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

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

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

**Table 4: AUVs (in CNY/Unit)<sup>430</sup>**

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

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

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

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

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

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

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

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

<sup>431</sup> We recall that the price comparison is based on AUVs, which represent average prices.

<sup>432</sup> See para. 7.236 of this Report.

<sup>433</sup> Final determination, Exhibit CHN-07, p. 157.

MOFCOM failed to engage with the evidence of overselling or the margins of overselling themselves.<sup>434</sup>

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

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

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

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

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

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

<sup>435</sup> These AUVs are set out in Table 4 above.

<sup>436</sup> Panel Report, *China – GOES*, para. 7.530; Appellate Body Report, *China – GOES*, para. 200.

<sup>437</sup> China's second written submission, paras. 116-120.

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

an IA examines price effects within the meaning of Article 3.2 of the Anti-Dumping Agreement and Article 15.2 of the SCM Agreement.<sup>439</sup>

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

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

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

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

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<sup>439</sup> Panel Report, *China – X-Ray Equipment*, para. 7.49; Appellate Body Report, *China – GOES*, para. 200.

<sup>440</sup> We note that the United States does not challenge MOFCOM's like product determination.

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

<sup>442</sup> Panel Report, *China – Broiler Products*, para. 7.475.

<sup>443</sup> Preliminary determination, Exhibit CHN-05, p. 33; final determination, Exhibit CHN-07, pp. 41-44.

<sup>444</sup> US respondent comments on the preliminary determination, Exhibit USA-12, Table 6, pp. 50-51.

<sup>445</sup> Indeed, MOFCOM concluded that Chrysler USA's data reinforced its like product determination, stating:

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

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

domestic products may substitute for each other and they are competing with each other.<sup>446</sup> (emphasis added)

MOFCOM reached the same conclusion in its final determination, with some additional discussion of the revised product scope.<sup>447</sup>

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

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

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

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

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

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

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<sup>446</sup> Preliminary determination, Exhibit CHN-05, pp. 29-30.

<sup>447</sup> Final determination, Exhibit CHN-07, pp. 44-47.

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

<sup>449</sup> China's second written submission, paras. 116-120.

<sup>450</sup> Although, of course, a price depression analysis may be based on actual price levels, which would reflect absolute values.

**Table 5: Market Shares (in %)**<sup>451</sup>

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

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

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

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

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

<sup>451</sup> Final determination, Exhibit CHN-07, pp. 128-129, 133.

<sup>452</sup> Final determination, Exhibit CHN-07, pp. 130-131.

<sup>453</sup> Final determination, Exhibit CHN-07, pp. 160-162.

**Table 6: Changes in Market Shares (in %)<sup>454</sup>**

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

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

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

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

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

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

<sup>455</sup> Final determination, Exhibit CHN-07, pp. 138-139.



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

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

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

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

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

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

#### **7.6.6 Conclusion**

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

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

#### **7.7.1 Provisions at issue**

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

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

[i]t must be demonstrated that the [dumped/subsidized] imports are, through the effects of [dumping/subsidization], as set forth in paragraphs 2 and 4, causing injury within the meaning of this Agreement. The demonstration of a causal relationship between the [dumped/subsidized] imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities. The authorities shall also examine any known factors other than the [dumped/subsidized]

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<sup>456</sup> We note in this regard also the potential relevance of the information on overselling by subject imports during this period, which is not addressed by MOFCOM.

<sup>457</sup> See para. 7.30 of this Report.

<sup>458</sup> See para. 7.231 of this Report.



imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the [dumped/subsidized] imports. Factors which may be relevant in this respect include, *inter alia*, the volume and prices of [non-subsidized imports of the product in question/ imports not sold at dumping prices], contraction in demand or changes in the patterns of consumption, trade restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry.

### 7.7.2 Factual background

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

7.300. MOFCOM concluded its causation analysis as follows:

[t]he investigation evidence indicates that, the United States is one of the major sources of imports of saloon cars and cross-country cars of a cylinder capacity >2500cc. During the POI, the import volume of the product under investigation accounts for a relatively large proportion of the total import volume to China. Both the import volume and the market share in China of the subject products increased continuously; the price change of the subject imports has an important impact on the prices of Chinese domestic like product.

In the first three quarters of 2009, contrary to the substantial drop by 32.63% of import volume of other countries (region), the import volume of the product under investigation increased significantly by 20.12% and its share in Chinese domestic market increased by 4.69 percentage points, while the import price decreased by 3.17% in the same time. The import price of the product under investigation depressed the prices of Chinese domestic like product. As a result, the prices of Chinese domestic like product decreased by 10.13% in the same time.

In the first three quarters of 2009, the domestic industry overcame the impact of the decrease in apparent consumption of the domestic market and maintained the increase of production, sales and market share by continually improving production and operation levels as well as the product competitiveness. However, because of the effects that the import volume of the product under investigation increased and the import prices decreased, the sales price of domestic like product, the increase margin of the sales revenue, pre-tax profits and the rate on return of investment of the domestic industry all fell sharply; the profitability of the domestic industry was badly affected; the investment plan and new projects of certain domestic manufacturers were forced to be laid aside, delayed or cancelled. The domestic industry was materially injured.<sup>459</sup>

### 7.7.3 Arguments of the parties

#### 7.7.3.1 United States

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

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<sup>459</sup> Final determination, Exhibit CHN-07, pp. 140-142.

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

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

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

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

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

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<sup>460</sup> US second written submission, paras. 100-101.

<sup>461</sup> US first written submission, paras. 156-157.

<sup>462</sup> See for instance US comments on China's response to Panel question No. 45.

<sup>463</sup> US first written submission, para. 159.

<sup>464</sup> US opening statement at the first Panel meeting, paras. 92-94.

<sup>465</sup> See for instance US response to Panel question No. 21.a.

<sup>466</sup> US comments on China's response to Panel question No. 43.

<sup>467</sup> See for instance US opening statement at the first Panel meeting, paras. 97-98.

<sup>468</sup> US first written submission, paras. 165-167.

<sup>469</sup> US opening statement, para. 100.

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

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

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

### 7.7.3.2 China

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

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

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<sup>470</sup> US opening statement at the second Panel meeting, para. 79.

<sup>471</sup> See for instance US response to Panel questions Nos. 21.a and 21.b.

<sup>472</sup> US response to Panel questions Nos. 21.b and 22.a.

<sup>473</sup> US response to Panel question No. 21.b.

<sup>474</sup> US comments on China's response to Panel questions Nos. 44.a, 44.b and 44.c.

<sup>475</sup> US response to Panel questions Nos. 22.a and 22.b.

<sup>476</sup> See for instance China's first written submission, para. 221.

<sup>477</sup> China's first written submission, para. 224.

<sup>478</sup> China's first written submission, para. 226.

<sup>479</sup> China's first written submission, para. 263.

China submits that it is for the United States to make a *prima facie* case that China breached Articles 3.5 and 15.5.<sup>480</sup>

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

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

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

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

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

<sup>480</sup> China's first written submission, para. 264.

<sup>481</sup> See for instance China's second written submission, paras. 135, 139.

<sup>482</sup> China's second written submission, para. 139.

<sup>483</sup> See for instance China's second written submission, para. 135.

<sup>484</sup> China's first written submission, paras. 237-238.

<sup>485</sup> See for instance China's first written submission, fn. 256.

<sup>486</sup> China's second written submission, paras. 146-147.

<sup>487</sup> China's first written submission, paras. 243-244.

<sup>488</sup> China's second written submission, para. 140.

<sup>489</sup> China's second written submission, para. 142.

<sup>490</sup> China's second written submission, paras. 142-143.

<sup>491</sup> See for instance China's response to Panel question No. 22.c.

<sup>492</sup> China's opening statement at the second Panel meeting, para. 68.

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

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

#### 7.7.4 Arguments of the third parties

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

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

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

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<sup>493</sup> See for instance China's second written submission, para. 148.

<sup>494</sup> China's second written submission, para. 151.

<sup>495</sup> China's response to Panel question No. 44.c.

<sup>496</sup> See for instance China's second written submission, para. 155.

<sup>497</sup> China's second written submission, para. 154.

<sup>498</sup> EU third party submission, paras. 68, 72-77.

<sup>499</sup> EU third party submission, paras. 78-80.

<sup>500</sup> EU third party submission, paras. 86, 91.

<sup>501</sup> Japan's third party submission, para. 32.

<sup>502</sup> Japan's third party submission, para. 34.

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

### 7.7.5 Evaluation by the Panel

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

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

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

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

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

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<sup>503</sup> Saudi Arabia's third party submission, paras. 42-44.

<sup>504</sup> Saudi Arabia's third party submission, para. 47.

<sup>505</sup> Saudi Arabia's third party submission, para. 45.

<sup>506</sup> Panel Report, *China – X-Ray Equipment*, para. 7.244 (citing Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93).

<sup>507</sup> Appellate Body Report, *US – Wheat Gluten*, para. 67.

<sup>508</sup> See Panel Reports, *Thailand – H-Beams*, para. 7.273; *EU – Footwear (China)*, para. 7.484.

<sup>509</sup> See Panel Reports, *Thailand – H-Beams*, para. 7.274; *Egypt – Steel Rebar*, para. 7.115.

<sup>510</sup> Panel Report, *EC – Salmon (Norway)*, para. 7.660.

<sup>511</sup> Appellate Body Report, *US – Hot-Rolled Steel*, paras. 233-236.



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

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

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

7.327. However, we have concluded that MOFCOM's price effects analysis was inconsistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement and Articles 15.1 and 15.2 of the SCM Agreement.<sup>513</sup> The price effects analysis represents an important element of the injury determination in this case. In our view, it would be difficult, if not impossible, to make a determination of causation consistent with the requirements of the Articles 3 and 15 of the Anti-Dumping and SCM Agreements, respectively, in a situation where an important element of that determination, the underlying price effects analysis, is itself inconsistent with the provisions of those Agreements. Nothing in MOFCOM's determination or China's arguments in this dispute suggests that the causation determination we are considering would stand on its own, without consideration of the price effects of the subject imports.

7.328. Thus, having found violations of Articles 3.1 and 3.2 of the Anti-Dumping Agreement and Articles 15.1 and 15.2 of the SCM Agreement concerning MOFCOM's price effects analysis, we conclude that MOFCOM's causation analysis is inconsistent with Articles 3.1 and 3.5 of the Anti-Dumping Agreement and Articles 15.1 and 15.5 of the SCM Agreement.

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

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

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

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

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<sup>512</sup> See para. 7.231 of this Report.

<sup>513</sup> See para. 7.296 of this Report.

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

<sup>515</sup> See Table 6, at p. 87 of this Report.



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

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

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

[b]esides the subject country, during the POI, the countries (regions) that exported saloon cars and cross-country cars of a cylinder capacity > 2500cc to China include also the European Union, South Korea and Japan, etc.

According to the statistical data of the Customs of the People's Republic of China, during the POI, the export volumes to China from other countries (regions) and their market shares in Chinese domestic market both initially increased and then decreased. But the volume of the subject imports to China and its market share in Chinese domestic market grew continually. Especially in the first three quarters of 2009, the volume of subject imports to China significantly increased by 20.12%, of which the ratio in the total import volume to China and the market share in China both increased. However the import volume to China from other countries (regions) decreased sharply by 32.63% at the same time, of which the ratio in the total import volume to China and the market share in Chinese market both decreased. Imports from other countries (regions) do not affect the finding of causal link in this case.<sup>516</sup> (emphasis added)

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

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

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

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

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

<sup>516</sup> Final determination, Exhibit CHN-07, pp. 142-143.

<sup>517</sup> See para. 7.288 of this Report.

<sup>518</sup> US response to Panel question No. 21.a.

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

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

**Table 7: Labor Costs as a percentage of Total Costs<sup>519</sup>**

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

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

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

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

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

<sup>520</sup> We calculate a difference of 88 million CNY.

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

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

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

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

(1) In the comments on the preliminary determination, American Government, Chrysler Group LLC and General Motors LLC all alleged that, within the POI, the import prices of the product under investigation are much higher than that of the domestic like product, which indicates that the import prices of the product under investigation did not depress or undercut the price of the domestic like product.

Both Chrysler Group LLC and General Motors LLC alleged that, there is a great difference between the price of the product under investigation and the price of the domestic like product, so there is no competition between them. They argued that the product under investigation mainly competes with the products manufactured by joint ventures in China and "the domestic industry" which is Chinese "local automobile companies", is injured by the products manufactured by the joint ventures in China. Chrysler Group LLC also argued that, "the domestic industry" mainly produces and sells the products of "the entry level", while the overwhelming majority of the product under investigation is the products of "the luxury level", so there is no competition.

...

(3) The Investigating Authority Found that:

...

② Price is not the single criteria of finding the competition relationship between the product under investigation and the domestic like product, and the competition relationship between them cannot be denied just due to the price difference. The investigating authority has conducted a comprehensive investigation on the product under investigation and the like product manufactured in China in terms of physical characteristics, performance, production process, product use, product substitution, perception of consumers and producers, sales channels, prices and so on. The investigation indicates that the two are similar and comparable, which can substitute for and compete with each other.

...

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<sup>521</sup> See para. 7.281 of this Report.

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

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

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

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

##### **7.7.5.5.1 Decline in apparent consumption**

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

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

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

<sup>522</sup> Final determination, Exhibit CHN-07, pp. 155-158.

<sup>523</sup> See para. 7.236 of this Report.

<sup>524</sup> Moreover, we find it contradictory for MOFCOM to both dismiss as unreliable the evidence submitted by Chrysler USA, and conclude that the same evidence supports MOFCOM's conclusion that the domestic like product and the subject imports compete. Further, we are not convinced that Chrysler USA's sales data actually supports MOFCOM's finding of a competitive overlap between subject imports and the domestic like product.

<sup>525</sup> MOFCOM lists "Changes in Market Demand and Consumption Model, and Substitute Products" as an "Other Factor" in the causation chapter of its final determination. See Final determination, Exhibit CHN-07, p. 143.

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

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

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

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

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

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

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

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

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

<sup>526</sup> Final determination, Exhibit CHN-07, pp. 143-144.

<sup>527</sup> See para. 7.323 of this Report.

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

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

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

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

#### 7.7.5.5.3 Increase in sales tax

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

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

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

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

<sup>528</sup> US response to Panel question 21.b.

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

<sup>530</sup> US respondent comments on the preliminary determination, Exhibit USA-12, pp. 22-23.



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

(3) The Investigating Authority Found that:

① In the preliminary determination, the investigating authority found that "in the first three quarters of 2009, although the apparent consumption of the domestic market decreased, the domestic industry still maintained the increase of production and sales through continually improving production and operation level as well as product competitiveness". The argument of American party, that "the production and sale of the domestic industry decreased" in its comments on the preliminary determination, is not consistent with the facts.

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

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

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

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

### 7.7.6 Conclusion

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

<sup>531</sup> Final determination, Exhibit CHN-07, pp. 163-164.

<sup>532</sup> We find this characterisation of Chrysler's argument to be of no import to the resolution of the US claim.

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



## 7.8 Consequential violations

### 7.8.1 Provisions at issue

7.364. Article 1 of the Anti-Dumping Agreement reads in relevant part:

[a]n anti-dumping measure shall be applied only under the circumstances provided for in Article VI of GATT 1994 and pursuant to investigations initiated and conducted in accordance with the provisions of this Agreement. The following provisions govern the application of Article VI of GATT 1994 in so far as action is taken under anti-dumping legislation or regulations.

7.365. Similarly, Article 10 of the SCM Agreement provides that:

Members shall take all necessary steps to ensure that the imposition of a countervailing duty on any product of the territory of any Member imported into the territory of another Member is in accordance with the provisions of Article VI of GATT 1994 and the terms of this Agreement. Countervailing duties may only be imposed pursuant to investigations initiated and conducted in accordance with the provisions of this Agreement and the Agreement on Agriculture.

### 7.8.2 Arguments of the parties

7.366. The **United States** claims that China's actions are inconsistent with Article 1 of the Anti-Dumping Agreement and Article 10 of the SCM Agreement.<sup>534</sup> The United States submits that, insofar as the Panel finds that China acted inconsistently with any provision of the Anti-Dumping Agreement cited in its claims above, the Panel should also find that, as a consequence of imposing an AD measure not "in accordance with" the Anti-Dumping Agreement, China has breached Article 1 of the Anti-Dumping Agreement.<sup>535</sup> The United States likewise contends that insofar as the Panel finds that China violated any provision of the SCM Agreement in this dispute, the Panel should also find a violation of Article 10 of the SCM Agreement.<sup>536</sup>

7.367. **China** argues that while the United States claims that MOFCOM acted inconsistently with Article 1 of the Anti-Dumping Agreement and Article 10 of the SCM Agreement, the United States does not cite any specific evidence or legal argument in support of its claim. In China's view, the United States has thus failed to make out a *prima facie* case regarding these consequential claims.<sup>537</sup>

### 7.8.3 Evaluation by the Panel

7.368. To succeed in a claim under Article 1 of the Anti-Dumping Agreement or Article 10 of the SCM Agreement, a complaining Member need only establish that AD or CVD measures were imposed, and the imposing Member acted inconsistently with one of its obligations under the relevant Agreement.<sup>538</sup> We have found that MOFCOM acted inconsistently with several provisions of the Anti-Dumping and SCM Agreements, with respect to the requirement for non-confidential summaries of confidential information, the disclosure of essential facts, the determination of the residual AD and CVD rates, the determination of price effects, and the determination of causation. Therefore, we also find that China has, as a consequence of these inconsistencies, acted inconsistently with Article 1 of the Anti-Dumping Agreement and Article 10 of the SCM Agreement.

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<sup>534</sup> US first written submission, paras. 176-177. The United States also argued, in its first written submission, that MOFCOM acted inconsistently with Article VI of the GATT 1994. However, the United States dropped this argument in its second written submission. See US second written submission, fn. 153.

<sup>535</sup> US second written submission, para. 120.

<sup>536</sup> US second written submission, paras. 120-121.

<sup>537</sup> China's first written submission, para. 266.

<sup>538</sup> Appellate Body Reports, *US – Anti-Dumping and Countervailing Duties (China)*, para. 358; *US – Softwood Lumber IV*, para. 143.

## 8 CONCLUSIONS AND RECOMMENDATION

8.1. For the reasons set forth in this Report, the Panel concludes as follows:

- i. China acted inconsistently with Articles 6.5.1 of the Anti-Dumping Agreement and 12.4.1 of the SCM Agreement in failing to require the submission of adequate non-confidential summaries of confidential information contained in the petition;
- ii. China acted inconsistently with Article 6.9 of the Anti-Dumping Agreement because MOFCOM failed to disclose the essential facts under consideration which formed the basis of its decision to impose the AD duties;
- iii. China acted inconsistently with Article 6.8 and paragraph 1 of Annex II of the Anti-Dumping Agreement with respect to the determination of the residual AD duty rate for unknown US exporters;
- iv. China acted inconsistently with Article 12.7 of the SCM Agreement with respect to the determination of the residual CVD rate for unknown US exporters;
- v. China acted inconsistently with Articles 3.1 and 3.2 of the Anti-Dumping Agreement and Articles 15.1 and 15.2 of the SCM Agreement in connection with MOFCOM's analysis of price effects;
- vi. China acted inconsistently with Articles 3.1 and 3.5 of the Anti-Dumping Agreement and Articles 15.1 and 15.5 of the SCM Agreement in connection with MOFCOM's causation determination; and
- vii. China acted inconsistently with Article 1 of the Anti-Dumping Agreement and Article 10 of the SCM Agreement as a consequence of the foregoing violations of these Agreements.

8.2. For the reasons set forth in this Report, the Panel further concludes as follows:

- i. The United States has not established that China acted inconsistently with Articles 6.9, 12.2 and 12.2.2 of the Anti-Dumping Agreement with respect to the disclosure of the essential facts and public notice regarding MOFCOM's determination of the residual AD duty rate for unknown US exporters;
- ii. The United States has not established that China acted inconsistently with Articles 12.8, 22.3 and 22.5 of the SCM Agreement with respect to the disclosure of the essential facts and public notice regarding MOFCOM's determination the residual CVD rate for unknown US exporters; and
- iii. The United States has not established that China acted inconsistently with Articles 3.1 and 4.1 of the Anti-Dumping Agreement and Articles 15.1 and 16.1 of the SCM Agreement in connection with MOFCOM's definition of the domestic industry.

8.3. Under Article 3.8 of the DSU, in cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment. Thus, we conclude that, to the extent that the measures at issue are inconsistent with the Anti-Dumping and SCM Agreements, they have nullified or impaired benefits accruing to the United States under those Agreements. On this basis, pursuant to Article 19.1 of the DSU, we recommend that China bring its measures into conformity with its obligations under the Anti-Dumping and SCM Agreements.

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