CHINA – ANTI-DUMPING AND COUNTERVAILING DUTY MEASURES ON CERTAIN AUTOMOBILES FROM THE UNITED STATES
(DS440)

EXECUTIVE SUMMARY OF THE OPENING STATEMENT OF THE UNITED STATES OF AMERICA AT THE FIRST SUBSTANTIVE MEETING OF THE PANEL

July 3, 2013

Mr. Chairperson, members of the Panel:

1. This is the third dispute settlement proceeding the United States has commenced against China concerning antidumping and countervailing duty measures targeting U.S. exports. Each of the disputes we have brought addresses similar problems under the same substantive provisions of the covered agreements, and we are concerned by China's repeated failure to abide by fundamental commitments that it made in the trade remedies area when it joined the WTO.

2. China, through its investigating authority, MOFCOM, has acted inconsistently with its obligations under the AD Agreement, the SCM Agreement, and Article VI of the GATT 1994. In particular, MOFCOM failed to adhere to a range of key WTO obligations relating to transparency and procedural fairness, and it once again went forward with final affirmative determinations in the face of wholly inadequate evidence of material injury that should have led to the termination of the investigations, not the imposition of duties.

3. China's responses to the U.S. claims are unpersuasive. China seeks to counter arguments the United States does not make; to divert attention from the claims the United States is actually pursuing; to minimize MOFCOM's numerous procedural failures; and to assert without any factual basis that MOFCOM engaged in a searching and critical evaluation of the facts and evidence before it. However, as the United States has shown, the conclusions that MOFCOM reached simply do not meet the standard, as described by a recent panel, of being "such reasonable conclusions as could be reached by an unbiased and objective investigating authority in light of the facts and arguments before it and the explanations given." Contrary to China's charge, it is not the case that the United States is seeking to "impose its mode of implementing the AD and SCM Agreements on other WTO Members." Rather, it is just that, when subjected to scrutiny, MOFCOM's investigations and determinations fail to meet the requirements of the AD and SCM Agreements and Article VI of the GATT 1994.

I. CHINA FAILED TO REQUIRE ADEQUATE NON-CONFIDENTIAL SUMMARIES OF CONFIDENTIAL INFORMATION

4. Under Article 12.4.1 of the SCM Agreement and Article 6.5.1 of the AD Agreement, when an interested party claims that certain information must be treated as confidential, an investigating authority must require the party to provide sufficiently detailed non-confidential summaries of the confidential information. In exceptional circumstances, if an interested party believes the confidential information is not susceptible of summary, an explanation of why must be provided to the investigating authority. We demonstrated in our first written submission that China failed to meet these requirements.

5. China argues that the respondents never objected to the sufficiency of the non-confidential summaries. However, there is nothing in the text of Articles 12.4.1 or 6.5.1 that relieves China of its obligations under those provisions in the absence of an "objection" from respondents. China made this same exact argument in *China – GOES*, and the panel there rejected it.

6. China also argues that the petitioner did in fact prepare adequate summaries, even though they were not labeled as such. However, for the categories of confidential information identified, China points to general statements in the petition addressing topics related to the confidential information, but these general statements are insufficient. The recent panel report in *China – GOES* makes clear that interested parties do not have "to infer, derive and piece together a possible summary of confidential information."

7. Two examples cited by China illustrate why China's approach is misguided. Table 19 from the petition, which we have reproduced as Exhibit USA-14, and Table 27 from the petition, which we have reproduced as Exhibit USA-15. In both of these tables, China points to a trend

line that is not labeled to indicate scale, and it relies on discussion where the key information is simply redacted.

8. China's approach to summaries would require interested parties to "infer, derive and piece together a possible summary of confidential information," contrary to the requirements of Articles 12.4.1 and 6.5.1. Because of these redactions and other shortcomings in summarization, in this case the respondents could not discern the substance of the information provided.

9. Additionally, we note that neither the petition nor the documents prepared by MOFCOM during the course of the proceeding ever asserted that summarization was not possible or otherwise justified the absence of meaningful non-confidential summaries.

10. Accordingly, China breached Article 6.5.1 of the AD Agreement and Article 12.4.1 of the SCM Agreement.

II. MOFCOM'S USE OF FACTS AVAILABLE TO DETERMINE THE "ALL OTHERS" CVD RATE IS INCONSISTENT WITH ITS OBLIGATIONS UNDER ARTICLE 12.7 OF THE SCM AGREEMENT

11. We turn now to MOFCOM's determination of the "all others" CVD rate. In the autos proceeding, the following U.S. exporters/producers of automobiles registered for the investigation: General Motors, Chrysler, Mercedes-Benz and its affiliated company Daimler, BMW, Honda, Mitsubishi, and Ford. Notwithstanding the fact that neither the petitioner nor MOFCOM identified any other U.S. producers or exporters of automobiles, China not only established an "all others" subsidy rate for unknown or unidentified producers, but applied facts available to arrive at this rate based on the purported lack of cooperation by these unknown or unidentified companies.

12. China claims that any unknown or unidentified companies were properly notified by virtue of the fact that MOFCOM placed a copy of the public version of the petition in a reading room in Beijing, published the notice of initiation, and notified the U.S. government.

13. This is not an adequate basis to resort to facts available. Under Article 12.1 of the SCM Agreement, all interested parties "shall be given notice of the information which the authorities require and ample opportunity to present in writing all evidence which they consider relevant." In that regard, an interested party cannot "refuse[] access to, or otherwise … not provide, *necessary* information" if it has not been given notice of "the information which the authorities *require*." As the Appellate Body has made clear, an exporter must be given the opportunity to provide information required by an investigating authority before the investigating authority resorts to facts available that can be adverse to the exporter's interests. By definition, an exporter that is unknown to the investigating authority is not notified of the information required, and thus is denied an opportunity to provide it.

14. The panel in *China – GOES* reviewed facts that are similar to the facts in this dispute. The *China – GOES* panel found that China acted inconsistently with Article 12.7 of the SCM Agreement, noting that "in the absence of being notified of the 'necessary information' in the context of a particular investigation, it is difficult to conclude that unknown exporters refused access to or failed to provide necessary information or otherwise impeded the investigation." The panel also observed that "a conclusion that non-existent exporters refused to provide information or impeded the investigation seems illogical."

15. As in *China – GOES*, in the absence of being notified of the "necessary information" in the autos proceeding, it is illogical to conclude that unknown exporters refused access to or failed to provide necessary information or otherwise impeded the investigation. And similar to *China –*

GOES, no other exporters existed at the time of the autos investigation; it is logically impossible to argue in this dispute that a non-existent exporter failed to cooperate.

16. China's mere placement of a petition in a reading room and publication of a notice do not constitute a meaningful opportunity for a company to provide information. Accordingly, an unidentified or unknown exporter cannot be said to have failed to cooperate by not having located the petition or the notice of initiation in this case. Thus, by applying facts available to non-existent, unknown, or unidentified firms, China breached Article 12.7 of the SCM Agreement.

III. CHINA'S DETERMINATION OF THE "ALL OTHERS" RATE IN THE FINAL ANTIDUMPING DUTY DETERMINATION IS INCONSISTENT WITH ARTICLE 6.8 AND PARAGRAPH 1 OF ANNEX II OF THE AD AGREEMENT

17. For the "all others" dumping rate, as with the "all others" subsidy rate, notwithstanding the fact that neither the petitioner nor MOFCOM identified any other U.S. producers or exporters of autos, China applied a facts available dumping rate to unknown or unidentified exporters of autos. Notably, this "all others" dumping rate was more than twice as high as the highest rate calculated for an investigated company.

18. China again claims that it was permitted to apply facts available because it placed the petition in a reading room in Beijing and published the notice of initiation on its website. For the reasons described earlier, this is not a sufficient basis to deem unknown or unidentified producers or exporters uncooperative.

19. China further claims that, while the AD Agreement limits the antidumping rate that can be applied to known producers or exporters that are not individually examined, there are no such limits placed on unknown producers/exporters. Therefore, according to China, MOFCOM was within its rights to base the "all others" dumping rate on facts available. This argument, however, overlooks the clear direction in Article 6.1 and paragraph 1 of Annex II to notify all interested parties of the information that is required of them and to provide them with ample opportunity to provide all relevant information.

20. Understood in light of the obligation to notify interested parties of the information required of them, Article 6.8 and Annex II are intended to address situations where an interested party does not provide such information to or cooperate with the investigating authority. A failure to provide necessary information or a failure to cooperate cannot be found to have existed where no other producer or exporter was made aware of the information which the authorities require of it for purposes of that investigation. And where there was no other producer or exporter, they of course could not be aware of the investigation, much less the information required.

21. In *China – GOES*, the panel found that China acted inconsistently with Article 6.8 of the AD Agreement, and paragraph 1 of Annex II, for reasons similar to those provided in its findings under Article 12.7 of the SCM Agreement. The facts of the *China – GOES* dispute are similar to the facts of this dispute. The panel in this dispute should similarly find that China acted inconsistently with Article 6.8 and paragraph 1 of Annex II of the AD Agreement.

IV. CHINA BREACHED ARTICLE 12.8 BY FAILING TO DISCLOSE THE ESSENTIAL FACTS REGARDING THE CALCULATION OF THE "ALL OTHERS" SUBSIDY RATE

22. During the autos investigation, MOFCOM calculated the all others subsidy rate by applying "facts available." It did so without disclosing the essential facts forming the basis for its decision, contrary to Article 12.8 of the SCM Agreement. These essential facts included the

facts that led MOFCOM to conclude that "facts available" was warranted. In *China – GOES*, the panel found that China acted inconsistently with the disclosure obligations under Article 12.8 of the SCM Agreement by not disclosing facts leading to the conclusion that applying "facts available" to calculate the "all others rate" was warranted. Accordingly, the panel in this dispute should find that China acted inconsistently with Article 12.8 of the SCM Agreement by not disclosing the essential facts forming the basis for its decision regarding final measures for "all other" U.S. companies.

V. CHINA FAILED TO DISCLOSE THE ESSENTIAL FACTS REGARDING THE CALCULATION OF THE "ALL OTHERS" DUMPING RATE, CONTRARY TO ARTICLE 6.9 OF THE AD AGREEMENT

23. China also acted inconsistently with Article 6.9 of the AD Agreement by failing to disclose the essential facts forming the basis of the "all others" dumping rate. MOFCOM's "all others" dumping rate was twice as high as the highest calculated rate. China justified its choice of this final rate as reliance on the "facts available."

24. However, prior to the final determination, China did not disclose the essential facts forming the basis for its decision. In response, China argues that it applied the AD rate alleged in the petition, and there were no adjustments or calculations that could have been disclosed. This argument is inadequate. It ignores that an "essential fact" when an investigating authority seeks to resort to facts available would be the facts identified in Article 6.8 – that is, the facts that demonstrate an interested party has "refuse[d] access to, or otherwise d[id] not provide, necessary information … or significantly impede[d] the investigation." Further, MOFCOM also did not disclose any of the facts it employed to corroborate the margin information provided in the petition, or to decide that it was an appropriate margin for the "all others" rate.

25. In *China – GOES*, the panel found that China acted inconsistently with the disclosure obligations under Article 6.9 of the AD Agreement by not disclosing facts leading to the conclusion that applying "facts available" to calculate the "all others rate" was warranted.

26. By failing to disclose these essential facts in the autos proceeding, China acted inconsistently with Article 6.9 of the AD Agreement.

VI. CHINA FAILED TO DISCLOSE THE DATA AND CALCULATIONS UNDERLYING ITS DETERMINATION OF THE DUMPING MARGIN, CONTRARY TO ARTICLE 6.9 OF THE AD AGREEMENT

27. China also breached Article 6.9 of the AD Agreement because MOFCOM failed to disclose the data and calculations it performed to determine the existence and margin of dumping, including the calculation of the normal value and the export price for the respondents.

28. As just discussed, Article 6.9 of the AD Agreement requires the investigating authority to disclose the essential facts "under consideration which form the basis for the decision whether to apply definitive measures." Definitive measures are only applied if the normal value exceeds the export price, and the margin of dumping is based on the extent to which it does so. Therefore, the data and calculations used to determine the normal value and export price constitute "essential" facts. Without those facts, no affirmative dumping determination could be made, and no definitive duties could be imposed.

29. China asserts that the U.S. reading of Article 6.9 creates a disclosure requirement without limit. To the contrary, the first sentence of Article 6.9 has at least three limitations – it applies to *facts*, as opposed to other matters ; it concerns only the *essential* facts, as opposed to any and all facts; and it is limited to those essential facts that *form the basis of the decision to apply definitive measures*. The United States claim under Article 6.9 is firmly based on this text, and

respects these limitations. Additionally, the first sentence of Article 6.9 must be read in context of the second sentence, which provides that that the aim of the requirement is "to permit parties to defend their interests." As the panel in *EC – Salmon* explained, the purpose of Article 6.9 is to "provide the interested parties with the necessary information to enable them to comment on the completeness and correctness of the facts being considered by the investigating authority" and "provide additional information or correct perceived errors."

30. China responds by arguing that it did disclose the essential facts. In doing so, China cites a passage of the final determination that merely states that China disclosed the essential facts. This is not enough. China does not cite any evidence showing that it disclosed the actual essential facts – the data and calculations – underlying the dumping margin determination. Thus, by failing to disclose the data and calculations it performed to determine the existence and margin of dumping, including the calculation of the normal value and the export price for the respondents, China has breached Article 6.9 of the AD Agreement.

VII. MOFCOM'S INJURY DETERMINATION IS INCONSISTENT WITH CHINA'S WTO OBLIGATIONS

A. MOFCOM's Narrow Definition of the Domestic Industry Is Inconsistent with Articles 3.1 and 4.1 of the AD Agreement and Articles 15.1 and 16.1 of the SCM Agreement

31. The petition in these cases was filed by the China Association of Automobile Manufacturers or "CAAM." We do not know who CAAM's members are – they were never identified. After initiating its investigations, MOFCOM published "Notifications for Registration to Participate" in the injury investigations. CAAM was the only domestic producer or association of domestic producers to respond to MOFCOM's notices. CAAM was then the only such domestic entity to which MOFCOM issued the injury questionnaire, and CAAM was the only domestic entity that provided a response to the injury questionnaire. MOFCOM based its injury determination on data submitted only by CAAM. However, the producers for which CAAM provided data accounted for only about one-third of total domestic production for most of the period of investigation. It simply cannot be the case that MOFCOM had "ample data" with which to make an accurate injury determination when the domestic industry – as MOFCOM defined it – was limited only to enterprises that supported the petition and excluded more than 60 percent of total domestic production.

32. Article 4.1 of the AD Agreement and Article 16.1 of the SCM Agreement establish that the term "domestic industry shall be interpreted as referring to the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products." Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement require that a determination of injury be based on "positive evidence" and involve an "objective examination" of, *inter alia*, the impact of imports on the domestic producers of such products.

33. In *EC – Fasteners*, the Appellate Body explained that "to ensure the accuracy of an injury determination, an investigating authority must not act so as to give rise to a material risk of distortion in defining the domestic industry, for example, by excluding a whole category of producers of the like product." The Appellate Body also explained that there is a relationship between the proportion of domestic production included in the domestic industry definition and the likelihood that the injury determination will be distorted. In other words, in cases such as this, where the industry "coverage" is low, there is a heightened risk that the injury determination will be distorted.

34. In these investigations, the definition of the domestic industry was distorted because it was limited to entities that were willing to register to participate in the injury investigations, that is, domestic producers that supported the petition. This is similar to the situation in *EC – Fasteners*, where the domestic industry was defined on the basis of a willingness to be included in a sample. China attempts to distinguish the facts of the *EC – Fasteners* dispute, but, in fact, the situations are quite similar. In each case, the investigative procedure introduced a material risk of distortion, which was inconsistent with the obligation to conduct an objective examination.

35. China claims that it conducted "an open, inclusive, and transparent" investigation. In reality, MOFCOM's investigation bore none of these attributes, and the standard to which MOFCOM's investigation must be held is not whether it was "open, inclusive, and transparent;" the relevant question is whether it met the specific requirements of the AD and SCM Agreements. It did not.

36. China tries to refute an argument that the United States did not make; namely that MOFCOM categorically excluded data from joint ventures between international and Chinese-owned companies. What the United States argued is that MOFCOM's definition of the domestic industry was distorted because it included only those producers that supported the petition, namely CAAM's member companies (*i.e.*, the petitioners) or some subset thereof.

37. China disputes that MOFCOM defined the domestic industry as the petitioner CAAM's member companies. The final determination provides two strong indications that the domestic industry was indeed defined to encompass CAAM member companies or some subset thereof. First, the final determination makes clear that the only questionnaire response that MOFCOM received from domestic producers was from CAAM. There is no indication in the final determination that CAAM was reporting data for any company other than its member companies in that questionnaire response. Second, in discussing the definition of the domestic industry, MOFCOM stated that "there is evidence showing that the total production of like products from domestic industry represented by China Association of Automobile Manufacturers accounts for the main part of that of domestic like products," and that the "domestic enterprises mentioned above can represent the Chinese domestic industry." The unavoidable implication of this statement is that the domestic industry was defined as the CAAM member companies or some subset thereof.

38. China argues that no "freestanding distortion test" can be read into Article 4.1 of the AD Agreement and Article 16.1 of the SCM Agreement. The obligation to avoid distortion stems from Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement, which are overarching obligations that inform the rest of the injury determination. MOFCOM's definition of the domestic industry was distorted because it included only producers that supported the petition.

39. China's first written submission makes clear that only about one third of domestic production was included in MOFCOM's definition of the domestic industry for most of the period of investigation. While the AD and SCM Agreements do not provide a definition of "a major proportion," that does not mean that there are no limitations on how an investigating authority may define the domestic industry. As the Appellate Body explained in *EC – Fasteners*, a proper interpretation of the term "a major proportion" "requires that the domestic industry defined on this basis encompass producers whose collective output represents a relatively high proportion that substantially reflects the total domestic production."

40. The Appellate Body further explained that *in certain circumstances* it might be appropriate for investigating authorities to have some flexibility in interpreting "major proportion." However, in this investigation, MOFCOM neither described the domestic industry

as fragmented nor identified any practical constraints on its ability to obtain information. Further, nothing in the final determination suggests that MOFCOM's investigation of automobiles involved any such special market situations that would warrant a lower threshold for defining "major proportion."

41. China seeks to excuse MOFCOM's failure to collect data covering a larger proportion of domestic production by noting that MOFCOM does not have the authority to compel interested parties to provide data for its investigations. However, there is no evidence that MOFCOM even made *any effort* to obtain information from additional producers on a voluntary basis. In fact, MOFCOM created a disincentive by requiring that producers apply to participate in the injury investigation as a prerequisite to submitting information.

42. MOFCOM stated in its final determination that it issued its injury questionnaire to "known" domestic producers. This is certainly not true. CAAM was not the only domestic producer or association of domestic producers that could have been "known" to MOFCOM. Indeed, MOFCOM by law would have approved all of the Sino-foreign joint ventures in the auto sector. It therefore would appear that MOFCOM simply closed its eyes to the existence of about two-thirds of the industry producing the domestic like product in China.

43. For these reasons, MOFCOM's definition of the domestic industry does not constitute "a major proportion of domestic production," within the meaning of Article 4.1 of the AD Agreement and Article 16.1 of the SCM Agreement. MOFCOM failed to ensure that the "domestic industry" was capable of providing "ample data" that would "ensure an accurate injury analysis." MOFCOM's injury determination, which was based on its definition of the domestic industry, was neither objective nor based on "positive evidence," as required by Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement.

B. MOFCOM's Price Effects Analysis Is Inconsistent with Articles 3.1 and 3.2 of the AD Agreement and Articles 15.1 and 15.2 of the SCM Agreement

44. Contrary to China's assertion, the United States does not merely challenge "certain narrow elements of MOFCOM's analysis" and ignore the big picture. The problem is that MOFCOM ignored the big picture, and the overall factual situation presented in the final determination simply does not support MOFCOM's conclusion with respect to price effects.

45. MOFCOM found that subject imports depressed prices for the domestic like product at the end of the period of investigation, in interim 2009, the first nine months of that year. That is the only adverse price effect that MOFCOM identified. MOFCOM made this finding despite the fact that subject imports were selling at much higher prices than the domestic like product. The average unit price of subject imports in interim 2009 was about RMB 411,000, while the average unit price of the domestic like product was about RMB 316,000. Moreover, the decline in the price of subject imports in interim 2009, as compared with interim 2008, was only 3.17 percent, compared to a decline for the domestic product of 10.13 percent.

46. This scenario presents a difficult question for China: how is it that a 3 percent decline in the price of the subject imports could have caused a 10 percent decline in the price of the domestic like product, when the imports were *overselling* the domestic product by such a wide margin? MOFCOM's explanation is cursory in the extreme and implausible on its face.

47. As an initial matter, we are puzzled by China's argument that MOFCOM was not required to make a finding of price undercutting. The United States did not argue in its first written submission that MOFCOM was required to make such a finding. The United States merely observed that MOFCOM did not make a finding of price undercutting, in order to identify with precision the type of price effects finding that MOFCOM *did* make.

48. MOFCOM gave two reasons for its conclusion that subject imports had depressed domestic prices in interim 2009: (1) "parallel pricing," and (2) the rising market share of subject imports, especially at the end of the period of investigation. Neither of these is sufficient to explain MOFCOM's price depression finding.

49. With respect to parallel pricing, MOFCOM's conclusion that the prices of the domestic like product and subject imports were moving in tandem is belied by the relevant data, which showed that these prices diverged significantly in 2007. The data on the record before MOFCOM plainly show that there was no price parallelism.

50. China takes issue with the U.S. argument that, because of a sharp divergence in prices in the 2006-2007 period, the record did not show parallel pricing. However, China's argument actually shows that MOFCOM's parallel pricing finding was at such a level of generality as to be virtually meaningless. According to China's preferred translation, the final determination states that "change trends of the price of product under investigation and the price of the domestic like product were *consistent basically*," and that they increased from 2006 to 2008 "*in general*." Observations at this level of generality are simply not enough for an investigating authority to, in the Appellate Body's words, "understand whether subject imports have explanatory force for the occurrence of significant depression . . . of domestic prices."

51. Furthermore, even if there had been parallel pricing, merely identifying the existence of such a price trend does nothing to explain how the effect of subject imports was to significantly depress prices for the domestic like products. MOFCOM said nothing in the final determination to explain how parallel pricing caused the depression of domestic prices.

52. MOFCOM's second reason for finding price depression in interim 2009 is equally unconvincing. MOFCOM found that the rising market share of subject imports, especially at the end of the period of investigation, resulted in price depression for the domestic like product. However, MOFCOM failed to explain this conclusion, which was, in fact, contradicted by other evidence. MOFCOM's final determination shows that the market share of the domestic like product *also increased* from interim 2008 to interim 2009, nearly as "sharply" as that of subject imports. In other words, subject imports were not taking market share from the domestic like product. Rather, both subject imports and the domestic like product took market share from Chinese producers not included in MOFCOM's definition of the domestic industry and from non-subject imports during this period. Under these circumstances, it is hard to see how the increase in market share of subject imports could have depressed the price of the domestic like product, and MOFCOM's determination gives no indication of how it considered these facts.

53. China argues that MOFCOM's finding of price depression in interim 2009 was explained by the increase in the volume or market share of subject imports, both throughout the period of investigation and in interim 2009. This is unpersuasive. The increases in the volume of subject imports in the 2006-2008 period were commensurate with rising consumption of the subject merchandise in the Chinese market. These increases resulted in only a very slight rise in the market share of subject imports, from 9.97 percent in 2006 to 10.74 percent in 2008. It is true that the domestic industry as defined by MOFCOM lost market share in the 2006-2008 period, but this was almost entirely because of gains made by Chinese producers not included in MOFCOM's definition of the domestic industry and third-country imports, not the subject imports.

54. The integrity of MOFCOM's finding that subject imports were responsible for price depression is also undercut by MOFCOM's use of average unit values or "AUVs." In light of the varying grades of the automobiles MOFCOM was comparing, MOFCOM should have made necessary adjustments to ensure price comparability, or, at the very least, it should have explained why such adjustments were not necessary. China argues that the relevant WTO

agreement provisions do not require any specific methodology when examining price trends. But, as the Appellate Body recognized in *China – GOES*, although Articles 3.2 and 15.2 do not specify a particular methodology for evaluating price effects, a failure to ensure price comparability would not be consistent with the requirements under Articles 3.1 and 15.1 that a determination of injury be based on "positive evidence" and involve an "objective examination" of the effect of subject imports on the prices of domestic like products.

55. China also maintains that MOFCOM established that there was a sufficient competitive overlap between subject imports and the domestic product to warrant the use of AUVs in the price effects analysis. The United States submits that MOFCOM's analysis (much of which occurred in the context of MOFCOM's discussion of the scope of the investigation and the definition of the domestic like product, and not in the context of a discussion of price effects) was at such a level of generality that it failed to establish the degree of competitive overlap that would make an analysis of price effects meaningful.

56. In sum, MOFCOM's finding of price depression during interim 2009 is not supported by the evidence on the record, and its consideration of price effects is not based on "positive evidence" and did not "involve an objective examination." Consequently, MOFCOM acted inconsistently with Articles 3.1 and 3.2 of the AD Agreement, and Articles 15.1 and 15.2 of the SCM Agreement, in conducting its price effects analysis.

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

57. Not only is MOFCOM's causation analysis compromised by its flawed definition of the domestic industry and price effects analysis, but it also suffers from a number of other defects.

58. China suggests that the United States "selectively cit[ed] isolated data and ignor[ed] the complete picture," but it is MOFCOM that selectively cited the few elements of data that may have lent some support to its conclusion while ignoring the bulk of information on the record tending to suggest that no relationship of cause and effect existed between the subject imports and any difficulties experienced by the Chinese domestic industry.

59. China also argues that "[s]ubject imports need only be a 'cause,' not the sole or significant cause, and may be one of many causes and still satisfy Articles 3.5 and 15.5." While China's position is unobjectionable in this regard, it is also beside the point. Taking the evidence on the record before MOFCOM as a whole, *i.e.*, looking at the complete picture, there simply is no support for MOFCOM's conclusion that subject imports were in any way a cause of material injury to the Chinese domestic industry. When MOFCOM's causation analysis is subjected to scrutiny, it becomes clear that the evidence on which MOFCOM relied does not support the conclusion that MOFCOM reached, and the evidence that MOFCOM ignored provides further confirmation of MOFCOM's error.

60. MOFCOM relied on the increase in the volume and market share of subject imports to support its causation analysis, but again it failed to take into account that the market share of the Chinese domestic industry also increased, nearly as sharply as that of the subject imports, in interim 2009. China responds that MOFCOM fully examined the role of third country imports and found that they did not affect the causal link in this case. China misses the point. The question is not whether third-country imports injured the domestic industry in interim 2009, but whether the increase in the market share of subject imports in interim 2009 was at the expense of the domestic industry or of third country imports. China also argues that the United States should not have focused on interim 2009, but the development of subject imports prior to interim 2009 provided no basis for attributing injury to the domestic industry in interim 2009 to subject imports in prior years.

61. MOFCOM also failed to account for the significant decline in the domestic industry's productivity throughout the period of investigation. China argues that productivity was not a meaningful or significant factor to be examined when considering the causal link between subject imports and material injury because labor costs are a relatively insignificant part of the cost of manufacturing a vehicle in China. However, most of the decline in the domestic industry's pre-tax profits from interim 2008 to interim 2009 (a decline of RMB 493 million) can be attributed to the near-doubling of labor costs over this period (an increase of RMB 406 million).

62. MOFCOM also failed in its causation analysis to recognize the lack of competition between subject imports and the domestic like product. China attempts to rebut the U.S. arguments concerning the lack of competition between subject imports and the domestic like product by pointing to the fact that subject imports undersold the domestic like product in one year of the period of investigation, in 2007. In fact, China's argument only serves to underscore the competitive disconnect between subject imports and the domestic product. This is because the underselling in 2007 had absolutely no effect on domestic prices, which rose in both 2007 (by 11 percent) and 2008 (by 17 percent).

63. Another defect in MOFCOM's causation analysis is that MOFCOM failed to take into account the sharp drop in demand in the Chinese market in interim 2009. China points to portions of the final determination in which MOFCOM dismissed declining demand as a cause of injury because the domestic industry "still kept increasing production and sales." It appears from the evidence on the administrative record that the domestic industry found itself in the unfortunate position of ramping up production just as demand fell sharply, and that it had to decrease its prices in interim 2009 in order to move its excess production. These actions are not properly attributable to subject imports, but rather to ill-considered decisions made by the domestic industry. It appears that MOFCOM did indeed attribute the injury from declining demand to the subject imports, contrary to the prohibition on doing so in Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement.

64. MOFCOM also failed adequately to address other factors that likely accounted for the challenges experienced by the Chinese domestic industry in interim 2009, such as the increase in the sales tax in China on larger engine vehicles, and the sharp increases in wages and employment, coupled with the decline in productivity, in the Chinese domestic industry in interim 2009.

65. In short, MOFCOM did not fulfill its obligations under the Agreements to establish a causal link between the imports under investigation and the injury sustained by the domestic industry, and its causation determination was not based on positive evidence and did not involve an objective examination. Consequently, China acted inconsistently with Articles 3.1 and 3.5 of the AD Agreement and Articles 15.1 and 15.5 of the SCM Agreement.