[[WTO Confidential Information Redacted]]

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

(DS414)

SECOND WRITTEN SUBMISSION OF THE UNITED STATES OF AMERICA

July 22, 2014

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US-14	Orig. Exhibit CHN-31	

I. INTRODUCTION

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

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

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

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

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

5. As demonstrated in the U.S. first written submission, China breached Articles 3.1 and 3.2 of the AD Agreement and Articles 15.1 and 15.2 of the SCM Agreement because MOFCOM's price effects analysis was fundamentally flawed in a number of respects. In response, China

[1] *China-GOES (Panel),* para. 8.5.

offers arguments that are unconvincing and do not serve to rebut the U.S. showing that China's price effects analysis in the Re-determination fell far short of meeting China's WTO obligations.

6. In Section A below, the United States responds to China's untenable legal argument that, in conducting the price effects analysis required under the covered agreements, an authority may ignore the relative prices of the imported product and the like domestic product. In Section B below, the United States explains that China has failed to show that subject imports had "explanatory force" for any price suppression. In Section C below, the United States describes how China's attempts to link subject imports to any price depression experienced by the domestic like product are unavailing.

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

7. In the U.S. first written submission, the United States highlighted that China's Re-determination was fundamentally deficient because MOFCOM had ignored evidence on the relative prices of imports and the domestic like product.[2] In response, China attempts to defend MOFCOM's deficient price effects analysis by promoting a radical interpretation of the AD and SCM Agreements. According to China, an authority may choose to conduct a price effects analysis that does not even consider the record evidence concerning the relative prices of imports and domestic products.[3] China's legal position is untenable.

8. The text of the covered agreements is the starting point for showing that China's legal position is incorrect. Articles 3.1 and 3.2 of the AD Agreement obligate an authority to undertake a price effects analysis, and contain the following relevant language:

> 3.1 A determination of injury for purposes of Article VI of GATT 1994 **shall be based on positive evidence and involve an objective examination** of both (a) the volume of the dumped imports **and the effect of the dumped imports on prices in the domestic market for like products**, and . . .

[2] U.S. First Written Submission, paras. 46-47.

[3] China's First Written Submission, para. 17.

> 3.2 [With regard to the volume of the dumped imports, . . .] **With regard to the effect of the dumped imports on prices,** the investigating authorities shall consider whether there has been a significant price undercutting by the dumped imports as compared with the price of a like product of the importing Member, or whether the effect of such imports is otherwise to depress prices to a significant degree or prevent price increases, which otherwise would have occurred, to a significant degree. **No one or several of these factors can necessarily give decisive guidance.**[4]

9. For this purpose, four aspects of these provisions bear emphasis. First, under Article 3.2, the question to be examined is the "effect of the dumped imports on prices in the domestic market for like products." (As shorthand, the United States has used the phrase "price effects analysis.") For example, an authority must assess whether any observed price declines, or price increases not commensurate with increases in costs, were the effect of the subject imports. The authority must also assess the effects of any significant underselling by the subject imports.

10. Second, Article 3.1 states that an injury determination must be based on "positive evidence" and must involve an "objective examination" of this question of price effects. From any perspective, an obligation to conduct an objective examination of the price effects of one group of products on a second group of products would include an examination of the relative prices of the two groups. Failing to do so would miss an important aspect of determining whether the two groups are price competitive, and whether subject imports have "explanatory force"[5] for the occurrence of adverse price effects.

11. Third, Article 3.2 contains some details on what factors are relevant to determining what, if any, effects imports may have had on domestic prices. Article 3.2 first mentions "whether there has been a significant price undercutting by the dumped imports as compared with the price of a like product of the importing Member." Article 3.2 then states other factors that may be relevant – in particular, "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." Thus, the text recognizes that price undercutting – which can only be evaluated by comparing relative prices – and factors other than price undercutting could affect the price effects analysis.

12. Fourth, Article 3.2 closes with the statement that "No one or several of these factors can necessarily give decisive guidance." This statement makes clear that in conducting the price effects analysis required under Articles 3.1 and 3.2, an authority may not *a priori* exclude consideration of any particular factor related to the price effects analysis. This especially holds

[4] AD Agreement, Arts. 3.1, 3.2 (emphasis added). Articles 15.1 and 15.2 of the SCM Agreement are worded identically to Articles 3.1 and 3.2 of the AD Agreement, except that Articles 15.1 and 15.2 of the SCM Agreement use the term "subsidized imports" where Articles 3.1 and 3.2 of the AD Agreement refer to "dumped imports."

[5] *China – GOES (AB)*, para. 136.

true with respect to relative prices of the imported and domestic products, because relative prices are closely tied to questions concerning price effects.

13. The common sense reading of these provisions is that an objective assessment of all of the relevant factors would require an evaluation of evidence on relative prices. Yet China argues that, as a legal matter, an authority may choose to ignore information on relative prices. This proposed interpretation is not consistent with the text; instead of ignoring an obviously relevant factor regarding price effects, an objective authority would have performed a comparison of the pricing levels of imports and domestically produced products in order to ensure that it has performed an "objective examination" of the "positive evidence" bearing on the issue of subject imports' effect on prices in the market.

14. The United States also notes that China provides no support for its position in any prior panel or Appellate Body reports. To the contrary, the Appellate Body's findings support the notion that even when an authority considers the volume of subject imports to assess price effects, an authority cannot completely disregard or ignore the relationship between the prices of subject imports and the prices of the domestic like product: "we recognize that, given the inter-relationship of product volumes and prices, it is not clear that an investigating authority may in practice easily separate and assess the relative contribution of the volumes versus the prices of subject imports on domestic prices."[6] In other words, to assess the volume of subject imports, an authority must also consider the effects of the prices of subject imports.

15. China attempts to find support for its approach in isolated statements in the Appellate Body report, but these citations are unpersuasive. First, China cites to the Appellate Body's statement in *China-GOES* at paragraph 137 that "even if prices of subject imports do not significantly undercut those of like domestic products, subject imports could still have a price-depressing or price suppressing effect on domestic prices."[7] In this paragraph, the Appellate Body noted that adverse price effects may take the form of price undercutting, or price depression/suppression.[8] The Appellate Body said nothing to suggest that an analysis of the relationship between the prices of subject imports and the prices of the domestic like product is not required for an objective examination of price depression/suppression. China's position that there is no requirement to undertake price comparisons is unsupported.

16. Second, China also cites paragraph 138 of the Appellate Body report in an attempt to support its contention that there was no need to undertake price comparisons.[9] The Appellate Body stated that "the reference to 'the effect of such [dumped or subsidized] imports' in Articles 3.2 and 15.2 indicates that the effect stems from the relevant aspects of such imports, including

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[6] *China – GOES (AB),* ft. 364.

[7] China's First Written Submission, para. 16. China's citation to paragraph 136 of the report appears to be error, as the quoted language appears in paragraph 137.

[8] *China – GOES (AB),* para. 137.

[9] China's First Written Submission, para. 17.

the price and/or the volume of such imports."[10] Nothing in this language suggests that an authority may disregard or ignore the relationship between the prices of subject imports and the prices of the domestic like product when considering the effects of subject import prices.

17. The United States further notes that the fact that MOFCOM neglected to undertake price comparisons suggests that available evidence of prices would have weakened the "explanatory force" of subject imports for any adverse price effects. The United States agrees with the European Union when it states in its third party submission that "[w]here an investigating authority deliberately omits to include in its determination any such price comparison, despite the fact that the necessary evidence is, or should have been, available in the record, it can be surmised that such price comparison would have called into question the authority's findings based on the volume of subject imports."[11]

18. Finally, China misrepresents the U.S. position in this dispute. China attempts to argue that the U.S. position is that "price suppression or depression can only be demonstrated through a comparison of domestic and subject import prices."[12] The United States has not made any such argument. Rather, the United States has made clear that the issue here is that MOFCOM chose to ignore in its assessment of price effects any and all information regarding relative prices. If subject imports and domestic like products do not compete on price, as the evidence indicates in this dispute, then an unbiased authority would call into question the "explanatory force" of subject imports.

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

19. In its first written submission, the United States showed that MOFCOM's price effects analysis in its Re-determination contains a crucial gap because it fails to show that subject imports had any "explanatory force" for the asserted price effects. In essence, MOFCOM's analysis consisted of little more than its observations that: (i) the volume and market share of subject imports increased in 2008; (ii) the domestic industry experienced price suppression and depression; and (iii) consequently subject imports must have caused these price effects.[13]

20. The United States further explained that for subject imports to affect domestic prices, price must be an important factor in customers' purchasing decisions. If customers are making purchasing decisions for reasons other than price – for example, because of quality, product range, or availability – then there would be no reason for domestic producers to exercise pricing restraint to regain market share.[14]

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[10] *China – GOES (AB)*, para. 138.

[11] Third Party written submission by the European Union, para. 20.

[12] China's First Written Submission, para. 10.

[13] U.S. First Written Submission, paras. 54-64.

[14] U.S. First Written Submission, para. 61.

21. MOFCOM ignored compelling evidence in the record of an absence of price competition between subject imports and the domestic like product. As the Appellate Body recognized,[15] the price movements and market share data for the first quarter of 2009 indicated that subject imports and the domestic product were not competing on the basis of price. Although the domestic industry's prices dropped by 30.25 percent, and the prices of subject imports declined by only 1.25 percent, this sharp divergence in prices did not translate into significant shifts in market share. The domestic industry gained 1.04 percentage points of market share, and subject imports gained 1.17 percentage points – both at the expense of nonsubject imports. If price were an important factor in purchasing decisions, the drastic decline in the domestic industry's prices should have caused a much more significant shift in sales and market share in favor of the domestic industry.

22. Instead of addressing the evidence, China attempts to explain away this fundamental gap in MOFCOM's analysis. China relies on five arguments in an attempt to show that subject imports were affecting the prices of the domestic like product. As discussed below, each of these five arguments is wrong.

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

23. China contends that by merely noting the domestic industry's loss of market share to subject imports in 2008 "MOFCOM more than met its burden of showing that subject imports had some explanatory force."[16] MOFCOM's analysis contains a crucial flaw. MOFCOM simply *assumed* that the increasing volume and market share of subject imports in 2008 had explanatory force for the alleged price suppression experienced by the domestic industry in 2008 and the first quarter of 2009.[17] The problem with MOFCOM's so-called analysis is that coincidence is not tantamount to evidence of price effects, nor does it automatically amount to explanatory force.

24. MOFCOM claims that domestic producers found themselves in a "dilemma" and that they reacted to the increase in subject imports in 2008 by restraining price increases and then by slashing prices.[18] MOFCOM is, however, not able to cite to a scintilla of evidence in the record, aside from temporal coincidence, that supports its finding that the domestic producers' pricing decisions were in response to subject imports. The linkage that China claims exists between subject imports and price effects[19] was, in effect, concocted by MOFCOM and not based on

[15] *China – GOES (AB)*, para. 226.

[16] China's First Written Submission, para. 23.

[17] Article 3.2 of the AD Agreement and Article 15.2 of the SCM Agreement describe price suppression as the prevention of price increases, which otherwise would have occurred. It is not clear why an authority would characterize a 30.25 percent decline in prices as the "prevention of price increases."

[18] Re-determination at 49 (Exhibit US-01).

[19] China's First Written Submission, para. 21.

positive evidence. This is nothing more than a storyline that MOFCOM has superimposed on the facts – and an implausible one at that.

25. The sharply divergent price trends, along with the muted market share response, in the first quarter of 2009 demonstrated the absence of price competition between subject imports and the domestic like product. China's attempt to dismiss this evidence as "a single fact disconnected from the overall evidence before MOFCOM in this case" is particularly unconvincing.[20] It may be a "single fact," but it is also a powerful one, given the magnitude of the price divergence—and in light of the fact that the "overall evidence" for a link between market share shifts and price effects to which China refers is particularly sparse.

26. China's efforts to discount the relevance of the Appellate Body's discussion of the price movements in the first quarter of 2009 are unavailing.[21] Contrary to China's assertion, the Appellate Body's reasoning was not limited to the effects of the *prices* of subject imports. The Appellate Body spoke of what the divergence in prices indicated about the competitive relationship between subject imports and the domestic like product generally. The Appellate Body explained: "one would normally expect that under the conditions of price competition indicated by these factors, there would be a closer correlation in the movements in subject import and domestic prices."[22] It further noted that "[t]he fact that there was a substantial divergence in pricing levels over that period could suggest that the two products were not in competition with each other, or that there were other factors at work."[23] Moreover, in the same paragraph of its report, the Appellate Body specifically addressed China's argument regarding "the importance of the increase in subject import volume to MOFCOM's finding of significant price depression and suppression," and did not find it persuasive.[24]

27. China makes much of its characterization that the subject imports' gain in market share and the domestic industry's loss of market share in 2008 were of similar magnitude. According to China, these data show that "MOFCOM more than met its burden of showing that subject imports had some explanatory force."[25] But China's characterization is misleading because it ignores a key fact. China has failed to acknowledge that the overall market was experiencing substantial growth, and that sales of both imported products and domestic products were increasing. Thus, this was not a case where subject imports replaced the domestic product in a flat market. The Chinese market for GOES was growing in 2008; demand expanded by 18.09

[20] China's First Written Submission, para. 39.

[21] China's First Written Submission, paras. 40-41.

[22] *China – GOES (AB)*, para. 226.

[23] *China – GOES (AB)*, para. 226.

[24] China's contention that the Appellate Body's discussion of this issue focused on the adequacy of MOFCOM's explanation also is not correct. China's First Written Submission, para. 41. The words "adequately explained" appear only in the last sentence of paragraph 226 of the report, where the Appellate Body stated: "[t]hat pricing dynamic *also* calls into question whether prices of subject imports adequately explain the depression or suppression of domestic prices." (emphasis added).

[25] China's First Written Submission, para. 23.

percent.[26] Both Chinese and subject import sales quantities were increasing in 2008 by large amounts, so there is simply no basis to conclude that sales made by subject imports were "lost" by the domestic industry. In short, MOFCOM can point to no evidence linking the increase in the subject imports' market share in 2008 to any price suppression in 2008 or the first quarter of 2009.

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

28. China maintains that MOFCOM's findings in two different contexts – its determination of the domestic like product, and its determination to cumulate imports from the United States and Russia – support a conclusion that subject imports and the domestic like product were competitive for purposes of MOFCOM's price effects analysis. China's contention is unfounded. The comparisons that MOFCOM made for purposes of the domestic like product and cumulation analyses were at a level of generality that established merely some degree of competitive overlap. The comparisons neither needed nor purported to establish that the products were so highly substitutable that they competed on the basis of price. Put differently, while the United States has not contended that MOFCOM's comparisons were insufficient for defining the like product or for deciding whether cumulation is appropriate, the comparisons do not suffice to show that subject imports are sufficiently competitive with the domestic like product to be causing adverse price effects.

29. In its domestic like product analysis, MOFCOM stated that the investigation showed that the subject imports and the domestic like product are "fundamentally the same" in terms of physical characteristics, production techniques and processes, product use, and sales channels; and that "the general price change trends of the two are fundamentally consistent."[27] MOFCOM did not find that the domestic and imported products competed on the basis of price, nor can such a finding be inferred by the ones that MOFCOM did make.

30. MOFCOM's cumulation analysis is at the same level of generality. MOFCOM stated that the subject merchandise and the Chinese domestic like products are "fundamentally the same" in terms of physical characteristics, production techniques and processes, end uses, sales channel, and sale price trends; that they all arose in the Chinese market at "fundamentally the same time;" that product quality is "similar;" that both "satisfy customer requirements;" that they are substitutable; that "a competitive relationship exists between them;" and that the competition conditions are "fundamentally the same."[28]

31. MOFCOM's like product and cumulation analyses do not go beyond very general similarities between subject imports and the domestic like product, and do not include any

[26] Re-determination at 28 (Exhibit US-01).

[27] Re-determination at 11-12 (Exhibit US-01).

[28] Re-determination at 21 (Exhibit US-01). There was no explanation for the conclusion that "a competitive relationship exists between them."

meaningful consideration of the nature of price competition – or lack thereof – between these products. China's assertion that these analyses were sufficient to show that there was direct competition between subject imports and the domestic like product – such that subject imports could be found to have "explanatory force" for price effects – is without any merit.

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

32. As noted in the U.S. first written submission, the Appellate Body explained that, although it could "conceive of ways in which an observation of parallel price trends might support a price depression or suppression analysis . . . there is no basis on which to draw any such conclusion in this case."[29] China claims that its findings on parallel pricing have "expanded significantly."[30] This "expanded analysis," however, is merely rhetoric regarding the same conclusory statements made in the original determination. MOFCOM's reliance on parallel pricing, thus, is just as unsupported in the Re-determination as it was in the original determination.

33. China's assertion that MOFCOM's findings of "parallel pricing" were sufficient to show a competitive relationship between subject imports and the domestic like product is unavailing. The annual average unit values ("AUVs") on which MOFCOM relied showed the following price changes:[31]

Period	Subject Imports	Domestic Like Product
2007	+2.97%	+6.67%
2008	+17.57%	+14.53%
Q1 2009	-1.25%	-30.25%

34. MOFCOM's theory has two problems. First, the price trends that it identifies are at such a level of generality as to have no probative value. Based on these data, MOFCOM observed that "during the period of investigation the import price of the subject merchandise and the price of the domestic like product increased and then decreased."[32] From the fact that prices "increased and then decreased" MOFCOM concluded that "the trends are consistent."[33] But, an authority engaging in an objective examination could not reasonably conclude that there was a competitive relationship between two groups of products merely because prices "increased and

[29] U.S. First Written Submission, para. 66.

[30] China's First Written Submission, para. 43.

[31] Re-determination at 23-24 (Exhibit US-01).

[32] Re-determination at 24 (Exhibit US-01).

[33] Re-determination at 24 (Exhibit US-01).

then decreased," especially when this observation is based on only four data points over a period of more than three years.[34]

35. The second flaw in MOFCOM's theory is that it simply mischaracterized the data, or characterized it in such a broad-brush fashion as to be of little value. Thus, MOFCOM stated that "[i]n 2007 and 2008, the rate change in the price of the subject merchandise was close to that of domestic like products;"[35] and that "from 2006 to 2008, the trend of change between the subject merchandise and the domestic like product was consistent and the rate of change was similar."[36] This is clearly a mischaracterization of the data. From 2006 to 2007, the rate of change in the price of the domestic like product was more than twice that of the subject imports, and from 2007 to 2008, the increase in the average price of the subject imports was more than 20 percent more than that of the domestic product.[37] Again, an authority engaging in an objective examination could not reasonably conclude that the data establish that there was a competitive relationship between the two products based on these trends, especially when this observation is based on only four data points over a period of more than three years.[38]

36. Moreover, the data for the first quarter of 2009 show anything but "parallel pricing" – the domestic industry's price dropped by 30.25 percent, while that of subject imports fell by only 1.25 percent. China seeks to explain away this sharp divergence by attributing it to the domestic industry's alleged decision to slash prices to regain market share.[39] But, as the Appellate Body recognized, the sharp divergence in pricing in the first quarter of 2009, along with the absence of any significant corresponding shift in market share, underscored the *absence* of a competitive relationship between subject imports and the domestic like product.[40]

37. China urges the Panel not to "second-guess" MOFCOM.[41] But, contrary to the way in which China seeks to portray this issue, this is not an instance where there are divergent but

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[34] Moreover, as one of the U.S. respondents, Allegheny Ludlum, pointed out in a submission in the original Panel proceeding (Exhibit US-14) (orig. Exhibit CHN-31, section (4)), fluctuations in the prices of GOES were consistent with fluctuations in the prices of raw materials used in the production of GOES. Because of this, the broad similarities in price movements that MOFCOM emphasizes are more indicative of trends in raw materials costs than of any "competitive relationship."

[35] Re-determination at 24 (Exhibit US-01).

[36] Re-determination at 49 (Exhibit US-01).

[37] As the *China-Autos* panel observed at para. 7.264, "the definition of 'parallel' generally suggests not only movements in the same direction, but also equivalent changes."

[38] As the United States noted in its first submission (para. 67), both this Panel and the Appellate Body found the annual average unit value data which MOFCOM apparently used for its parallel pricing finding to be unreliable. China's response – that here MOFCOM was "simply observing trends over time," rather than comparing prices (China's First Written Submission, para. 46) – is unpersuasive. The same shortcomings in the AUV data identified by this Panel (in para. 7.528 of its report) undermine the use of such data to establish comparative trends.

[39] China's First Written Submission, paras. 44-45.

[40] *China – GOES (AB)*, para. 226.

[41] China's First Written Submission, para. 45.

reasonable ways to evaluate the evidence. In concluding that the data discussed above showed that there was parallel pricing sufficient to establish the existence of a competitive relationship between subject imports and the domestic like product, MOFCOM failed to engage in an objective examination.

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

38. The United States showed in its first submission that the four verification documents relied upon by MOFCOM were not probative of price competition between the subject imports and the domestic like product.[42] China fails to rebut the U.S. argument.

39. The United States noted at the outset that these verification documents pertain only to the first quarter of 2009,[43] and thus shed little, if any, light on competitive conditions in 2008, the part of the period of investigation that MOFCOM now deems to have "more evidentiary value for determining injury and causal link."[44] China fails to address this point.[45]

40. China's assertion that the United States "concedes . . . that purchasers were using *offers for subject merchandise* to negotiate for lower domestic prices"[46] is incorrect. The United States concedes no such thing. The contract between the Russian trading company and the Chinese customer (Exhibit US-06) merely provides that [[ ]].[47]

41. Similarly, all that the three price negotiation documents show is that [[ ]]. These are nothing more than [[ ]]. Contrary to China's assertion, there was no written evidence of *offers* for imported merchandise, much less actual sales transactions, at the [[ ]] prices.

42. The original panel and the Appellate Body both recognized that the probative value of the "pricing policy" documents was undermined by the pricing dynamic in the first quarter of 2009, when the price of the domestic like product fell by 30.25 percent, while that of the subject imports declined by only 1.25 percent.[48] As discussed above, China's efforts to downplay this startling divergence in pricing by characterizing it as "simply one of many facts" or a "single

[42] U.S. First Written Submission, paras. 68-70.

[43] U.S. First Written Submission, para. 69.

[44] Re-determination at 55 (Exhibit US-01).

[45] *See* China's First Written Submission, paras. 47-49.

[46] China's First Written Submission, para. 47.

[47] Contrary to China's assertion in paragraph 47 of its first submission, the United States is not arguing over the meaning of the word "accordingly" in the contract; rather, the United States is interpreting the contract according to its plain meaning. China fails to explain why it was reasonable for MOFCOM to interpret the contract to mean that the Russian trading company would offer a lower price.

[48] *China – GOES (Panel)*, paras. 7.533 and 7.534.

fact"[49] is unavailing. Similarly, China's assertion that the pricing policy documents provided evidence of pricing competition is unconvincing.

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

43. The United States showed in its first submission that a partial overlap of customers does not provide any support for MOFCOM's conclusion that subject imports compete with the domestically produced product on the basis of price. The United States explained that the fact that some customers buy both from subject sources and from domestic producers does not establish that there is direct competition for sales to these purchasers by domestic and subject suppliers, that the domestic and subject suppliers were selling the same products, or that price is an important factor in purchasing decisions.[50]

44. China's response to this is first to accuse the United States of engaging in "speculation."[51] This is nothing more than a disingenuous attempt to divert attention from the gap in MOFCOM's reasoning. MOFCOM engaged in speculation by assuming that the partial overlap in customers must mean that subject imports are close substitutes for the domestic product.

45. China then conflates the customer overlap issue with MOFCOM's consideration of a different issue – namely the question of whether there were certain specialty products that the Chinese industry did not produce.[52] As MOFCOM notes in its Re-determination, Allegheny Ludlum had at one point raised the issue of whether the Chinese domestic industry produced M2 and M3 GOES.[53] It later became apparent that Allegheny Ludlum did not export these products to China during the period of investigation.[54] Also, certain respondents had at one point argued that laser scribing, low iron loss and other high-end products could only be produced in the United States, Japan and other countries.[55] It was in this connection that MOFCOM verified that the domestic industry made and sold those products. However, this finding does not support MOFCOM's conclusion that subject imports are competitive with the domestic like product.

46. Neither the partial overlap of customers nor MOFCOM's findings that the Chinese GOES industry produces certain specialty products supports MOFCOM's conclusion that subject imports are competitive with the domestic like product.

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[49] China's First Written Submission, para. 49.

[50] U.S. First Written Submission, paras. 71-72.

[51] China's First Written Submission, para. 50.

[52] China's First Written Submission, para. 51.

[53] Re-determination at 12 and 51 (Exhibit US-01).

[54] Re-determination at 12 and 51 (Exhibit US-01).

[55] Re-determination at 51 (Exhibit US-01).

6. Conclusion

47. MOFCOM's findings that the volume of subject imports suppressed domestic prices in 2008 and the first quarter of 2009 is not based on positive evidence, and does not reflect an objective examination of the evidence. MOFCOM has not shown that "the effect of such imports is otherwise to depress prices to a significant degree or prevent price increases, which otherwise would have occurred, to a significant degree." When confronted with the flaws and insufficiencies in each component of MOFCOM's analysis discussed above, China often resorts to arguing that the aspect of the analysis in question is only part of a multi-faceted discussion of the record as a whole,[56] or that MOFCOM "holistically" reviewed all of the evidence.[57] If the constituent parts of MOFCOM's analysis are unsupported by positive evidence, not based on an objective examination, or otherwise inconsistent with the WTO agreements, these appeals to the "big picture" cannot save MOFCOM's analysis. Accordingly, China has acted inconsistently with Articles 3.1 and 3.2 of the AD Agreement and Articles 15.1 and 15.2 of the SCM Agreement.

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

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

48. In its first written submission, the United States explained that there is no evidence that the sharp drop in the domestic industry's prices in the first quarter of 2009 was in any way related to the gain in the subject imports' market share in 2008.[58]

49. Although China contends that MOFCOM has "significantly expanded and clarified its reasoning" of price depression in the Re-determination,[59] this is not so. According to China, the increasing volume and market share of subject imports in 2008 constitute "evidence," and MOFCOM's conclusion that the domestic industry slashed its prices by 30.25 percent in response constitutes the requisite "analysis."[60]

50. The fact that there is no evidence that the 30.25 percent drop in the domestic industry's prices in the first quarter of 2009 was in any way related to the gain in the subject imports' market share in 2008 undermines MOFCOM's theory. As discussed above, in connection with price suppression, there is no evidence aside from temporal coincidences to support MOFCOM's

[56] China's First Written Submission, paras. 46, 51 and 65.

[57] China's First Written Submission, paras. 27 and 46 n.49.

[58] U.S. First Written Submission, para. 74-81.

[59] China's First Written Submission, para. 52.

[60] China's First Written Submission, para. 57.

version of events. MOFCOM has essentially concocted a reason to link two events with no apparent cause-effect relationship. This does not constitute "analysis."

51. The United States pointed out that it would have been economically irrational for the domestic industry to slash prices by over 30 percent to regain a 5.65 percent loss of market share in 2008, particularly when that loss of market share is seen in the wider context of the 2006-2008 period, when the domestic industry's market share rose by 1.9 percent.[61] China's response on this point is unconvincing.

52. China first attempts to back away from the magnitude of the domestic products' price decline by arguing that "given the imprecision of AUVs . . . the specific percentage price decline must be viewed with caution."[62] Given that MOFCOM relied extensively on the magnitude of this price decline throughout its Re-determination,[63] it is disingenuous for China now to question its magnitude. It should also be noted that the imprecision of AUVs could mean that that the decline was even larger than 30.25 percent, not necessarily smaller, as China now suggests.

53. Second, China suggests that because MOFCOM asserted that subject imports "noticeably bear responsibility" for the price decline[64] this must somehow lend economic rationality to MOFCOM's decision to link the price decline to the market share shift.[65] This is nothing more than a conclusory assertion by MOFCOM.

54. Finally, China argues that because the domestic industry was able to regain some market share in the first quarter of 2009, the decision to slash prices cannot have been an irrational response to the subject imports' market share gain in 2008.[66] China neglects to mention the very small magnitude of the domestic industry's market share gain. Although the domestic industry's prices dropped by 30.25 percent, subject imports gained 1.17 percentage points of market share,[67] and the domestic industry gained only 1.04 percentage points of market share (at the expense of nonsubject imports).[68] This very small gain in market share by the domestic industry only serves to underscore the irrationality of attempting to link price depression in the first quarter of 2009 with market share shifts in 2008.

55. The United States explained in its first submission that MOFCOM's price depression analysis was further marred by its claim that price depression was caused by efforts of subject

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[61] U.S. First Written Submission, para. 77.

[62] China's First Written Submission, para. 61.

[63] *E.g.*, Re-determination at 24, 26 and 49 (Exhibit US-01).

[64] In fact, MOFCOM found that subject imports "noticeably bear responsibility" *for adversely affecting the domestic industry*, not for the price decline. Redetermination at 52-53 (Exhibit US-1).

[65] China's First Written Submission, para. 61.

[66] China's First Written Submission, para. 61.

[67] Re-determination Disclosure at 9, (Exhibit US-03).

[68] Re-determination at 23 and 31 (Exhibit US-01).

imports to undercut the price of the domestic product in the first quarter of 2009. The United States noted that a decline of 1.25 percent in the price of subject imports can hardly be characterized as an effort to undercut the domestic product given that domestic prices dropped by 30.25 percent and the domestic product was actually underselling subject imports during this period.[69] China has failed to address this issue.

56. The Appellate Body made clear that "Articles 3.2 and 15.2 contemplate an inquiry into the relationship between subject imports and domestic prices" and that "an investigating authority is required to examine domestic prices in conjunction with subject imports in order to understand whether subject imports have explanatory force for the occurrence of significant depression or suppression of domestic prices."[70] Notwithstanding MOFCOM's claim that it engaged in a "comprehensive" analysis, MOFCOM's consideration of the price depression issue is an unsupported as it was in the original injury determination.

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

57. The United States explained in its first submission that MOFCOM's reliance on an alleged policy of price undercutting by subject imports to explain its finding of price depression in the first quarter of 2009 is as misplaced as it was in MOFCOM's original determination.

58. China's assertion that "the pricing policy documents show the ways in which purchasers were using *subject import prices* to drive down domestic prices" is incorrect.[71] As explained above, MOFCOM had no written evidence of actual offers for imported merchandise, much less actual sales transactions, in the first quarter of 2009, at [[ ]] prices.

59. The Appellate Body was clear that, in light of the pricing dynamic in the first quarter of 2009 – where the price of subject imports declined by 1.25 percent, while the price of domestic products plunged by 30.25 percent, and subject imports oversold the domestic product – there was no basis to conclude that a policy of price undercutting could explain depressive or suppressive effects on domestic prices.[72]

60. China's contends that Panel and Appellate Body criticism of MOFCOM's reliance on pricing policy documents no longer apply because these criticisms allegedly focused on MOFCOM's old explanation involving "low price."[73] China misreads the Appellate Body report. The Appellate Body's analysis was not based on MOFCOM's "low price" findings in the

[69] U.S. First Written Submission, para. 77.

[70] *China – GOES (AB)*, para. 138.

[71] China's First Written Submission, para. 65 (emphasis added).

[72] *China – GOES (AB)*, para. 226.

[73] China's First Written Submission, para. 64.

original determination. China made precisely the same argument to the Appellate Body as it makes here, as evidenced by this discussion in the Appellate Body's report:

> We consider that the existence of a pricing policy by importers to undercut the prices of domestic producers could, when successful, lead to actual price undercutting. Even in the absence of price undercutting, however, a policy that aims to undercut a competitor's prices may still be relevant to an examination of its price depressive or suppressive effects. Indeed, a policy aimed at price undercutting may very well depress and suppress domestic prices in instances where, *as China asserts, "domestic producers were reacting to subject import competition and were lowering domestic prices so as to compete more effectively and minimize any further loss of market share.*" In this respect, if an importer pursues a policy of undercutting a competitor, but that competitor anticipates or responds to that policy by lowering its price to win the sale, this may still reveal that subject imports have the effect of depressing, or preventing the increase of, domestic prices.[74]

61. The Appellate Body went on to explain that:

> {E}ven though we consider that a policy of price undercutting can explain depressive or suppressive effects on domestic prices even in the absence of actual price undercutting, we do not see that, in the light of the pricing dynamic in the first quarter of 2009, there was a basis to conclude so in this case.[75]

62. In short, the Appellate Body's analysis is as relevant to the Re-determination as it was to MOFCOM's original injury determination. As the United States explained in its first submission, an objective examination of the four verification documents at issue, along with a recognition of the pricing dynamic in the first quarter of 2009, make clear that MOFCOM's reliance on these documents to show that price depression was an effect of subject imports was unreasonable.[76]

III. CHINA CANNOT DEFEND MOFCOM'S REVISED IMPACT ANALYSIS

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

63. China asserts that the United States improperly brings a new claim before this Panel. Specifically, China attempts to challenge on procedural grounds the U.S. demonstration that MOFCOM's Re-determination breaches Articles 3.1 and 3.4 of the AD Agreement, and Articles 15.1 and 15.4 of the SCM Agreement. China, for instance, asserts that "the introduction of a new claim at this stage of proceedings is contrary to basic principles of fairness and due

[74] *China – GOES (AB)*, para. 206 (emphasis added).

[75] *China – GOES (AB)*, para. 226.

[76] U.S. First Written Submission, paras. 88-89.

process."[77] China is incorrect. This claim, like other U.S. claims, is appropriate because the claim challenges aspects of China's compliance measures that are inconsistent with the covered agreements. Thus, China's arguments relating to claims that may be alleged under Article 21.5 of the DSU are misguided.

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

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

Article 21.5 is concerned with the "consistency with a covered agreement of measures taken to comply with the recommendations and rulings." The text of Article 21.5 does not distinguish between "old" and "new" claims.[78]

65. The role of a 21.5 compliance panel is to review the WTO-consistency of a compliance measure. As the Appellate Body explained in *Canada – Aircraft (Article 21.5 – Brazil)*, a complainant may raise new claims during Article 21.5 proceedings when the proceedings involve a new measure that was not before the panel in the original proceeding. The Appellate Body in that dispute disagreed with the panel's refusal to consider a new argument because the argument "did not form part of the basis for the finding" in the original proceedings.[79] Article 21.5 requires a panel to review the WTO-consistency of a compliance measure, and therefore, a panel is not limited to the reviewing claims that related to the original proceeding:

[77] China's First Written Submission, para. 71.

[78] *U.S. – Oil Country Tubular Sunset Reviews (Article 21.5- Argentina)*, para. 7.92.

[79] *Canada — Aircraft (Article 21.5 — Brazil) (AB)*, para. 42; *Canada — Aircraft (Article 21.5 — Brazil) (Panel)*, para. 5.17.

> {I}n carrying out its review under Article 21.5 of the DSU, a panel is not confined to examining the "measures taken to comply" from the perspective of the claims, arguments and factual circumstances that related to the measure that was the subject of the original proceedings. Although these may have some relevance in proceedings under Article 21.5 of the DSU, Article 21.5 proceedings involve, in principle, not the original measure, but rather a new and different measure which was not before the original panel. In addition, the relevant facts bearing upon the 'measure taken to comply' may be different from the relevant facts relating to the measure at issue in the original proceedings. It is natural, therefore, that the claims, arguments and factual circumstances which are pertinent to the 'measure taken to comply' will not, necessarily, be the same as those which were pertinent in the original dispute. Indeed, the utility of the review envisaged under Article 21.5 of the DSU would be seriously undermined if a panel were restricted to examining the new measure from the perspective of the claims, arguments and factual circumstances that related to the original measure, because an Article 21.5 panel would then be unable to examine fully the 'consistency with a covered agreement of the measures taken to comply', as required by Article 21.5 of the DSU.[80]

66. China cites to *US – Countervailing Measures Concerning Certain Products from the EC* in its submission to suggest that this Panel's consideration of Articles 3.1 and Articles 3.4 of the AD Agreement and Article 15.1 and 15.4 of the SCM Agreement would violate China's due process rights.[81] Unlike this dispute, *US – Countervailing Measures Concerning Certain Products from the EC* concerned a new claim against an aspect of a compliance measure that remained unchanged.[82] Although the panel there did not permit the new claim at issue, it confirmed that "an Article 21.5 panel can consider a new claim on an aspect of the measure taken to comply that constitutes a new or revised element" of the measure in the original proceedings.[83]

67. China's suggestion that the Panel's consideration of the new claim would lead to a due process violation has no merit. As a general matter, MOFCOM's original determination relied heavily on the alleged "low price" of subject imports to demonstrate injury, whereas MOFCOM sought to eliminate all such references to subject imports' "low price" in the Re-determination. Consistent with its approach, MOFCOM modified its impact analysis in the Re-determination by

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[80] *Canada — Aircraft (Article 21.5 — Brazil) (AB)*, para. 41. See also *EC — Bed Linen (Article 21.5 — India) (AB)*, para. 79.

[81] China's First Written Submission, para. 71.

[82] *US — Countervailing Measures on Certain EC Products (Article 21.5 — EC) (Panel)*, para. 7.65.

[83] *US — Countervailing Measures on Certain EC Products (Article 21.5 — EC) (Panel)*, para. 7.64. The panel in *US – Countervailing Measures on Certain EC* Products also analyzed the Appellate Body's findings in *US – FSC (Article 21.5 – EC)*, and noted that the "Appellate Body upheld a ruling on a new claim challenging an aspect of the measure taken to comply that was a revision of the original measure." *US — Countervailing Measures Concerning Certain EC Products (Article 21.5 — EC) (Panel)*, para. 7.59; *see also US — FSC (Article 21.5 — EC) (AB)*, para. 222.

deleting all references to the "low price" of subject imports.[84] In addition, as the United States explained in its submission, MOFCOM modified its impact analysis to rely significantly on market conditions in 2008 when, in contrast, MOFCOM's original impact analysis did not indicate a specific reliance on market conditions in 2008 at all.[85]

68. The United States raises a claim to address an aspect of China's compliance measure that is inconsistent with the covered agreements. MOFCOM's revised injury determination contains several changes. In light of these changes, the utility of the compliance proceedings would be "seriously undermined" if the Panel were unable to evaluate whether China's Re-determination on this aspect is consistent with the covered agreements.[86]

69. The original panel did not consider the above-mentioned modifications because they were not part on the original determination. China incorrectly assumes that these revisions would automatically be deemed consistent with the covered agreements, simply because they were not part of the original proceedings.[87] In sum, the U.S. claims relate directly to the measures taken by China to comply with the DSB's recommendations and rulings: its revised injury analysis and the newly disclosed facts that purportedly support that analysis.

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

70. The United States showed in its first written submission that MOFCOM's examination of the factors enumerated in Articles 3.4 of the AD Agreement and 15.4 of the SCM Agreement for 2008 is highly distorted and selective. As a result, MOFCOM's "examination of the impact of the dumped imports on the domestic industry concerned" and "evaluation of all relevant economic factors and indices having a bearing on the state of the industry" was not based on an "objective examination" of "positive evidence."

71. Contrary to China's argument,[88] the United States is not arguing that it is not reasonable, or that it is distortive, for an authority to focus on the latter portion of its period of investigation when assessing injury. The United States *is* arguing that – when focusing on a recent period, or any period, for that matter – data must be viewed in their proper context. This is particularly true when, as here, data are viewed only in terms of year-to-year percentage changes. Thus, for example, when considering a deceleration in the growth of a particular factor from 2007 to 2008, MOFCOM should have recognized and taken into account the fact that the rate of growth in 2007 may have been at an extremely high and unsustainable level. However, MOFCOM failed to do this with respect to a number of the impact factors. MOFCOM "focused on the trends in

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[85] *See* U.S. First Written Submission, para 95.

[86] *See Canada — Aircraft (Article 21.5 — Brazil) (AB)*, para. 41.

[87] China's First Written Submission, para. 73.

[88] China's First Written Submission, para. 78.

growth rates,"[89] or on the velocity of growth, without considering the trends in their proper context.

72. China makes much of the fact that the overall market for GOES in China was growing.[90] However, a number of the domestic industry's performance indicators grew by more than the 18.09 percent growth in demand in 2008: production grew by 23.91 percent,[91] sales income grew by 20.31 percent,[92] employment grew by 73.03 percent,[93] and wages increased by 49.13 percent.[94]

73. Even for those particular factors that did not increase at the rate of the growth in demand in 2008, growth in 2007 often substantially exceeded the 22.08 percent growth in demand in that year. For example: sales grew by 5.04 percent in 2008, after increasing by 45.49 percent in 2007;[95] profits before tax increased by 1.24 percent in 2008, after rising 52.09 percent in 2007;[96] net cash flow declined by 6.12 percent in 2008, after a 95 percent increase in 2007; and sales income increased 20.31 percent in 2008, after rising 55.18 percent in 2007.[97] MOFCOM's analysis of 2008 data in isolation disregards that growth in some factors at less than the rate of demand in 2008 may simply be a function of these factors having increased at far greater than the rate of demand in 2007. The problem with MOFCOM's analysis is not, as China contends, that it focused on the more recent period. It is that MOFCOM failed to act objectively by using the data from this period out of context, and without regard to the data that MOFCOM itself collected for 2007.

74. As the United States explained in its first written submission,[98] at least two of the indicia of the domestic industry's performance in 2008 – capacity utilization and rate of return on investment – were almost certainly affected by the fact that one of the two Chinese producers, Baosteel, only began production in May 2008, and that it took time for that firm to ramp up its production. An authority conducting an objective examination would have taken this into account. China attempts to sidestep this issue by arguing that MOFCOM was required to

[89] China's First Written Submission, para. 80.

[90] China states that the market was growing "about 20 percent a year." China's First Written Submission, para. 80. In fact, there was a deceleration in the growth in demand, which was 22.08 percent in 2007 and 18.09 percent in 2008. Re-determination at 28 (Exhibit US-01).

[91] Re-determination at 28 (Exhibit US-01).

[92] Re-determination at 30 (Exhibit US-01).

[93] Re-determination at 32 (Exhibit US-01).

[94] Re-determination at 32 (Exhibit US-01).

[95] Re-determination at 30 (Exhibit US-01).

[96] Original Injury Disclosure at 8 (Exhibit US-05) (Orig. Exhibit US-27).

[97] Re-determination at 30 (Exhibit US-01).

[98] U.S. First Written Submission, paras. 100 and 102.

consider the condition of the domestic industry as a whole.[99] China misses the point. Taking into account a firm's start-up posture is not inconsistent with the requirement to consider the domestic industry as a whole, particularly when the domestic industry consists of only two producers.

75. China makes much of the domestic industry's loss of market share in 2008.[100] But as noted in Section II, China's overall market was experiencing substantial growth, and the sales of both imported products and domestic products were increasing. China ignores the fact that loss of market share is less significant when the overall market is growing and domestic sales are increasing. Market share, also, is only one of the 15 non-exclusive factors that Articles 3.4 of the AD Agreement and 15.4 of the SCM Agreement direct an authority to evaluate in examining the impact of subject imports on the domestic industry. China does not explain why developments in market share should be given such disproportionate weight, when so many of the other factors were positive for the domestic industry in 2008.

76. China argues that "in any case, there are likely to be some factors with positive trends and some factors with negative trends." The problem here for China is that in 2008 the positive trends vastly outnumbered and outweighed the negative ones.

77. In *China – X-Ray Equipment*, the panel examined China's injury factors under Articles 3.1 and 3.4 of the AD Agreement. In doing so, the panel noted another panel's findings in *Thailand H – Beams*:

> While we do not consider that such positive trends in a number of factors during the {POI} would necessarily preclude the investigating authorities from making an affirmative determination of injury, we are of the view that such positive movements in a number of factors would require a compelling explanation of why and how, in light of such apparent positive trends, the domestic industry was, or remained, injured within the meaning of the Agreement. In particular, we consider that such a situation would require a thorough and persuasive explanation as to whether and how such positive movements were outweighed by any other factors and indices which might be moving in a negative direction during the {POI}.[101]

With respect to China's treatment of individual injury factors, the panel in *China – X-Ray Equipment* ultimately found that China had not conducted an "objective examination" of several factors at issue. According to the panel, because "MOFCOM's treatment of certain individual injury factors did not reflect an objective examination of the evidence . . . this consequently affects MOFCOM's overall assessment of the state of the industry."[102]

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[99] China's First Written Submission, para. 81.

[100] China's First Written Submission, para. 85.

[101] *China —X-Ray Equipment (Panel)*, para. 7.195 (citing *Thailand —H-Beams (Panel)*, para. 7.249).

[102] *China —X-Ray Equipment (Panel)*, para. 7.215.

78. Thus, where there are "positive movements in a number of factors," the investigating authority must provide "a compelling explanation of why and how, in light of such apparent positive trends, the domestic industry {is}, or remain{s}, injured." MOFCOM failed to do so here.

79. The "examination" contemplated by Articles 3.4 of the AD Agreement and 15.4 of the SCM Agreement must be based on a "thorough evaluation of the state of the industry" and it must "contain a persuasive explanation as to how the evaluation of relevant factors led to the determination of injury."[103] Additionally, an authority's factual findings under Articles 3.4 and 15.4 must comply with the "objective examination" and "positive evidence" requirements set out in Articles 3.1 of the AD Agreement and 15.1 of the SCM Agreement. MOFCOM's conclusion that the domestic industry experienced material injury in 2008 is not based on a thorough evaluation of the state of the industry in that year, is not based on a persuasive explanation, and is neither objective nor based on positive evidence.

IV. CHINA CANNOT DEFEND MOFCOM'S REVISED CAUSATION ANALYSIS

80. The United States established in its first written submission that MOFCOM's causation analysis is inconsistent with Articles 3.1 and 3.5 of the AD Agreement and Article 15.1 and 15.5 of the SCM Agreement. In response to China's submission, the United States explains below why MOFCOM's causation analysis is flawed: (1) its causation analysis relies on its defective price effects findings; (2) its assertion that the domestic industry could not realize economies of scale because of subject imports is without a factual basis; (3) its non-attribution analysis with respect to the Chinese GOES industry's over-expansion and over-production does not reflect an objective examination based on positive evidence; and (4) its non-attribution analysis with respect to nonsubject imports is inadequate.

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

81. The panel in *China-Autos* considered whether the defective price effects analysis in that dispute also compromised MOFCOM's causation analysis. In finding that it did, the panel explained:

[103] *Thailand – H-Beams (Panel)*, para. 7.236.

> 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.[104]

82. The same reasoning applies in this dispute. MOFCOM's price effects analysis represented an important element of its overall injury determination, notwithstanding China's suggestion that it was merely "collateral."[105] For example, MOFCOM found that the declining price-cost differential of the domestic like product since 2008 "has resulted in a dramatic decline in the profitability of the domestic industry."[106] As in *China – Autos*, it would be difficult, if not impossible, for MOFCOM to have made its determination of causation without relying on adverse price effects.

83. Because MOFCOM failed to establish that subject imports under had any significant price effects on the domestically produced product, a necessary element of MOFCOM's causal link analysis is compromised. Accordingly, due to its failure to demonstrate significant price effects, China has failed to demonstrate that dumped or subsidized imports are causing injury, as required by the covered agreements.

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

84. In the Re-determination MOFCOM made a number of conclusory assertions to the effect that the increased output and capacity of the domestic industry did not produce the corresponding economies of scale.[107] MOFCOM's assertions were not supported by any factual analysis. Moreover, as shown by the United States in its first submission, given the timing of the increases in capacity and output by Wuhan and Baosteel, and the high start-up costs which steel plants often incur, it was unreasonable for MOFCOM to expect that these firms would be realizing economies of scale immediately after starting production or bringing new capacity online.[108]

85. Instead of addressing these flaws in MOFCOM's analysis, China merely makes the observation that "{w}henever a domestic industry loses market share to subject imports, that lost

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[104] *China – Autos*, para. 7.327.

[105] China's First Written Submission, para. 94.

[106] Re-determination at 35 (Exhibit US-01).

[107] Re-determination at 28, 29, 42, and 43 (Exhibit US-01).

[108] U.S. First Written Submission, paras. 113 and 114.

volume hurts the domestic industry" because the per-unit cost of the remaining volume goes up as total fixed costs are allocated over less volume.[109]

86. China's observation is nothing more than an abstract truism. Assuming unused capacity is available, domestic producers' unit costs will rise somewhat if the industry loses market share. The extent of this rise in costs will depend not only on the magnitude of the loss of market share, but also on what proportion of a producer's costs are fixed. For example, if a GOES producer is not integrated and instead buys the flat-rolled steel it uses to make GOES from another firm, then its (variable) raw material costs will account for a relatively significant proportion of its overall costs, and fixed costs will be of relatively less significance. MOFCOM failed to examine this issue.

87. China also attempts to excuse MOFCOM's failure to examine when it would have made sense to expect Wuhan and Baosteel to realize economies of scale as a result of their increases in output and capacity by arguing that MOFCOM was required to examine the industry as a whole.[110] China again misses the point. Independent, competitive firms realize economies of scale on their own. There is no reason why one firm would realize economies of scale after another firm adds capacity and increases its output. In this circumstance, when an industry contains only two producers, examining the issue of economies of scale on a firm-by-firm basis is not inconsistent with the requirement that material injury and causation be determined for the domestic industry as a whole.

88. China's suggestion that MOFCOM's failure to quantify the effects of loss of economies of scale should be excused because of the "need to protect confidential information and not disclose publicly calculations"[111] has no merit. MOFCOM had no trouble protecting other confidential information of the two domestic GOES producers in this proceeding. This suggests that MOFCOM did not perform any calculations that needed to be protected from disclosure.

89. MOFCOM's findings about economies of scale are nothing more than conclusory assertions, unsupported by any factual analysis. MOFCOM's findings that the domestic industry was injured because it was prevented by subject imports from realizing the benefits of economies of scale does not rest on an objective examination based on positive evidence.

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

[109] China's First Written Submission, para. 101. We note that China has recast MOFCOM's finding on this point. MOFCOM found that the domestic industry's *increase in output and capacity failed to produce* the corresponding economies of scale. Confronted with the flaws in MOFCOM's analysis, China resorts to the general observation that market share losses can have economy of scale effects for domestic producers.

[110] China's First Written Submission, para. 100.

[111] China's First Written Submission, para. 103.

90. The United States showed in its first written submission that MOFCOM's non-attribution analysis with respect to the injury caused by the domestic industry's overexpansion and overproduction was marred by errors and unsupported, conclusory statements.[112] Rather than addressing the flaws in MOFCOM's analysis, China, for the most part, asserts that, because the covered agreements do not specify any particular methodology, MOFCOM was free to address this issue in any manner. China's argument misses the point. The covered agreements provide that an authority's analysis must be based on positive evidence and an objective analysis. MOFCOM's analysis did not meet these fundamental standards.

91. The United States explained that MOFCOM's use of 2007 as a baseline in its apportionment leads to an understatement of the degree to which the domestic industry's overproduction contributed to inventory overhangs. This is because the domestic industry's market share climbed by almost eight percent in 2007.[113] Neither of the reasons that China gives for MOFCOM's selection of 2007 as the benchmark are persuasive.

92. China claims that using 2006 "would not have allowed MOFCOM to focus on the impact at the end of period" or "allow MOFCOM to more specifically analyze the effect of the subject import surge in 2008."[114] China's reasoning is specious. Using 2006 as a benchmark would in no way have prevented MOFCOM from focusing on what was occurring in 2008. MOFCOM would still have been measuring the respective contributions of the domestic industry, subject imports, and nonsubject imports to the inventory overhang that built up in 2008. By using 2006, MOFCOM's benchmark would not have been distorted by the domestic industry's large gain in market share in 2007. MOFCOM's use of 2007 as a benchmark was neither reasonable nor objective. Instead, it was designed to minimize the domestic industry's responsibility for the inventory overhang in 2008 and the first quarter of 2009.

93. The United States explained in its first submission that if MOFCOM had performed its apportionment analysis separately for the first quarter of 2009, using market shares in 2008 as a basis, it would have shown that the domestic industry's share of the responsibility for the inventory overhang in that quarter was much higher than the 45-55 percent that it calculated for the 15-month period encompassing 2008 and the first quarter of 2009.[115] China's sole defense to analyzing inventory on a 15-month basis while every other factor was evaluated separately for 2008 and for interim 2009 is to appeal to an authority's discretion. MOFCOM's own redetermination suggests that the reason for collapsing 2008 and the first quarter of 2009 was that "the effect of the increase in imports of the subject merchandise in the first quarter of 2009

[112] U.S. First Written Submission, paras. 117-134.

[113] U.S. First Written Submission, paras. 129-130.

[114] China's First Written Submission, para. 116. We note that the reasons that China now provides are different from those given by MOFCOM. MOFCOM's reasoning is, however, just as deficient. MOFCOM stated that "[a]s the year closest to 2008, the year 2007 is the year that is more comparable and representative" and that "2007 can be regarded as a year of normal market conditions." MOFCOM does not explain what is "normal" about a 22.80 percent gain in domestic demand, and a 7.97 percent gain in market share for the domestic industry.

[115] U.S. First Written Submission, para. 131.

on the inventory growth of domestic like product is less notable than in 2008."[116] In other words, MOFCOM needed to modify the analysis it used with respect to this factor to obtain the result it wanted – a clear indication of an analysis that was not objective.

94. In an apparent effort to draw attention away from the flaws in MOFCOM's analysis, China notes that "the inventory discussion in the redetermination is only part of MOFCOM's discussion of the role of domestic capacity and subject imports." But the United States discussion of this causation issue was not limited to question of how MOFCOM apportioned responsibility for the inventory overhang. The United States also discussed the rapid increases in the domestic industry's capacity.[117]

95. MOFCOM 's redetermination is inconsistent with Articles 3.1 and 3.5 of the AD Agreement, and Articles 15.1 and 15.5 of the SCM Agreement by having failed to conduct an objective non-attribution analysis to ensure that it was not attributing to subject imports injury caused by the Chinese GOES industry's over-expansion and over-production.

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

96. The United States showed in its first submission that nonsubject imports were a much more significant factor in the Chinese market than subject imports during all portions of the period of investigation.[118] MOFCOM failed to address the question of how the increasing quantity of subject imports in 2008 could have had injurious effects on the domestic industry while the increasing and much greater quantity of nonsubject imports in 2008, sold at lower AUVs than subject imports, could have had no injurious effects. MOFCOM also failed to explain how the smaller quantity of subject imports in the first quarter of 2009 could have had injurious effects on the domestic industry, while the much greater quantity of nonsubject imports in that period allegedly had no injurious effects.

97. China does not dispute the dominant role of nonsubject imports (as compared to subject imports) throughout the period of investigation. Instead, China argues that *shifts* in market share should be dispositive in considering the effects of subject and nonsubject imports.[119]

98. MOFCOM used the same reasoning in the Re-determination where it stated:

> In order to better analyze the relevant factors that might cause injury to the domestic industry as argued by the U.S., the Investigating Authority finds that the analysis should compare the changes to the import of the subject merchandise, the import from other sources and the domestic like products during the same period.

[116] Re-determination at 55 (Exhibit US-01).

[117] U.S. First Written Submission, paras. 122-123 and 133.

[118] U.S. First Written Submission, paras. 137 and 138.

[119] China's First Written Submission, paras. 118-122.

> *The one that experiences the most notable change among the three will obviously give rise to the comparatively more important influence.*[120]

99. MOFCOM's analysis makes no commercial sense. It is obvious that when nonsubject imports are present in the market at much greater volumes (as they were in 2008 and the first quarter of 2009) and at lower prices than subject imports (as they were in 2008, the part of the period of investigation that MOFCOM found to be "more persuasive for identifying the injury and causal link" than the first quarter of 2009)[121] that they will "give rise to the comparatively more important influence" than subject imports.

100. China's argument for using market share data conflates shifts in market share with absolute market share data. China argues that market share figures are highly relevant and probative because in a growing market, market share figures adjust for the changing size of the overall market, and because they allow for direct comparison of the relative magnitude of each participant in the market.[122] These are valid observations, but they are beside the point because MOFCOM did not examine market share data; instead, it limited its analysis to *shifts* in market share. Had MOFCOM examined the relative market shares of subject and nonsubject imports, it would have been apparent that nonsubject imports were a much more significant factor in the market than subject imports in 2008 and the first quarter of 2009.

101. Because of these flaws in MOFCOM's non-attribution analysis with respect to nonsubject imports, MOFCOM failed to comply with Articles 3.1 and 3.5 of the AD Agreement, and Articles 15.1 and 15.5 of the SCM Agreement.

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

102. As demonstrated in the U.S. first written submission, MOFCOM acted inconsistently with Article 6.9 of the AD Agreement and Article 12.8 of the SCM Agreement by failing to disclose the "essential facts" forming the basis of MOFCOM's decision to apply definitive measures. In response, China asserts that, inter alia, the essential facts were confidential, thus China could not have disclosed the essential facts; and that general statements and reasoning addressing topics related to the essential facts constitute the actual disclosure of the essential facts. In doing so, China disregards the obligations contained in Article 6.9 of the AD Agreement and Article 12.8 of the SCM Agreement.

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[120] Re-determination at 55 (Exhibit US-01) (emphasis added). It should be noted, however, that MOFCOM did not rely exclusively on shifts in market share. In the section of the Re-determination entitled "Analysis of Other Factors" MOFCOM also relied on an analysis of import volumes. MOFCOM stated that "since 2008," nonsubject imports accounted for a decreasing percentage of the quantity of all imports. *Id.* At 37. The United States showed that this observation is incorrect. U.S. First Written Submission, para. 140.

[121] China criticizes the United States for relying on AUVs (China's First Written Submission, para. 123), but then proceeds itself to make an argument based on AUVs (China's First Written Submission, para. 124).

[122] China's First Written Submission, para. 120.

103. The Appellate Body in *China-GOES* noted that the essential facts are "those facts on the record that may be taken into account by an authority in reaching a decision as to whether or not to apply definitive … duties," or "those facts that are significant in the process of reaching a decision as to whether or not to apply definitive measures."[123] The Appellate Body explained that "[a]n authority must disclose such facts, in a coherent way, so as to permit an interested party to understand the basis for the decision whether or not to apply definitive measures."[124]

104. The provisions dictate the timing of the disclosure, as such disclosure must take place "before a final determination is made." In addition, what constitutes "essential facts" are those facts that relate to the elements an authority is required to examine in the context of an injury analysis, which are set out in Articles 3.1, 3.2, 3.4, and 3.5 of the AD Agreement and Articles 15.1, 15.2, 15.4, and 15.5 of the SCM Agreement.

105. Article 6.9 of the AD Agreement and Article 12.8 of the SCM Agreement also serve the due process objective of allowing parties to "defend their interests." If an authority does not disclose the essential facts, then the ability of a party to defend its interest is compromised. For instance, the panel in *EC – Salmon (Norway)* stated:

> We consider that the purpose of disclosure under 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, provide additional information or correct perceived errors, and comment on or make arguments as to the proper interpretation of those facts.[125]

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

106. The United States identified categories of essential facts that must have been taken into account by MOFCOM in its price effects and causation determinations. As the United States has explained, for each category of essential facts, China's disclosure was non-existent. Because of these errors, the interested parties were unaware of the essential facts and consequently were unable to defend their interests in a meaningful way. As a result, China breached Article 6.9 of the AD Agreement and Article 12.8 of the SCM Agreement.

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

107. In its response, China cannot point to anywhere in the record where MOFCOM discloses the data underlying MOFCOM's assertion that the price trends of the subject imports and the domestic like product were the same. Instead, China claims, without citation, that MOFCOM's

[123] *China-GOES (AB),* para. 240.

[124] *China-GOES (AB),* para. 240.

[125] *EC – Salmon (Norway),* para 7.805.

assertion was referring to Chinese customs data and verified information from the domestic industry.[126] China also claims that it did not disclose pricing data because the "disclosure of more detailed information would have required MOFCOM to disclose confidential pricing information."[127]

108. These assertions regarding supposed confidential information appear to be *ex post facto* rationalizations, and are of no particular value in this dispute settlement proceeding. Furthermore, China's argument confuses two distinct concepts under the covered agreements: confidential information and essential facts. Confidential information has a specific definition under the covered agreements, and once that definition is met, it is to be protected from disclosure. Essential facts are a distinct concept, and the essential facts must be disclosed to interested parties.

109. Essential facts may come from various sources of information, including at times from confidential information. But there is no basis for concluding, as China implicitly assumes, that disclosure of essential facts necessarily would reveal any underlying confidential information. For example, (1) the essential facts may be at an aggregate level of detail, and thus disclosure of essential facts would not reveal confidential information; (2) the essential facts may be drawn from nonconfidential summaries;[128] or (3) the authority, as provided in footnote 17 of the AD Agreement, may allow disclosure of confidential information pursuant to a narrowly-drawn protective order.[129] In short, though there may be some complications presented where essential facts are based in part on confidential information, the authority is not excused from its obligation to disclose to interested parties the essential facts which formed the basis of the decision to apply definitive measures.

110. Finally, the United States notes that in arguing that its ability to disclose the essential facts was impaired because of supposed confidentiality concerns, China appears to admit that it failed to disclose the essential facts.

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

111. Again, China cannot point to anywhere in the record where MOFCOM discloses the data underlying MOFCOM's assertion that the domestic industry was prevented by subject imports from realizing economies of scale. Instead of highlighting the facts on the record, China appears to argue that it disclosed its reasoning supporting its conclusions, and that such disclosure satisfies the obligations of the covered agreements. China, for example, defends the bare

[126] China's First Written Submission, para. 138.

[127] China's First Written Submission, para. 138.

[128] *China-GOES (AB),* para. 247

[129] Footnote 42 of the SCM Agreement is the parallel footnote.

assertions it makes by contending that "the preliminary disclosure document explained the reasoning for this assertion."[130]

112. China's statement misses the point, because the obligations contained in the covered agreements apply to the disclosure of facts, and not reasoning. By the plain terms of the text, the covered agreements require investigating authorities to disclose those *facts* underlying the final findings and conclusions supporting the application of definitive measures. Other panels have explained that this obligation applies to essential facts, as opposed to *reasoning.*[131] The original panel in this dispute affirmed this interpretation and "noted that the disclosure obligation does not apply to the reasoning of the investigating authorities, but rather to the 'essential fact' underlying the reasoning."[132]

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

113. China cites a series of general statements in the preliminary disclosure that do nothing to reveal the essential facts supporting the existence of these alleged sales obstacles. China, for instance, asserts that "MOFCOM explains that 'sales obstacles' caused a dramatic increase in the domestic industry's inventory."[133] The statement represents MOFCOM's conclusion – that the "sales obstacles" *caused* an increase in inventory—but it is not a fact.

114. China then states that "information on the 'sales obstacles' immediately follows in MOFCOM's analysis."[134] However, this statement is unsupported by a citation to the record. The reader is left unaware of what the actual sales obstacles are. At the end of its convoluted explanation, China states that the "disclosure document clearly explains that the sale obstacles were the surge in subject imports."[135] In essence, China would force the reader to infer or derive the essential facts that support MOFCOM's conclusions. Such an approach is inconsistent with the covered agreements.

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

115. MOFCOM fails to support its assertion that the domestic industry's loss of market share in 2008 led it to slash prices by over 30 percent in the first quarter of 2009.[136] China argues that "MOFCOM's preliminary disclosure document cited the information and explained the rationale

[130] China's First Written Submission, para. 139.

[131] *U.S. – Oil Country Tubular Sunset Reviews (Article 21.5- Argentina),* para. 7.148.

[132] *China-GOES (Panel),* Para. 7.407.

[133] China's First Written Submission, para. 140.

[134] China's First Written Submission, para. 140.

[135] China's First Written Submission, para. 140.

[136] Re-determination Disclosure at 11 (Exhibit US-03).

that served as the basis for this conclusion."[137] As noted above, China's statement misses the point because the obligations contained in the covered agreements apply to the disclosure of facts, and not reasoning. China also appears to cite a confidentiality defense to justify its failure to disclose the essential facts.[138] The United States has already explained why this argument is flawed.

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

116. China points to a decline in gross profit, but it does not cite any essential facts to support its conclusion that Wuhan's price-cost differential decreased in 2008. China only provides a conclusion with no factual basis: "from this gross profit decline, it is clear that Wuhan experience a significant price-cost squeeze."[139] China appears to cite a confidentiality defense to justify its failure to disclose the essential facts.[140] The United States has already explained why this argument is flawed.

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

117. Unsupported with a citation to the record, China asserts that "it was clear that the growth in domestic capacity in 2008 was actually less than the growth in overall in overall demand."[141] It is unclear as to what data China is referring, particularly since the available data actually show capacity and output outstripping demand.[142]

MOFCOM's division of responsibility for the inventory overhang

118. China claims that "MOFCOM's preliminary disclosure document included extensive discussion on the cause of the domestic industry's inventory overhand."[143] In the ensuing discussion, China points to the reasoning MOFCOM employed to support its division of responsibility for the inventory overhang. MOFCOM states that the inventory overhang in 2008 and the first quarter of 2009 was attributable to these sources in the following proportions: (i) 45-55 percent to overproduction by the domestic industry, (ii) 41-51 percent to subject imports, and (iii) two percent to nonsubject imports.[144]

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[137] China's First Written Submission, para. 141.

[138] China's First Written Submission, para. 141.

[139] China's First Written Submission, para. 143.

[140] China's First Written Submission, para. 143.

[141] China's First Written Submission, para. 144.

[142] U.S. First Written Submission, para. 122.

[143] China's First Written Submission, para. 145.

[144] Re-determination Disclosure at 24 (Exhibit US-03).

119. China, however, omits the fact that nowhere in the preliminary disclosure document does MOFCOM provide the data supporting its division of responsibility for the inventory overhang. The parties therefore were unable to defend their interests, as they could not assess the completeness and correctness of the facts being considered by MOFCOM that led to this percentage breakdown. China appears to cite a confidentiality defense to justify its failure to disclose the essential facts.[145] The United States has already explained why this argument is flawed.

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

120. As demonstrated in the U.S. first written submission, MOFCOM acted inconsistently with Articles 12.2 and 12.2.2 of the AD Agreement, and Articles 22.3 and 22.5 of the SCM Agreement by failing to explain in sufficient detail the matters of fact that MOFCOM took into consideration in its injury Re-determination. Article 12.2 states that an investigating authority must provide a notice or separate report setting out "in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities." The Appellate Body in *China-GOES* stated that, with regard to "matters of fact," Article 12.2.2 requires disclosure of "those facts that allow an understanding of the factual basis that led to the imposition of final measures",[146] and "{w}hat constitutes 'relevant information on the matters of fact' is … to be understood in the light of the content of the findings needed to satisfy the substantive requirements with respect to the imposition of final measures."[147]

121. The U.S first written submission highlights several instances where MOFCOM does not explain the issues and matters of fact which led to the imposition of antidumping and countervailing duties. These issues were "material" within the meaning of Articles 12.2 of the AD Agreement and 22.3 of the SCM Agreement because they had to be resolved before MOFCOM could render an affirmative material injury Re-determination. This information also constituted "relevant information on the matters of fact and law and reasons which have led to the imposition of final measures," within the meaning of Article 12.2.2 of the AD Agreement and Article 22.5 of the SCM Agreement.

122. In its response, China makes a series of statements that are unsupported by the record. For instance, China justifies MOFCOM's assertion that the prices of the subject imports and the domestic like product were the same by noting that MOFCOM explained in the Re-determination that "prices increased in 2007 and 2008, only to fall in 2009."[148] Yet data from the first quarter of 2009 demonstrate otherwise. In the first quarter of 2009, prices diverged substantially, indicating that prices for subject imports and the domestic product were not

[145] China's First Written Submission, para. 145.

[146] *China – GOES (AB)*, para. 256.

[147] *China – GOES (AB)*, para. 257.

[148] China's First Written Submission, para. 156.

following a consistent trend.[149] These data indicate that the actual basis for MOFCOM's finding of consistent price trends remains unclear. The Re-determination therefore does not contain "all relevant information on the matters of fact and law" which led MOFCOM to conclude that the prices of the subject imports and the domestic like product were the same.

123. Regarding MOFCOM's assertion that the domestic industry was prevented by subject imports from realizing economies of scale, MOFCOM did not disclose the factual basis for this assertion. China states that MOFOCM cited increased sales volume in 2008, and that "this sale volume would have otherwise benefited the domestic industry through economies of scale from larger production and shipments." However, China does not provide a citation to support this statement. The gap between China's proffered justification for the finding that the domestic industry was prevented by subject imports from realizing economies of scale, and MOFCOM's alleged justification indicates that the actual basis for the finding remains unexplained.

124. China's explanations and MOFCOM's findings suffer from similar gaps with respect to MOFCOM's finding of unspecified "sales obstacles," the conclusion that the domestic industry's loss of market share in 2008 led it to slash prices by over 30 percent in the first quarter of 2009, and the finding that the capacity and output of the domestic GOES industry did not exceed market demand. The Re-determination does not support China's explanations. Therefore, MOFCOM did not explain its findings in sufficient detail. Consequently, China has not satisfied the requirements of the covered agreements.

VII. CONCLUSION

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

[149] Re-determination at 24 (Exhibit US-01). The prices of subject imports fell by 1.25 percent, but the prices of domestic like product plummeted by 30.25 percent.