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

COMMENTS OF THE UNITED STATES ON CHINA'S RESPONSES TO THE PANEL'S SECOND SET OF QUESTIONS TO THE PARTIES

November 15, 2013

TABLE OF REPORTS

Short Form	Full Citation
Argentina – Textiles and Apparel (AB)	Appellate Body Report, *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, WT/DS56/AB/R, adopted 22 April 1998
Canada – Aircraft (AB)	Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R, adopted 20 August 1999
China – Broiler Products	Panel Report, *China – Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States*, WT/DS427/R, adopted 25 September 2013
China – GOES (Panel)	Panel Report, *China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States*, WT/DS414/R, adopted 16 November 2012, as modified by the Appellate Body Report, WT/DS414/AB/R
China – X-Ray Equipment	Panel Report, *China – Definitive Anti-Dumping Duties on X-Ray Security Inspection Equipment from the European Union*, WT/DS425/R, adopted 24 April 2013
EC – Fasteners (China) (AB)	Appellate Body Report, *European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*, WT/DS/397/AB/R, adopted 28 July 2011
U.S. – Wheat Gluten (AB)	Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS166/AB/R, adopted 19 January 2001
U.S. – Wool Shirts (AB)	Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, adopted 23 May 1997, and Corr.1

INTRODUCTION

1. In this document, the United States comments on China's responses to the Panel's second set of questions. To a large extent, China's responses repeat arguments that the United States has addressed previously. Rather than also repeat prior U.S. responses on these issues, the comments below contain additional points on China's arguments that the United States hopes the Panel finds useful. The absence of a U.S. comment on an aspect of China's response to any particular question should not be understood as agreement with China's response.

ALLEGED VIOLATION OF ARTICLE 6.5.1 OF THE ANTI-DUMPING AGREEMENT AND ARTICLE 12.4.1 OF THE SCM AGREEMENT

CHINA

25. The Panel notes China's argument that the year on year percent changes contained in some of the tables accompanying the non-confidential summaries cited by the United States are "functionally equivalent" to indexes.[1]

a) Could China please elaborate upon how China considers these to be "functionally equivalent"?

2. China in its response asserts that year-over-year percentage changes are "functionally equivalent to indexes."[2] China makes a similar argument in its prior submissions.[3] As explained, the United States continues to find these statements puzzling. The trend lines in the application are unlabeled. Thus, respondents could not identify the average changes, or even the percentage changes, based solely on viewing the trend line.[4]

3. Though unclear, China's argument appears to be premised on the notion that adequate non-confidential summaries are not necessary; instead, a party must demonstrate only "the degree of magnitude of changes in the underlying numbers, rather than averaging or ranging the absolute numbers themselves."[5] China thus appears to be repeating its contention that its obligation to require adequate non-confidential summaries should be assessed in the context of Article 3.4 of the AD Agreement and Article 15.4 of the SCM Agreements.[6] As noted, China's view is erroneous, and reflects a fundamental misunderstanding of the obligations contained in the SCM and AD Agreements.[7]

4. Table 28, cited by China in its response, exemplifies the defects in China's approach. As explained, the year-over-year percentage changes here do not reveal the significance in the

---

[1] China First Written Submission, para. 57; and China Second Written Submission, para. 21.
[2] China Response to Panel Question 25(a), para. 1.
[3] China First Written Submission, para. 57.
[4] U.S. Second Written Submission, paras. 23-25.
[5] China Response to Panel Question 25(a), para. 1.
[6] *See* China Second Opening Statement, para. 6 ("in the context of this case and the substantive obligations of Article 3, the "substance" at issue pertains to the movement or trends of certain factors, rather than the absolute numbers themselves.").
[7] *See, e.g.*, U.S. Second Written Submission, para. 12; U.S. Second Opening Statement, para. 9; *China – Broiler Products*, paras. 7.56, 7.60.

absolute changes. Thus, the year-over-year percentage changes that were provided did not give the respondents enough information to defend their interests. Reporting aggregate figures would have been helpful. No reason, however, is given for the failure to report aggregate figures, despite the fact that reporting these figures would not have implicated any confidentiality concerns.[8]

b) Could China please clarify whether or to what extent these percent changes differ from the data displayed in the trend lines contained in some of these non-confidential summaries? In its response, could China indicate in particular, and with reference to the record, whether the trend lines reflect indexing based on year-on-year changes, or indexing based on changes relative to year 1 (i.e., 2006) values?

5. In its response, China contends that "the percentage changes provided in the non-confidential summaries complement and provide additional detail concerning the trend lines…the percentage changes thus provide additional useful information to the information to the interested parties beyond that contained in the trend lines alone."[9] Nowhere in the application or on the record of the underlying proceeding does China direct the interested reader to combine the trend lines with the percent changes to "complement and provide additional detail concerning the trend lines." Thus, the alleged complementarity of the trend lines and percent changes was not disclosed to interested parties during the proceeding.

6. As noted in paragraph 12 of the U.S. Opening Statement at the second Panel meeting, China is suggesting that adding inadequate trend lines to defective percent changes produces a combination that is somehow consistent with the covered agreements. However, the "very exercise of calculating an approximate figure... through a series of operations"[10] suggests that the purported summaries are inadequate. Table 18, offered by China in its response, demonstrates that China is requiring respondents to "infer, derive and piece together a possible summary of confidential information,"[11] contrary to the requirements of the covered agreements.

c) Where the year on year percent changes contained in the tables are accompanied by trend lines, what value do these trend lines add to the year-on-year changes already reported in the data tables?

7. China writes that "the trend lines present visually the same data as the percentage changes."[12] China does not make this statement in the application, or on the record of the underlying proceeding, and thus did not even present this information (whatever its utility) to interested parties. Further, as the United States has explained, the unlabeled trend lines are inadequate because without a sense of scale, it is impossible to obtain a reasonable understanding of the substance of the confidential information.[13] China also repeats the same error it has made throughout this proceeding by relying on a purported "trends-focused analysis" rather than

[8] *See, e.g.*, U.S. Second Written Submission, para. 25; U.S. Second Opening Statement, para. 11; *China – Broiler Products*, para. 7.60.
[9] China Response to Panel Question 25(b), para. 5.
[10] *China – Broiler Products*, para. 7.60.
[11] *China – GOES (Panel)*, para. 7.202.
[12] China Response to Panel Question 25(c), para. 8.
[13] *See, e.g.*, U.S. First Opening Statement, para. 12.

requiring adequate non-confidential summaries, apparently reading Articles 12.4.1 of the SCM Agreement and 6.5.1 of the AD Agreement in context of other, unrelated Articles. As noted, the text of the covered agreements does not support China's misguided understanding.

ALLEGED VIOLATION OF ARTICLE 6.9 OF THE ANTI-DUMPING AGREEMENT

26. The Panel notes the United States' assertion that it only has in its possession a final disclosure sent by MOFCOM to the US government, which the United States submitted to the Panel as Exhibit USA-11.[14] The Panel also notes China's assertion that MOFCOM sent final disclosures to General Motors LLC, Chrysler Group LLC, Ford Motor Company, Mercedes-Benz US International, Inc., BMW Manufacturing LLC, Honda of America Mfg., Inc, and American Honda Motor Co., Inc.[15]

27. Could China please indicate whether the final disclosures sent to these respondents in the anti-dumping (AD) investigation at issue contained:

a) Company-specific dumping margin calculations, and/or

b) A description of the methodology used in the calculations?

Could China please provide the Panel with copies of these final disclosures?

8. China's seven paragraph answer is non-responsive to the Panel's request for the final disclosure documents that China issued to the respondent U.S. companies, and which China asserts include the company-specific dumping margin calculations and a description of the methodologies used. Indeed, throughout this dispute, China has failed to provide any evidence of its assertions in this regard. And here, instead of responding to the Panel's direct request for this information, China attempts to change the subject and provide excuses as to why it refuses to provide the disclosures.

9. Pursuant to DSU Article 13, WTO Members should "'respond promptly and fully' to requests made by panels for information."[16] A failure to respond promptly and fully to requests made by a panel could deprive the panel of its ability to assess the facts:

> The refusal by a Member to provide information requested of it undermines seriously the ability of a panel to make an objective assessment of the facts and the matter, as required by Article 11 of the DSU. Such a refusal also undermines the ability of other Members of the WTO to seek the "prompt" and "satisfactory" resolution of disputes under the procedures "for which they bargained in concluding the DSU.[17]

10. China conspicuously fails to provide any evidence that it actually disclosed these calculations and methodologies to the respondents. A party asserting a claim of fact has the

[14] Final Disclosure (AD/CVD) (Exhibit USA-11).
[15] Final Determination, section I.E.1(3), p. 30 (Exhibit CHN-07).
[16] *Canada – Aircraft (AB)*, para. 187.
[17] *U.S. – Wheat Gluten (AB)*, para. 171.

burden of proving its factual claim.[18] China's response does not provide positive evidence to support its unsubstantiated assertions.

11. From this failure, it is reasonable to infer that the documents China failed to provide in response to the Panel's request would have revealed information unfavorable to China. It would have demonstrated that China, in fact, did not provide the data and calculations underlying the dumping margin calculations for the individual respondents. This failure to provide the essential facts would be consistent with the position China has taken in other disputes, in particular with respect to disclosing dumping margin calculations. In these other disputes, China has consistently argued that an investigating authority is under no legal obligation to provide details on the calculations underlying the dumping margin.[19] These statements belie China's assertions that, in this dispute, it sent company-specific dumping margin calculations and descriptions of the methodologies used.

12. Instead of simply providing the requested information, China attempts to make excuses and claim that it is the responsibility of the United States to do so. This is nothing more than distraction. As noted, the reason why China possesses these documents, and that the United States does not, follows from the normal course of an anti-dumping proceeding. MOFCOM itself prepared and issued the disclosures, and provided them directly to the private sector respondents. And, MOFCOM has never provided copies to the United States.[20] Therefore, China's statement that the United States is "logically positioned to provide the letters"[21] is erroneous. By failing to respond to the Panel's request, it is China, and not the United States, that is depriving the Panel of any ability to assess the adequacy of its disclosure letters.

13. China refuses to submit the documents for panel review because MOFCOM failed to make available the dumping calculation, and data underlying those calculations, depriving the interested parties of their ability to defend their interests. China's failure to disclose the essential facts is inconsistent with Article 6.9 of the AD Agreement.

28. The Panel notes that Exhibit USA-20 consists of a letter dated 28 April 2011 submitted by Mercedes-Benz US International, Inc. to MOFCOM.

Without prejudice to China's objection regarding the timing of the submission of this evidence into the record, could the United States please clarify whether the English translation provided is complete? If not, could the United States please submit a full translation of this letter?

14. As noted, the calculations relied on by an investigating authority to determine the normal value and export price, as well as the data underlying those calculations, constitute "essential facts" forming the basis of the investigating authority's imposition of final measures within the meaning of Article 6.9 of the AD Agreement. These data are "facts" because they are things "known for certain to have occurred." These calculations similarly are "facts" because they also represent things known to have occurred. The calculations and underlying data are facts that are

[18] *U.S. – Wool Shirts (AB)*, pp. 14-16.
[19] *China – X-Ray Equipment*, para. 7.394; *China – Broiler Products*, para. 7.76.
[20] U.S. Second Opening Statement, para. 17.
[21] China Response to Panel Question 27, para. 13.

"absolutely indispensable" to the determination of the existence and magnitude of dumping. The investigating authority must consider the margin calculations, along with their constituent values, in making a decision to apply a duty. Without such information, no affirmative determination could be made and no definitive duties could be imposed. [22]

15. China has not contested the U.S. interpretation of Article 6.9 of the AD Agreement. Rather, China relies on misplaced procedural arguments. It complains, for instance, that the Panel's Working Procedures preclude acceptance of certain U.S. exhibits, and that acceptance of these exhibits would impair due process.[23] In doing so, China misconstrues the Panel's Working Procedures, and its claims regarding due process are unfounded.

16. First, the Panel's Working Procedures do not support China's argument. The United States demonstrated that China failed to disclose the essential facts in its first written submission, and at the first panel meeting.[24] China, in response, stated that it sent disclosure documents to the private sector respondents, including Mercedes Benz, and in these documents disclosed the essential facts.[25] The United States submitted Exhibits USA-20 and USA-21 as rebuttal evidence. As explained, the U.S. submission of this evidence is fully consistent with paragraph 8 of the Panel's Working Procedures in this dispute, which provides that "evidence necessary for the purposes of rebuttal, answers to questions or comments on answers to questions" may be submitted later than the first substantive meeting of the Panel.[26]

17. China cites the Appellate Body report in *Argentina – Textiles and Apparel* to argue that the second stage of a panel proceeding is reserved almost exclusively for the responding party to make out its rebuttal case.[27] However, this view is incorrect and it misconstrues the Appellate Body's findings. In *Argentina – Textiles and Apparel*, what the Appellate Body said is that in the second stage of dispute settlement proceedings, *each party* is allowed to rebut arguments and evidence submitted by the other party.[28] The U.S. submission of Exhibits USA-20 and USA-21 is consistent with this finding, and the Panel's Working Procedures.

18. Second, China's due process arguments fail. "Due process" is not a term used in the DSU although the concept may be reflected in numerous provisions of the DSU, such as Article 12.4 (sufficient time for parties to prepare their submissions). If China believes it had not been given sufficient time to prepare a response to the U.S. rebuttal evidence, China could have requested time and the opportunity to comment on that evidence. Yet, China failed to make this request, and in fact, has had the time and opportunity to response to the U.S. rebuttal evidence in its comments on the U.S. answers. Because China has not alleged any impediment to supplying documentary evidence in response to the U.S. rebuttal evidence in the time afforded, China has suffered from no procedural unfairness, and its "due process" complaints have no merit. And as noted above, despite having the chance to supply relevant documents in response to a Panel

[22] U.S. First Written Submission, paras. 51-52.
[23] China Response to Panel Question 28, paras. 18-28.
[24] U.S. First Written Submission, paras. 47-57; U.S. First Opening Statement, paras. 37-40.
[25] *See, e.g.*, China Response to Panel Question 6(a), para. 8.
[26] U.S. Response to Panel Question 28, para. 2.
[27] China Response to Panel Question 28, paras. 18-19 (While China refers to the dispute as *Argentina – Footwear*, the official short title of the dispute is *Argentina – Textiles and Apparel*).
[28] *Argentina – Textiles and Apparel (AB)*, para. 79 (emphasis added).

question, China refused to provide the documents, explicitly depriving the Panel of its ability to properly assess the facts.

DETERMINATION OF "ALL OTHERS" AD AND CVD RATES

CHINA

29. Could China please indicate whether or to what extent the data requested in the registration forms[29] accompanying the AD and countervailing duty (CVD) notices of initiation of 6 November 2009 differed from the data requested in the AD and CVD questionnaires[30], respectively, sent to interested parties on 9 December 2009?

19. China admits that "the data requested by MOFCOM's AD and CVD registration forms are different from the data requested by MOFCOM's AD and CVD questionnaires."[31] This admission suggests that MOFCOM's notices did not specify in detail the information required of the interested parties for the purposes of the AD and CVD investigations. The *China – GOES* panel faulted China for a similar lack of detail in its initiation notice.[32]

20. As explained, the *China – GOES* panel rejected the same arguments that China is now offering in this dispute as insufficient for satisfying the preconditions for resorting to facts available. The panel analyzed whether there is an obligation on unknown exporters to come forward after a general public notice of initiation, and found that it is "difficult to find…any obligation on unknown exporters to come forward after a general notice of initiation is published."[33] It also analyzed whether evidence existed of unknown exporters refusing access to or failing to provide information, or impeding the investigation, and found there was not.[34] On that basis, the panel concluded there was no basis for resort to facts available. Given the soundness of the *China – GOES* panel's reasoning, and the similar underlying facts and legal arguments in *China – GOES* and this dispute, the United States considers the panel's reasoning in *China – GOES* to be highly relevant and persuasive here.[35]

30. Could China please provide the Panel with copies of the registration forms that foreign exporters willing to participate in the investigations were meant to fill out in <u>both the AD and the CVD investigations</u> at issue?

21. The United States has no comment on China's response to this question.

31. The Panel notes China's argument that because MOFCOM undertook a "broad notification effort prior to the imposition of facts available. . . it may reasonably infer that the exporters and producers that did not make themselves known have decided not

[29] Referenced in AD Notice of Initiation, section III, p. 2 (Exhibit USA-06); and CVD notice of initiation, section IV, p. 4 (Exhibit USA-07).
[30] Referenced in Final Determination, sections I.B.1(2) & I.B.2(2), pp. 8-9 & 11-12 (Exhibit CHN-07).
[31] China Response to Panel Question 28, para. 29.
[32] *China – GOES (Panel)*, para. 7.386.
[33] *China – GOES (Panel)*, para. 7.386.
[34] *China – GOES (Panel)*, para. 7.387.
[35] U.S. Second Written Submission, paras. 39-40.

to cooperate."[36] The Panel also notes China's statement at paragraph 30 of its oral statement at the second meeting of the Panel that "MOFCOM did not apply facts available to Ford".

The Panel's understanding is that, since no individual dumping margin was calculated for Ford Motor Company, following the AD investigation at issue, this company's exports of the subject product to China would be subject to the 21.5% residual AD rate calculated by MOFCOM. Does China agree? Please elaborate.

22. China's assertion that it did not apply facts available to Ford is simply not credible.[37] The Final Determination indicates that China applied facts available to calculate the all others AD rate. By the terms of the Final Determination, Ford is subject to the all others AD rate. The paragraph discussing Ford is not a free-standing paragraph; the paragraph falls under the heading "All Others Rate." Therefore, China applied facts available to calculate the all others AD rate, which it then applied to Ford.

DEFINITION OF DOMESTIC INDUSTRY: ALLEGED VIOLATIONS OF ARTICLES 3.1 AND 4.1 OF THE ANTI-DUMPING AGREEMENT AND ARTICLES 15.1 AND 16.1 OF THE SCM AGREEMENT

CHINA

34. The Panel refers to the injury registration notice entered into evidence before the Panel as Exhibit CHN-02. In order to clarify the terminology used by the Parties in this regard, please explain whether the injury registration notice mentioned is the registration form accompanying the AD and CVD notices of initiation[38]. If this is not the case, please explain what a registration notice is. If the registration notice is in fact the registration form, the Panel notes that Exhibit CHN-02 contains only the registration form used in the AD investigation at issue. Could China please also provide the Panel with a copy of the injury registration form for the CVD investigation?

23. China explains that, "[u]nder its standard practice followed in this case, MOFCOM made the registration forms available to all potential interested parties as attachments to the registration notices."[39] In a footnote to this statement, China notes that "MOFCOM's registration notices for its AD and CVD investigations and accompanying registration forms are available, respectively, at the following webpages:

http://www.cacs.gov/cn/cacs/newcommon/detailsaspx?articleid=62087 [sic] and http://www.cacs.gov/cn/cacs/newcommon/details.aspx?articleid=62085. [sic]"[40]

[36] China Response to Panel Question 12.
[37] China Response to Panel Question 28, para. 25.
[38] Referenced in AD Notice of Initiation, section III, p. 2 (Exhibit USA-06); and CVD Notice of Initiation, section IV, p. 4 (Exhibit USA-07).
[39] China Response to Panel Question 34, para. 38.
[40] China Response to Panel Question 34, footnote 38.

24. However, the webpage addresses China provides are incorrect. In both of the addresses, "gov/cn" should be "gov.cn" and, in the first address, "detailsaspx" should be "details.aspx." Accordingly, the correct webpage addresses, through which we were able to access the registration notices and forms online, are:

http://www.cacs.gov.cn/cacs/newcommon/details.aspx?articleid=62087 and
http://www.cacs.gov.cn/cacs/newcommon/details.aspx?articleid=62085.

25. While this appears to have been a typographical error on China's part, it highlights a concern about MOFCOM's process. By making the registration notices and forms and the injury questionnaires available almost exclusively on webpages with long and complicated addresses, rather than sending the materials directly to known domestic producers by mail, the likelihood that producers will be unaware of ongoing investigations and unable to access the materials is greatly increased. Indeed, simply copying and pasting the erroneous links China provided in its response to the Panel's question would leave a user frustrated and unable to access the documents. The same would be true for a user who made the same typographical mistakes that China did. That likely would reduce participation in the injury investigation, limiting the amount of information on which MOFCOM could base its examination, and potentially distorting the injury determination.

35. Could China please provide the Panel with copies of the registration forms that the Chinese producers willing to participate were meant to fill out in both the AD and CVD investigations at issue?

26. China once again asserts that "MOFCOM accepted and included in its injury investigation data from all domestic producers that *chose* to participate."[41] China's own statement is evidence of the existence of a self-selection process among the domestic producers and MOFCOM's failure to undertake its duty to investigate. MOFCOM examined information only from those domestic producers that "chose" to provide it. It stands to reason that domestic producers posting the weakest performance would have the most to gain from the imposition of an antidumping or countervailing duty measure, and would therefore have a financial incentive to support the petition and participate in the injury investigation. MOFCOM's investigative procedure therefore introduced a material risk of distortion, which was inconsistent with its obligation to conduct an objective examination.

27. The United States notes that it is not asserting, as a factual matter, that only domestic producers posting the weakest performance provided information to MOFCOM. Whether or not that is the case is unknown, and unknowable, precisely because MOFCOM failed even to attempt to collect additional information or to determine why the petitioner, CAAM, provided information only from certain companies. That is a serious flaw in MOFCOM's process as it relates to the definition of the domestic industry, and that, in part, is why MOFCOM's injury determination was not based on positive evidence and did not involve an objective examination, as required by Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement.

[41] China Response to Panel Question 35, para. 39 (emphasis added).

36. The Panel notes China's statement that only eight companies represented by the CAAM were included in MOFCOM's domestic industry definition.[42] Could China please indicate:

a) Whether, and if so how many, additional Chinese national and joint venture producers of the like product were members of the CAAM?

28. China "derive[s]" a response to this question using a market research report that the U.S. respondent Chrysler submitted to MOFCOM during the investigation.[43] It is curious that China points to a secondary source of this information, and one that was submitted relatively late in the investigative process,[44] rather than simply seek the information directly from CAAM. The Panel also should note that the analysis undertaken by China in response to the Panel's question is not an analysis that is reflected anywhere in MOFCOM's final determination. Nothing in the final determination indicates that MOFCOM ever asked CAAM about its membership.

29. Elsewhere in its response to the Panel's question, China states that MOFCOM "evaluated the injury data supplied by domestic producers through CAAM and satisfied itself that it obtained data covering sufficient domestic production to satisfy the 'major proportion' test."[45] MOFCOM must have performed this "evaluation" relatively early in the investigative process. This raises the question of what data MOFCOM consulted to reach the conclusion that the "major proportion" standard was satisfied. It is also anomalous that China now relies on this market research report, which China has criticized as being unreliable at other stages in this dispute.[46]

30. Finally, China contends that joint ventures affiliated with U.S. exporters and producers "chose as a group" not to participate in the injury investigation.[47] China has no evidence to support this contention.[48] Indeed, no individual producer registered to participate in the injury investigation. The petitioner, CAAM, was the only entity to register and the only entity to provide information to MOFCOM.

b) Whether, and if so how many, Chinese national and joint venture producers of the like product operating in the Chinese car market were not members of the CAAM?

31. The United States has no comment on China's response to this part of the question.

c) Upon what basis the eight companies were selected?

---

[42] China Response to Panel Question 15.c.
[43] China Response to Panel Question 36(a), paras. 41-42.
[44] MOFCOM initiated its injury investigation on November 6, 2009. Final Determination, p. 1 (Exhibit CHN-07). Chrysler's comments were filed on April 12, 2011. Final Determination, p. 36 (Exhibit CHN-07).
[45] China Response to Panel Question 43(a), para. 48.
[46] *E.g.*, China Response to Panel Question 19, para. 54; China Second Written Submission, paras. 127-131.
[47] China Response to Panel Question 43(a), para. 43.
[48] There is also no evidence to support China's contention that these joint ventures "would have had an incentive to participate in the injury investigation so as to defeat trade remedy measures." China Response to Panel Question 36(a), para. 43. To the extent that any of these joint ventures believed that their performance was worse than that of the domestic industry overall, and if their overall objective was to defeat trade remedy measures, they would have had an incentive *not* to participate in the injury investigation.

32. China makes "several points" in response to the Panel's question, though China does not, in fact, answer the question.[49] The United States would like to respond to a number of China's points.

33. China asserts that neither MOFCOM nor CAAM engaged in any "selection, determination, or compulsion of domestic industry participation in the injury investigation."[50] This raises the question: How does China know that CAAM played no role in the selection of the producers whose data was to be included in the CAAM injury questionnaire response? There is no indication in the final determination or the disclosure of basic facts that MOFCOM ever made any inquiry about this issue.

34. China also urges that, "[w]hile the United States has repeatedly alleged that MOFCOM or CAAM engaged in self-selection to determine the definition of the domestic industry, the U.S. allegations rest entirely on speculation."[51] Yet again, China misunderstands the U.S. argument and the nature of "*self*-selection." The United States is not arguing that MOFCOM selected the participants. That would not be *self*-selection. The domestic producers themselves *self*-selected whether or not to participate and MOFCOM simply accepted the result of that self-selection process. The evidence of this self-selection is in China's own statements. For example, in response to the Panel's question, China yet again states that, "as China has emphasized, every domestic producer of the domestic like product was free to decide for itself whether to participate in MOFCOM's injury investigation."[52] China does not seem to understand that, with this statement, China itself describes the problem.

35. In *EC – Fasteners (China)*, the Appellate Body said that "to ensure the accuracy of an injury determination, an investigating authority must not act so as to give rise to a material risk of distortion in defining the domestic industry . . . ."[53] A corollary to this statement is that an investigating authority must not fail to act if doing so would give rise to a material risk of distortion. Yet, that is exactly what MOFCOM did in this case. MOFCOM, in effect, delegated the investigatory function to the domestic producers. MOFCOM permitted each producer "to decide for itself whether to participate." The participating producers, in effect, defined the domestic industry. And then MOFCOM took what information it received without question. In so doing, MOFCOM failed to meet its obligation to investigate, and failed to base its injury determination on positive evidence and an objective examination.

36. Additionally, for the first time in these proceedings, China asserts that CAAM acted merely as a "conduit" for information submitted by "companies that elected to participate in the injury investigation."[54] China goes on to suggest that "[t]he record offers no basis to conclude that CAAM as an association pursued a specific outcome in the injury investigation. . . ."[55] Contrary to China's striking claims, however, the record, in fact, gives *every* reason to believe that CAAM pursued a specific outcome in the injury investigation, namely an affirmative injury

[49] China Response to Panel Question 36(c), para. 45.
[50] China Response to Panel Question 36(c), para. 45.
[51] China Response to Panel Question 36(c), para. 45.
[52] China Response to Panel Question 36(c), para. 46 (emphasis added).
[53] *EC – Fasteners (China) (AB)*, para. 414 (citations omitted) (emphasis added).
[54] China Response to Panel Question 36(c), para. 46.
[55] China Response to Panel Question 36(c), para. 46.

determination. CAAM was, after all, the petitioner in the investigation.[56] CAAM advocated for the imposition of antidumping and countervailing duties at every turn.[57] CAAM was the only domestic producer entity that applied to participate in the injury investigation.[58] CAAM was also the only domestic producer entity to submit a questionnaire response in the injury investigation, submitting a single response to MOFCOM's injury questionnaire on behalf of the domestic industry.[59] China's assertion now that CAAM pursued no specific outcome in the injury investigation is utterly without support.

37. Finally, China suggests that the U.S. emphasis on China's revelation that only eight domestic producers provided data to MOFCOM is "misguided."[60] In China's view, what matters under the AD and SCM Agreements is the collective output of the producers included in the domestic industry definition. While China is correct that the term "domestic industry" is defined, in part, on the basis of the collective output of the producers, and not the number of producers, China misses the point. The AD and SCM Agreements also require that an injury determination be based on positive evidence and involve an objective examination. MOFCOM permitted the domestic producers to define the domestic industry themselves using a self-selection process, through which the petitioner, CAAM, provided data to MOFCOM from only eight of its member companies, and MOFCOM never raised a question about why data was provided only from those particular companies. In addition, we have established that the collective output of those eight companies was not "relatively high"[61] and they did not account for a major proportion of total domestic production. Taken as a whole, the many flaws in MOFCOM's process and in its domestic industry definition support the conclusion that MOFCOM failed to base its injury determination on positive evidence and an objective examination.

37. Could China please indicate, with reference to the record, how the "major proportion" calculation was made in MOFCOM's investigations? Specifically, was the calculation made by MOFCOM, or made by the CAAM and accepted by MOFCOM? If the latter, please detail the steps taken by MOFCOM to verify the CAAM's calculation.

38. The United States has no comment on China's response to this question.

38. The Panel notes China's statement, at footnote 99 of its second written submission, that "the average [percentage of total production captured by MOFCOM's domestic industry definition] over the period of investigation is roughly 42 percent."

Could China please clarify how MOFCOM calculated this figure?

39. The United States has no comment on China's response to this question.

---

[56] Final Determination, p. 3 (Exhibit CHN-07).
[57] *E.g.*, Final Determination, pp. 16, 24-25, 26, 36, 48, 147-148, 150-151, 156-157, and 159-160 (Exhibit CHN-07).
[58] Final Determination, p. 19 (Exhibit CHN-07).
[59] Final Determination, p. 22 (Exhibit CHN-07).
[60] China Response to Panel Question 36(c), para. 47.
[61] *See EC – Fasteners (China) (AB)*, paras. 412 and 419.

PRICE EFFECTS ANALYSIS: ALLEGED VIOLATIONS OF ARTICLES 3.1 AND 3.2 OF THE ANTI-DUMPING AGREEMENT AND ARTICLES 15.1 AND 15.2 OF THE SCM AGREEMENT

CHINA

41. The Panel notes China's reference, at footnote 223 of its first written submission, to pages 48 to 49 of MOFCOM's final determination. China refers to this portion of the final determination in support of its argument that MOFCOM "found substitutability and mutual competition between subject imports and the domestic like product, further justifying the use of averages in this case".

MOFCOM's discussion at pages 48 to 49, however, relates to the "Definition of the Domestic Industry", and does not specifically address the issue of competitive overlap between subject imports and the domestic like product. Could China please clarify how the discussion referred to relates to the issue of competitive overlap and supports MOFCOM's use of averages?

40. China's response to this question underscores the fact that MOFCOM conducted one analysis of the physical characteristics and other similarities between subject imports and the domestic like product, for purposes of defining the domestic like product (at pp. 44-47 of the Final Determination), and then relied on that extremely generalized analysis to find sufficient competitive overlap for its price effects and causation analysis.

41. MOFCOM's domestic like product analysis consisted of the following:

- *Product characteristics.* Subject imports and the domestic product are "basically the same." Both are "composed of basic parts including engines, the chassis, car bodies and electrical equipments, etc." They are both "used for carrying passengers and their carry-on luggage and/or temporary objects."[62]

- *Production process.* Subject imports and the domestic product have the same production process, consisting of "stamping, welding, painting and general assembly."[63]

- *Uses.* Subject imports and the domestic product were both "used in road transportation, and mainly used for carrying passengers and their carry-on luggage and/or temporary objects. Both of them aim at end consumers in China, and some Chinese domestic consumers own both the product made in China and the product under investigation."[64]

[62] Final Determination, p. 45 (Exhibit CHN-07).
[63] Final Determination, p. 45 (Exhibit CHN-07).
[64] Final Determination, p. 46 (Exhibit CHN-07).

- *Sales Channels.* Sales channels for both are "basically the same." Both "are sold to end users by networks of franchised dealers or 4S stores."[65]

- *Prices.* "The overall trends of change of the prices are basically the same."[66]

It is clear that MOFCOM's like product analysis is limited to very general similarities in physical and other characteristics between subject imports and the domestic like product, and does not include any consideration of the competitive overlap – or lack thereof – between these products.

42. China suggests that MOFCOM addressed competitive overlap elsewhere in the final determination. Thus, for example, China claims that MOFCOM relied on a "variety of pieces of evidence,"[67] and that this discussion "was offered as one piece of support among many for the factual conclusion that there was significant similarity between subject imports and the domestic like product, with significant competitive overlap between them."[68] China, however, fails to cite any portion of MOFCOM's preliminary determination or final determination that contains any evidence or analysis of competitive overlap. The citations China offers are limited to MOFCOM's "like product" discussion.[69]

43. China and MOFCOM fail to recognize that the analysis involved in defining the "like product" is different than that for analyzing price effects and causation. Article 2.6 of the AD Agreement and footnote 45 of the SCM Agreement provide that the term "like product" is to be interpreted as a product that is identical or one that "has characteristics closely resembling those of the product under consideration." (emphasis added). Article 3.5 of the AD Agreement, however, speaks of "the demonstration of a causal relationship between the dumped imports and the injury to the domestic industry." (emphasis added) (Article 15.5 of the SCM Agreement uses similar language.) The examination of product characteristics that is required to define the like product is not the same as the "demonstration of a causal relationship" that is required in the analysis of price effects and causation. Nothing in the preliminary determination or the final determination indicates that MOFCOM engaged in this latter analysis at all.

42. The Panel notes China's argument that the United States' approach of making adjustments to average unit values (AUVs) would be more appropriate to a price undercutting analysis, where an investigating authority must compare absolute price levels to determine whether subject imports in fact undercut the prices of the domestic like product. Is China of the view that, except in the context of a price undercutting analysis, or an analysis of other price effects in which undercutting plays a pervasive role, reliance on AUVs without any adjustments will always be appropriate? If not, please indicate what elements are relevant to deciding whether or not reliance on AUVs without any adjustment will be appropriate.

44. The United States has no comment on China's response to this question.

[65] Final Determination, p. 46 (Exhibit CHN-07).
[66] Final Determination, p. 46 (Exhibit CHN-07).
[67] China Response to Panel Question 41, para. 53.
[68] China Response to Panel Question 41, para. 56.
[69] *See* China Response to Panel Question 41, para. 55.

CAUSATION: ALLEGED VIOLATIONS OF ARTICLES 3.1 AND 3.5 OF THE ANTI-DUMPING AGREEMENT AND ARTICLES 15.1 AND 15.5 OF THE SCM AGREEMENT

43. The Panel notes the United States' argument at footnote 28 of its response to Panel questions that a factor is "known" to the extent it is reported in an investigating authority's final determination.[70]

Could China respond to this argument?

45. The United States agrees with China that it would be impractical and unrealistic to require investigating authorities to conduct a separate causation analysis for each individual "data point" reported in the authority's final determination.[71] But this is not what is at issue here. The Chinese domestic industry's sagging productivity during the period of investigation cannot be dismissed as merely an obscure "data point" in MOFCOM's final determination. As MOFCOM itself recognized, the industry's productivity fell from 3.92 units/person in 2006, to 3.68 units/person in 2007, to 2.92 units/person in 2008. Over the interim periods, productivity fell from 2.56 units/person in interim 2008 to 1.71 units/person in interim 2009. In other words, productivity in interim 2009 was 33.24 percent lower than in interim 2008 and 112 percent lower than in 2006.[72] This sharp drop in productivity in interim 2009 occurred at the same time as the domestic industry expanded its labor force by 68.71 percent.[73] The sharp drop in productivity in interim 2009 is particularly significant because this was the period in which MOFCOM found that the domestic industry suffered material injury.

46. China's belated attempts to dismiss the decline in productivity as unimportant[74] are unavailing. As the United States noted in its opening statement at the second Panel meeting, the increase in the domestic industry's labor costs from interim 2008 to interim 2009 (406 RMB) was nearly as large as the decline in the industry's pre-tax profits (493 RMB), a decline on which MOFCOM relied in finding material injury.[75] Moreover, the fact that the industry's total unit costs declined in interim 2009 also does not render the increase in labor costs unimportant. Were it not for the labor cost increase, unit costs would have declined even further, with beneficial effects on the industry's profitability.[76] Given the significance of the declines in the industry's productivity, MOFCOM should have considered what role these declines played in the industry's financial performance.

[70] U.S. Responses to Panel Questions 22(a) and 22(b).
[71] China Response to Panel Question 43, para. 59.
[72] Final Determination, pp. 136-137 (Exhibit CHN-07). MOFCOM did not present data for interim 2008 in the final determination. The data reflected here are derived from the data for interim 2009 and the percentage change from interim 2008 to interim 2009, which were presented in the final determination.
[73] Final Determination, p. 136 (Exhibit CHN-07).
[74] China Response to Panel Question 43, para. 60.
[75] U.S. Second Opening Statement, paras. 80-81.
[76] U.S. Second Opening Statement, para. 82.

44. The Panel notes MOFCOM's discussion, at section VII.B of its final determination,[77] of six "other factors" that may have caused injury to the domestic industry. Could China please indicate:

a) Upon what basis MOFCOM selected these factors for examination?

b) Which of these factors were raised by interested parties, and which were examined by MOFCOM on its own initiative?

c) Why productivity was not discussed in this section?

47. China explains that MOFCOM examined the six "other factors" referenced in the Panel's question "on its own initiative."[78] China further explains that MOFCOM did not examine productivity "because in this industry trends in labor productivity were not significant to an analysis of causation and because no party raised the issue in the investigation."[79] China's explanations are revealing.

48. The first basis China offers for MOFCOM's decision to ignore productivity and labor cost is unavailing for two reasons. First, there is nothing in MOFCOM's final determination that indicates that MOFCOM actually considered whether "industry trends in labor productivity were not significant to an analysis of causation. . . ."[80] This is simply a *post hoc* rationalization that China has offered during the course of this dispute in an attempt to explain away MOFCOM's failure to examine this issue. Second, as we explain in response to question 43 above, given the significance of the decline in the industry's productivity and the increase in the industry's labor cost, MOFCOM should have considered what role these trends played in the industry's financial performance.

49. The second basis China offers for MOFCOM's decision to ignore productivity and labor cost is likewise unavailing. China argues that "no party raised the issue" of the domestic industry's declining productivity and increasing labor cost during the course of the investigation. Yet, no party raised the other issues that MOFCOM examined either. MOFCOM examined them "on its own initiative."[81] MOFCOM's decision to examine those other factors, which MOFCOM concluded did not affect its causation determination,[82] and MOFCOM's decision not to examine the domestic industry's declining productivity and increasing labor costs, which we have demonstrated should have affected MOFCOM's causation determination, indicates a lack of objectivity on MOFCOM's part in the choices it made of what data to examine in connection with its causation analysis.

45. The Panel notes China's explanation at paragraph 234 of its first written submission that MOFCOM did not base its injury determination on domestic producers' loss of market share. The Panel also notes the corresponding reference to MOFCOM's

[77] Final determination, pp. 142-146 (Exhibit CHN-07).
[78] China Response to Panel Question 44, para. 63.
[79] China Response to Panel Question 44, para. 65.
[80] China Response to Panel Question 44, para. 65.
[81] China Response to Panel Question 44, para. 63.
[82] Final Determination, pp. 142-146 (Exhibit CHN-07).

statement in its final determination that "to determine whether [subject imports] causes injury on the basis of the size of market shares only is not in line with the laws"[83]. Is the Panel to understand from China's explanation and the above-cited portion of the final determination that MOFCOM relied neither on:

a) the market share gains of subject imports; nor

b) the loss of market share of the domestic industry during the POI; in its injury determination?

50. As the Panel has noted, in its first written submission, China took the position that "MOFCOM's Final Determination never states that injury was caused by the domestic producers' loss of market share. The Final Determination discusses the indicia of material injury in this case in detail, and does not list loss of market share as an indicia of injury."[84] China has changed its argument and now contends that "MOFCOM relied in part on the market share gains of subject imports and the market share of the domestic industry."[85]

51. As the United States has previously explained,[86] to the extent that MOFCOM relied in its injury determination on gains in the subject imports' market share in interim 2009, that analysis was flawed because it failed to take into account that the market share of the Chinese domestic industry also increased, nearly as sharply as that of the subject imports, and that subject imports took market share from some combination of Chinese producers not included in MOFCOM's definition of the domestic industry and third-country imports, not from the domestic industry as defined by MOFCOM.

[83] Final Determination, p. 161 (Exhibit CHN-07).
[84] China First Written Submission, para. 234.
[85] China Response to Panel Question 45, para. 67.
[86] U.S. First Written Submission, para. 159; U.S. First Opening Statement, para. 91; U.S. Second Opening Statement, para. 63; Exhibit USA-19.