

*****PUBLIC VERSION - Business Confidential Information Redacted from Pages 41-42*****

**CHINA – COUNTERVAILING AND ANTI-DUMPING DUTIES
ON GRAIN ORIENTED FLAT-ROLLED ELECTRICAL STEEL
FROM THE UNITED STATES
(DS414)**

**COMMENTS OF THE UNITED STATES OF AMERICA
ON CHINA’S RESPONSES TO QUESTIONS FROM THE PANEL TO THE PARTIES
FOLLOWING THE SECOND SUBSTANTIVE MEETING OF THE PANEL**

January 13, 2012

*China – Countervailing and Anti-Dumping Duties on
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1. The United States appreciates this opportunity to comment on China’s responses to the questions posed by the Panel following the second substantive meeting with the parties. Many of the points China raises have already been addressed by the United States in prior written and oral submissions or are not relevant to the resolution of this dispute. In the comments below, the United States will focus on points that China raises that are pertinent to the resolution of this dispute and/or that have not been addressed in prior U.S. submissions. 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.

*(a) Initiation of the countervailing duty investigation
(i) Questions to both parties*

1. Given that Article 4.5 of the SCM Agreement appears to use the term “nature” as a reference to whether or not an alleged subsidy is prohibited, could the parties elaborate on why they consider the phrase “nature of the subsidy” in Article 11.2(iii) to refer to whether or not the alleged subsidy is specific.

2. The United States and China agree that the term “nature” is not used in Article 11.2(iii) of the SCM Agreement in the same manner as the term “nature” in Article 4.5. But in its response to the Panel’s question, China also suggests that the evidentiary standard for specificity is lower under the SCM Agreement than the other elements of a subsidy – financial contribution and benefit. China, for instance, asserts “the lack of any direct reference to ‘specificity’ and Article 1.2 in Article 11.2(iii) ... does suggest a different evidentiary standard for specificity.” China then suggests that this means that there need not be any “hard evidence” of specificity and indeed that the nature of a subsidy may be discussed only in terms of “inferences.”¹

3. Contrary to China’s assertions, Article 11.3 of the SCM Agreement does not excuse deficient evidence of specificity, nor does it contain a special exception to evidentiary requirements for specificity. Instead, the obligation applies to both elements of a subsidy, and specificity. As noted in prior submissions, the obligations in Article 11 exist so that investigations will not be initiated unless certain evidentiary requirements are met.²

¹ China Response to Second Set of Panel Questions, para. 1.

² U.S. Opening Statement at the Second Panel Meeting, para. 13; *See also US – Carbon Steel (AB)*, para. 115.

4. China essentially is asking the Panel to read out of the text of Article 11.2 the clear language: “Simple assertion, unsubstantiated by relevant evidence, cannot be considered sufficient to meet the requirements of this paragraph.” And in reviewing the sufficiency of evidence of specificity, it is important to recognize the guidance contained in the SCM Agreement. In particular, the SCM Agreement provides guidance under Article 2.1(a) and (b) for factors to consider when a subsidy may be *de jure* specific, and under Article 2.1(c) for when a subsidy may be *de facto* specific. Notably, the second sentence of Article 2.1(c) lists four factors to be considered where there are reasons to believe that a subsidy is *de facto* specific. The last sentence of Article 2.1(c) identifies additional factors to take into account. This guidance indicates the types of evidence that could be used when evaluating specificity with respect to an alleged subsidy..

5. China neglects this evidentiary guidance because, as noted in prior submissions,³ the application contained insufficient evidence, or in many cases no evidence at all, that would indicate *de jure* or *de facto* specificity in relation to several allegations, including the 2003 Economic Stimulus Plan of Pennsylvania, Pennsylvania’s Alternative Energy Funding Program, the Medicare Prescription Drug, Improvement and Modernization Act of 2003 – as well as the Coal, Natural Gas, and Electricity allegations.

2. Could the parties elaborate on their views of the meaning of “price support” under Article 1.1(a)(2) of the SCM Agreement. Does the meaning of price support extend to border measures, as the petitioners suggest in relation to the Steel Import Stabilization Act (see p. 48 of Exhibit CHN-2, where the petitioners state “{t}he VRA also provided the U.S. steel companies a government compulsory pricing support mechanism”)?

6. In its response, China continues to misunderstand the obligations contained in Article 11 of the SCM Agreement. To justify initiation of an investigation into this Act, China can only state that the statute “might be construed generally as a price or income support”, or alternatively “might be seen as evidence of a financial contribution.”⁴

7. As noted in the U.S. response to this question, a price support refers to a measure designed to support a price above that which would otherwise prevail.⁵ But nothing in the evidence cited by China indicates the existence of a price support, nor does it provide sufficient evidence to merit initiation of an investigation. Instead, the study, which the applicant did not

³ United States First Written Submission, para. 78; United States Second Written Submission, paras. 8-10, 21-33.

⁴ China Response to Second Set of Panel Questions, para. 2.

⁵ Para. 5.

cite to support its allegation concerning the Steel Import Stabilization Act of 1984, only shows that under import restraint agreements signed over 25 years ago, a certain portion of U.S. market share was reserved to imports.⁶ The study also speculates that an effect of these agreements was increased revenue for U.S. steel companies.⁷ Any references to an actual price support are nowhere to be found. In this circumstance, merely indicating that a law “might” be construed “generally” as a price support falls short of the requirement of “sufficient evidence” embodied in Article 11 of the SCM Agreement. And China’s response only further emphasizes that, as the United States noted in its response to the Panel questions, China’s approach would convert any border measure into a form of price or income support within the meaning of the first part of the definition of a subsidy. China argues that any form of border measure raises domestic prices and so would be a form of price or income support.

(iii) Questions to China

4. In its second written submission at paragraph 16, the United States introduces the argument that the petition for initiation did not include any indication of what the benefit under the State of Indiana Steel Advisory Service programme would be. How does China respond to this argument?

8. China has not produced any evidence indicating that the Indiana Steel Advisory Service provided a financial contribution or benefit. As noted by the United States, China has presented no evidence that the Indiana Steel Advisory Service would perform a study, and, if it did so, whether that study would be available to the steel industry.⁸ Evidence that a commission has been formed is not evidence that costs have been relieved. China’s statement that the government took on costs that the respondents otherwise would have incurred is mere assertion, unsubstantiated with relevant evidence.

5. How does China respond to the argument at paragraph 29 of the United States’ second written submission, namely that there were six other focal points of the 2003 Economic Stimulus Plan of Pennsylvania, apart from “traditional manufacturing industries”, and therefore there was inadequate evidence of specificity in the petition with respect to this programme?

9. The allegation with respect to the 2003 Economic Stimulus Plan of Pennsylvania did not contain sufficient evidence of specificity to justify initiation. The evidence submitted by the

⁶ CHN-4, pp. 109-110.

⁷ CHN-4, pp. 111.

⁸ U.S. Second Written Submission, para. 16.

applicant indicated that the Plan covered several different sectors, including: investments in economic and community development projects; investments in rural, urban, and suburban sites; capital resources for small cities and communities; real estate and business development; high-growth firms; and resources for traditional industries, especially manufacturing.⁹ Even if the Plan had been focused only upon “traditional industries, especially manufacturing,” this would be too broad a focus to be specific to an “enterprise or industry or group of enterprises or industries” for purposes of initiation.¹⁰

10. China, in its response to Question 5, claims that “not all” of the other “focal points” of the 2003 Economic Stimulus Plan relate to “an enterprise or industry or groups of enterprises or industries.” By implication then, China concedes that some of the other focal points did relate to an enterprise or industry or groups of enterprises or industries. Furthermore, even China’s claim that some of the “focal points” should not be considered because they are not related to enterprises or industries, or groups thereof, is incorrect. Based on the evidence in the application, it appears that high-growth firms, investors in rural or urban or suburban sites, and investors in small cities or communities, among others, could be recipients under the 2003 Economic Stimulus Plan.¹¹ Thus any number of enterprises or industries, or groups of enterprises or industries, could receive subsidies under the Plan.

11. China also claims that the U.S. position constitutes a “huge loophole” because it would mean that a law targeting several sectors with unique forms of support cannot satisfy the specificity requirement for initiation.¹² China is incorrect. Of course, when there is legislation targeting discrete sectors of the economy with different kinds of support, an applicant or an investigating authority can examine the different measures separately and assess whether each one meets the standard of sufficient evidence of financial contribution, benefit, and specificity, for initiation. However, that is not the case here. The applicant and MOFCOM treated the 2003 Economic Stimulus Plan as a whole. Thus, for its allegation of financial contribution, the applicant relied upon the evidence referring to “2.8 billion dollars of loans, grants and guarantees,” the “R&D tax credits” as well as “joint venture investment guarantees.”¹³ In other words, the applicant relied upon all the different aspects of the Plan. However, with respect to specificity, the applicant only focused upon one portion of the Plan, claiming it was tailored for “traditional enterprises, especially manufacturing industries by providing resources for the

⁹ Exhibit CHN-8.

¹⁰ See U.S. Response to First Set of Panel Questions, para. 13.

¹¹ See Exhibit CHN-8.

¹² China Response to Second Set of Panel Questions, paras. 5-6.

¹³ Exhibit CHN-5 at 27.

improvement of their productivity through introduction of new technologies.”¹⁴ In other words, the applicant, having relied upon all focal points of the Plan to support its allegation of certain subsidy elements, then narrowed its focus with respect to specificity to make the Plan seem more narrowly tailored than it actually is. The United States has simply noted this inconsistency and has pointed out that the applicant’s own evidence indicated that the 2003 Economic Stimulus Plan targeted a broader array of sectors than simply “traditional industries, especially manufacturing.”

7. With respect to the allegations in the petition regarding the electricity-related subsidies to the steel industry, how does China respond to the United States’ position, at paragraph 21 of its second written submission, that the United States Government does not set retail electricity prices for the country and does not set preferential prices for certain industries or regions?

12. As the United States has explained, the U.S. Government does not set retail electricity prices or preferential electricity prices for certain industries or regions. At the time of the allegation in the petition, there was evidence before MOFCOM demonstrating this, and the allegation regarding the provision of electricity lacked sufficient evidence of financial contribution, benefit and specificity.¹⁵ China argues that there is a “fine line” between regulating the provision of electricity and the setting of prices, and it refers to Exhibit CHN-6 for support.¹⁶ The quotation from that Exhibit, however, does not support China’s argument. The quotation says nothing about price setting. Nor does it link the Tennessee Valley Authority or Power Marketing Administrations to the industry under investigation. Further, the portion of the quotation expressing federal government support for the electricity industry says nothing about the steel industry.

13. China also argues that the application detailed regional and industrial price differentiation, including lower prices for the steel industry.¹⁷ However, mere evidence of price differentiation is not sufficient evidence, for purposes of initiation, that the government is setting prices or is favoring certain industries or regions. Electric companies may negotiate lower prices with substantial users. In other words, a high-consuming industry like the steel industry may

¹⁴ Exhibit CHN-5 at 28.

¹⁵ See Exhibit US-29.

¹⁶ China Response to Second Set of Panel Questions, para. 8.

¹⁷ China Response to Second Set of Panel Questions, para. 9.

receive a discount, compared to a lower-consuming industry.¹⁸ This is the result of market forces, not government action.

8. In fulfilling its obligations under Article 11.3 of the SCM Agreement, how did MOFCOM treat the comments submitted by the United States regarding the new subsidy allegations, submitted to the Panel as Exhibit US-29? For instance, did MOFCOM weigh the information in its assessment of the accuracy and adequacy of the evidence or ask the petitioners to comment on the information submitted by the United States?

14. The United States has elaborated in detail the problems with MOFCOM’s approach to initiation. Exemplifying China’s flawed approach, China’s response states that: “Objectively, it must be presumed that these [U.S.] comments were considered by MOFCOM in making its initiation determination.” However, there is no basis for China’s “presumption.” In other words, it appears that China is saying that it cannot show that the comments were taken into account, and so the Panel must simply “presume” that they were, with no support or evidence to justify any such presumption.

15. China then goes on to state that “the fact that MOFCOM chose to decline initiation on four of the subsidy allegations challenged by the United States as insufficient demonstrates that MOFCOM weighed the evidence before it, including the U.S. Government comments, in accordance with Article 11.3 of the SCM Agreement.”¹⁹ In other words, China suggests that the fact MOFCOM initiated on some programs but not others proves that it fulfilled its Article 11.3 obligations.

16. MOFCOM’s decision not to initiate on four programs is beside the point, as it has no relation to whether other alleged subsidy programs were supported with sufficient evidence under Article 11.3 of the SCM Agreement. The United States and China both agreed that determinations under Article 11 of the SCM Agreement should be made on a program-by-program basis.²⁰ As noted in our prior submissions, for five programs alleged in the new subsidy petition, China’s claims that the application contained sufficient evidence are belied by the facts.

17. China also misrepresents the U.S. position with respect to the standard of evidence for initiating a CVD investigation. The U.S. has never attempted “to reach the merits of any final determination rather than consider what was necessary for initiation.”²¹ In fact, the United States

¹⁸ See Exhibit US-29.

¹⁹ China Response to Second Set of Panel Questions, para. 11.

²⁰ U.S. Response to First Set of Panel Questions, para. 12; China First Written Submission, para. 13.

²¹ China Response to Second Set of Panel Questions, para. 12.

stated at the outset that it is not necessary that an application definitively establish the presence of all three subsidy elements.²² To merit initiation under Article 11 of the SCM Agreement, an application must contain a degree of actual evidence indicating a financial contribution, benefit, and specificity.²³

- (b) Non-confidential summaries**
- (ii) Questions to China**

12. Does the information that was treated as confidential by MOFCOM under Articles 12.4 of the SCM Agreement and 6.5 of the Anti-Dumping Agreement, and about which the adequacy of the non-confidential summaries in the petition is in contention, include the annual averages of the data or only the underlying raw data?

18. To justify the absence of adequate non-confidential summaries in the application, China asserts that “for much of the period of investigation there was only one domestic producer, and for the entire period of investigation there were never more than two domestic producers.” First, it is not clear that averages even from a single company would reveal confidential information. Because different grades and qualities of GOES are sold at different price points, disclosing an average would not disclose specific pricing information.

19. And setting aside the fact that a statement of why summarization was not possible was never provided on the record,²⁴ in many cases information for Baosteel, which started production in 2008, is simply missing. At Table 36, for instance, capacity utilization or changes in capacity utilization are not reported for Baosteel. At Table 42 no return on investment or changes in return on investment are reported for Baosteel. At Tables 49 and 50, no cash flow data or changes in cash flow are reported for Baosteel. In these cases, China did not require the applicant to provide anything, not even inadequate percentage changes, for one of the two domestic producers.

²² U.S. First Written Submission, ft. 147.

²³ See U.S. Response to First Set of Panel Questions, paras. 7-9.

²⁴ See *EC – Fasteners (Panel)*, para. 7.515 (Noting the risk of abuse in investigations if adequate non-confidential summaries or a statement of reasons why summarization is not possible is not provided on the record: “In the absence of scrutiny of the non-confidential summaries or stated reason why summarization is not possible by the investigating authority, the potential for abuse of confidential treatment by interested parties would be unchecked unless and until the matter were reviewed by a panel. This would obviously defeat the goal of maintaining transparency during the course of the investigation itself that is one of the purposes of Article 6.5. Thus, in our view, the investigating authorities must ensure that where an interested party asserts that a particular piece of confidential information is not susceptible of summary, the reasons for that assertion are appropriately explained.”); *EC – Fasteners (AB)*, para. 544.

13. We refer to China’s argument at the first meeting of the Panel regarding the purported summaries of the “change in price data” redacted from Table 5 of the petition. We recall China argued that the data from the third column of Table 5 could be plugged into the trend line on page 13, Exhibit US-2, to reveal the scale of the graph and therefore the confidential data on the average price of the petitioners. Is it China’s position that a non-confidential summary, in the sense of Articles 12.4.1 of the SCM Agreement and 6.5.1 of the Anti-Dumping Agreement, exists when information is presented in such a way that it allows the derivation of the confidential data?

20. In relation to the unlabeled trend line on page 13 of US-2, China argues that “one should not look at the one chart in isolation, and assume no other information is available, particularly when the other information is literally right above the chart in question.”²⁵ The unlabeled trend line purports to show the weighted average price for imports from Russia and the United States, along with the average price of petitioners. The “other information...literally right above the chart in question” appears to be Table 5, and includes data for the weighted average price for imports from Russia and the United States, but nothing on the weighted average price of petitioners’ product.

21. China struggles to explain why Table 5 – showing the weighted average price for imports from Russia and the United States – informs an understanding of the unlabeled trend line (purporting to show the weighted average price of petitioners) when Table 5 is missing any reference to the weighted average price of petitioners. China’s approach to non-confidential summaries is perplexing. Forcing a respondent to engage in such an abstract exercise does not meet the requirements for an adequate non-confidential summary under Article 6.5.1 of the AD Agreement and Article 12.4.1 of the SCM Agreement.

15. We refer to the final part of paragraph 83 of the United States’ first written submission. From where in the petition is the category of confidential information referred to as “statistics and information about dumping by the United States” redacted?

22. China in its response highlights certain redacted information, indicating vaguely that the application provides a “reasonable understanding” of this information.²⁶ The United States refers to China’s first written submission, where China asserts that the United States could have performed reverse engineering to obtain this redacted information.²⁷ As noted in our second

²⁵ China Response to Second Set of Panel Questions, para. 19.

²⁶ China Response to Second Set of Panel Questions, para. 21.

²⁷ China First Written Submission, para. 108.

written submission, the fact China insists that respondents engage in reverse engineering itself is an admission that the non-confidential summary was inadequate.

(ii) Questions to China

19. China asserts, at para. 75 of its second written submission, that “the ‘facts available’ announced in the preliminary determination proved still to be the most reasonable ‘facts available’ for the final determination”. Please specify precisely which “facts available” were “announced in the preliminary determination”.

23. At the outset, it should be noted that China’s response to question 19 omits the fact that MOFCOM assumed that all sales during the POI for both respondent companies were of carbon steel, notwithstanding record evidence from a variety of sources indicating that this could not be true.²⁸ For example, MOFCOM had in its possession detailed sales databases from both U.S. companies demonstrating substantial sales of non-carbon steel product GOES, and none of it to the government.²⁹ In its Final Determination, MOFCOM refused to consider such sales data even after AK Steel re-submitted them for the subsidies investigation in a timely response. AK Steel’s customer list also was organized by product³⁰, and its annual report contained sales figures for stainless/electrical, coated, cold-rolled, tubular, hot-rolled, and secondary steels.³¹ MOFCOM ignored record evidence of the variety of steel products that AK Steel sold during the POI and unrealistically assumed the company sold only one type of steel.

24. China also states that the “facts available” adopted in the preliminary determination includes evidence submitted by petitioners concerning the use of the U.S. companies’ products “in construction, which is among the focal points of the investigated buy American laws.” The evidence submitted by petitioners, however, does not show that all of the U.S. companies’ production was used in construction. Indeed, the evidence submitted by petitioners showed that at most 29 percent of AK Steel’s production was used in construction.³² To be more precise, at most 29 percent of AK Steel’s production was sold for use in the “[a]ppliance, [i]ndustrial

²⁸ See Exhibit CHN-16 at 37.

²⁹ See, e.g., US-23.

³⁰ See Exhibit US-15.

³¹ See Exhibit CHN-3 at 24.

³² See Exhibits CHN-3 and US-9 at 2, 24 (where AK Steel’s annual report states that “Infrastructure and Manufacturing” (formerly referred in AK Steel’s 10-K reports to as the “Appliance, Industrial Machinery and Equipment, and Construction” market) accounted for 29 percent of net sales in 2008, 26 percent of net sales in 2007, and 29 percent of sales in 2006).

[m]achinery and [e]quipment, and [c]onstruction” markets combined.³³ China does not explain how such “facts available” could support a 100 percent utilization rate for the alleged government procurement programs.

25. Further, China claims that there was a “complete refusal” on the part of the U.S. companies “to provide the requested information to allow MOFCOM to investigate their use of programs.” As discussed in detail in our previous submissions, this is simply inaccurate. The U.S. companies’ engaged extensively with MOFCOM on the relevant questions, including several narrative responses with supporting documentation demonstrating that they did not make sales to the government under the alleged programs.³⁴

26. Finally, in its response to question 19, China states that the “facts available” adopted in the preliminary determination include the existence of government procurement programs that apply a “25 percent price premium” for domestic steel. As the United States explained in its questionnaire response, “prices paid by the government are based on competitive bids, reflect market conditions, and do not exceed adequate remuneration.”³⁵ Contrary to MOFCOM’s assertions, the record of the investigation reveals that there are no automatic overpayments. Moreover, contrary to China’s assertion that the United States “denied effective access to foreign steel”, the record is clear that foreign products from countries that are party to the WTO Government Procurement Act and other agreements with the United States could be included in the competitive bidding process under the alleged programs.

20. China contends (China’s response to Panel question 20, para. 86) that transaction data was needed to identify “anomalous transactions”, and analyze “pricing trends”, for the purpose of planning for verification. We note that Question 4 only requested quantity and value data. It did not seek transaction-specific price data. Nor did the deficiency letter appear to request price data. Please explain how MOFCOM could have used quantity and value data to identify “anomalous transactions” and analyze “pricing trends”.

27. Putting aside the fact that MOFCOM’s questionnaires clearly stated twice that no responses were necessary for programs that a company did not use,³⁶ MOFCOM’s request for

³³ *Id.* (emphasis added).

³⁴ *See* U.S. Second Written Submission, paras. 64-78; *see also* Exhibits US-15 and US-23.

³⁵ Exhibit US-3 at 72; *see also* Exhibit US-4 at 4.

³⁶ *See* Exhibit US-11 at 6 (“If the question does not apply to you, please write down explicitly “this question does not apply to my company” and state the reasons.”) and 17 (“As to each program, if your company did not apply for, make use of, or benefit from the following programs, please provide explanations. Otherwise, please answer all the listed questions.”).

aggregate quantity and value data covering the period of investigation would not be useful for any of the purposes China now claims the information might have been used. GOES, for example, is sold in many different grades at different price points. Prices for steel products also ebb and flow with supply and demand. As the quarterly AUV data set forth in China’s response to the Panel’s second set of questions illustrates,³⁷ any analysis of the aggregate quantity and value data for two customers without reference to the specific time period of the sales in question likely would be of little value given the fluctuation in AUVs over the period of investigation. Consequently, annualized quantity and value tables not reveal, as China suggests, potential utilization of the alleged programs and would, thus, be useless for the inquiry that China says MOFCOM intended to perform.

28. China’s effort to explain how MOFCOM could use summary quantity and value data to find anomalous transactions and pricing demonstrates that these explanations are *post-hoc* rationalizations to justify requests for unnecessary information and MOFCOM’s subsequent use of what it terms “facts” available. Notwithstanding China’s statements to the Panel, the data requested in Question 4 would only be potentially useful in identifying benchmarks for comparison against the prices for the transactions identified in response to Question 3. For U.S. companies without any procurement transactions to report in response to Question 3 (i.e., no “government procurement signed”³⁸), however, the data requested in Question 4 are clearly unnecessary.

29. Further, China’s response to question 20 neglects the fact that MOFCOM had extensive information on all POI sales for the subject merchandise from both companies from the beginning of the investigation. AK Steel also, after previously referencing this information in its response to the initial countervailing duty questionnaire,³⁹ submitted its sales data on the record of the subsidies investigation in timely comments on the Preliminary Determination only to have them ignored.⁴⁰ Notwithstanding China’s assertions with respect to the analysis that it could have performed if it had the quantity and value data it requested in question 4, the United States notes that with respect to GOES, the investigation team at MOFCOM had more specific, actual transaction data in its possession throughout the pendency of the investigation and performed no such analysis.

³⁷ China Response to Second Set of Panel Questions, para. 111 (showing quarterly AUVs for sales of GOES during the period Q1 2008 through Q1 2009).

³⁸ Exhibit US-11, at 22.

³⁹ Exhibit US-11.

⁴⁰ Exhibit CHN-21; Exhibit US-23.

21. Regarding para. 28 of China’s oral statement at the second hearing, please explain how the data requested by MOFCOM would have been used to verify AK Steel’s assertions that “it has no reason to know that its customers do with their purchases”, and that “even if the government ultimately overpaid ... [AK Steel] only received a market-determined price for its product”.

30. As discussed above, the MOFCOM team conducting the verification had complete sales databases for GOES from both companies from the start of the investigation yet declined to make any attempt to verify anything with regard to either company’s assertions with respect to utilization of the government procurement programs.

31. In an apparent concession with respect to the “necessity” of the quantity and value data requested by MOFCOM in question 4, China now claims that these data would have “streamline[d] verification.” Indeed, as the United States has explained, China had numerous means at its disposal to verify the U.S. companies assertions with respect to utilization of the government procurement programs.

32. Further, China’s claims that random sampling of transactions would be ineffective are not persuasive. Random sampling is an effective and efficient process that allows the investigating authority to “spot-check” a representative number of transactions to ascertain whether a respondent’s claim of non-use of a program is accurate. Random sampling, by virtue of the fact that the respondent does not know in advance which transactions will be examined, allows an investigating authority to verify whether or not the respondent’s claim of non-use is accurate.

33. China’s accusation that the United States is seeking to create a “false presumption” that the information requested in question 4 of its questionnaire was merely a tool for verification or otherwise wants obscure the broader impact of MOFCOM’s failure to secure the requested information is baseless. In describing MOFCOM’s purported purpose for seeking the information in question, the United States has merely repeated China’s own stated reasons for deeming this information necessary⁴¹ and explained why MOFCOM’s purported purpose was not credible.⁴²

⁴¹ See China Response to First Set of Panel Questions, para. 86 (“AK Steel denied MOFCOM the ability to plan efficiently for verification by identifying anomalous transactions and the customers to which they related that could then be the focus of its verification. China elaborated in response to questions from the Panel at the first meeting, noting that, provided sufficient time with the data, it could have identified pricing trends among and across products, as well as patterns that might indicate utilization under the program with respect to individual sales and customers. These sales and/or customers could then be the focus of more careful examination and verification, including examination of underlying documentation.”).

⁴² See U.S. Opening Statement at the Second Panel Meeting, paras. 24-25; U.S. Second Written Submission, paras. 92-97.

22. With regard to para. 15 of China’s oral statement at the second hearing, please explain how the information allegedly requested in Question 4 would have been used to verify the responses to Question 3.

34. Notwithstanding the fact that Question 3 of the original questionnaire only sought transaction data for “government procurement signed within the POI,” the fact that both U.S. companies indicated with respect to GOES that there was no “government procurement signed within the POI,” and the fact that AK Steel in two separate submissions clarified that it made no direct or indirect use of the alleged government procurement programs with regard to any product, China continues to claim that the U.S. companies “never adequately responded to Question 3.” For the reasons we have previously described, this is clearly erroneous.⁴³

35. The information requested in Question 4 was almost certainly intended to provide benchmark information for comparison to the transaction data sought in Question 3 and, at least for AK Steel, became irrelevant when the company demonstrated that it did not participate in the alleged procurement programs. AK Steel had no procurement sales during the POI and as a result had no information to provide in response to Question 3.

*(c) Use of facts available for AK Steel and ATI
(iii) Questions to both parties*

23. To what extent, if any, does Annex II of the Anti-Dumping Agreement inform the interpretation and application of Article 12.7 of the SCM Agreement? For example, can facts available only be applied once an investigating authority has demonstrated that an interested party failed to provide “verifiable” information (Annex II.3), or failed to submit information in a “timely fashion” (Annex II.3), or failed to act to the best of its ability (Annex II.5)? Is the Declaration on Dispute Settlement Pursuant to the Anti-Dumping Agreement and Part V of the SCM Agreement relevant in this regard? Please explain.

36. In responding to question 23, China repeats its erroneous assertion that “AK Steel made no effort to address the issue of indirect sales.” AK Steel directly addressed this issue in its response to MOFCOM’s deficiency letter, dated September 9, 2009.

37. Specifically, AK Steel explained that it was impossible to know what its customers did with its products:

With regard to government procurement, AK Steel provides in Exhibit 11.3 of the Revised Subsidy Questionnaire Response a list of all its customers during the period of

⁴³ See U.S. Second Written Submission, paras. 68-78.

investigation ("POI") grouped by product category. This list demonstrates that AK Steel did not sell either the subject merchandise or any other product to any government entity during the POI.

To the extent MOFCOM is requiring AK Steel to demonstrate that none of the steel it sold to non-government entities was used in a project that was subject to the "Buy America" or similar act, MOFCOM is imposing an impossible burden. AK Steel has no reason to know what its customers do with their purchases. Because such a substantial proportion of AK Steel's products are sold to service centers, which resell the products to end users, there is no way to find out. Moreover, as stated in AK Steel's questionnaire response, even if the government ultimately overpaid for a project incorporating steel that may have originated with AK Steel, the entity that received the overpayment did not provide any of that overpayment to AK Steel, which received only a market-determined price for its product.⁴⁴

24. If the Panel were to find that the deficiency letter dated 26 August 2009 was the first time that MOFCOM clearly indicated that Question 4 included non-GOES quantity and value transaction data, to what extent could MOFCOM be considered to have complied with the requirement in Annex II.6 of the Anti-Dumping Agreement to provide interested parties “an opportunity to provide further explanations” regarding such non-GOES data? In such circumstances, could MOFCOM’s 26 August 2009 letter be deemed to give notice of any deficiency in respect of respondents’ original replies to Question 4?

38. China’s response to question 24 does not address the fact that MOFCOM’s deficiency letter did not reference quantity and value data as requested in Question 4; it related exclusively to “transactions” as requested in Question 3.⁴⁵ The deficiency letter therefore provided no notice relative to Annex II.6 for the quantity and value data now being cited as justification to impose countervailing duties of approximately 12 percent for both companies, the only non-*de minimis* subsidy rates determined in the investigation.

39. In any event, contrary to China’s assertions, AK Steel provided “further explanation within a reasonable period” after receiving MOFCOM’s deficiency letter. In particular AK Steel responded directly to MOFCOM’s statement that the “company would bear the burden of proof” regarding non-use of the alleged procurement programs⁴⁶ by providing additional narrative

⁴⁴ Exhibit US-14.

⁴⁵ See Exhibit CHN-20.

⁴⁶ See CHN-19.

responses and evidence identifying all of AK Steel’s customers for all products.⁴⁷ MOFCOM, in the Preliminary Determination, rejected this further explanation and documentation and then refused to consider additional information including detailed transactional information timely filed with comments on the Preliminary Determination.⁴⁸ MOFCOM’s review of U.S. government procurement records, which are unavailable on the internet, further demonstrated the absence of any government procurement involving any AK Steel product.⁴⁹

40. MOFCOM’s decision to ignore the information submitted by AK Steel and other record information demonstrating that AK Steel did not participate in the alleged procurement programs would be inconsistent with the requirements set out in Annex II.3 of the Anti-Dumping Agreement, which require an investigating authority to use all submitted information that is verifiable, appropriately submitted, timely submitted, and capable of being used without undue difficulty. MOFCOM’s decision would also be inconsistent with the requirements set out in Annex II.5, which provides that an investigating authority cannot simply disregard information that “may not be ideal in all respects,” provided the interested party acted to the best of its ability.

25. The Appellate Body stated in Mexico-Beef:

We understand that recourse to facts available does not permit an investigating authority to use any information in whatever way it chooses....to the extent possible, an investigating authority using “facts available” in a countervailing duty investigation must take into account all the substantiated facts provided by an interested party, even if those facts may not constitute the complete information requested by the party...the facts available to the agency are generally limited to those that may reasonably replace the information that an interested party failed to provide.

Regarding the notion of “substantiated facts”, the Oxford English Dictionary defines “substantiate” as “prove the truth of (a charge, statement, claim, etc.); give good grounds for.” In the context of Article 12.7 of the SCM Agreement, must an investigating authority only use facts that “prove the truth of (a charge, statement, claim, etc.)”, or must the authority also take into account facts that “give good grounds for” that charge, statement, claim etc.?

41. In responding to question 25, China makes the incredible claim that the quantity and

⁴⁷ Exhibits US-13 and US-15.

⁴⁸ See CHN-21; US-23.

⁴⁹ See Exhibit US-12 at 3; Exhibit US-25 at 24.

value information sought by MOFCOM was “the only information that would truly ‘substantiate’ assertions of utilization or lack thereof, as well as the level of any subsidy benefit”.⁵⁰ This assertion is in stark contrast to China’s milder assessment that the information would merely “streamline” verification⁵¹ and ignores the other means (including those means identified by China itself⁵²) by which MOFCOM could have verified the U.S. companies’ claims of non-utilization but chose not to employ.⁵³

42. With respect to China’s unfair assertion that the U.S. companies “did appear to and did affirmatively act to withhold information,” the United States reiterates that the U.S. companies’ engaged extensively with MOFCOM on the relevant questions, including several narrative responses with supporting documentation demonstrating that they did not make sales to the government under the alleged programs.⁵⁴ Indeed, both U.S. respondents supplied the same Chinese investigation team with data on sales of the subject merchandise in the parallel antidumping proceeding and one company tried to place this same information on the record in the antisubsidy proceeding. The U.S. companies’ extensive engagement with MOFCOM does not indicate any intent on the part of the companies to “affirmatively act to withhold” anything.

43. With respect to the proposition that the level of benefit could be discerned from “company specific sales volume and pricing [data] by product and customer”, China has simply made no demonstration as to how a level of benefit (other than zero) could be calculated. China’s assertion is particularly implausible with respect to AK Steel, for which all sales were made to unaffiliated, non-government entities.

44. Finally, with respect to China’s reference to the panel determination in *EC-DRAMs*, the United States notes that the passage quotes relates to a situation in which a willfully uncooperative respondent withheld “essential information which was clearly requested.” In

⁵⁰ China Response to Second Set of Panel Questions, para. 47.

⁵¹ China Response to Second Set of Panel Questions, para. 17.

⁵² China Response to First Set of Panel Questions, para. 60. (“it was likely that the customer in an indirect transaction would, at a minimum, provide specifications that required steel melted and poured in the United States, or otherwise manufactured in the United States, consistent with the various origin requirements of the Buy American provisions at issue . . . [FOOTNOTE 36:] For example, the FHWA Buy American Provision requires any project funded under the Federal-aid Highway Program to use only steel or manufactured goods that are 100 percent made in the United States unless one of the circumstances supporting a waiver of this requirement applies. Contractors may receive certificates from the manufacturer certifying that the steel or iron is domestically produced. *See* Exhibit US-3, p. 131.”).

⁵³ *See* U.S. Second Written Submission, paras. 92-97.

⁵⁴ *See* U.S. Second Written Submission, paras. 64-78; *see also* Exhibits US-15 and US-23.

contrast, as we have discussed above and in previous submissions, the information requested was neither essential⁵⁵, nor clearly requested.⁵⁶ Moreover, as noted above and in previous submissions, the U.S. companies in this case made numerous submissions directly responsive to MOFCOM’s questions and instructions.⁵⁷

- (e) Disclosure obligations*
- (i) Questions to both parties*

28. Can Articles 6.9 and 12.2.2 of the Anti-Dumping Agreement and 12.8, 22.3 and 22.5 of the SCM Agreement be used to challenge the substantive adequacy of an investigating authority’s reasoning?

45. China’s response to this question alludes to Article 14 of the SCM Agreement,⁵⁸ and it asserts that the United States is challenging the consistency of China’s measures with Article 14 of the SCM Agreement as part of its challenge to China’s failure to fulfill its transparency obligations under Article 22.3 of the SCM Agreement.⁵⁹

46. China’s view is mistaken. The United States referenced Article 14 in its second written submission to highlight the inadequacy of MOFCOM’s explanation of its benefit determination. The United States reiterates that without an adequate explanation of the basis of its conclusion, it is impossible to identify how MOFCOM arrived at its conclusion that the price resulting for a competitive bidding process did not reflect market conditions.

29. Does the obligation under Article 22.3 of the SCM Agreement to disclose the “findings and conclusions reached on all issues of fact and law” refer to the findings and conclusions in fact reached by an investigating authority or to an objective standard of findings and conclusions that should reasonably have been reached, by reference to the substantive matter at issue?

47. The United States and China agree that the focus of Article 22.3 of the SCM Agreement

⁵⁵ See, e.g., U.S. Response to Second Set of Panel Questions, paras. 16-24; U.S. Opening Statement at the Second Panel Meeting, para. 24; U.S. Second Written Submission, paras. 92-97.

⁵⁶ See, e.g., U.S. Response to Second Set of Panel Questions, para. 25; U.S. Opening Statement at the Second Panel Meeting, para. 24; U.S. Second Written Submission, paras. 64-77.

⁵⁷ See, e.g., U.S. Second Written Submission, para. 78.

⁵⁸ China Response to Second Set of Panel Questions, para. 53.

⁵⁹ China Opening Statement at the Second Panel Meeting, para. 40.

is on the findings and conclusions actually reached by the investigating authorities. In its response, China argues that “authorities need not disclose every detail, but rather will exercise discretion to disclose those issues of fact and law considered ‘material’ by the authorities.”⁶⁰ MOFCOM’s failings are far beyond failing to disclose “every single detail.” In MOFCOM’s preliminary determination, for example, MOFCOM indicates that the price resulting from a competitive bidding process did not reflect “market competition in the usual sense.”⁶¹ This finding was “material” for MOFCOM to make its benefit determination. Yet, MOFCOM never disclosed the basis for its finding.

48. At the second panel meeting, China cited sections of the preliminary determination that are irrelevant to the finding that the competitive bidding process did not reflect “market competition in the usual sense.”⁶² Nothing in that section of the preliminary determination sheds light on how the price resulting from a competitive bidding process did not reflect “market competition in the usual sense.” Merely stating vague and conclusory assertions is insufficient under Article 22.3 of the SCM Agreement.

(iii) Question to China

33. With reference to paragraph 164(a) of the United States’ second written submission, could China clarify the source of the information on the “pricing strategies” of the importers. Does China accept the United States’ argument that the information was obtained from third parties, to whom the data would not have been confidential?

49. China disclosed the basis for its statements on the “pricing strategies” of the exporters when it submitted its November 25, 2011, response to the Panel’s request for confidential data. This “basis” is information from one unnamed domestic producer from one unnamed customer. The United States has explained why these documents do not provide positive evidence supporting MOFCOM’s conclusion that exporters had a strategy of charging “low” prices for the subject imports.⁶³

34. We refer to the United States’ argument at paragraph 181 of its second written submission, namely that MOFCOM did not disclose any information regarding the volumes and prices of non-subject imports. Was data on the volume and prices of non-

⁶⁰ China Response to Second Set of Panel Questions, para. 55.

⁶¹ U.S. First Written Submission, para. 28; US-5, pg. 27.

⁶² China Opening Statement at the Second Panel Meeting, para. 40.

⁶³ U.S. Response to China November 25 Submission, paras. 9-14. The United States has not challenged China’s assertion of confidentiality for CHN-37, CHN-38, CHN-39, and CHN-40.

subject imports in fact considered by MOFCOM?

50. China’s response confirms the lack of disclosure of information concerning non-subject imports. The only information that China indicates MOFCOM disclosed about non-subject imports concerned relative changes in market share *vis-a-vis* the subject imports.⁶⁴ China does not dispute that MOFCOM disclosed no information concerning the quantity of non-subject imports, although such information was not confidential. Had MOFCOM disclosed such information, it would have revealed that in 2008 (the only year for which such data have been provided to the United States and the Panel), the volume of nonsubject imports was substantially higher than the volume of subject imports.⁶⁵

51. China states that any consideration of prices of non-subject imports was “indirect” and concerned only the lack of any allegation that these imports were dumped or subsidized.⁶⁶ Consequently, China does not dispute that neither MOFCOM’s Final Determination nor any prior disclosure document contains *any* information about the prices or average unit values for the non-subject imports. China repeats its contention that MOFCOM was not obliged to consider such information because no party asserted an argument on the issue. As we have previously discussed, China’s argument overlooks that the essential facts disclosure requirements of Article 6.9 of the AD Agreement and Article 12.8 of the SCM Agreement require authorities to provide information to permit “parties to defend their interests.”⁶⁷ Had MOFCOM disclosed the available information related to the pricing of non-subject imports – which would have revealed that during 2008 the non-subject imports had lower average unit values than the subject imports – parties to the investigation, including the United States, may well have been able to develop arguments concerning non-subject imports.⁶⁸

(ii) Questions to China

46. At para. 49 of its oral statement at the second hearing, China asserts that Articles 3.1 and 3.2 of the Anti-Dumping Agreement, and Articles 15.1 and 15.2 of the SCM Agreement, do not require an authority to demonstrate that adverse price effects are a

⁶⁴ China Response to Second Set of Panel Questions, para. 62. Moreover, China’s current assertion that “non-subject imports were a stable factor in the Chinese market,” *id.*, is not what MOFCOM found. The only MOFCOM finding pertinent to this issue is that “the proportion of GOES volume from other countries and regions in total imports continued to drop.” MOFCOM Final Determination, CHN-16, at 67.

⁶⁵ U.S. Response to China November 25 Submission, para. 21.

⁶⁶ China Response to Second Set of Panel Question, para. 63.

⁶⁷ U.S. Second Written Submission, para. 183.

⁶⁸ U.S. Second Written Submission, para. 187; *see* Exhibit US-41.

cause of subject imports. In note 24, regarding the panel report in *EC - DRAMs*, China seems to distinguish between the notions of "causal link", and "the effect of the subsidized imports on prices". We note the United States' argument, at para. 40 of its oral statement at the second hearing, that "an examination of the 'effect' of imports necessarily involves a causation analysis". Is establishing that adverse price effects are an effect of subject imports part and parcel of establishing a causal link between subject imports and the material injury suffered by the domestic industry? Please explain.

52. In its response to the Panel, China repeats its position that only Articles 3.5 of AD Agreement and 15.5 of the SCM Agreement require an authority to find a causal link between the price effects and the subject imports.⁶⁹ China’s view seems to be that *any* price depression and suppression that occurs while subject imports are in the market is sufficient to constitute a price effect under Articles 3.2 of the AD Agreement and Article 15.2 of the SCM Agreement.

53. This position cannot be reconciled with the language of the Agreements. Articles 3.2 and 15.2 direct an authority to determine 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.”⁷⁰ China cannot attempt to replace the actual language of the Agreements with its undocumented assertion that the provisions merely set forth a list of possible effects for an authority to consider “in light of an allegation that subject imports are causing the problems” of the domestic industry.⁷¹

48. Please comment on the United States' argument (second written submission, para. 138) that "China’s assertion to the Panel that the domestic industry was 'losing market share because of these surging volumes of unfairly traded imports,' cannot be reconciled with the facts disclosed by MOFCOM, which indicated that the industry’s market share was higher in 2008 than in 2006 and was higher in the first quarter of 2009 than in the first quarter of 2008" (footnote omitted).

54. China’s response does not dispute the factual predicate of the U.S. argument, which is based directly on the materials MOFCOM disclosed. China’s assertion that the Panel should nonetheless reject the argument is premised on a selective and incomplete reading of the record.

55. China contends that a comparison encompassing 2006 to 2008 – the three full years of the MOFCOM period of investigation – is not helpful because “the volume of subject imports did

⁶⁹ China Response to Second Set of Panel Questions, paras. 75-78.

⁷⁰ U.S. Response to First Set of Panel Questions, para. 56; U.S. Second Written Submission, para. 151.

⁷¹ China Response to Second Set of Panel Questions, para. 78.

not change much between 2006 and 2007.”⁷² That the domestic industry gained market share over the course of the three full calendar years MOFCOM examined is indeed pertinent. This increase occurred despite the fact that, according to the data China has provided to the Panel, the subject imports were purportedly being sold at the same “low prices” *throughout* this period.⁷³ Thus, viewed over the entire period of investigation, there is simply no correlation between “low prices” for the subject imports and market share changes for the domestic industry.

56. China’s response provides another example of its propensity for disregarding 2006-07 data when it does not support the conclusion reached by MOFCOM. As we have previously observed, MOFCOM’s highly selective use of 2006-07 data is inconsistent with the requirement of an objective examination under Article 3.1 of the AD Agreement and Article 15’1 of the SCM Agreement.⁷⁴

57. With respect to the first quarter of 2009, China argues that “the domestic industry lost market share in 2008 when it attempted to maintain its price levels, but then began to regain market share only when it slashed its prices to compete with unfairly traded subject imports.”⁷⁵ China provides no citation for this statement, which cannot be reconciled with the information in the record. There is nothing in the record attempting to explain what factors the domestic industry used to establish prices during any portion of the period of investigation, much less support for the proposition that the domestic industry “attempted to maintain its price levels” in 2008. Indeed, China’s statement to this effect seems to contradict the MOFCOM findings of price depression and suppression in 2008 that China simultaneously defends. As we explain below in our comments on China’s responses to Panel Questions 60 and 69, the domestic industry’s lower average unit values in the first quarter of 2009 cannot be attributed to the subject imports.

49. Please comment on the United States' argument (second written submission, para. 139) that "the price effects were the sole factor that MOFCOM used to attempt to tie the imports under investigation to the declines in profitability and sales revenues during the first quarter of 2009" (footnote omitted).

58. China contends that the United States has misread MOFCOM’s Final Determination. Nevertheless, it conspicuously fails to quote the portions of the determination the United States

⁷² China Response to Second Set of Panel Questions, para. 81.

⁷³ China November 25 Response to Panel Request at 1.

⁷⁴ U.S. Response to Second Set of Panel Questions, para. 86; U.S. First Written Submission, paras. 232-235.

⁷⁵ China Response to Second Set of Panel Questions, para. 83.

cited in paragraph 139 of its second written submission.⁷⁶ MOFCOM introduced its discussion concerning the domestic industry’s performance declines in 2009 with the following passage, which focuses solely on price:

During the injury investigation period, the product concerned imported from the U.S. and Russia has been sold in China’s domestic market at prices below the normal value, while imports from the U.S. had been supported by the USG subsidies. *The import price of the product concerned was at a low level and decreased generally. The pricing strategies and sales prices of the product concerned in Chinese domestic market had a great impact on the sales price of the domestic like product of China.*⁷⁷

59. Furthermore, China’s assertion that “[t]he United States seems to be implicitly conceding that full year 2008 saw significant adverse volume effects that hurt domestic profitability and sales revenues” is baseless.⁷⁸ The United States does not concede that either domestic profitability or sales revenues were impaired in 2008, when they increased to peak levels.⁷⁹

50. Please comment on the United States' argument (second written submission, para. 152) that, "in order to satisfy the requirements of Article 3.2 of the Anti-Dumping Agreement and Article 15.2 of the SCM Agreement, MOFCOM would need to have established that the imports under investigation precluded the domestic industry from achieving price hikes significantly greater than 14.53 per cent".

60. China’s response does not address the substance of the U.S. argument. Article 3.2 of the AD Agreement and Article 15.2 of the SCM Agreement state that the pertinent inquiry is whether “the effect of such imports is otherwise to . . . prevent price increases, which otherwise would have occurred, to a significant degree.” China cannot dispute that the Agreements consequently required MOFCOM to provide a reasoned explanation why the subject imports precluded the domestic industry from achieving price increases *significantly* greater than 14.53 percent during 2008, supported by positive evidence. Nor can it dispute that MOFCOM provided no evidence in support of such a finding. Instead, China attempts to divert the Panel’s attention by raising two tangential points. Each lacks merit.

61. China first criticizes the United States for focusing on full year data, instead of those

⁷⁶ China Response to Second Set of Panel Questions, para. 85-86.

⁷⁷ MOFCOM Final Determination, CHN-16, at 65 (emphasis added).

⁷⁸ China Response to Second Set of Panel Questions, para. 84.

⁷⁹ MOFCOM Essential Facts Disclosure, CHN-29, at 10.

discrete portions of 2008 when, according to China, adverse price effects were most evident.⁸⁰ China’s criticisms are surprising, and particularly ill-founded, given its later insistence in its response to Panel Question 53 that “MOFCOM’s basic framework focused on changes over the annual periods.”⁸¹ The U.S. argument responded to MOFCOM’s actual findings, not to the *post-hoc* justifications China has prepared for the Panel.

62. Additionally, China contends without any supporting citation that “[i]t is important to remember that all prices were rising during 2008 because of increasing costs. During 2008 the domestic industry tried to raise its prices enough to cover fully the increasing costs, but was not able to do so.”⁸² Here China continues its pattern of asserting to the Panel facts that are nowhere supported by the record, much less referenced in the MOFCOM determination. As we have previously advised the Panel, MOFCOM made no findings, and disclosed no information, concerning trends in the domestic industry’s costs.⁸³ Furthermore, as we have previously stated, there is nothing in the record reflecting what considerations the domestic industry used in establishing prices, much less anything supporting the notion that the industry “tried” to raise prices to recover increasing costs.

51. Please comment on the United States' argument (second written submission, para. 153) that "MOFCOM apparently did not examine, and certainly made no findings, whether the Chinese industry in 2007 and the Chinese industry in 2008 were actually comparable for purpose of cost comparisons".

63. China’s response does not rebut the United States argument. As with its response to Question 50, China attempts to avoid addressing the merits of the U.S. argument by raising tangential points without merit.

64. China first suggests that the U.S. argument is inappropriate because it is not one that the parties raised to MOFCOM.⁸⁴ We have previously explained in detail in our response to Panel Question 41 why our assertion of this argument is proper.⁸⁵

⁸⁰ China Response to Second Set of Panel Questions, paras. 88, 91.

⁸¹ China Response to Second Set of Panel Questions, para. 102.

⁸² China Response to Second Set of Panel Questions, para. 91.

⁸³ U.S. First Written Submission, para. 191; U.S. Response to Second Set of Panel Questions, para. 81.

⁸⁴ See China Response to Second Set of Panel Questions, paras. 92-94.

⁸⁵ U.S. Response to Second Set of Panel Questions, paras. 75-77. China’s arguments about whether this issue is “material” suggest it believes that the U.S. arguments concerning cost comparisons are based on Articles 12.2 of the AD Agreement and 22.3 of the SCM Agreement. See China Response to Second Set of Panel Questions, paras.

65. China’s second argument pertains to Baosteel, which began production of GOES in May 2008.⁸⁶ China asserts that, in periods prior to 2008, “Baosteel (and thus the domestic industry as a whole) would have been incurring various costs for which they had no production at all to generate offsetting revenues.”⁸⁷ Even if this were true from an accounting standpoint,⁸⁸ there is no indication that this was reflected in the record before MOFCOM. As we have previously explained to the Panel, the only pertinent information in the record available to the Panel and the United States indicates that Baosteel did not provide MOFCOM with financial performance data for any period prior to 2008.⁸⁹ Consequently, there is nothing in the record to justify China’s assertion, which likely explains China’s failure to provide any citation to support it.

52. With regard to para. 42 of the United States' oral statement at the second hearing, please explain whether or not MOFCOM considered the cost components, and the composition of costs, when determining the existence of price suppression.

66. In its response, China acknowledges that MOFCOM did not consider the various cost components when determining the existence of price suppression.⁹⁰ In attempting to justify MOFCOM’s failure to do so, China again makes assertions without record support.

67. In particular, China posits without supporting citation that “[w]hatever role falling raw material prices might have played, the net result was that overall prices during 2008 were not rising fast enough to cover increasing costs earlier during 2008, and were falling faster than declining costs later during 2008.”⁹¹ China’s statement suggests that MOFCOM analyzed the

93, 98. In fact, the U.S. arguments concern whether China has satisfied its obligation to conduct an objective examination pursuant to Articles 3.1 of the AD Agreement and 15.1 of the SCM Agreement. U.S. Second Written Submission, para. 153.

⁸⁶ Exhibit CHN-2 at 99, 106-07.

⁸⁷ China Response to Second Set of Panel Questions, para. 97.

⁸⁸ In fact, it would not be true under U.S. accounting principles. Under these principles, expenses incurred in starting production of GOES would properly be applied as production and sales begin – which for Baosteel would have been the period after May 2008.

⁸⁹ U.S. Response to Second Set of Panel Questions, paras. 70-71. Indeed, because Baosteel did not begin production until May 2008, it would have had no sales or revenues to report to MOFCOM for prior periods. Moreover, any comparison between the first quarter of 2008 and the first quarter of 2009 would be skewed because Baosteel would have reported sales and revenues for the later period, but not for the earlier period.

⁹⁰ China Response to Second Set of Panel Questions, para. 99.

⁹¹ China Response to Second Set of Panel Questions, para. 101.

relationship between industry costs and prices on a partial year (such as a quarterly) basis during 2008. If this is true, it is nowhere apparent from MOFCOM’s Preliminary Determination, Essential Facts Disclosure, Final Determination, or any other document in the record. These documents fail even to disclose industry cost trends on an annual basis. None of the documents purports to correlate industry costs and prices on a quarterly basis during 2008. Indeed, given China’s own admission to the Panel that “MOFCOM’s basic framework focused on changes over the annual periods,”⁹² this statement appears to be entirely conjectural.

68. More fundamentally, China’s responses to Panel Questions 51 and 52 confirm that MOFCOM did not conduct *any* independent examination of the comparability of the cost structure of the domestic industry in 2007 and 2008. It simply assumed that the industry’s cost structure was the same both years. In light of the entry of a new producer, Baosteel, in 2008, and the known phenomenon that new steel production facilities incur substantial start-up costs,⁹³ MOFCOM’s failure to investigate was neither reasonable nor consistent with the obligation under Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement that it conduct an objective examination. Assuming that an industry’s cost structure is static when the industry changed from one producer to two producers and its capacity increased dramatically cannot be considered an objective examination.

53. China contends (response to Panel question 33, para. 121) that MOFCOM found that domestic prices declined in the fourth quarter of 2008. Is there any reference to this finding in MOFCOM's preliminary or final determinations?

69. China states that “MOFCOM’s basic framework focused on price changes over the annual periods,”⁹⁴ that “MOFCOM did not make any direct reference to the magnitude of domestic prices declining in Q4 2008,”⁹⁵ and that it only furnished the underlying data indicating when in 2008 average unit values began declining when requested to do so by the Panel.⁹⁶ Consequently, China’s four-paragraph answer to the Panel’s question could have been summarized in a single word: “No.”

70. China’s response – particularly its acknowledgment that MOFCOM’s determination focused on annual changes in values – confirms the U.S. argument that MOFCOM never made

⁹² China Response to Second Set of Panel Questions, para. 102.

⁹³ U.S. Second Written Submission, para. 153; Exhibits US-40, US-42.

⁹⁴ China Response to Second Set of Panel Questions, para. 102.

⁹⁵ China Response to Second Set of Panel Questions, para. 103.

⁹⁶ China Response to Second Set of Panel Questions, para. 105.

any finding that price depression occurred in 2008, a year prices rose on an annual basis.⁹⁷ Nevertheless, China now asserts that MOFCOM’s analysis was premised on the notion that prices for the domestically produced product began to decline in the fourth quarter of 2008, notwithstanding MOFCOM’s failure to make any finding to this effect.⁹⁸ As the United States has argued, MOFCOM’s failure to disclose any information in its Preliminary Determination or Essential Facts Disclosure about a matter China now contends is critical to the price effects analysis breached Articles 6.9 of the AD Agreement and Article 12.8 of the SCM Agreement.⁹⁹

54. At para. 102 of its second written submission, China refers to the existence of certain positive evidence supporting MOFCOM's determination regarding "low" or "lower" subject import prices. In the sixth line of that paragraph, China refers to evidence in "the public version of the petition". China does not refer to any evidence included in MOFCOM's determination. At para. 105 of its second written submission, China refers to record evidence that "can be seen in both the MOFCOM determinations and in other public documents...". Please identify what precisely China means by evidence (of "low" or "lower" subject import prices) that can be seen in MOFCOM's determinations.

71. China’s response indicates that its failure in its second written submission to “refer to any evidence included in MOFCOM’s determination” was not inadvertent. In fact, the MOFCOM determination did not contain any meaningful description of the evidence concerning “pricing strategies” of the exporters of the subject merchandise which China confirms was the basis for MOFCOM’s findings concerning “low” or “lower” subject import prices.¹⁰⁰ The United States has explained to the Panel why the statements in MOFCOM’s determination are conclusory and provide no information to which an interested party could meaningfully respond concerning when, how, or by whom the “pricing strategies” were implemented.¹⁰¹

⁹⁷ U.S. Second Written Submission, para. 146.

⁹⁸ China Response to Second Set of Panel Questions, paras. 103-04.

⁹⁹ U.S. Second Written Submission, para. 165.

¹⁰⁰ China Response to Second Set of Panel Questions, para. 107. China also suggests that the fact merchandise is dumped or subsidized indicates that it is sold at “lower prices” in the export market than it is in the home market. *Id.* Indeed, these constitute the first and fifth of the five items of evidence that China lists as supporting MOFCOM’s findings. The existence of dumping or subsidization does not, however, establish underselling or low market prices. If affirmative dumping or subsidy findings were sufficient in themselves to establish adverse price effects, the specific examination of price effects required by Articles 3.2 of the AD Agreement and 15.2 of the SCM Agreement would be redundant. Consequently, China's assertion would have the effect of reading provisions out of the Agreements.

¹⁰¹ U.S. Response to Second Set of Panel Questions, paras. 47-49.

72. The United States has previously discussed the confidential materials China has identified as supporting the MOFCOM finding.¹⁰² We have explained to the Panel why these materials fail to provide positive evidence for the finding. Contrary to China’s statement, these documents neither establish that exporters set their prices lower than domestic producers,¹⁰³ nor provide any evidence pertaining to pricing patterns during or after 2008.¹⁰⁴

55. The indexed data provided by China (response to Panel question 33, para. 121) shows that domestic prices increased by 0.01% during 2008. In its Final Determination (Exhibit CHN-16, page 58), MOFCOM found that prices increased by 14.53% from 2007 to 2008. In the light of such price increases, please explain how MOFCOM concluded that there was "significant" price depression in 2008.

73. China’s answer is both unresponsive to the Panel’s question and relies on so-called MOFCOM “findings” that China has acknowledged in response to a previous question do not exist.

74. The Panel’s question asked how MOFCOM concluded that any price depression that occurred in 2008 was “significant.” Indeed, we have argued that “[w]hatever MOFCOM found, it did not explain why any price declines that may have occurred during the fourth quarter of 2008, following sizeable increases during the prior quarters of that year, were significant.”¹⁰⁵ China’s response, a mathematical exercise that never mentions the word “significant,” neither answers the Panel’s question nor addresses the U.S. argument.

75. Instead, China asserts that MOFCOM made a “finding” of price depression based on price declines during the fourth quarter of 2008.¹⁰⁶ China’s assertion here cannot be reconciled with its statement in response to Panel Question 53 that “MOFCOM’s basic framework focused on price changes over the annual periods,”¹⁰⁷ and that MOFCOM’s Final Determination did not actually contain any findings concerning quarterly pricing during 2008.

¹⁰² The second, third, and fourth items of evidence that China lists as supporting MOFCOM’s findings all pertain to the documents China submitted to the Panel in conjunction with its November 25 response to Panel request (b). See China Response to Second Set of Panel Questions, para. 107.

¹⁰³ U.S. Response to China November 25 Submission, para. 10.

¹⁰⁴ U.S. Response to China November 25 Submission, paras. 9-12.

¹⁰⁵ U.S. Second Written Submission, para. 147.

¹⁰⁶ China Response to Second Set of Panel Questions, para. 108.

¹⁰⁷ China Response to Second Set of Panel Questions, para. 102.

56. Please provide the actual domestic quarterly AUVs, for 2008 and the first quarter of 2009, referred to in the table at para. 117 of China's response to Panel question 33. Please also provide any quarterly AUVs for subject imports for 2008 and the first quarter of 2009.

76. Although the Panel’s question expressly requested “actual domestic quarterly AUVs,” China has not provided such information. Instead, it has provided the Panel with a “range” of AUVs. As was the case with prior ranged data that China has provided the Panel, the “range” information does not correspond with any actual ranged data MOFCOM obtained or requested. Instead, China arbitrarily constructed the range and has failed to provide the Panel the “actual” confidential data it requested.¹⁰⁸

77. In its answer, China emphasizes the importance to MOFCOM’s analysis that during the first three quarters of 2008, “subject imports, on a cumulated weighted average basis, were selling for amounts *much lower* than domestic producers” and “the gap by which subject imports had average prices lower than domestic prices was *considerable*.”¹⁰⁹ This answer is noteworthy in two respects. First, it does not cite to any corresponding portion of the MOFCOM determination, and in fact cannot be reconciled with China’s previous, accurate response that “MOFCOM’s basic framework focused on changes over the annual periods.”¹¹⁰ Second, it contradicts China’s subsequent statement that MOFCOM did not rely on the magnitude of AUV differentials in its analysis.¹¹¹

78. The United States addresses the substance of the ranged data provided by China, and China’s characterization of the data, below in our comments on China’s responses to Panel Questions 60 and 69.

58. Regarding para. 35 of the United States' oral statement at the second hearing, please indicate whether MOFCOM made a finding that the domestic industry lowered prices in order to prevent further loss of market share, and that such lower prices then led to price depression and price suppression.

79. The United States in its oral statement asserted that “MOFCOM’s actual findings were that price depression and price suppression were caused by ‘low’ prices of imports under

¹⁰⁸ U.S. Response to China November 25 Submission, paras. 5-6.

¹⁰⁹ China Response to Second Set of Panel Questions, para. 112 (emphasis added).

¹¹⁰ China Response to Second Set of Panel Questions, para. 102.

¹¹¹ China Response to Second Set of Panel Questions, para. 161.

investigation.”¹¹² None of the passages from the MOFCOM Final Determination China cites in its response to this question call this U.S. assertion into question or support the proposition that MOFCOM found that the *sole* reason the domestic industry lowered prices was to react to the domestic industry’s loss of market share in 2008. Instead, each passage indicates that MOFCOM relied upon the “low” prices of the subject imports as a reason for price declines.

80. China furnishes only fragmentary excerpts of MOFCOM’s discussion of the effects of subject imports on domestic prices in an effort to show that MOFCOM found that increased subject import volumes led to lower prices.¹¹³ The actual language of the Final Determination supports the United States’ characterization, not China’s: “relevant evidences show that a pricing policy aiming at setting the price to a level lower than that of the domestic like product was adopted when selling the product concerned in [the] China market and that forced petitioner to lower the prices of like products.”¹¹⁴ We have shown why MOFCOM’s findings concerning the purported “pricing policy” are not supported by positive evidence.¹¹⁵

81. The discussion of impact also emphasizes the importance of MOFCOM’s findings of low prices. China’s response omits the first sentence of the pertinent discussion, which makes this clear.¹¹⁶ MOFCOM stated that, “[i]n Q1 2009, as a consequence of a large number of imports of product concerned at a low price, the sales price of like product of China’s domestic industry declined with deterioration of the profit level. In this case, in order to keep market share and business operation, China’s domestic industry made sales of the domestic like product based on a lowered selling price.”¹¹⁷ In other words, MOFCOM found that the domestic industry cut prices during the first quarter of 2009 both to counter the supposedly “low” prices of the subject imports and to maintain market share. *MOFCOM’s finding that subject import prices were “low” in the first quarter of 2009 cannot be reconciled with China’s recent disclosure that during that period average unit values for the subject imports were over 20 percent above those for the domestically produced product.*¹¹⁸

82. The discussion of causal link emphasized the significance of the “low” price findings in

¹¹² U.S. Oral Statement at Second Panel Meeting, para. 35.

¹¹³ China Response to Second Set of Panel Questions, para. 116.

¹¹⁴ MOFCOM Final Determination, CHN-16, at 59.

¹¹⁵ U.S. Response to China November 25 Submission, paras. 9-13.

¹¹⁶ China Response to Second Set of Panel Questions, para. 117.

¹¹⁷ MOFCOM Final Determination, CHN-16, at 62.

¹¹⁸ China Response to Second Set of Panel Questions, para. 111.

several places. The sentence China chooses to quote in its response references not only the domestic industry’s desire to maintain market share, but also the “low” prices of the imports.¹¹⁹ The emphasis on “low” prices is even greater in the prior two sentences, which China elected not to quote: “The import price of the product concerned was at a low level and decreased generally. The pricing strategies and sales prices of the product concerned in Chinese domestic market had a great impact on the sales price of the domestic like product of China.”¹²⁰ This emphasis is repeated in the last sentence of the paragraph: “The evidence available shows that during the investigation period, since the product concerned imported from the U.S. and Russia has been sold in the domestic market of China at a price below normal value and at the same time, the product concerned imported from the U.S. received subsidy from the USG, the import of the product concerned in large quantity and at a low price caused material injury to the domestic industry of China.”¹²¹

83. In its response, China attempts to portray MOFCOM as finding that price depression was solely a function of the volume of subject imports.¹²² As the preceding discussion indicates, China’s characterizations are inaccurate and reflect further attempts to rewrite MOFCOM’s determination. Examination of the actual findings MOFCOM made in its Final Determination confirms the U.S. representation in its oral statement that MOFCOM pervasively and repeatedly referenced the “low” prices of subject imports in its injury analysis.

59. (i) Please comment on the United States' assertion, at para. 45 of its oral statement, that the BCI submitted by China indicates that MOFCOM combined data for all grades of GOES into a single value measure, and combined all annual transactions into a single price point. (ii) Please also comment on the United States' argument that MOFCOM's comparative pricing analysis was not objective because, in comparing average annual values, it did not measure prices at all. (iii) How could MOFCOM conclude that the *prices* of subject imports were lower than the *prices* of the domestic like product on the basis of a comparison of AUVs?

84. China does not dispute that the AUV data MOFCOM used combined all annual transactions into a single price point. China attempts to justify this on the basis that MOFCOM could not provide any information that was further disaggregated.¹²³

¹¹⁹ China Response to Second Set of Panel Questions, para. 118.

¹²⁰ MOFCOM Final Determination, CHN-16, at 65.

¹²¹ MOFCOM Final Determination, CHN-16, at 65.

¹²² China Response to Second Set of Panel Questions, para. 120.

¹²³ China Response to Second Set of Panel Questions, paras. 122-23.

85. China is incorrect. MOFCOM could easily have disaggregated the AUV data temporally. The United States has demonstrated that AUV data for imports can be disaggregated on a monthly or quarterly basis.¹²⁴ Information that China has submitted to the Panel strongly suggests that MOFCOM collected AUV data from the domestic industry on at least a quarterly basis.¹²⁵

86. We further observe that the import data permitted at least some disaggregation of AUVs by grade.¹²⁶ MOFCOM could easily have collected corresponding breakouts for the domestically produced product.¹²⁷

87. China posits that AUVs can be used to ascertain how domestic prices have trended over time.¹²⁸ This is typically true only when the domestic industry’s raw material costs are stable and its product mix has generally stayed constant over the time compared. Otherwise, changes in AUVs may reflect changes in raw material costs and/or product mix. China admits that raw materials costs were not constant, falling during the fourth quarter of 2008 after rising earlier in the year.¹²⁹ As to product mix, an industry that shifts production from higher-priced grades of GOES to lower-priced grades of GOES would show a decline in AUVs even if the prices of particular grades remained constant over time. MOFCOM made no finding, and apparently conducted no examination, of whether the domestic industry’s product mix actually remained constant during its period of investigation.

88. Moreover, the AUVs that MOFCOM used for the subject imports and the domestic like product do not reflect comparisons at the same level of trade, as we explain below in our comments to China’s responses to Panel Questions 64 and 65. In these circumstances, a comparison of AUVs for the subject imports and the domestically produced product cannot be the equivalent of a comparison of prices. China cannot dispute this, so its argument essentially is reduced to the statement that “[p]ractical constraints of the data available thus limited the options

¹²⁴ Exhibit US-41.

¹²⁵ China Response to Second Set of Panel Questions, para. 111.

¹²⁶ Exhibit US-41, first page.

¹²⁷ Additionally, material in the MOFCOM record indicates that there was some publicly available data in China for particular product grades sold by the domestic industry. See Allegheny Ludlum Comments, CHN-31, Table 1.

¹²⁸ China Response to Second Set of Panel Questions, para. 125.

¹²⁹ China Response to Second Set of Panel Questions, paras. 91, 101.

MOFCOM had in this case.”¹³⁰ China neglects to mention that these “practical constraints” were entirely self-imposed due to MOFCOM’s disinclination to seek pricing data for use in its injury investigation.

89. China’s current “practical constraints” argument should be compared with China’s prior statement to the Panel that “[w]hen analyzing price undercutting, it may be necessary to have more precise information to ensure that the comparison of domestic and import prices is in fact reasonable and objective.”¹³¹ The United States has previously explained that there is no meaningful distinction as far as the need for a sufficient evidentiary basis between the “price comparisons” that MOFCOM purported to conduct and the “price undercutting” analysis that China states MOFCOM eschewed in this investigation.¹³² Thus, we would assert that under *China’s* view, the authority should have requested “more precise” information than AUVs to satisfy the objective examination requirements of Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement. China’s response indicates that MOFCOM made no efforts in this respect.

60. At para. 45 of its oral statement, the United States contends that the BCI data provided by China indicates that the largest difference between the value of the subject imports and the value of the domestic product occurred in 2007, a year when the domestic industry raised prices, gained market share, and increased profits by 50 per cent. Please comment, in the light of MOFCOM’s determination that the volume of subject imports, and the low price thereof, caused the domestic industry to cut prices in 2008 and the first quarter of 2009.

90. China’s response to this question proceeds from an assumption that the subject imports achieved substantial volume gains during 2008 simply because they were present in the market. As we have previously explained, there is no basis for such an assumption.¹³³ Imports achieve or fail to achieve volume gains because purchasers either choose or decline to buy them. There are several reasons that purchasers may make such decisions, including considerations of quality, availability, or national laws or regulations requiring use of goods produced in the home market in certain circumstances. They may also include considerations of price. Pricing considerations were the *sole* reason that MOFCOM provided why purchasers decided to buy the subject imports. MOFCOM’s Final Determination repeatedly characterized increases in subject import volumes after 2008 as a function of the supposedly “low” prices at which these imports were

¹³⁰ China Response to Second Set of Panel Questions, para. 127.

¹³¹ China Response to First Set of Panel Questions, para. 131.

¹³² U.S. Response to Second Set of Panel Questions, para. 57.

¹³³ U.S. Response to Second Set of Panel Questions, para. 59.

sold.¹³⁴ Indeed, it is not clear how MOFCOM – or any authority – could find that dumped or subsidized imports have significant price effects on the domestically produced product absent a finding that pricing considerations played at least some role in purchasing decisions.

91. If GOES purchasers’ principal consideration in purchasing decisions was obtaining product at “low” prices, as MOFCOM’s Final Determination appears to posit, one would expect that subject import penetration would increase more significantly when prices were at their lowest levels compared to the domestically produced product, and that subject import penetration would decline when prices were at their highest levels compared to the domestically produced product. The information China has disclosed in response to the Panel’s questions demonstrates otherwise.

92. The information China has disclosed to the Panel indicates that on an annual basis the AUVs of the subject imports were at their lowest levels in relationship to the AUVs of the domestically produced product in 2007.¹³⁵ Yet during 2007 the domestic industry gained 7.97 percentage points of market share.¹³⁶ Consequently, in 2007 Chinese purchasers obtained an increasing share of their requirements from domestic suppliers notwithstanding the availability of subject imports with lower AUVs. Nothing in China’s response – or MOFCOM’s determination – purports to explain why supposedly “low” values for subject imports in 2008 resulted in market share declines for the domestic industry, but even “lower” values in 2007 resulted in market share gains.

93. The data China has now disclosed for the first quarter of 2009 raise further questions concerning the importance of “low” prices in purchasing decisions. China has now revealed that AUVs for the subject imports during the first quarter of 2009 were over 20 percent *above* those for the domestically produced product.¹³⁷ If the notion that purchasing decisions were motivated solely by pricing considerations were correct, one would expect that during the first quarter of 2009, the domestic industry’s market share would increase, and the market share of the subject imports would decline. Yet the information MOFCOM disclosed indicates that during the first quarter of 2009, the market share of both the domestically produced product and the subject imports increased at approximately the same rate.¹³⁸

¹³⁴ MOFCOM Final Determination, CHN-16 at 58, 61, 63, 65.

¹³⁵ China November 25 Submission at 1.

¹³⁶ MOFCOM Essential Facts Disclosure, CHN-29, at 10.

¹³⁷ China Response to Second Set of Panel Questions, para. 111.

¹³⁸ MOFCOM Essential Facts Disclosure, CHN-29, at 9-10.

94. Had MOFCOM conducted an objective examination, it would have ascertained whether there was a correlation between “low prices” and increases in subject import market penetration throughout the entire period of investigation, instead of merely during 2008. It failed to do so, and the confidential record before the Panel indicates that no such correlation exists. Instead, during portions of the period of investigation, lower AUVs for the subject imports did not preclude the domestic industry from gaining market share (such as during 2007) and lower AUVs for the domestic industry did not preclude the subject imports from gaining market share (such as during the first quarter of 2009).

61. At para. 53 of its oral statement, the United States asserts that the BCI submitted by China confirms that the capacity increase was far greater than warranted by increases in demand. The United States notes that, according to China, demand grew by 20% annually, whereas capacity more than doubled between 2006 and 2008. Please comment.

95. MOFCOM cannot deny the accuracy of the U.S. calculations, which were taken directly from information provided by MOFCOM and China. Instead, it accuses the United States of making “simplistic statements” that disregard that “the U.S. comparison of percentages is compar[ing] two items of very different magnitude.”¹³⁹

96. The United States framed its statement in terms of percentage changes because this was the only information disclosed by MOFCOM or China. Indeed, the United States made its statement at the second panel meeting *after* China purported to respond to a Panel request for confidential data concerning demand, domestic capacity, capacity utilization, domestic production, and inventories. Had China provided the actual data that the Panel requested, the United States would have used it in preparing its oral statement. Instead, China provided very little of the confidential data that the Panel requested.¹⁴⁰ As further explained in our comments on China’s responses to Panel Questions 56 and 69, in its response to the second set of Panel Questions China has persisted in refusing to supply the actual confidential data that the Panel has requested.

62. Please comment on para. 56 of the United States' oral statement, where the United States asserts that, during the first quarter of 2009, the domestic industry's 55.23% increase in production was far greater than the corresponding 12.46% increase in demand.

97. China’s response to this question is similar to its response to Panel Question 61. Again, China cannot deny the accuracy of calculations that are taken directly from MOFCOM determinations. Instead, China argues that the data are misleading because they are based on

¹³⁹ China Response to Second Set of Panel Questions, paras. 135-36.

¹⁴⁰ U.S. Response to China November 25 Submission, para. 16.

percentages.¹⁴¹ As we discussed above, the United States used percentage changes because these were the only data that MOFCOM or China disclosed.

98. The record now before the Panel indicates that the Chinese industry’s decision to increase production far more rapidly than demand warranted during the first quarter of 2009 contributed substantially to the inventory overhang that caused prices for the domestically produced product to collapse during that period. We discuss this further in our comments on China’s response to Panel Question 69.

64. Please explain what levels of trade the respective AUVs for subject imports and domestic products were fixed at.

65. Did MOFCOM make any adjustments to the data used in the AUVs to ensure price comparability? Please explain.

99. In its response to questions 64 and 65, China acknowledges: (1) that domestic AUVs were the values received at the factory by the Chinese producer, while the import AUVs were the values received at the port by the exporter; and (2) it did not make any adjustments to the AUV data.¹⁴² China specifically states that “[w]ith respect to the findings of ‘low price,’ MOFCOM believed that there were no issues of price comparability that needed to be addressed through any adjustments to the AUV data for the domestic producers or the subject imports.”¹⁴³

100. MOFCOM’s belief is mistaken because the AUV data it used reflect a different level of trade for the domestic industry than for the subject imports. The AUV data for domestically produced product reflected transactions between the domestic producer and the end user. By contrast, the subject import AUVs measure transactions between the exporter and the first Chinese purchaser, which is typically an importer that will then resell the product – at a profit – to the end user. Consequently, differences in AUVs may merely reflect difference in levels of trade between the imports and the domestically produced articles, as opposed to any differences in actual prices that a GOES purchaser would encounter in an actual “apples to apples” comparison. For this reason, MOFCOM’s comparison of unadjusted AUVs cannot serve as positive evidence for its findings that the subject imports were sold at “low” prices.

66. Why did MOFCOM use AUVs as a measure of subject import prices, rather than the sales data collected in the anti-dumping proceeding?

¹⁴¹ China Response to Second Set of Panel Questions, paras. 138-39.

¹⁴² China Response to Second Set of Panel Questions, paras. 141-42.

¹⁴³ China Response to Second Set of Panel Questions, para. 142.

101. In its answer to this question, China emphasizes the separate administrative records MOFCOM maintains for its antidumping and subsidy proceedings. The United States has addressed this argument elsewhere with respect to the dumping and subsidy determinations.¹⁴⁴ With respect to the injury determination, the responsiveness of China’s answer is at best unclear. MOFCOM did not issue separate injury determinations for the antidumping and countervailing duty determinations. Instead, it conducted a single injury investigation and issued a single determination for both the antidumping and countervailing duty proceedings.¹⁴⁵

67. Please comment on the United States' argument (made at the second hearing) that AUVs should not be treated as Business Confidential Information.

102. The United States elaborated upon this argument in its Response to China’s November 25 submission. Several factors militate against treating as confidential the AUV data that China has provided. First, the data do not indicate actual AUVs at all; instead, China claims confidential treatment for ranged data. Second, the ranges could be derived from other public data that either China or MOFCOM has disclosed. Third, the data reflect multiple transactions for a variety of product grades over the course of a calendar year.¹⁴⁶

103. China’s response addresses none of these arguments. Instead, China merely states that MOFCOM “needs to respect that judgment by the domestic producer” as to the sensitivity of the information.¹⁴⁷ This assertion is not pertinent to the data at issue, because whatever information the domestic producer provided to MOFCOM was not the ranged data that China provided to the Panel. China told the Panel at the second meeting that it constructed the ranges.¹⁴⁸ China’s ranges should have been sufficient to protect whatever information Chinese GOES producers submitted confidentially to MOFCOM, and China has provided no justification whatsoever for its claim of confidential treatment for the ranged data.

¹⁴⁴ See U.S. Second Written Submission, para. 95.

¹⁴⁵ Although U.S. practice is not relevant to this dispute resolution proceeding, China’s description of U.S. practice is misleading. See China Response to Second Set of Panel Questions, para. 144. When the U.S. International Trade Commission conducts simultaneous antidumping and countervailing duty investigations concerning the same product from the same country or countries, it conducts a single investigation proceeding with a consolidated record. In other words, the USITC will rely on the same materials in both the AD injury investigation and the CVD injury investigation.

¹⁴⁶ U.S. Response to China November 25 Submission, para. 6.

¹⁴⁷ China Response to Second Set of Panel Questions, para. 145.

¹⁴⁸ See United States Response to China November 25 Submission, para. 5.

68. The United States asserted in oral argument at the second hearing that the focus of MOFCOM's price effects analysis was the last quarter of 2008, and the first quarter of 2009. Does China agree? Please explain, by reference to MOFCOM's final and preliminary determinations.

104. While China opens its response to this question by stating that “the U.S. argument mischaracterizes the MOFCOM determination,”¹⁴⁹ the information China has submitted to the Panel confirms the U.S. assertion that the principal focus of MOFCOM’s price effects analysis was the last quarter of 2008 and the first quarter of 2009.

105. Indeed, China essentially acknowledges that the fourth quarter of 2008 and the first quarter of 2009 were the focus of MOFCOM’s price depression analysis.¹⁵⁰ According to the information that China has disclosed to the Panel, these were in fact the only periods during MOFCOM’s period of investigation when AUVs declined.¹⁵¹

106. China states in its response to this question that MOFCOM’s price suppression finding concerned the entire year of 2008.¹⁵² By contrast, China strikes a different emphasis in its responses to other questions. For example, when asked by the Panel to respond to a U.S. argument that the price suppression finding was not supported by full year 2008 data, China asserted that “the United States considers only the average price level over all of 2008, and ignores the fact that domestic prices began to decline during 2008.”¹⁵³ Thus China states that the fourth quarter of 2008 – the only portion of the year when it contends prices were declining – was in fact central to its price suppression analysis. China has responded in a similar vein to other questions. In its response to Panel Question 50, China asserted that “by the end of 2008, the domestic industry determined it needed to react” to the increased volume of subject imports.¹⁵⁴ Similarly, in its response to Panel Question 56, China contends that the pricing situation “changed in Q4 2008, when the volume of the lower priced subject imports forced

¹⁴⁹ China Response to Second Set of Panel Questions, para. 147.

¹⁵⁰ China Response to Second Set of Panel Questions, para. 148.

¹⁵¹ China Response to First Set of Panel Questions, para. 121; China Response to Second Set of Panel Questions, para. 111. We have previously observed that the pricing information China has disclosed to the Panel is not the same information that MOFCOM disclosed to the parties.

¹⁵² China Response to Second Set of Panel Questions, para. 149.

¹⁵³ China Response to Second Set of Panel Questions, para. 88.

¹⁵⁴ China Response to Second Set of Panel Questions, para. 91.

domestic producers to react.”¹⁵⁵ Thus, China’s responses to the Panel’s question repeatedly reinforce the notion that the price effects analysis focused on the domestic industry’s pricing patterns after the fourth quarter of 2008, as opposed to earlier portions of the period of investigation. The notion that any domestic industry “reaction” to the supposedly low prices of the subject imports began during the latter portion of 2008 is supported by the quarterly AUV data China has provided to the Panel, which indicate that during the first half of 2008, the AUVs for the domestically produced product were rising more quickly than the AUVs for the subject imports.¹⁵⁶

107. China also discusses MOFCOM’s findings of “low” import prices, but appears confused concerning what periods they are supposed to cover. At one point China states that the findings encompass the period from 2006 to 2008.¹⁵⁷ At another point China states that the findings “were a mixture of full year 2008, Q4 2008, and Q1 2009, all in the context of the full period of investigation.”¹⁵⁸ The latter statement is surprising in light of China’s prior statement that MOFCOM did not make quarterly price findings,¹⁵⁹ and China’s prior disclosure that AUVs for the subject imports were actually higher than AUVs for the domestically produced product during the fourth quarter of 2008 and substantially higher during the first quarter of 2009.¹⁶⁰

108. China is similarly confused about the implications of MOFCOM’s “low price” findings. China’s statement that “MOFCOM did not characterize the AUVs as evidence of ‘price undercutting,’ but simply as evidence that, on average, subject import prices (as measured by AUVs) were lower” is a non-sequitur.¹⁶¹ MOFCOM compared the values of the domestically produced product and the subject imports, and the Agreements require that a price comparison finding, however it may be characterized by the authority, be supported by positive evidence.

109. The United States has explained to the Panel why MOFCOM’s “low price” findings lack such support. First, as discussed in our comments on China’s responses to Panel Questions 59, 64, and 65, China did not use any specific pricing data for its so-called pricing comparisons. Instead, it used AUV data that compared subject imports and the domestically produced product

¹⁵⁵ China Response to Second Set of Panel Questions, para. 112.

¹⁵⁶ China Response to Second Set of Panel Questions, para. 111.

¹⁵⁷ China Response to Second Set of Panel Questions, para. 150.

¹⁵⁸ China Response to Second Set of Panel Questions, para. 155.

¹⁵⁹ China Response to Second Set of Panel Questions, para. 102.

¹⁶⁰ China Response to Second Set of Panel Questions, para. 111.

¹⁶¹ China Response to Second Set of Panel Questions, para. 150.

at different levels of trade. Additionally, the information on which MOFCOM relied in making its findings on the “pricing strategies” supposedly adopted by the exporters of subject merchandise do not in fact evidence such strategies. Nor do they concern the periods for which MOFCOM found “low” prices.¹⁶²

69. Please comment on the document due to be submitted by the United States on 14 December 2011, containing the U.S. comments on China's BCI submission of 25 November 2011.

Comments on Response Concerning Question (a)

110. The United States has previously commented on China’s arguments concerning the AUV data it submitted in its comments on China’s responses to Panel Questions 59, 60, 64, 65, 66, and 67.

111. China’s statement concerning why MOFCOM did not disclose the *nonconfidential* information it disclosed to the Panel for the first time in part (a) of its November 25 submission is disingenuous. China states that it “has no obligation to disclose factual details about findings it did not make.”¹⁶³ In making this statement, China apparently overlooked its response to Panel Question 68, in which it acknowledges that MOFCOM’s “low price” findings rely on the AUV data.¹⁶⁴ Moreover, China’s statement that MOFCOM was simply observing the existence of underselling cannot be reconciled with prior statements stating that “subject imports, on a cumulated weighted average basis, were selling for amounts *much lower* than domestic producers,” “the subject import AUV still remained *significantly* below that of domestic producers” and citing “the *magnitudes* of the price gap” between the subject imports and the domestically produced product.¹⁶⁵

Comments on Response Concerning Question (b)

112. In the U.S. comments on China’s November 25 submission, the United States emphasized that the confidential documents China submitted to the Panel as supporting MOFCOM findings on the “pricing strategies” supposedly adopted by the exporters of subject merchandise neither evidenced such strategies nor concerned the periods for which MOFCOM

¹⁶² U.S. Response to China November 25 Submission, paras. 9-14.

¹⁶³ China Response to Second Set of Panel Questions, para. 158.

¹⁶⁴ China Response to Second Set of Panel Questions, para. 150.

¹⁶⁵ *Compare* China Response to Second Set of Panel Questions, para. 161 *with id.* at paras. 112 (emphasis added), 133 (emphasis added), 150 (emphasis added).

found “low” prices. This is true whether the documents are viewed individually or collectively.¹⁶⁶ China’s comments neither address nor rebut the U.S. factual arguments concerning the evidentiary deficiencies of the documents.

Comments on Response Concerning Question (c)

113. In the U.S. comments on China’s November 25 submission, the United States emphasized that the materials that China provided were largely unresponsive to Panel question (c).¹⁶⁷ China’s response would seem to indicate that its failure to provide responsive information was deliberate.

114. It is clear that the Panel sought confidential data from China. The very first sentence of the Panel’s fax stated “[i]n order to assist in its deliberations, the Panel requests *certain confidential data* from China.” China was directed to make its submission in accordance with the working procedures concerning business confidential information. In the context of this instruction, the Panel’s request for “data supporting MOFCOM’s finding that the domestic industry’s increase in capacity and production did not cause any injury, including information on demand, domestic capacity, capacity utilization, domestic production, and inventories,” was clearly a request for *confidential* information on these factors. Indeed, there was no need for the Panel to make a special request for the public data that MOFCOM had previously disclosed in the documents that had already been submitted to the Panel.

115. Nevertheless, China provided very little confidential information to the Panel, and did not provide *any* confidential information on demand, capacity levels, production, or inventories.¹⁶⁸ China now contends that this is because the Panel did not specifically request confidential data.¹⁶⁹ This statement cannot be reconciled with the opening paragraph of the fax from the Panel.

116. Because China did not fully respond to the request, the United States made a good-faith effort to provide the Panel with the data it requested on the basis of the information in the record which had been disclosed to it. Consequently, the United States furnished estimates of apparent consumption, market share, domestic shipments, capacity, and production for 2008. The United States described in detail how it derived its estimates.¹⁷⁰ China does not dispute the U.S.

¹⁶⁶ U.S. Response to China November 25 Submission, paras. 9-14.

¹⁶⁷ U.S. Response to China November 25 Submission, paras. 15-16.

¹⁶⁸ U.S. Response to China November 25 Submission, para. 16.

¹⁶⁹ China Response to Second Set of Panel Questions, paras. 167-168.

¹⁷⁰ U.S. Response to China November 25 Submission, paras. 21-23.

estimates of apparent consumption, market share, or domestic shipments.

117. China does dispute the U.S. estimates on capacity and domestic production.¹⁷¹ As the United States explained in its prior submission, it based its capacity estimate on China’s disclosure in its November 25 submission that the domestic industry’s capacity had increased to a peak of [[]] percent.¹⁷² The United States believed that this figure pertained to 2008, the most recent period for which China provided capacity data in the November 25 submission.¹⁷³ China now states that “[t]he [[]] percent figure did not apply to full year 2008.”¹⁷⁴ China, however, does not identify what, if any period, for which the [[]] percent figure is applicable. Moreover, continuing its pattern of selective and fragmentary disclosures, China does not provide an actual capacity figure for the domestic industry for 2008, or any other period. Instead, it provides the Panel with a selection of ranged data for which it nonetheless requests confidential treatment, notwithstanding that the high and low numbers in the ranges vary by as much as one-third. Obviously, if China had provided actual data in its November 25 submission, as the Panel had requested, the United States would not have been required to derive estimates.

118. The new information China has provided, assuming it is accurate, indicates two important facts. First, it would indicate that the domestic industry’s inventory accumulation in 2008 was larger than the increase in the volume of subject imports.¹⁷⁵ This confirms that the domestic industry’s production increased in excess of what demand would warrant, whether or not subject import market penetration increased from the levels of 2007, which MOFCOM did not find to be injurious. Indeed, the Chinese industry would have been able to ship its vastly increased production only if it could succeed in *displacing* both subject and nonsubject import from the market, notwithstanding China’s current position that “[f]airly traded imports also had a right to compete for the Chinese market.”¹⁷⁶ Indeed, this position cannot be reconciled with China’s prior position that the industry’s expansion to supply [[]] percent of apparent consumption, in a market where the peak domestic industry share was previously [[]] percent,¹⁷⁷ was

¹⁷¹ China Response to Second Set of Panel Questions, paras. 174-75.

¹⁷² China November 25 Submission at 4.

¹⁷³ U.S. Response to China November 25 Submission, para. 20.

¹⁷⁴ China Response to Second Set of Panel Questions, para. 164.

¹⁷⁵ China Response to Second Set of Panel Questions, para. 176. Because China identifies the increase in subject import volume from 2007 to 2008 as 51,689 metric tons, this indicates that the inventory increase in 2008 was at the high end of the [[]] metric ton range provided by China. *Id.*

¹⁷⁶ China Response to Second Set of Panel Questions, para. 172.

¹⁷⁷ This was the domestic industry’s market share in 2007. *See* U.S. Response to China November 25 Submission, para. 21; MOFCOM Essential Facts Disclosure, CHN-29, at 10.

supported by increased demand.¹⁷⁸

119. Second, the excess production increased into the first quarter of 2009 – the only portion of the period of investigation where the domestic industry’s amount of pre-tax profit declined.¹⁷⁹ Based on the information China has disclosed, the domestic industry produced at least [[]] metric tons more GOES than it could ship during the first quarter of 2009.¹⁸⁰ Given that in 2008, domestic industry shipments on a quarterly basis averaged [[]] metric tons,¹⁸¹ this quantity of excess production is staggering. Again, this inventory accumulation cannot be attributed to subject imports taking market share from the domestic industry. The subject imports and domestic industry gained market share at approximately the same rate during the first quarter of 2009.¹⁸²

120. The additional information that China has provided to the Panel confirms that the domestic industry’s pricing behavior during the first quarter of 2009 was caused by this massive inventory accumulation and not the subject imports. China has reported during the first quarter of 2009, that the AUVs for the domestically produced product were at least 20 percent *below* the AUVs for the subject imports.¹⁸³ Even assuming *arguendo* that purchasers made purchasing decisions on the basis of price,¹⁸⁴ if the domestically produced product and the subject imports were comparable products, purchasers presumably would have switched from the subject imports to the domestically produced product if the domestically produced product was offered at comparable, as opposed to significantly lower, prices. Instead, the only explanation for the dramatic price cuts the domestic industry chose to implement during the first quarter of 2009 was

¹⁷⁸ China Oral Statement at Second Panel Meeting, para. 75.

¹⁷⁹ MOFCOM Essential Facts Disclosure, CHN-29, at 10.

¹⁸⁰ We derived this estimate on the basis of China’s statements: (1) that domestic production in 2008 exceeded shipments by more than the amount of increase in subject imports, and perhaps by as much as [[]] metric tons and (2) that 63 percent of 2009 inventories had accumulated in 2008. China Response to Second Set of Panel Questions, paras. 176-177.

¹⁸¹ This figure represents the annual 2008 domestic shipment quantity data provided in para. 21 of the U.S. Response to China November 25 Submission, which China has not challenged, divided by four. Again, we are forced to use an estimate because China has not provided the Panel data concerning domestic production or shipments during the first quarter of 2009.

¹⁸² MOFCOM Essential Facts Disclosure, CHN-29, at 9-10.

¹⁸³ China Response to Second Set of Panel Questions, para. 111.

¹⁸⁴ Nevertheless, as we explained in our comments to China’s response to Panel Question 60, there was no discernible correlation during MOFCOM’s period of investigation between “low prices” and subject import market penetration.

the need to reduce the massive inventories it had accumulated because of its continued overproduction.

(g) Causation

(i) Question to China

71. In question 36 following the first substantive meeting, the Panel sought to establish the nature of the determination made by MOFCOM regarding the expansion of Chinese production capacity. The Panel wanted to clarify whether MOFCOM had found that this factor was a cause of injury, whose injurious effects should not be attributed to subject imports, or whether MOFCOM had found that this factor was not a cause of any injury at all. In its response, China asserted "MOFCOM found that effects of this other known factor were not 'causing' the injury" (China's response to Panel question 36, para. 135). This would suggest that there was no need for MOFCOM to conduct a non-attribution analysis in respect of this factor, since MOFCOM found that this factor did not have any injurious effects that could be improperly attributed to subject imports. At para. 113 of its second written submission, though, China asserts that "although MOFCOM could have stopped its analysis by simply noting the respondents' factual premise was incorrect, MOFCOM went further and ensured that it did not 'attribute' any effects of the change in domestic industry capacity to subject imports." This statement suggests that MOFCOM did perform a non-attribution analysis in respect of the expansion in Chinese production capacity. (i) Did MOFCOM perform a non-attribution analysis in respect of this factor? (ii) If so, how did this analysis differ from its analysis of whether or not this factor was a cause of injury to the domestic industry?

121. China’s response contends that this question indicates “confusion on this issue [that] seems to reflect the assumption that an authority would conduct a non-attribution analysis only if it found some other factor to be a ‘cause’” of injury.¹⁸⁵ What China characterizes as an “assumption,” however, is not a hypothesis of the Panel. It instead is an inference based directly upon the language of the Agreements. The third sentence of Article 3.5 of the AD Agreement states that “[t]he authorities shall also examine any known factors other than the dumped imports which *at the same time are injuring the domestic industry*, and the injuries caused by these other factors must not be attributed to the dumped imports” (emphasis added). Article 15.5 of the SCM Agreement contains a nearly identically-worded passage concerning subsidized imports. Thus, under the Agreements, the premise of a non-attribution analysis is that there is at least one known factor other than the dumped or subsidized imports that is injuring the domestic industry. Should the dumped or subsidized imports be the sole factor injuring the domestic industry, the Agreements neither require nor contemplate that an authority will conduct a non-attribution analysis. Indeed, in such a circumstance, the authority can appropriately attribute all injury to the

¹⁸⁵ China Response to Second Set of Panel Questions, para. 186.

dumped or subsidized imports.

122. China essentially argues that MOFCOM conducted an analysis concerning excess capacity and overproduction that simultaneously examined both whether this factor caused injury and the question of non-attribution.¹⁸⁶ MOFCOM’s analysis, however, was not framed and did not function as a non-attribution analysis. The analysis certainly did not purport to distinguish possible adverse effects due to the overproduction from possible adverse effects of the subject imports. Instead, MOFCOM simply rejected the U.S. argument that this factor was the cause of any injury to the domestic industry.¹⁸⁷ Instead, what China now characterizes as MOFCOM’s “inventory correlation” analysis was simply MOFCOM’s way of establishing that the capacity increases were not a cause of injury. China admits as much when it states that the correlation analysis “was consistent with and confirmed its finding that production capacity did not cause the material injury suffered by the domestic industry.”¹⁸⁸ The Panel should reject China’s belated attempt to reframe the analysis.

123. The United States addressed the analytical flaws of MOFCOM’s “inventory correlation” analysis in its response to Panel Question 43. As the United States explained, that analysis did not reflect an objective examination of the data in the record.¹⁸⁹

¹⁸⁶ China Response to Second Set of Panel Questions, para. 185.

¹⁸⁷ MOFCOM Final Determination, CHN-16 at 72.

¹⁸⁸ China Response to Second Set of Panel Questions, para. 185.

¹⁸⁹ U.S. Response to Second Set of Panel Questions, paras. 82-86.

Table of Reports

Short Title	Full Case Title and Citation
<i>EC – Fasteners (AB)</i>	Appellate Body Report, <i>European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China</i> , WT/DS397/AB/R, adopted 28 July 2011
<i>EC – Fasteners (Panel)</i>	Panel Report, <i>European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China</i> , WT/DS397/AB/R, adopted 28 July 2011, as modified by the Appellate Body Report, WT/DS397/AB/R
<i>US – Carbon Steel (AB)</i>	Appellate Body Report, <i>United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany</i> , WT/DS213/AB/R and Corr. 1, adopted 19 December 2002