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

FIRST WRITTEN SUBMISSION OF THE UNITED STATES OF AMERICA

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SHORT FORM	FULL CITATION
Argentina – Floor Tiles	Panel Report, *Argentina – Definitive Anti-Dumping Measures on Imports of Ceramic Floor Tiles from Italy*, WT/DS189/R, adopted 5 November 2001
Argentina – Poultry	Panel Report, *Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil*, WT/DS241/R, adopted 19 May 2003
EC – DRAMS	Panel Report, *European Communities – Countervailing Measures on Dynamic Random Access Memory Chips from Korea*, WT/DS299/R, adopted 3 August 2005
EC – Pipe Fittings (AB)	Appellate Body Report, *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil,* WT/DS219/AB/R, adopted 18 August 2003
Guatemala – Cement II	Panel Report, *Guatemala – Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico*, WT/DS156/R, 17 November 2000
Mexico – Olive Oil	Panel Report, *Mexico – Definitive Countervailing Measures on Olive Oil from the European Communities*, WT/DS341/R, adopted 21 October 2008
Mexico – Rice (AB)	Appellate Body Report, *Mexico – Definitive Anti-Dumping Measures on Beef and Rice; Complaint with Respect to Rice*, WT/DS295/AB/R, adopted 20 December 2005
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US – DRAMS CVD (AB)	Appellate Body Report, *United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea*, WT/DS296/AB/R, adopted 20 July 2005
US – DRAMS CVD (Panel)	Panel Report, *United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea*, WT/DS296/R, adopted 20 July 2005, as modified by the Appellate Body Report, WT/DS296

US – Hot-Rolled Steel (AB)	Appellate Body Report, *United States – Anti-dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, adopted 23 August 2001
US – Offset Act (Byrd Amendment) (Panel)	Panel Report, *United States – Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217/R, WT/DS234/R, adopted 27 January 2003, as modified by the Appellate Body Report, WT/DS217/AB/R, WT/DS234
US – Softwood Lumber Dumping (Panel)	Panel Report, *United States – Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/R, adopted 31 August 2004, as modified by the Appellate Body Report, WT/DS264/AB/R
US – Softwood Lumber ITC Investigation	Panel Report, *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada*, WT/DS277/R, adopted 26 April 2004

I. Introduction

1. In this dispute, the United States is challenging various aspects of the definitive antidumping and countervailing duty measures that the Government of the People's Republic of China ("China") has adopted with respect to imports of grain oriented flat-rolled electrical steel (GOES) from the United States. Several aspects of these measures are inconsistent with China's obligations under the General Agreement on Tariffs and Trade 1994 ("GATT 1994"), the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("AD Agreement"), and the Agreement on Subsidies and Countervailing Measures ("SCM Agreement").

2. From the very outset, China's conduct of the GOES investigation raised serious transparency and due process concerns. For example, as described in greater detail below, China initiated costly and lengthy investigations with respect to 22 federal and state laws alleged to provide subsidies. For several of these laws, the petition contained no evidence or explanation of how the measure constituted a financial contribution, provided a benefit, or was specific such that it could be deemed a countervailable subsidy. In some instances, the information in the petition itself indicated that the law in question had expired decades ago, or had no relationship to the production of GOES. Despite these deficiencies, China initiated an investigation into almost all of petitioners' allegations. Moreover, to the extent that petitioner provided information to support its allegations, China agreed to treat much of it as confidential, and never required petitioner to provide non-confidential summaries of the information it had supplied. This meant that neither the United States nor other interested parties could know the basis for the claims sufficiently to defend their interests.

3. Following China's wide-ranging investigation, in which it requested detailed information on companies' entire production lines including products unrelated to GOES, data on sales stretching back fifteen years, and on laws and regulations that had no relation to the companies or product at issue, and after both the United States and U.S. companies provided over a dozen questionnaire responses, the serious due process and transparency problems evident from the beginning of the proceeding became even more apparent as China began issuing its determinations. From the preliminary determination to the final disclosure, to China's final determination, each measure China issued contained limited explanation of its reasoning, and even less insight into its calculations and the underlying data, such that it was impossible for the United States and interested parties to understand the basis for China's determinations or to defend their interests.

4. To place the issues raised in this dispute in context, it is important to understand that the issues presented here appear to have wider, perhaps systemic, implications. Transparency and due process commitments are important elements of the AD and SCM Agreements. Since initiating the GOES investigations, China has since pursued a series of additional antidumping and countervailing duty investigations against producers/exporters of a range of products from the United States and other Members including the European Union, Japan, Korea, Malaysia, Saudi Arabia, and Thailand. Regrettably, many of the flaws evident in the GOES investigation

— lack of transparency, unexplained decision-making, absence of due process — are also evident in those proceedings.

5. The United States proceeds in this submission as follows:

- First, the United States describes the procedural and factual background of the dispute, including the facts surrounding China's decision to impose antidumping and countervailing duties on imports of GOES from the United States.

- Second, the United States demonstrates that the Chinese investigating authority failed to conduct its antidumping and countervailing duty investigation in accordance with the requirements of the AD Agreement, SCM Agreement, and GATT 1994.

II. Procedural Background

6. On September 15, 2010, the United States requested consultations with China pursuant to Articles 1 and 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (“DSU”), Article XXIII of the General Agreement on Tariffs and Trade 1994 ("GATT 1994"), Article 30 of the Agreement on Subsidies and Countervailing Measures ("SCM Agreement"), and Article 17.3 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("AD Agreement"), with respect to China’s measures imposing countervailing duties and anti-dumping duties on grain oriented flat-rolled electrical steel (“GOES”) from the United States. Pursuant to this request, the United States and China held consultations on November 1, 2010. These consultations provided helpful clarifications, but failed to resolve the dispute.

7. On February 11, 2011, the United States requested the establishment of a panel pursuant to Article 6 of the DSU, Article 17.4 of the AD Agreement, and Article 30 of the SCM Agreement.[1] The Dispute Settlement Body (“DSB”) considered this request at its meeting on February 24, 2011, at which time China objected to the establishment of a panel.

8. On March 25, 2011, the United States renewed its request for the establishment of a panel. The panel was established at the DSB meeting of March 25, 2011, with the following terms of reference: “to examine, in the light of the relevant provisions of the covered agreements cited by the parties to the dispute, the matter referred to the DSB by United States in document WT/DS414/2 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.”[2]

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[1] WT/DS414/2.

[2] WT/DS414/3.

III. Factual Background

A. Description of the Product

9. GOES is a steel product sold in sheet or strip form. GOES is subjected to specialized rolling and annealing processes which yield grain structures uniformly oriented in the rolling, or lengthwise, direction of the sheet. The grain structure permits it to conduct a magnetic field with a high degree of efficiency. GOES is used in the manufacture of power and distribution transformers as well as specialty transformers because of its superior magnetic properties, chiefly its higher permeability and lower core loss, compared with non-GOES.[3] The grain structure of the product permits it to conduct a magnetic field with a high degree of efficiency. GOES is used in the manufacture of power and distribution transformers as well as specialty transformers because of its superior magnetic properties. The magnetic properties of GOES help to transform electric power from a high-voltage form generated by a power plant to levels appropriate for local distribution. Distribution transformers, which are smaller than power transformers, further reduce the electrical voltage to levels suitable for commercial and residential use.[4]

10. Although the production of electrical steels is similar to that of carbon steels, as a general matter much more careful control is exercised at every stage of production. The production of GOES generally begins with the melting of scrap in electric arc furnaces, which is often augmented by vacuum degassing before the material proceeds to continuous casting. Slabs of electrical steel are rolled at high temperatures into heavy gauge coils, which are then acid pickled to remove scale. The material is then cold rolled to final gauges in coil form and annealed.

B. The Imposition of Duties on U.S. Imports

1. The Petition

11. On April 27,2009, two Chinese steel producers, Wuhan Iron and Steel (Group) Corporation and Baosteel Group Corporation, filed a petition with China's Ministry of Commerce ("MOFCOM") requesting relief under China's AD and CVD laws on behalf of

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[3] Core loss refers to the situation in transformers and inductors where some of the energy that would otherwise be transferred through the device instead generates heat or sometimes sound. According to classic magnetic theory, core loss is considered to be composed of several types of loss. These are hysteresis loss, eddy current loss within individual laminations, and interlaminar losses that may arise if laminations are not sufficiently insulated from one another.

[4] Grain-Oriented Silicon Electrical Steel from Italy and Japan, Inv. Nos. 701-TA-355, 731-TA-660 (Final), USITC Pub. 2778 at II-8 (May 1994). (US-1).

China's domestic grain oriented flat-rolled electrical steel industry. [5] The petitioners alleged that U.S. producers of grain-oriented electrical steel, in particular AK Steel Corporation ("AK Steel") and ATI Allegheny Ludlum Corporation ("ATI"), had engaged in injurious dumping and benefitted from various countervailable subsidies.[6]

12. Regarding subsidies, the petitioners alleged that 27 federal and state laws provided countervailable subsidies to the U.S. companies. Among the laws challenged were several federal procurement statutes: the Buy American Act of 1933,[7] the Airport and Airway Improvement Act of 1982,[8] and the Surface Transportation Assistance Act of 1982.[9] Notably, despite the fact that the petition did not identify the American Recovery and Reinvestment Act of 2009 as a countervailable subsidy, MOFCOM initiated an investigation with respect to that law as well, despite the fact the law was in effect for only the last month of the period of investigation.[10]

13. Aside from these federal procurement statutes, the petitioners challenged the following federal and state laws that they claimed provided countervailable subsidies to GOES producers:

[5] Petition. (US-2)

[6] The petition also alleged that Russian producers of GOES engaged in injurious dumping.

[7] The Buy American Act of 1933 "requires the federal government to buy domestic 'articles, materials, and supplies' when they are acquired for public use unless a specific exemption applies. The Act applies to all federal procurements, but has separate provisions for supply contracts and construction contracts." United States Questionnaire Response, Aug. 17, 2009, pg. 66. (US-3)

[8] Under the Airport and Airway Improve Act of 1982, "funds are authorized to continue to make improvements to the U.S. airports and airways in order to accommodate both the current and projected growth of aviation and the needs of interstate commerce." Id., pg. 78.

[9] The"Buy American" provision of the Surface Transportation Assistance Act of 1982 required that "all steel and iron to be permanently incorporated into a highway project must be produced in the United States. The...Buy America provision also requires that all manufactured products [to be incorporated into a highway project] must be produced in the United States. However, in 1983 the Federal Highway Administration (FHWA) issued a blanket waiver of the application of the FHWA Buy America provision to manufactured goods based on a finding that such application would be inconsistent with the public interest." Id.

[10] United States, Anti-Subsidy Investigation on Imported Grain Oriented Flat-Rolled Electrical Steel Originating in the United States/Comments on the Preliminary Determination, (Dec. 30, 2009), at pg. 2. (US-4)

- The Medicare Prescription Drug, Improvement, and Modernization Act of 2003, a law establishing a program to cover prescription drug costs for patients over 65 years old, with no relationship to the GOES industry.[11]

- A provision of the Economic Recovery Tax Act of 1981 that lapsed over 25 years earlier.[12]

- A provision of the Tax Reform Act of 1986 which has not been in effect for over 20 years.[13]

- The Steel Import Stabilization Act of 1984, which involved voluntary restraint agreements, not subsidies.[14]

- The State of Indiana Steel Industry Advisory Service, an entity whose sole responsibilities are to advise and report to the State of Indiana's legislative assembly on steel issues.[15]

- Grace periods provided under EPA regulations for meeting Clean Air Act emissions standards.[16]

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[11] Petition, pg. 36. (US-1). The program established under this law covers outpatient prescription drugs for persons over the age of 65. United States Questionnaire Response, Aug. 17, 2009, pg. 182. (US-3) The program lowers the costs of purchasing prescription drugs for eligible recipients, and does not relate to the GOES industry in the United States.

[12] Petition, pg. 44. (US-1). The "rules provided under the Economic Recovery Tax Act of 1981 were terminated in 1982. Because this program was not in effect at any time during the POI or the preceding 14 years," the law could not have provided a countervailable subsidy. United States Questionnaire Response, Aug. 17, 2009, pg. 216. (US-3)

[13] Petition, pg. 44. (US-1). "Because this program was not in effect at any time during the POI or the preceding 14 years," the law could not have provided a countervailable subsidy. United States Questionnaire Response, Aug. 17, 2009, pg. 217. (US-3)

[14] Petition, pg. 48. (US-1). "Because any arrangements under the relevant legal provisions were not in effect at any time during the POI or the preceding 14 years," the law could not have provided a countervailable subsidy. United States Questionnaire Response, Aug. 17, 2009, pg. 219. (US-3)

[15] Petition, pg. 49. (US-1). The purpose of the advisory service was to "advise the Indiana General Assembly, the state legislative body, and to produce an annual report to that body. The Commission never received a budgetary appropriation and was not formed to provide any type of "services" to the steel industry at the State's expense." United States Questionnaire Response, Aug. 17, 2009, pg. 271. (US-3)

[16] Petition, pg. 50-51. (US-1). "With respect to the alleged exemption from standards under the Clean Air Act, there is no – and petitioners do not allege any – loss to the U.S. government from the alleged exemption." See United States Questionnaire Response, Aug. 17, 2009, pg. 222. (US-3)

Specific deficiencies in the petitioners' subsidy allegations are described in greater detail in Section IV(A), *infra*.

14. Regarding the dumping allegations, petitioners relied on Chinese customs statistics to calculate an export price for GOES,[17] and what they described as "evidence of price of U.S. exports to the European Union" to calculate the normal value.[18] Relying on these data, petitioners estimated a dumping margin for GOES imports from the United States of 25%.[19]

15. The petition alleged that imports of GOES from the United States and Russia caused and threatened injury to the Chinese industry.[20] Citing China's AD regulations, the petitioners argued that a cumulative assessment of injury should be performed, which would collectively take into consideration GOES imports from the United States and Russia.[21] The petition then alleged price undercutting, price depression, and price suppression caused by the imports.[22]

16. To support their allegations, the petitioners purportedly relied on output data for the Chinese manufacturers, consumption data of GOES in China, information on the petitioners' production process, petitioners' sales prices data, and other types of data and information. Virtually none of this information was disclosed, however, because the petitioners sought and obtained from MOFCOM confidential treatment for nine types of information that it claimed was confidential, including categories characterized as broadly as "statistics and information about dumping from the United States"[23] and "items to be adjusted on the subject imports from the United States."[24] Other broad categories of information that petitioner simply redacted included: "similarity or likeliness of production techniques,"[25] "production capacity, output, sales volume, sales vs. output, sales revenue, inventory, capacity utilization rate, change of price, pre-tax profit, return of investment, number of employees, salary, productivity, cash flow, and various changes

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[17] Petition, pg. 17. (US-1)

[18] Id.

[19] Id. at pg. 18. The petitioners also estimated a dumping margin of 37% for GOES imports from Russia.

[20] Id. at pgs. 71-72.

[21] Id. at pg. 52.

[22] Id. at pg. 59.

[23] Id. at pg. 81.

[24] Id. at pg. 79.

[25] Id.

of the petitioners,"[26] "output of the petitioners, total output of the GOES in China, proportion of the petitioners' output in China's total output,"[27] "information about the output of the Chinese domestic manufacturers, their production capacity and sales price,"[28] "sales price of the subject merchandise by the petitioners,"[29] "apparent consumption of GOES in China,"[30] and "the suppressing or depressing effects on the price of a like domestic product and influence on price."[31]

17. On May 15, 2009, MOFCOM notified the U.S. embassy in China of the petition, and offered consultations.[32] On May 27, 2009, the United States and MOFCOM engaged in bilateral consultations regarding the countervailing duty investigation.[33] On June 1, 2009, MOFCOM initiated the anti-dumping, countervailing duty, and injury investigations.[34] For the anti-dumping and countervailing duty proceedings, MOFCOM set a period of investigation from March 1, 2008 to February 28, 2009, and for injury MOFCOM set the period of investigation from January 1, 2006 to March 31, 2009.[35] In the countervailing duty initiation notice, MOFCOM initiated on 22 of the 27 federal and state laws petitioners alleged provided countervailable subsidies.[36]

2. Subsidy Questionnaires and New Allegations

18. On June 26, 2009, MOFCOM issued initial subsidy questionnaires to AK Steel and ATI, as well as the United States. MOFCOM asked the United States for purchase data relating to GOES during the period of investigation.[37] In its questionnaire response, the United States explained that, regarding the Airport and Airway Improvement Act of 1982, and the Surface

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[26] Id. at pg. 80.

[27] Id. at pgs. 78-79.

[28] Id. at pg. 79.

[29] Id.

[30] Id. at pg. 80.

[31] Id.

[32] Preliminary Determination, pg. 3 (US-5)

[33] Id.

[34] CVD Initiation Notice. (US-6)

[35] Id. at pg. 2; AD Initiation Notice. (US-7)

[36] CVD Initiation Notice, pg. 3. (US-6)

[37] United States Questionnaire Response, Aug. 17, 2009, pg. 75. (US-3)

Transportation Act of 1982, no transactions existed in relation to GOES because GOES is not used for airport infrastructure or highway infrastructure.[38] Based on the results from a search of the federal procurement database, the United States also showed that GOES was not purchased by the government.[39]

19. In the subsidy questionnaires issued to AK Steel and ATI, MOFCOM demanded volumes of information unrelated to the subject merchandise.[40] For example, MOFCOM demanded that AK Steel provide detailed transaction data for billions of dollars in transactions involving carbon steel, stainless steel, non-oriented electrical steels, and tubular products – products that are neither inputs for GOES nor substitutable for GOES.[41] Despite the fact that AK Steel produced GOES as only two of its facilities, Butler Works and Zanesville works, MOFCOM demanded detailed information on costs and operations at all seven AK Steel facilities throughout the course of the investigation.[42] MOFCOM increased the burden further by demanding detailed records for sales of all products sold in the past 15 years.[43]

20. Because of the volumes of information requested, neither AK Steel nor ATI could fulfill all of the requests made in the CVD proceeding.[44] Explaining the hardship involved in obtaining this data, AK Steel wrote that "MOFCOM has requested volumes of information on numerous alleged programs that have little or no impact on AK Steel's daily operations and, as a result, AK Steel has needed to educate itself about these alleged programs in order to respond to MOFCOM's questions."[45]

21. In addition, in connection with demands for all sales data for all products, AK Steel referenced the fact that it had already submitted detailed sales data for GOES in the parallel antidumping proceeding, and asked MOFCOM to review that data for purposes of the CVD

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[38] Id. at pg. 65.

[39] Id. at pg. 76.

[40] AK Steel, New Subsidy Questionnaire Response, Sept. 21, 2009, pg. 17 (US-8)

[41] See 2008 10-K Report, at 1. (US-9)

[42] See, e.g., AK Steel, Second Supplemental Questionnaire Response, Oct 9, 2009. (US-10)

[43] AK Steel, Original Questionnaire Response, pg. 22, referencing Table 4-2 in the parallel antidumping proceeding. (US-11)

[44] United States, Countervailing Duty Investigation on Imported Grain Oriented Flat-Rolled Electrical Steel Originating in the United States/Comments on the Final Disclosure, (Mar. 30, 2010), at pg. 4. (US-12)

[45] AK Steel, Response to Deficiency Letter, Sept. 9, 2009. (US-13)

proceeding,[46] since China's antidumping laws and regulations do not provide for separate investigative records. The U.S. companies submitted the questionnaire responses within the deadline specified.

22. The U.S. companies further demonstrated that they did not sell any GOES to any government entity. In addition to referring MOFCOM to detailed sales data for GOES, AK Steel provided MOFCOM customer lists for all products showing that no sales were made to the government.[47] ATI provided customer lists for the subject merchandise.[48]

23. On July 20, 2009, the petitioners filed new subsidy allegations regarding 10 federal and state laws. Petitioners characterized some of the allegations as:

- The "supply of electricity to the steel industry at a low price."[49] The petitioners did not explain how the steel industry paid a lower price than other users.

- The "supply of natural gas to the steel industry at a low price."[50] Petitioners simply got the facts wrong, because GOES producers purchase natural gas on the open market and not from the government.

- A "subsidy to coal for the steel industry."[51] The petitioners complained of a legislative proposal, not a statute.

- The 2003 Economic Stimulus Plan of Pennsylvania."[52] The petitioners appeared to assume that steel is the only industry in the state of Pennsylvania, therefore, any economic assistance provided by the state is specific to the steel industry.

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[46] AK Steel, Original Questionnaire Response, pgs. 20-22, referencing Table 4-2 in the parallel antidumping proceeding. (US-11)

[47] AK Steel, Revised Original Questionnaire Response, Sept 9, 2009, pgs. 21-23 (US-14) and Exhibits {II.3} (US-15)

[48] Preliminary Determination, pg. 28. (US-5).

[49] Petition for Additional Subsidy Programs, June 20, 2009, pgs. 4-9. (US-16)

[50] Id. at pp. 9-13.

[51] Id. at pp. 13-15.

[52] Id. at pp. 25-28.

- "Pennsylvania's Alternative Energy Funding Program."[53] Again, the petitioners got the facts wrong, as publicly available information showed that funding was not provided during the period of investigation, and that GOES producers did not receive any funding.

Section IV(A,), *infra*, describes specific deficiencies in these allegations in greater detail. Despite these deficiencies, on August 19, 2009, MOFCOM initiated an investigation covering these five programs.[54]

24. After filing its initial questionnaire response on August, 10, 2009, in a span of just eight weeks, AK Steel received and responded to five lengthy supplemental questionnaires issued by MOFCOM in the CVD investigation. On September 9, 2009, AK Steel noted the considerable burden resulting from MOFCOM's investigation, and stressed its willingness to cooperate.[55] On September 21, 2009, MOFCOM issued the first supplemental questionnaire to AK Steel, due in one week.[56] MOFCOM issued a second supplemental questionnaire to AK Steel on September 28, 2009 – the same date on which AK Steel filed its first response.[57] On October 16, 2009, MOFCOM issued a third supplemental questionnaire to AK Steel.[58] On October 19, 2009, only three days later, MOFCOM issued a fourth supplemental questionnaire to AK Steel.[59] MOFCOM then issued yet another supplemental questionnaire to AK Steel on November 2, 2009, which was due in one week..[60] AK Steel responded to all of MOFCOM's requests.

3. Preliminary Determination

25. On December 20, 2009, MOFCOM published the preliminary determination. Regarding the government procurement statutes, MOFCOM applied what it termed facts available and calculated a subsidy rate of 11.7% for AK Steel and 12% for ATI.[61] MOFCOM asserted that it

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[53] Id. at pp. 28-30.

[54] MOFCOM, Additional Initiation Notice for Countervailing Duty Investigation, No. 60, Aug. 19, 2009. (US-17)

[55] AK Steel, Response to Deficiency Letter, Sept. 9, 2009. (US-13)

[56] AK Steel, First Supplemental Questionnaire Response, Sept. 28, Oct. 9, 2009. (US-18)

[57] AK Steel, Second Supplemental Questionnaire Response, Oct. 12, 2009. (US-10)

[58] AK Steel, Third Supplemental Questionnaire Response, Oct. 23, 2009 (US-19)

[59] AK Steel, Fourth Supplemental Questionnaire Response, Oct. 26, 2009. (US-20)

[60] AK Steel, Fifth Supplemental Questionnaire Response, Nov. 5, 6, 2009. (US-21)

[61] Preliminary Determination, pg. 45. (US-5)

applied facts available to the U.S. companies because it determined that the U.S. companies did not cooperate in its investigation.[62] MOFCOM specifically cited U.S. companies' failure to provide data on all sales of all steel products.[63] As indicated above, MOFCOM demanded that the two companies demanded that the two companies provide detailed sales data for all products for a 15-year period.[64] Thus, for example, according to MOFCOM, notwithstanding the evidence demonstrating that the U.S. government does not purchase GOES and that AK Steel and ATI sold no GOES to any government entity during the POI, AK Steel's and ATI's failure to provide detailed sales data for billions of dollars in transactions involving carbon steel, stainless steel, non-oriented steels, and tubular products meant that the company had failed to completely cooperate in MOFCOM's investigation of whether GOES benefitted from federal procurement subsidies, and that therefore use of facts available was warranted. The only reference to how MOFCOM calculated the subsidy rate for federal procurement is enigmatic:

> The Investigation Authority has deduced that the steel products of the respondent companies were sold at a prices 25% higher than that of foreign products; therefore, the steel products of the respondent companies were sold at a price 18% higher than the US market price. Based on this, it was calculated that the US market price was 14.4% lower than the constructed domestic sales price of the respondent companies. Further, in the preliminary determination, the Investigation Authority provisionally determined 14.4% of the domestic sales revenue of respondent companies as the amount of benefit under this program.[65]

Without analysis, MOFCOM erroneously concluded that the U.S. companies sold all of their products, including products other than GOES, for a price 25% higher than that for foreign products.[66] MOFCOM also neglected to elaborate on what it described as the "constructed domestic sales price of the respondent companies."

26. For two programs available in States where AK Steel produced only non-subject merchandise such as carbon steel, stainless steel, non-oriented steel products, and tubular products, MOFCOM found *de minimis* levels of countervailable subsidies.[67] For 19 federal and

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[62] Id. at pg. 30.

[63] Id.

[64] AK Steel, Revised Questionnaire Response, Sept. 9, 2009, pp. 21-22. (US-14)

[65] Preliminary Determination, pg. 31. (US-5)

[66] The source of the 25% markup apparently is the general rule that an agency may purchase foreign products under procurement requirements if the price of domestic products is 25% greater than the price of foreign products. Id. at pg. 30.

[67] Id. at pp. 37, 45.

state programs, MOFCOM did not calculate subsidy rates, and for two programs, MOFCOM stated that it would investigate further.[68]

27. MOFCOM did not provide non-confidential summaries of the purportedly confidential information supplied by petitioners that it relied on in the preliminary determination, or request that the petitioners provide non-confidential summaries. Thus, MOFCOM appears to have accepted the petitioners' request for confidential treatment for the categories of information noted without requiring additional non-confidential summaries of the information submitted.

28. Regarding its benefit determination for the federal procurement statutes, MOFCOM concluded that competitive bidding under the procurement statutes does not result in a valid market price. While conceding that competitive bidding exists, MOFCOM nonetheless concluded that the qualification criteria for bid participants prevented the price from reflecting true market conditions. According to MOFCOM:

> The Investigation Authority found that, according to provisions in the Buy American Act and other regulations, although there is competitive bidding process, using steel and finished products produced from the U.S. is required unless there is a waiver. The Investigation Authority holds that this fact shows that the scope of products allowed for bidding under Buy American Act has actually been limited to some extent, and thus the bidding is not market competition in the usual sense....
>
> Investigation Authority considered that the competitive bidding restricted the scope of participating products, and thus could not reflect the full market competition. Even if there is competition, it is competition only among the U.S. domestic steel products (may include part of the foreign products at the federal level and in some regions). Hence the price obtained through competitive bidding does not reflect the true market conditions.[69]

29. MOFCOM calculated preliminary dumping margins of 10.7% for AK Steel, 19.9% for ATI,[70] and 25% for all others.[71] The only explanation MOFCOM provided regarding how it calculated the all others rate was a single sentence in its report, as follows: "Regarding the other U.S. companies who failed to register responses or to submit responses, in accordance with Article 21 of the Anti-Dumping Regulation, the Investigation Authority decided to adopt the obtained and best

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[68] Id. at pp. 41, 45-46.

[69] Id. at pg. 27.

[70] Id. at pg. 21.

[71] Id.

information available to make the determination as for dumping and dumping margin."[72] MOFCOM provided no further explanation of its calculation of the all others dumping rate, and it did not disclose the information forming the basis for the calculation of this rate.

30. The all others subsidy rate in the preliminary determination was 12%.[73] As with the all others dumping rate, MOFCOM did not explain how it calculated the all others subsidy rate.

4. On-Site Verification

31. Between January 5, 2010 and January 13, 2010, MOFCOM conducted an on-site verification of each of the two U.S. companies subject to individual investigation. The detailed sales data for GOES and customer lists for all products submitted by AK Steel and detailed GOES sales data submitted by ATI before the verification were usable for the determination of the subsidy rate because the data showed records for all sales, as well as the absence of sales to the government. MOFCOM could have used these data, in conjunction with the information supplied by the United States from its procurement database, to determine that GOES was not purchased by the U.S. government under any federal procurement programs. Because the detailed sales data for GOES and customer lists for all products submitted by AK Steel provided a basis for MOFCOM to determine the level of sales to government entities, the U.S. companies requested that MOFCOM verify the customer lists submitted before the preliminary determination was issued:

> AK Steel made two oral requests that MOFCOM review and verify its list of customers to confirm that AK Steel did not sell the subject merchandise or any other merchandise to any government entities during the POI. We again request that MOFCOM verify this key data, particularly because the alleged government procurement subsidies represented virtually the entire amount of the subsidy margin assigned to AK Steel in the preliminary determination. We are providing this request in writing to ensure that AK Steel's willingness to cooperate is reflected in the record of the investigation.[74]

Despite this request, MOFCOM did not verify the customer lists in the CVD proceeding.[75]

32. As noted above, in its response to the initial CVD questionnaire, AK Steel initially directed MOFCOM to the detailed GOES sales data it had submitted in the antidumping investigation. In

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[72] Id. at pg. 17.

[73] Id at pg. 45.

[74] AK Steel, Written Request to Verify the Customer Lists, Jan. 12, 2010 (US-22)

[75] MOFCOM, the Disclosure Letter for Fundamental Facts of the Verification on AK Steel Corporation in the GOES Anti-Subsidy Investigation, Mar. 3, 2010, pg. 3. (US-24)

subsequent submissions, AK Steel provided a customer list for all products[76] and then re-submitted the detailed GOES data it had provided in connection with the AD proceeding..[77] In the parallel antidumping proceeding, MOFCOM verified this sales data, but when the very same team of verifiers were asked to verify this data for the CVD proceeding,[78] MOFCOM refused to allow it to be verified.[79][80] MOFCOM did not question the reliability of the sales data provided in the antidumping proceeding.

5. Disclosure Documents

a. Factual Disclosure on Dumping Margin and Subsidy Rate

33. Prior to issuing the Final Determination for the antidumping and countervailing duty investigations, MOFCOM released its Final Disclosure, in which it revealed that it had nearly quadrupled the all others subsidy rate to 44.6 percent.[81] As with the Preliminary Determination, the Final Disclosure provided only the following observation to explain the source of the all others subsidy rate: "[t]he margin for all other American companies was calculated based on information submitted by the petitioners pursuant to article 21 of the CVD regulations."[82] Article 21 of China's CVD regulations pertains to facts available. MOFCOM did not disclose the facts that led it to conclude that the use of facts available was justified for all other U.S. companies. It also did not disclose the facts that led it to conclude that 44.6 percent was a justifiable rate or the calculations performed to determine this rate.

34. Also in the Final Disclosure, MOFCOM revealed that it was increasing the all others dumping rate to 64.8 percent.[83] Again, MOFCOM simply provided a vague reference to Article 21

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[76] AK Steel, Revised Original Questionnaire Response, Exhibit II.3 (US-15)

[77] AK Steel, Comments on Preliminary Determination, Exhibit 1 (US-23)

[78] AK Steel, Original Questionnaire Response, Aug. 10, 2009, pp. 20-22, referencing Table 4-2 in the parallel antidumping proceeding; (US-11)

[79] MOFCOM, the Disclosure Letter for Fundamental Facts of the Verification on AK Steel Corporation in the GOES Anti-Subsidy Investigation, Mar. 3, 2010, pg. 3. (US-24)

[80] MOFCOM, the Disclosure Letter for Fundamental Facts of the Verification on AK Steel Corporation in the GOES Anti-Dumping Investigation, pg. 5, (US-25); *compare to* MOFCOM, the Disclosure Letter for Fundamental Facts of the Verification on AK Steel Corporation in the GOES Anti-Subsidy Investigation, Mar. 3, 2010, pg. 2. (US-24)

[81] Final Disclosure (US-26).

[82] Id.

[83] Id.

of China's antidumping law, and beyond that offered not a single piece of information regarding how the rate was calculated.[84] It did not disclose the particular "transaction information" that it used to calculate the all others rate or the facts leading it to conclude that a rate of 64.8 percent, which represented a substantial increase from the rate contained in the Preliminary Determination, was appropriate.

b. Injury Disclosure

35. On March 5, 2010, the Industry Injury Investigation Bureau of MOFCOM issued a document titled "Basic Facts Based on Which the Industry Injury Determination of the Antidumping Investigation into GOES Imports from the United States and Russia and the CVD Investigation into GOES Imports from the United States was Made" ("Injury Disclosure Document"). The document purported to "disclos[e] the basic facts upon which the final injury determination is made.

36. The Injury Disclosure Document provided some basic information about the volume of the imports under investigation, as well as trend information concerning the condition of the domestic industry.[85] Nevertheless, with respect to an issue that was critical to the subsequent injury determination – pricing – MOFCOM disclosed strikingly few facts. The only factual disclosure that purported to relate to price levels is found in a section of the Injury Disclosure Document titled "Price of the Subject Merchandise." There, MOFCOM stated as follows:

> According to the custom statistics, the price of GOES originated from the United States and Russia during 2006, 2007, 2008 and Q1 2009 is RMB25913.08/ton, RMB26683.58/ton, RMB31371.75/ton, and RMB26672.64/ton respectively.[86]

37. What MOFCOM characterized as "pricing" data were in fact average unit value data for transactions derived from Customs statistics. MOFCOM combined average unit value data for products imported from the United States and Russia, notwithstanding the fact that separate data for each country could be derived from the Customs statistics. MOFCOM also decided to use only one annual observation for calendar years 2006, 2007, and 2008. Consequently, in a three and one-quarter year period of investigation concerning products from two countries, MOFCOM reported – and apparently relied upon – only four observations of average unit values for the imports under investigation.

38. In short, MOFCOM's disclosure included *no information* concerning actual prices charged for *any product* in any commercial transaction.

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[84] Id.

[85] Injury disclosure, secs. V, VI. (US-27)

[86] Id. at sec. V(2).

39. Instead, the sole information that the Injury Disclosure Document provided concerning pricing of the domestically produced product addressed pricing trends. The Document stated that prices for the domestically produced product were 6.66 percent higher in 2007 than in 2006, and that prices increased even more rapidly – by 14.53 percent -- between 2007 and 2008. The Document reported a 30.25 percent price decline in the first quarter of 2009.[87]

40. MOFCOM did not state how it generated any information on the pricing of the domestically produced product. The minimal information disclosed concerning pricing trends suggests that, as with the imports, MOFCOM relied on only four pricing observations for domestically produced products.

41. Another issue central to the final determination was price suppression and the Chinese producers' purported inability to recover increasing costs. While the Injury Disclosure Document provided some information concerning trends in sales revenue and profits before tax, it disclosed nothing concerning the level, trends, or composition of the domestic industry's costs.[88]

42. On causation, MOFCOM disclosed that the Chinese industry's capacity increased by 53.67 percent in 2008, and was 80.13 percent higher in the first quarter of 2009 than during the first quarter of 2008.[89] The large capacity increases facilitated substantial increases in production, which rose by 23.91 percent in 2008, and was 55.23 percent higher in the first quarter of 2009 than during the first quarter of 2008.[90] These increases in production outstripped even robust increases in demand – particularly so in the first quarter of 2009. Chinese demand for GOES rose by 18.09 percent in 2008 and was 12.46 percent higher in the first quarter of 2009 than during the first quarter of 2008.[91] As a result, the domestic industry's inventories soared. They rose by 839.02 percent in 2008 and were 978.81 percent higher in first quarter of 2009 than during the first quarter of 2008.[92]

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[87] Id. at sec. VI(3).

[88] Id. at sec. VI.

[89] Id. at sec. VI(15).

[90] Id. At sec. VI(2).

[91] Id. at sec. VI(1).

[92] Id. at sec. VI(14).

6. Final Determination

a. Subsidy and Dumping Findings

43. On April 10, 2010, MOFCOM issued the final determination for the antidumping and countervailing duty investigations. MOFCOM applied a dumping margin of 7.8% to AK Steel, and 19.9% to ATI.[93]

44. For the subsidy rate, MOFCOM continued to use what it termed facts available to calculate subsidy rates for the federal procurement statutes because the respondents did not provide 15 years of detailed sales data for carbon steel, stainless steel, non-oriented electrical steels, and tubular products.[94] To calculate the amount of the subsidy purportedly benefitting GOES products, MOFCOM, relying on facts available, assumed that AK Steel and ATI sold only carbon steel, and sold *all* of their output to the government, despite the fact that the record demonstrated there were no sales of GOES to the government, AK Steel did not sell any product to any government entity during the POI, and only a limited amount of non-GOES AK Steel and ATI products could even as a theoretical matter have been purchased in connection with alleged government procurement,, as discussed below. Without any analysis, MOFCOM determined that U.S. carbon steel prices were 25% above prices for foreign products.[95]

45. Using its constructed benchmark for carbon steel, MOFCOM calculated subsidy rates for the federal procurement statutes indicating that GOES from AK Steel benefitted from subsidies at the rate of 11.918% and GOES from ATI benefitted at the rate of 11.65%.[96] For two states with laws that were only theoretically relevant to AK Steel production of non-GOES, MOFCOM found *de minimis* levels of countervailable subsidies.[97] For 18 other federal and state laws, MOFCOM found that no countervailable subsidy existed.[98]

46. In the final determination, as in the preliminary determination, MOFCOM did not provide non-confidential summaries of the purportedly confidential information petitioners that it relied on in the preliminary determination, or request that the petitioners provide non-confidential summaries.

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[93] Final Determination , pg. 30. (US-28)

[94] Id. at pg. 36.

[95] Id. at pg. 38. The source of the 25% markup apparently is the general rule that an agency may purchase foreign products under procurement requirements if the price of domestic products is more than 25% greater than the price of foreign products.

[96] Id. at pg 40.

[97] Id. at, pp. 44, 48.

[98] Id. at pp. 49-50.

47. Regarding the procurement statutes, MOFCOM also concluded that the prices obtained through the competitive bidding process provided for under U.S. law does not reflect real market prices.[99] In doing so, MOFCOM dismissed the position of the United States that procurement in the United States occurs under competitive bidding conditions and that foreign companies may compete for bids.[100] Repeating its position in the preliminary determination, MOFCOM simply stated that the prices generated by competitive bidding do not reflect market prices:

> The Investigating Authority found in its further investigation that the import volume of excluded foreign products usually accounts for 15% of total steel consumption in the U.S. Perhaps this rate is not significant, but this portion of foreign products may have a comparatively lower price, and competitive bidding that excludes this relatively cheaper steel cannot reflect the real market competition.[101]

The discussion in the final determination that procurement prices "do not reflect market conditions" appears to reflect full rationale and explanation of MOFCOM's conclusions.

48. Ignoring U.S. comments explaining the flaws in the all others subsidy rate calculation, filed in response to the disclosure document,[102] MOFCOM, in the Final Determination, imposed a final all others subsidy rate of 44.6 percent.[103] MOFCOM stated that for other U.S. producers/exporters that it did not examine, it determined the subsidy rate "according to the information submitted by the petitioner. . . ."[104] Again, at no time prior to the Final Determination did MOFCOM disclose to the United States or other interested parties the essential facts under consideration that formed the basis for the near quadrupling of the all others subsidy rate, other than stating that the rate was based on information from the petitioners pursuant to Article 21 of China's CVD regulations. MOFCOM's

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[99] Id. at pg. 36.

[100] United States, Anti-Subsidy Investigation on Imported Grain Oriented Flat-Rolled Electrical Steel Originating in the United States/Comments on the Preliminary Determination, (Dec. 30, 2009), at pg. 4 (US-4).; United States, Countervailing Duty Investigation on Imported Grain Oriented Flat-Rolled Electrical Steel Originating in the United States/Comments on the Final Disclosure, (Mar. 30, 2010), at pg. 6.(US-12)

[101] Final Determination, pg. 36. (US-28)

[102] The United States observed that "it appears that the rate may have been determined based on information placed on the record by petitioner. Assuming this is true, , and as this all-others rate is much higher than the individual rates calculated for each mandatory respondent in this case, MOFCOM apparently has ignored the detailed record regarding the actual experience of the US industry (as reflected in individual calculated rates) in favor of speculative information placed on the record by the petitioners." United States, Countervailing Duty Investigation on Imported Grain Oriented Flat-Rolled Electrical Steel Originating in the United States/Comments on the Final Disclosure, (Mar. 30, 2010), at pg. 7. (US-12)

[103] Final Determination, pg. 49 (US-28)

[104] Id.

explanation did not change from the preliminary determination and disclosure document to the final determination.

49. In the final determination, MOFCOM calculated an all others dumping rate of 64.8%, 332% higher than that in its preliminary determination.[105] It did so despite the fact that the dumping rates it calculated for the two respondents, AK Steel and ATI, were substantially lower that 64.8 percent – that is, 7.8 percent and 19.9 percent, respectively. Again, MOFCOM's only explanation was that it relied upon Article 21 of its Anti-Dumping Regulation and "the best information available and facts available and the information submitted by the respondent companies to make [the] determination on dumping and dumping margin" for all other U.S. companies.[106] The Final Determination contains no other explanation of how MOFCOM calculated the rate, the data it relied on, or why an increase from 25% was warranted for other U.S. producers/exporters that it did not examine.

b. Injury Findings

50. In its final determination, MOFCOM found that China' GOES industry sustained material injury and there was a causal link between the dumped imports of GOES from Russia and the dumped and subsidized imports of GOES from the United States and this injury.[107] A critical aspect of the causation analysis concerned the purportedly significant price effects of the imports under investigation.

51. MOFCOM furnished its principal price effects findings in section V(III) of its Final Determination. MOFCOM repeatedly stated that the importers had a "strategy" of charging "low prices." One critical finding at the beginning of the section is that "[t]he contracts and original records from the price formulation process provided by petitioners showed that the subject merchandise adopted a pricing strategy of selling at a price lower than Chinese like products in the Chinese domestic market. Because subject merchandise was kept at a low price, and the import volume of subject merchandise increased greatly since 2008, domestic producers had to lower their prices to keep market share."[108] MOFCOM failed to specify the nature of these contracts or records, or summarize their content in the Final Determination. As previously discussed, the Injury Disclosure Document contained no information concerning actual prices charged for any product in any commercial transaction. It also provided no information about these contracts or records.

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[105] Id. at pg. 30.

[106] Id.

[107] Id. at sec. I.

[108] Id. at V(III)(3). MOFCOM reiterated this finding in its response to the comments on the Injury Disclosure Document. *See id.*, sec. VII(2)(3) ("The Investigating Authority affirmed, as per accumulative valuation of the case and relevant evidence, the subject merchandise adopts the price strategy to be lower than the price of domestic like product in the Chinese market.")

52. Both the Russian and U.S. parties argued to MOFCOM that their prices were not in fact lower than the prices charged by the domestic producers. MOFCOM rejected these arguments at the end of its pricing discussion, in language almost identical to its "low price strategy" finding quoted above, providing no greater detail as to the nature or application of the policy. Specifically, it stated that "[t]he relevant evidence shows that the low price policy was adopted when selling subject merchandise in Chinese market and forced petitioners to drop the price of like products and caused the differential between price and cost to continue decreasing."[109] MOFCOM did not elaborate upon the nature of the "evidence" supporting this finding. By the same token, MOFCOM's causation discussion referenced that "[t]he pricing strategies and sales prices of subject merchandise in the Chinese domestic market have had a significant impact on the sales price for the Chinese like product," without specifying the nature of those "strategies" or explaining how such "strategies" were implemented.[110]

53. While the Injury Disclosure Document provided no comparisons of prices of domestic and imported products, there was one such comparison in the Final Determination. MOFCOM revealed for the first time, in its response to the disclosure comments, that "the Investigating Authority did not conclude that the price of the imported subject merchandise was lower than the price of the domestic like product in Q1 of 2009."[111] The Final Determination, however, contained no specific comparisons of prices of the imported and domestically produced product during the remaining period of investigation – calendar years 2006 through 2008.

54. As previously stated, notwithstanding the foregoing MOFCOM found that the imports under investigation had price-depressing effects. In particular, it found that domestic producers had to "lower their prices to keep market share" in response to the "pricing strategy" of the imports under investigation.[112]

55. MOFCOM also found that the imports under investigation had price-suppressing effects. It found that, because of the imports under investigation, domestic producers were not able to recover rising costs in the first quarter of 2009.[113]

56. MOFCOM provided in Section VI of its Final Determination its basic rationale for finding a casual linkage between the imports under investigation and material injury to the domestic industry. MOFCOM first found that, during 2008 and the first quarter of 2009, imports increased more quickly

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[109] Id. at sec V(III)(3).

[110] Id. at sec. VI(II)(1).

[111] Id. at sec. VII(II)(1)(4).

[112] Id. at sec. V(III)(3). *See also id*., sec. VI(I) ("Chinese producers have had to reduce prices for the like product.").

[113] Id. at sec. V(III)(3).

than domestic demand. MOFCOM then found that the increased market penetration of the imports under investigation caused declines in the domestic industry's capacity utilization and increases in its inventories in 2008 and the first quarter of 2009.[114]

57. MOFCOM next repeated the price effects findings from the injury disclosure. MOFCOM concludes that the subject imports, because of their purported underselling and purportedly significant price-depressing and -suppressing effects, "result[ed] in sharp decline[s] in the profitability of the domestic industry." MOFCOM cited as other adverse effects declines in sales revenues, profits, return on investments, and employment-related factors during the first quarter of 2009.[115]

58. MOFCOM further purportedly examined whether other factors caused injury to the domestic industry. In every instance, it found that the other factors caused no injury. Thus it found that GOES imports from countries other than Russia and the United States were not a cause of injury. MOFCOM's entire explanation with respect to such imports is as follows:

> During the POI, the proportion of total imports in China's total imports had been increasing, while the proportion of the volume of GOES imported from other countries and regions in total imports continued to drop. Moreover, there is no evidence that imports from other countries (regions) were ever dumped or subsidized. Therefore, there is no evidence suggesting that GOES imported from other countries or regions caused material injury to China's domestic industry.[116]

This discussion, which was the sole discussion in the Final Determination concerning imports from sources other than the United States and Russia, provided no empirical data concerning imports from nonsubject countries. Nor did MOFCOM include any information about imports from nonsubject countries in its Injury Disclosure Document.

59. Finally, MOFCOM responded to the U.S. comments that the Chinese industry's decisions to expand capacity and production were a likely alternative cause of injury. The United States argued before MOFCOM that the sharp increase in inventories caused by the domestic industry's overexpansion was an alternative cause of injury. MOFCOM rejected these arguments and concluded that the domestic industry's sharp increases in capacity, production, and inventories were not a cause of any injury to the domestic industry.[117]

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[114] Id. at sec. VI(I).

[115] Id. at sec. VI(I).

[116] Id. at sec. VI(II)(5). This finding repeats almost *verbatim* the comparable finding in the Preliminary Determination. Preliminary Determination (US-5), sec. VII(II)(5).

[117] Id. at sec. VII(II)(9).

60. MOFCOM concluded [without further analysis] that no factor than the imports under investigation caused or contributed to the material injury that it found the domestic industry was experiencing. The Final Determination consequently contained no non-attribution analysis.

IV. Legal Argument

61. China's measures imposing antidumping and countervailing duties on imports of GOES from the United States are inconsistent with a number of provisions of the AD Agreement, SCM Agreement, and the GATT 1994.

62. First, the initiation of the investigation was inconsistent with Article 11 of the SCM Agreement. An application to initiate a CVD investigation must include sufficient evidence of financial contribution, benefit, and specificity to satisfy the requirements of Article 11.2. For several allegations contained in the petition, the programs established under the laws and alleged to provide countervailable subsidies either were no longer in effect and could no longer provide benefits to the U.S. companies; the petitioners do not offer evidence of specificity; or the petitioners did not offer evidence of a financial contribution. Therefore, the petition failed to meet the requirements of Article 11.2.

63. In addition, to satisfy the requirements of Article 11.3, an investigating authority must objectively assess the accuracy and adequacy of the evidence contained in the petition before initiating an investigation. MOFCOM, however, failed to examine the accuracy and adequacy of the evidence with respect to several alleged subsidies. Regarding several of the supposed subsidies at issue, an objective investigating authority would not have initiated an investigation based on the petition's unsupported allegations.

64. Second, China breached Article 12.4.1 of the SCM Agreement and Article 6.5.1 of the AD Agreement because it failed to require non-confidential summaries of allegedly confidential information. The only purported non-confidential summaries are contained in the petition; no summaries of confidential information are contained in the preliminary determination, disclosure documents, nor final determination. Also, the purported non-confidential summaries in the petition are not in fact summaries. Instead, the petition only provides requests for confidential treatment of data and information. It does not summarize the information in a manner permitting a reasonable understanding of the substance of the data and information treated as confidential.

65. Third, China breached Article 12.7 of the SCM Agreement because its use of facts available was improper. MOFCOM ignored necessary information provided by the U.S. companies. The U.S. companies provided this necessary information within a reasonable period of time, and they did not impede the investigation. MOFCOM's use of facts available was unjustified and punitive.

66. Fourth, China breached Article 12.2.2 of the AD Agreement because it failed to make available to AK Steel and ATI the calculations used to determine these companies' final dumping margins. The dumping calculations are "relevant information on the matters of fact" that led to the

imposition of definitive measures. Accordingly, MOFCOM was required to make them available, but it did not do so.

67. Fifth, MOFCOM failed to adequately explain its findings and conclusions supporting its determinations that the competitive bidding process under the U.S. government procurement statutes at issue does not result in prices that reflect market conditions. These findings and conclusion were material to its finding of benefit in its subsidy investigation. MOFCOM failed to explain its novel benefit theory in the preliminary and final determinations. Therefore, China acted inconsistently with Article 22.3 of the SCM Agreement.

68. Sixth, MOFCOM, without explanation, applied countervailing duties based on facts available to other U.S. exporters/producers of GOES that were not named in the petition and were never sent a questionnaire. MOFCOM never notified a single producer other than those identified in the petition of the existence of the investigation, the information that would be required of them, or the consequences of not fully complying with MOFCOM's requests. MOFCOM compounded the impact of its application of facts available by providing no detail in its Final Determination and final disclosure documents with regard to the findings that led to its application of facts available. As a result of this lack of disclosure, the United States and other U.S. companies were deprived of any opportunity to defend their interests with respect to this issue. Thus, China acted inconsistently with Articles 12.7, 12.8, 22.3, and 22.5 of the SCM Agreement.

69. Seventh, as with the application of countervailing duties to other U.S. exporters/producers of GOES that were not named in the petition and were never sent a questionnaire, MOFCOM appears to have applied a facts available dumping margin to other U.S. producers/exporters of GOES despite never notifying a single producer other than those identified in the petition of the existence of the investigation, the information that would be required of them, or the consequences of not fully complying with MOFCOM's requests. In so doing, MOFCOM did not disclose the essential facts and conclusions of law that led it to this result. Consequently, China acted inconsistently with Articles 6.8 and 6.9 of the AD Agreement.

70. Eighth, MOFCOM's price effects analysis in its injury determination was fundamentally flawed in many respects. MOFCOM failed to disclose essential facts supporting is price effects analysis. MOFCOM's price effects analysis was also not based on positive evidence. In conducting its price effects analysis, MOFCOM did not engage in an objective examination of the evidence. MOFCOM did not offer an adequate explanation for its price effects findings. Therefore, China acted inconsistently with Articles 3.1, 3.2 , 6.9, and 12.2.2 of the AD Agreement, and Articles 12.8, 15.1, 15.2, and 22.5 of the SCM Agreement.

71. Finally, MOFCOM's causation analysis in its injury determination was similarly deficient. MOFCOM failed to disclose facts supporting its causation analysis. MOFCOM's causation analysis was not supported by positive evidence. MOFCOM's causation analysis was not based on an objective examination of the evidence. MOFCOM also did not communicate an adequate explanation

for its causation findings. Therefore, China acted inconsistently with Articles 3.1, 3.5, 6.9, and 12.2.2 of the AD Agreement, and Articles 12.8, 15.1, 15.5, and 22.5 of the SCM Agreement.

A. The Initiation of the Countervailing Duty Investigation for Several Programs Breached Article 11 of the SCM Agreement

1. The Petition Did Not Meet the Requirements of Article 11.2 Because It Offered No Evidence of Basic Subsidy Elements for Several Programs

72. Article 11.2 of the SCM Agreement sets out evidentiary requirements for petitions requesting to initiate countervailing duty investigations:

> An application... shall include sufficient evidence of the existence of (a) a subsidy and, if possible, its amount, (b) injury within the meaning of Article VI of GATT 1994 as interpreted by this Agreement, and c) a causal link between the subsidized imports and the alleged injury. Simple assertion, unsubstantiated by relevant evidence, cannot be considered sufficient to meet the requirements of this paragraph. The application shall contain such information as is reasonably available to the applicant on the following:...
> (iii) evidence with regard to the existence, amount and nature of the subsidy in question

73. The first sentence of Article 11.2 provides that "an application...shall include sufficient evidence of the existence of...a subsidy." Regarding the types of evidence that would constitute "evidence of the existence of a subsidy," the context of the provision, in particular, SCM Agreement, Articles 1, provides guidance. Article 1.1(a)(1) of the SCM Agreement explains that a subsidy exists if it includes a "financial contribution by a government or any public body." Article 1.1(a)(2) states that a benefit must be conferred for a subsidy to exist.

74. An application to initiate a CVD investigation therefore must include sufficient evidence of financial contribution and benefit to satisfy the requirements of Article 11.2. In addition, since Article 1.2 makes clear that Part III of the SCM Agreement only applies if a subsidy is specific, the application must also include evidence of specificity for each subsidy. This is reflected in Article 11.2(iii), which refers to evidence with regard to the "existence, amount and nature of the subsidy in question." Also, the petition must include sufficient evidence of these elements for *all* programs alleged to provide countervailable subsidies. Regarding "sufficient evidence," the second sentence of Article 11.2 states that "simple assertion, unsubstantiated by relevant evidence, cannot be considered sufficient." Article 11.2 thus helps "ensure that investigations are not initiated on the basis of frivolous or unfounded suits."[118]

75. The third sentence of Article 11.2 indicates that an application shall include "evidence with regard to the existence, amount and nature of the subsidy in question," as is "reasonably available."

[118] *US – Offset Act (Byrd Amendment Panel)* at 7.61.

Thus, an application may meet the requirements of Article 11.2 "even if it does not include all the specified information if such information was not reasonably available to the applicant."[119] Nonetheless, the application must "provide an evidentiary basis for the initiation of the investigative process."[120]

76. In the case of GOES, for several programs, the application offered *no evidence* of basic subsidy elements and was based on simple assertion.[121]

77. Nor did the applicant suggest that relevant information regarding financial contribution, benefit, or specificity was not "reasonably available," and indeed, a closer review of other aspects of the application indicate that information reasonably available to the applicant suggested that these programs were *not* subsidies that were specific.

78. In particular, the application failed to adequately allege one or more elements of subsidy with respect to the following measures alleged to provide subsidies to the U.S. industry:

> ***Medicare Prescription Drug, Improvement and Modernization Act of 2003.***[122] The petition alleged that this law provided a subsidy to GOES producers. The petition did not however include any evidence of specificity. Rather, the petition simply asserts without support that "the subsidy provided by the federal government for AK Steel has the characteristic of special orientation provided in Article 4 of the CVD Regulations."[123] The petition does not elaborate on the nature of this "special orientation," or cite to any evidence to support this assertion.
>
> ***Economic Recovery Tax Act of 1981.***[124] The petition alleged that the safe harbor leasing provision under the Economic Recovery Act of 1981, which was in effect for only two years, provided a countervailable subsidy. The petition did not include any evidence showing that the program provided a benefit during the period of investigation, nor did the petition allege that benefits from the alleged subsidy would be allocated to the period of investigation. The only evidence petitioners offered to support their assertions with respect to this program was a citation to a book, written in 2000, which includes figures from 1982. The authors of the

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[119] *US – Softwood Lumber Dumping (Panel)* at para. 7.55.

[120] Id. at para. 7.54.

[121] United States, Comment Regarding the Initiation Based on the New Allegations, (Aug. 17, 2009) (US-29)

[122] Petition, pg. 36. (US-1)

[123] Id.

[124] Id. at pg. 44.

book state that the law was in effect for only two years, expiring in 1983 – over *20 years before* the period of investigation.[125]

Tax Reform Act of 1986.[126] The petition alleged that a transition rule under the Tax Reform Act of 1986 for the steel industry provided a countervailable subsidy. The petition stated that "from 1986 to 1990, this special transition brought subsidy of $574 million to the domestic steel industry, and forms the provision of 'brings a benefit to the receiver' in Article 3 of the CVD Regulations."[127] The petition did not include any evidence showing that the program provided a benefit during the period of investigation, nor did the petition allege that benefits from the alleged subsidy would be allocated to the period of investigation. The only document the petition cites to in support of its position was written in 1999, and sets out figures on the program from 1986 to 1990 - over *15 years before* the beginning of the period of investigation.[128]

Steel Import Stabilization Act of 1984.[129] Petitioners alleged that voluntary restraint agreements concluded under the Steel Import Stabilization Act of 1984 constituted a countervailable subsidy. Petitioners provided no support for their assertion that these agreements constituted a financial contribution.[130]

State of Indiana Steel Industry Advisory Service.[131] Petitioners alleged that the establishment by the State of Indiana of a Steel Industry Advisory Commission to examine state and federal laws affecting the steel industry constituted a countervailable subsidy. The petition did not include any evidence showing that the advisory service provided a financial contribution, or that the advisory service even conducted a single study.[132] Rather the petition merely asserts that "the government undertook projects that would have cost huge amount of

[125] Id., citing "Paying the Price for Big Steel," at pg. 133. (US-30)

[126] Id. at pg. 44.

[127] Id.

[128] Id. citing "Subsidies to the U.S. Steel Industry," pg. 2. (US-31)

[129] Id. at pg. 48.

[130] Id. at pg. 48, citing "Paying the Price for Big Steel." (US-30)

[131] Id. at pg. 49.

[132] United States Questionnaire Response, Aug. 17, 2009, at pg. 271: "To our knowledge, no such studies were actually undertaken." (US-3)

payment by the steel companies., which is significant financial contribution to the companies."[133]

Grace periods for compliance with the Clean Air Act.[134] The U.S. Congress in 1981 provided steel firms an additional grace period for compliance with Clean Air Act emissions standards. The petition did not include any evidence showing that the legislation provided a financial contribution or that the program conferred a benefit during the period of investigation. The only evidence petitioners offered with respect to this program was a chapter in a book that was written in 2000, which noted that the grace periods ended in 1985 — over 20 years before the beginning of the period of investigation.[135]

Electricity.[136] The petitioners alleged that U.S. GOES producers received a countervailable subsidy through the pricing of electricity. Yet the petition contains no evidence of a financial contribution, or of the basis for the existence of a benefit during the period of investigation. In addition, the petitioners provided no evidence of specificity, instead simply asserting that the government "manipulates the electricity sales prices of the government-owned or government-controlled electricity companies in order to supply electricity to the steel industry at low prices."[137]

Natural Gas.[138] The petitioners alleged that U.S. GOES producers received a countervailable subsidy through the pricing of natural gas. Petitioners provided no evidence that a financial contribution or the basis for the existence of a benefit during the period of investigation. The market described by petitioners ceased to exist when the U.S. natural gas market was deregulated in the 1980s.[139] In addition, there was no evidence of how any alleged subsidy to the natural gas industry was passed through to steel producers, nor was there any evidence provided regarding specificity.

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[133] Petition, pg. 49. (US-1)

[134] Id. at pp. 50-51.

[135] Id. citing "Paying the Price for Big Steel," pg. 147. (US-30)

[136] Petition for Additional Subsidy Programs, June 20, 2009, pp. 4-9. (US-16)

[137] Id.

[138] Id. at pp. 9-13.

[139] United States, Comment Regarding the Initiation Based on the New Allegations, (Aug. 17, 2009) (US-29)

Coal.[140] The petitioners alleged that U.S. GOES producers received a countervailable subsidy through the pricing of coal. The petition contains no evidence of a financial contribution or sufficient evidence for the existence of a benefit. The application only claims, without citation, that "there is reason to believe that the subsidized coal price is much lower than unsubsidized coal price, which benefit the GOES industry economically by the decreased production cost."[141] No evidence was provided regarding specificity. The petitioners referred to the American Clean Energy Security Act of 2009 as providing a countervailable subsidy, a law that did not exist during the period of investigation (and indeed was merely a legislative proposal at the time the new subsidy allegation was filed).[142] Petitioners allegations thus related to a law that did not exist, and therefore could not have provided a financial contribution or benefit, during the period of investigation.

2003 Economic Stimulus Plan of Pennsylvania.[143] Regarding the 2003 Economic Stimulus Plan of Pennsylvania, most notably, petitioners provided no evidence regarding specificity. The application only contends that "Pennsylvania is an important steel (in particular the GOES) production base in the United States," as if steel was the only industry in the state of Pennsylvania. The petitioners alleged without any support that GOES producers invested heavily in R&D each year under the law.

Pennsylvania's Alternative Energy Funding Program.[144] Regarding Pennsylvania's Alternative Energy Funding Program, the petitioners did not provide any evidence regarding specificity, and publicly available information indicated that funding was not provided until after the period of investigation, and none of the funding went to the two GOES producers.[145] The petitioners did not offer any evidence showing that the program provided a benefit during the period of investigation. Rather, the petition simply asserted that "Pennsylvania is investing $650 million in setting up the Alternative Energy Funding to provide loans and grants to companies for clean and alternative energy projects, which obviously brings benefit to steel producers in the state."

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[140] Petition for Additional Subsidy Programs, June 20, 2009, pp. 13-15. (US-16)

[141] Id. at pg. 14.

[142] United States, Comment Regarding the Initiation Based on the New Allegations, (Aug. 17, 2009). (US-29)

[143] Petition for Additional Subsidy Programs, June 20, 2009, pp. 25-28. (US-16)

[144] Id. at pp. 28-30.

[145] United States, Comment Regarding the Initiation Based on the New Allegations, (Aug. 17, 2009) (US-29)

2. China Breached Article 11.3 Because An Objective Investigating Authority Would Not Have Found the Evidence Sufficient to Initiate

79. Article 11.3 of the SCM Agreement states that "the authorities shall review the accuracy and adequacy of the evidence provided in the application to determine whether the evidence is sufficient to justify the initiation of an investigation." Regarding the meaning of the term "evidence sufficient to justify initiation," Article 11.2 provides relevant context. As noted above, Article 11.2 provides that an application must contain evidence of the existence of a subsidy. Read in the context of Article 11.2 and Article 1.2, the reference to "evidence sufficient to justify initiation" in Article 11.3 pertains to evidence of the existence of a subsidy and that the subsidy is specific. To evaluate whether a Member acted consistently with this obligation, a panel should determine "whether an unbiased and objective investigating authority would have found that the application contained sufficient information to justify initiation of the investigation."[146]

80. MOFCOM failed to examine the accuracy and adequacy of the evidence provided to substantiate the existence of a subsidy. As noted above, for many programs alleged in the petition and included in the investigation, evidence of the basic subsidy elements is missing. Several of the programs are no longer in effect and were enacted so long ago that even if funds had been provided to the steel industry they could no longer provide benefits to GOES producers during the period of investigation. In many cases, the petitioners did not offer evidence of specificity, or evidence of a financial contribution. An application does not contain sufficient evidence to justify initiation of an investigation of a subsidy when evidence regarding one or more basic subsidy elements is absent or insufficient.[147] No reasonable investigating authority would have initiated an investigation of these programs based on an application bereft of evidence. Indeed, prior to initiation, the United States highlighted for MOFCOM the various deficiencies in the "supply of electricity to the steel industry at a low price," the "supply of natural gas to the steel industry at a low price,"the "subsidy to coal for the steel industry, "the 2003 Economic Stimulus Plan of Pennsylvania," and the "Pennsylvania's Alternative Energy Funding Program" allegation in the new subsidy petition.[148] Despite the fact that the petition contained no evidence of one or more key elements of a subsidy, and notwithstanding the information provided to MOFCOM by the United States, MOFCOM decided to initiate a countervailing duty investigation for all of these claims. In so doing, China breached its obligations under Article 11.3.

[146] *United States – Softwood Lumber Dumping (Panel)* at 7.87.

[147] This is not to say that it is necessary that an application definitively establish the presence of all three subsidy elements.

[148] United States, Comment Regarding the Initiation Based on the New Allegations, (Aug. 17, 2009) (US-29)

B. MOFCOM Failed to Require Adequate Non-Confidential Summaries, Breaching Article 12.4.1 of the SCM Agreement and Article 6.5.1 of the AD Agreement

81. Article 12.4.1 of the SCM Agreement provides that an investigating authority, if it accepts confidential information, must require that interested parties provide non-confidential summaries of that information:

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

Article 6.5.1 of the AD Agreement contains identical language.

82. MOFCOM failed to adhere to these obligations. MOFCOM's willingness to accept confidential information without requiring adequate non-confidential summaries of that information significantly prejudiced the ability of U.S. companies and the United States to defend their interests.

1. The Petitioners' Summaries in this Case Do Not Satisfy the Requirements of Article 12.4.1 of the SCM Agreement and Article 6.5.1 of the AD Agreement

83. The petitioners apparently submitted a large quantity of what petitioners claimed was confidential information to MOFCOM, designated as such under various broad category headings, without including adequate non-confidential summaries for any of this information. Notably, the petitioners also did not claim that the information was not capable of non-confidential summary or explain why it was not capable of summary. The sole description of the contents of the various confidential material submitted appears in the petitioners' request that its information be treated as business confidential. These generalized statements say little to nothing about the "substance" of the confidential information submitted:

I.1.i.b: Output of the petitioners, total output of the GOES in China, proportion of the petitioners' output in China's total output, and the Appendix 2

> The table in I.1.i.b provided statistics of the petitioners' output, total output of GOES in China, proportion of the petitioners' output in China's total output from 2006 to February 2009. As these data involves business proprietary of the petitioners, disclosure of which will

cause negative influence to the petitioners; therefore, the petitioners applied for confidential treatment of the information.[149]

I.1.i.d About the Chinese domestic industry

This part provides information about the output of the Chinese domestic manufacturers, their production capacity and sales price. As these statistics were not publicly available, and they involve the production and development of the Chinese domestic industry, disclosure of which will cause negative influence to the Chinese domestic industry, in particular to the petitioners; therefore, the petitioners applied for confidential treatment.

This part also involves apparent consumption of the subject merchandise from 2006 to 2008, as well as the prediction of the apparent consumption of the subject merchandise in China in 2010; as these statistics were from Appendix II, the petitioners applied for confidential treatment for the aforementioned reasons.[150]

I.2.ii.b: Similarity or likeliness of production techniques

This part involves process of GOES production by the petitioners, which is business proprietary of the petitioners, and disclosure of the process will cause serious harm to the petitioners; therefore, they applied for confidential treatment of the information.[151]

I.2.iii.c: Change of price

Tables in this part involve sales price of the subject merchandise by the petitioners from 2006 to February 2009. As they are business proprietary of the petitioners, disclosure of which will seriously harm the interest of the petitioners; therefore, the petitioners applied for confidential treatment of the information.[152]

II.2.i.b Dumping margin of GOES imports from the United States and Appendix 9

This part involves the items to be adjusted on price of subject imports from the United States; appendix 9 involves the petitioners' freight cost, insurance premium, and their percentages in the sales price. As these are business proprietary of the petitioners, disclosure of which will

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[149] Petition at pp. 78-79.(US-1)

[150] Id. at pg. 79.

[151] Id.

[152] Id.

seriously harm the interest of the petitioners; therefore, the petitioners applied for confidential treatment of the information.[153]

V.1.i.c, i.d, ii, iv.5, V.3.iii.b Apparent consumption of GOES in China

This part provides information about the output and apparent consumption of the subject merchandise from 2006 to January 2009; as these statistics were from Appendix II, the petitioners applied for confidential treatment for the aforementioned reasons. In addition, this part involves changes about production capacity of the petitioners, which is business proprietary of the petitioners, and disclosure of which will seriously harm interest of the petitioners; therefore, the petitioners applied for confidential treatment of the information.[154]

V.1.iii.b The suppressing or depressing effects on the price of a like domestic product and V3.ii: Influence on price

The part involves sales price of the petitioners from 2006 to February 2009, and based on aforementioned reasons, the petitioners applied for confidential treatment of the information.[155]

V Influence on the Chinese domestic industry and Appendix 14

Part V and the Appendix 14 involves production capacity, output, sales volume, sales vs. output, sales revenue, inventory, capacity utilization rate, change of price, pre-tax profit, return of investment, number of employees, salary, productivity, cash flow, and various changes of the petitioners. These involve business proprietary of the petitioners, and disclosure of which will cause serious harm to the petitioners and the Chinese domestic industry; therefore, the petitioners applied for confidential treatment of the information.[156]

Statistics and information about dumping by the United States

As the governments of China and the United States will have a consultation concerning the subsidy projects, disclosure of the statistics and information about dumping by the United

[153] Id.

[154] Id. at pg. 80.

[155] Id.

[156] Id.

States will cause serious harm to the petitioners; therefore, the petitioners applied for confidential treatment of the information.[157]

84. These statements do not allow for a reasonable understanding of the substance of the confidential information submitted, as required by SCM Article 12.4.1 and Article 6.5.1 of the Antidumping Agreement. Petitioners' request for confidential treatment contained general descriptions of the *types* of information for which confidential status was being sought, but did not summarize the information itself.

85. If the confidential information was not capable of summarization, petitioners could have explained why. The fact that they did not do so indicate that the information was, in fact, capable of summarization.

86. The United States notes that a number of techniques would have been available to both petitioners to summarize the confidential information in a manner that ensures its confidentiality while allowing for other interested parties to have a reasonable understanding of the substance of the information submitted. As one example, numeric data may be presented in a trend-line or indexed fashion instead of in absolute terms.[158]

87. Due to petitioners' extensive reliance on what it characterized as confidential information, and in turn MOFCOM's frequent use of that same information in key aspects of its analysis, the fact that MOFCOM did not require non-confidential summaries of the information that apparently was capable of summary was a significant failure, which seriously compromised the ability of the United States and U.S. companies to respond to the petitioners' allegations. The nature of the evidence supporting the petitioners' allegations remains, quite simply, a mystery. Because MOFCOM did not require adequate non-confidential summaries, the respondents could not adequately defend their interests.

C. China Breached Article 12.7 of the SCM Agreement Because Its Use of Facts Available Was Improper

88. Article 12.7 limits the use of facts available in countervailing duty investigations. Article 12.7 provides: "In cases in which any interested Member or interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation, preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available." A recent panel report interpreting the provision stated that "recourse to facts available is permissible only under the limited circumstances where an interested Member or interested party: (i) refused access to necessary information within a reasonable period; (ii) otherwise

[157] Id. at pg. 81.

[158] *Argentina – Floor Tiles*, at para. 4.135(b).

fails to provide such information within a reasonable period; or (iii) significantly impedes the investigation."[159]

89. The Appellate Body in *Mexico-Beef and Rice* elaborated on the requirements of Article 12.7 and its limitations on the application of facts available in countervailing duty investigations: "Article 12.7 of the SCM Agreement permits an investigating authority, under certain circumstances, to fill in gaps in the information necessary to arrive at a conclusion as to subsidization...and injury."[160] The Appellate Body also noted that "the provision permits the use of facts on record solely for the purpose of replacing information that may be missing, in order to arrive at an accurate subsidization or injury determination."[161] For these reasons, even if an exporter provides some information, but not all of the requested information, the investigating authority must take into account the information actually provided by the exporter:

> 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. (emphasis added) [162]

90. As to the context of Article 12.7, the Appellate Body has compared the AD Agreement to the SCM Agreement, and stated that an investigating authority is obliged to consider information submitted by an interested party:

> Like Article 6 of the Anti-Dumping Agreement , Article 12 of the SCM Agreement as a whole sets out evidentiary rules that apply throughout the course of the...investigation, and provides also for due process rights that are enjoyed by interested parties throughout...an investigation....[T]his due process obligation...requires the investigating authority...to take into account the information submitted by an interested party.[163]

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[159] *United States – Anti-Dumping and Countervailing Duties (China).*

[160] *Mexico – Rice (AB),*at para. 291.

[161] *Id.* at para. 293.

[162] *Id.* at para. 294.

[163] *Id.* at para. 292.

Though the SCM Agreement does not have a facts available Annex, "it would be anomalous if Article 12.7 of the SCM Agreement were the permit the use of facts available in countervailing duty investigations in a manner markedly different from that in anti-dumping investigations."[164]

91. As described above, MOFCOM concluded that because companies were unable to supply detailed information on all sales of all products during a 15-year period, it was entitled to apply facts available to calculate the subsidy rates for certain procurement programs in a punitive manner. MOFCOM appears to have concluded that if a company does not provide *some* information, or if the information provided does not perfectly fit the request to which it responds, MOFCOM may reject *all* information provided by the company.

92. The U.S. companies provided sales data showing that they did not sell subject merchandise to the U.S. government. AK Steel additionally provided customer lists showing that it did not make any direct sales to the U.S. government. MOFCOM rejected these facts, and assumed that the U.S. companies sold *all* of their output to the U.S. government, and that this output garnered a 25% price premium. In doing so, MOFCOM's use of facts available is inconsistent with SCM Article 12.7.

1. China Breached Article 12.7 Because it Ignored "Necessary Information" Provided By The U.S. Companies

a. MOFCOM Ignored Sales Data and Customer Lists On the Record Showing that the U.S. Companies Did Not Sell GOES to the Government During the Period of Investigation

93. MOFCOM issued the initial subsidy questionnaires to AK Steel and ATI on June 26, 2009. As explained in Section III(B)(2) above, MOFCOM demanded that the U.S. companies provide volumes of information, including 15 years of detailed information for sales of all products.[165] Later, MOFCOM conducted one on-site verification for the AD and CVD investigations for the companies from January 5, 2010 to January 13, 2010. During verification, MOFCOM declined to verify for purposes of the countervailing duty investigation the sales data and customer lists submitted by the companies.[166]

94. Despite company requests, MOFCOM did not verify the sales data or customer lists during on-site verification. As part of the parallel antidumping proceeding, however, MOFCOM verified the very same sales data it refused to verify during the CVD proceeding. The following excerpt from

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[164] *Id.* at para. 295.

[165] AK Steel, New Subsidy Questionnaire Response, Sept. 21, 2009, pg. 17 (US-8)

[166] MOFCOM, the Disclosure Letter for Fundamental Facts of the Verification on AK Steel Corporation in the GOES Anti-Subsidy Investigation, Mar. 3, 2010, pg. 3.(US-24).

MOFCOM's report on the verification of AK Steel illustrates this fact, detailing MOFCOM's verification of AK Steel's sales data submitted in the antidumping proceeding as follows:

> US Domestic sale
> The verification team firstly understood the information relevant to the company's domestic sale in the US. During the POI, the company produced and sold products by itself.
> The verification team verified the domestic sale and looked through the supporting documents for inland freight, freight for processing, the processing fee paid to processing factories, etc. The verification team sampled 6 domestic transactions at random on the site (the invoice numbers are: 210098, 373811, 373091, 373411, 373229, 394082) and inspected the relevant records of accounting system, calculation method and supporting documents.[167]

MOFCOM did not question the accuracy or the reliability of the sales data provided in the antidumping proceeding. Thus, information identical to that submitted for purposes of the countervailing duty proceeding was successfully verified.

95. Because MOFCOM had verified the sales data in the parallel anti dumping proceeding, MOFCOM was familiar with the sales data, as well as the customers of the U.S. companies. Also, the same team of verifiers participated in the antidumping verification proceeding as in the CVD verification proceeding.[168] MOFCOM conducted one on-site verification for the AD and CVD investigations.[169] In the same document where MOFCOM rejects the sales data for purposes of the countervailing duty investigation, MOFCOM contradicts itself by stating that the "evidence obtained would be recorded for both procedures."[170] Taken together, these facts support the conclusion that MOFCOM could have verified the sales data and the customer lists without undue difficulty. Although MOFCOM in its Disclosure Document indicates that it considered the evidentiary records of antidumping and anti-subsidy proceedings to be separate, it did not cite any regulations to support its assertion.[171]

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[167] MOFCOM, the Disclosure Letter for Fundamental Facts of the Verification on AK Steel Corporation in the GOES Anti-Dumping Investigation, Mar. 3, 2010, pg. 3. (US-25)

[168] MOFCOM, the Disclosure Letter for Fundamental Facts of the Verification on AK Steel Corporation in the GOES Anti-Dumping Investigation, Mar. 3, 2010, pg. 5, (US-25) *compare to* MOFCOM, the Disclosure Letter for Fundamental Facts of the Verification on AK Steel Corporation in the GOES Anti-Subsidy Investigation, Mar. 3, 2010, pg. 2. (US-24)

[169] MOFCOM, the Disclosure Letter for Fundamental Facts of the Verification on AK Steel Corporation in the GOES Anti-Subsidy Investigation, Mar. 3, 2010, pg. 2. (US-24)

[170] Id.

[171] Final Disclosure, pg. 27. (US-26)

96. As explained in Section III(B)(4), in January 2010, AK Steel again requested that MOFCOM verify the customer lists, but MOFCOM ignored this request.

b. MOFCOM Ignored Information on the Record Demonstrating that the U.S. Companies Did Not Sell Exclusively To Governments or Government Contractors

97. As noted, to calculate the amount of the alleged "subsidy" to producers resulting from the procurement programs, MOFCOM assumed that AK Steel and ATI sold *all* of their output to the government under programs requiring the payment of a 25% price premium.[172] Had MOFCOM not entirely disregarded the factual information actually supplied by the companies, it could not have assumed that the companies sold all of their output to the government. At most, AK Steel, for example, could have sold 29% of its output to industries with some relation to construction. MOFCOM required AK Steel's 10-K annual report be translated in its entirety. Page 2 of that report provides the percentage of AK Steel's sales attributable to three market segments. In 2008, the percentages were:

- Automotive: 32%;
- Infrastructure and Manufacturing: 29%; and
- Distributors and Converters: 39%.[173]

98. However, MOFCOM ignored this information on the record. To the extent that any AK Steel products could have made their way through commerce to government construction contractors, these sales would be included in the infrastructure and manufacturing segment. Because neither automotive manufacturers nor distributors and converters include construction contractors, sales to these market segments are necessarily unaffected by the government procurement statutes under investigation. If it was going to ignore all evidence indicating that AK Steel sold nothing to the government, MOFCOM should have at least limited its subsidy calculation to AK Steel's U.S. sales of products for the infrastructure and manufacturing segment, or 29 percent of the company's U.S. sales.

99. MOFCOM stated that it could not "ascertain" whether sales to distributors and converters were unaffected by the government procurement statutes under investigation because the assertion was not verified, and because MOFCOM did not "know the sales information of AK Steel Corporation."[174] But as explained above, MOFCOM did not know this information because of its own refusal to verify the sales information in the countervailing duty proceeding. MOFCOM cannot justify its conclusion by disregarding, verifiable information on the record.

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[172] Final Determination at pg. 40. (US-28)

[173] 2008 10-K Report, at 3. (US-9)

[174] Final Determination at pg. 40. (US-28)

2. The U.S. Companies Provided Necessary Information Within a Reasonable Period of Time

100. The information submitted by the U.S. companies was timely filed. For instance, AK Steel's Table 4-2 submitted in response to MOFCOM's antidumping questionnaire in August 2009 contains all of the requested information on sales for GOES.[175] In September 2009, AK Steel submitted customer lists as an exhibit to a revised questionnaire response in the CVD investigation.[176] AK Steel submitted its 10-K annual report in September 2009. AK Steel submitted this information within the deadlines specified.

3. The U.S. Companies Did Not Impede MOFCOM's Investigation

101. "Impede" is defined as "stand in the way of; obstruct, hinder."[177] MOFCOM's preliminary determination suggests that in MOFCOM's view the U.S. companies impeded its investigation by failing to cooperate: "the respondent companies did not cooperate in the investigation as they ought to and did not provide relevant information and data."[178]

102. In fact, the U.S. companies did not impede MOFCOM's investigation. At no point in the investigation did the U.S. companies fail to respond to MOFCOM's inquiries. They did so despite the fact that, for example, in a very short time period, MOFCOM issued a series of questionnaires to the U.S. companies, increasing their burden, and stretching their ability to formulate adequate responses in a timely fashion.

103. On September 9, 2009, AK Steel communicated the burden resulting from MOFCOM's investigation: "AK Steel...intends to cooperate to the best of its ability in this investigation. As MOFCOM is aware, AK Steel is subject to simultaneous antidumping and antisubsidies investigations with nearly overlapping deadlines. The burden on AK Steel's accounting and other staff is considerable."[179] AK Steel elaborated on the hardship associated with complying with MOFCOM's requests: "MOFCOM has requested volumes of information on numerous alleged programs that have little or no impact on AK Steel's daily operations and, as a result, AK Steel has

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[175] AK Steel, Original Questionnaire Response, pg. 22, referencing Table 4-2 in the parallel antidumping proceeding. (US-11)

[176] AK Steel, Revised Original Subsidy Response, Exhibit II.3, Customer Lists . (US-15)

[177] New Shorter Oxford English Dictionary, Clarendon Press, Oxford 1993.

[178] Preliminary Determination at pg. 30. (US-5)

[179] AK Steel, Response to Deficiency Letter, Sept. 9, 2009. (US-13)

needed to educate itself about these alleged programs in order to respond to MOFCOM's questions."[180]

104. After filing its initial questionnaire response on August, 10, 2009, in a span of just eight weeks, AK Steel received and responded to five lengthy supplemental questionnaires issued by MOFCOM in the CVD investigation. On September 9, 2009, AK Steel noted the considerable burden resulting from MOFCOM's investigation, and stressed its willingness to cooperate.[181] On September 21, 2009, MOFCOM issued the first supplemental questionnaire to AK Steel, due in one week; AK Steel responded on September 28, 2009.[182] MOFCOM issued a second supplemental questionnaire to AK Steel on September 28, 2009 – the same time AK Steel filed its first response.[183] On October 16, 2009, MOFCOM issued a third supplemental questionnaire to AK Steel.[184] On October 19, 2009 – only three days later - MOFCOM issued a fourth supplemental questionnaire to AK Steel.[185] MOFCOM then issued yet another supplemental questionnaire to AK Steel on November 2, 2009, which was due in one week..[186] AK Steel responded to all of MOFCOM's requests.

105. Cooperating with MOFCOM, the companies on several occasions provided sales data showing that subject merchandise was not sold to any governmental entity.[187] But MOFCOM refused to verify the data, despite the fact that the U.S. companies repeatedly asked MOFCOM to do so:

> AK Steel made two oral requests that MOFCOM review and verify its list of customers to confirm that AK Steel did not sell the subject merchandise or any other merchandise to any government entities during the POI. We again request that MOFCOM verify this key data, particularly because the alleged government procurement subsidies represented virtually the entire amount of the subsidy margin assigned to AK Steel in the preliminary determination. We are providing this request in writing to ensure that AK Steel's willingness to cooperate is reflected in the record of the investigation.[188]

[180] Id.

[181] Id.

[182] AK Steel, First Supplemental Questionnaire Response, Sept. 28, Oct. 9, 2009 (US-18)

[183] AK Steel, Second Supplemental Questionnaire Response, Oct. 12, 2009. (US-10)

[184] AK Steel, Third Supplemental Questionnaire Response, Oct. 23, 2009. (US-19)

[185] AK Steel, Fourth Supplemental Questionnaire Response, Oct. 26, 2009. (US-20)

[186] AK Steel, Fifth Supplemental Questionnaire Response, Nov. 5, 6. (US-21)

[187] AK Steel, Revised Original Subsidy Response, Exhibit II.3, Customer Lists Sept. 9, 2009. (US-15)

[188] AK Steel, Written Request to Verify the Customer Lists, Jan. 12, 2010 (US-22)

Coupled with the request to verify the data submitted, the United States made clear the difficulty the U.S. companies faced with compiling 15 years of all sales data.[189]

106. As discussed above, the U.S. government does not purchase GOES. The U.S. companies demonstrated that they did not sell GOES to any government entity. AK Steel did not participate in any procurement programs during the POI. Showing that an alleged financial contribution does not exist should not be considered impeding an investigation.

D. MOFCOM Failed to Make Available the Calculations It Performed to Arrive at the Dumping Margins, Inconsistent with Article 12.2.2 of the AD Agreement

107. During a dumping investigation, an investigating authority generally collects sales, price and cost data from the investigated producers or exporters, makes revisions to that data, and uses the data to calculate the dumping margins for the producers or exporters. The calculations, and the data underlying those calculations, are critical to the dumping margins. However, at no point during its dumping investigation of AK Steel and ATI did MOFCOM make available to the parties the calculations it performed and the data it used to arrive at the final dumping margins. In failing to do so, MOFCOM breached its obligations under Article 12.2.2 of the Antidumping Agreement.

1. MOFCOM's Determinations and Disclosures

108. In the Preliminary Determination, MOFCOM preliminarily arrived at a dumping margin of 10.7 percent for AK Steel and 19.9 percent for ATI. Although MOFCOM provided some narrative explanation in the Preliminary Determination regarding these margins, it did not release the calculations it performed.[190] Prior to the Final Determination, MOFCOM released the Final Disclosure, yet it did not include the calculations it performed.

109. During the investigation, ATI urged MOFCOM to release the actual dumping calculations and argued that MOFCOM's failure to do so denied ATI the opportunity to provide meaningful comment on MOFCOM's methodology and to review the calculations for mathematical errors.[191] MOFCOM ignored this request. In the Final Determination, without releasing or making available the calculations upon which it based its decision, MOFCOM imposed final dumping margins of 7.8 and 19.9 percent on AK Steel and ATI, respectively.

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[189] United States, Countervailing Duty Investigation on Imported Grain Oriented Flat-Rolled Electrical Steel Originating in the United States/Comments on the Final Disclosure, (Mar. 30, 2010), at pg. 4. (US-12)

[190] Preliminary Determination at 12-19 (US-5).

[191] ATI, Comments on AD Verification Disclosure, March 15, 2010 (US-32).

2. MOFCOM Failed to Make Available the Data and Calculations Used to Establish the Dumping Margins, Contrary to Article 12.2.2 of the AD Agreement

110. MOFCOM's failure during the investigation to make available the calculations and data it used to calculate the margins for AK Steel and ATI was inconsistent with Article 12.2.2 of the Antidumping Agreement. That article provides, in relevant part:

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

111. In other words, this Article requires an investigating authority to include in its public notice of an affirmative determination for the imposition of a definitive duty, or otherwise make available through a separate report, all relevant information on matters of fact and law and reasons which led to the imposition of a definitive duty. The Article also provides that the notice or report shall contain the information described in Article 12.2.1, which includes "the margins of dumping established and a full explanation of the reasons for the methodology used in the establishment and comparison of the export price and the normal value under Article 2."

112. The calculations employed by an investigating authority to determine dumping margins, and the data underlying the authority's calculations, constitute "relevant information on matters of fact and law and reasons which have led to the imposition of final measures" within the meaning of Article 12.2.2. The calculations themselves are the mathematical basis for arriving at the dumping margins imposed by an investigating authority. Therefore, they are highly "relevant" to the decision to apply definitive measures. They are "matters of fact" because they consist of sales and cost data and mathematical uses of these data. Further, they lead to the imposition of definitive measures, because if they result in an affirmative dumping margin, then an investigating authority may apply definitive measures.

113. By not releasing its calculations, MOFCOM breached its obligation under Article 12.2.2 of the AD Agreement. The Preliminary Determination, Final Disclosures and Final Determination only contain MOFCOM's vague reasoning and descriptions of its methodologies for determining and adjusting the export price and normal value for the two respondent companies. They do not contain the actual data used in the dumping margin calculations and the calculations themselves. For example, the disclosure document provided to AK Steel appears to provide product-specific figures relating to export volumes, export prices after adjustment, and normal values; however, MOFCOM

did not disclose how these summary figures were derived.[192] In other words, the summary table provided to AK Steel that allegedly shows the weighted-average dumping margin calculation only shows the final stage of a margin calculation, *i.e.*, the comparison of weighted-average export prices to weighted-average normal values and the weight-averaging of product-specific margins into a margin for the subject merchandise as a whole. This table does not show how the product-specific export prices and normal values were determined. The bare summaries of MOFCOM's methodologies, adjustments and calculations in its Preliminary Determination, Final Disclosures and Final Determination are insufficient to satisfy the requirements of Article 12.2.2 of the Antidumping Agreement. The calculations that MOFCOM should have made available include: (1) adjustments to the starting price to account for differences in the circumstances of sale; (2) revisions to the data reported by the respondent; and (3) the calculation of constructed value used to determine normal value, including the calculation of selling expenses, interest, and profit.

114. MOFCOM's failure to make available the calculation data prevented AK Steel and ATI from knowing basic information about how the dumping margins to which they would be subject had been determined. For example, there was no way for the companies to check MOFCOM's calculations to determine whether they contained clerical or mathematical errors. Indeed, ATI stated during the investigation that it was denied "the opportunity to review those calculations for mathematical errors...."[193] Likewise, there was no way for the companies to check the data MOFCOM used in its calculations against the data the companies provided in their questionnaire responses to determine whether or where MOFCOM made revisions.

115. China cannot rely on the fact that the calculations include confidential data as an excuse for not making available those calculations. Its obligation was to make available the calculations it used to determine AK Steel's dumping margin to AK Steel, and to make available the calculations it used to determine ATI's dumping margin to ATI. The United States is not suggesting that MOFCOM was required to disclose confidential information to parties other than to whom that information already belonged. Rather, a respondent company is entitled to see the calculations performed to arrive at its own dumping margin, because these calculations are "relevant information on the matters of fact" which have led to the imposition of definitive measures.

116. For these reasons, China acted inconsistently with Article 12.2.2 of the AD Agreement by failing to make available to AK Steel and ATI the dumping margin calculations it performed for each of them.

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[192] Final Disclosure (US-26)

[193] ATI, Comments on AD Verification Disclosure, March 15, 2010 (US-32)

E. MOFCOM's Failure to Provide Sufficient Information on the Findings and Conclusions of Law It Considered Material Constitutes a Breach of Article 22.3 of the SCM Agreement

1. SCM Article 22.3

117. Article 22.3 of the SCM Agreement requires investigating authorities to adequately explain findings and conclusions outlined in preliminary and final determinations:

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

The second sentence of Article 22.3 thus obliges MOFCOM to "set forth, or otherwise make available through a separate report, in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities." The ordinary meaning of the term "material" is "important, essential, relevant."[194] This obligation to explain findings or conclusions that are "important," essential," or "relevant" applies to the public notice of any preliminary or final countervailing duty determination.

118. In *US – DRAMS CVD*, the Appellate Body elaborated on the duty to explain findings and conclusions in the context of countervailing duty investigations:

> [W]e are of the view that the "objective assessment" to be made by a panel reviewing an investigating authority's subsidy determination will be informed by an examination of whether the agency provided a reasoned and adequate explanation as to: (i) how the evidence on the record supported its factual findings; and (ii) how those factual findings supported the overall subsidy determination. Such explanation should be discernible from the published determination itself. The explanation provided by the investigating authority—with respect to its factual findings as well as its ultimate subsidy determination—should also address alternative explanations that could reasonably be drawn from the evidence, as well as the reasons why the agency chose to discount such alternatives in coming to its conclusions.[195]

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[194] New Shorter Oxford English Dictionary, Clarendon Press, Oxford 1993.

[195] *US – DRAMS CVD (Panel)* at para. 186 (footnotes omitted).

MOFCOM failed to explain because it did not provide any rationale for its conclusion in the preliminary determination that competitive bidding under U.S. procurement laws does not result in an acceptable market price. In the preliminary determination, MOFCOM does not offer any discernable factual finding to support this conclusion. The final subsidy determination regarding U.S. procurement laws is inconsistent with Article 22.3 because the final determination merely repeats the preliminary determination. Finally, the U.S. government provided relevant information and arguments as to why there is no benefit under federal procurement laws, which MOFCOM dismissed without any explanation.

2. Details on Findings With Respect to Issues of Fact and Law Considered Material By the Investigating Authority Are Non-Existent

119. The United States argued during the course of the investigation that prices generated as a result of competitive bidding under the federal procurement laws reflected market conditions. As the United States explained, "no benefits were conferred on any manufacturers of goods that are purchased by the U.S. government, because prices paid by the government are based on competitive bids, reflect market conditions, and do not exceed adequate remuneration."[196] In the preliminary determination, MOFCOM conceded that competitive bidding existed but still dismissed the U.S. position. The preliminary determination only indicates, without citing to any evidence or making a factual finding, that if any foreign producer is excluded from bidding, there is no market price:

> The Investigation Authority found that, according to provisions in the Buy American Act and other regulations, although there is competitive bidding process, using steel and finished products produced from the U.S. is required unless there is a waiver. The Investigation Authority holds that this fact shows that the scope of products allowed for bidding under Buy American Act has actually been limited to some extent, and thus the bidding is not market competition in the usual sense....
>
> Investigation Authority considered that the competitive bidding restricted the scope of participating products, and thus could not reflect the full market competition. Even if there is competition, it is competition only among the U.S. domestic steel products (may include part of the foreign products at the federal level and in some regions). Hence the price obtained through competitive bidding does not reflect the true market conditions.[197]

120. After the preliminary determination, the United States again argued that transactions subject to federal procurement laws were subject to competitive bidding. Therefore, prices reflected market conditions. First, the U.S. producers competed with each other in the bidding process: "MOFCOM's conclusion..fails to take into account that given a sufficient number of bidders, the

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[196] United States Questionnaire Response, Aug. 17, 2009, at pg. 72. (US-3)

[197] Preliminary Determination at pg. 27. (US-5)

price the government pays will be bid down to the lowest bidder's marginal cost of production. In such situations, the lowest bid will be a market price."[198] Second, because of U.S. obligations under the WTO Government Procurement Agreement (the GPA) and bilateral FTAs, there would be competition from producers in several other countries, and their products would not be subject to Buy America requirements: "several Buy America provisions are subject to the [GPA] or free trade agreements, under which foreign competition is permitted."[199] Nonetheless, in its final determination, MOFCOM merely repeats its conclusion from the preliminary determination, simply stating without further explanation that the prices generated by competitive bidding do not reflect market conditions:

> The Investigating Authority found in its further investigation that the import volume of excluded foreign products usually accounts for 15% of total steel consumption in the U.S. Perhaps this rate is not significant, but this portion of foreign products may have a comparatively lower price, and competitive bidding that excludes this relatively cheaper steel cannot reflect the real market competition.[200]

121. At no point in the preliminary or final determination does MOFCOM explain why, if a foreign producer is excluded from a competitive bidding process, a price derived from the competitive bidding process would not reflect a market price. Whether a competitive bidding process can generate a market price is a material issue in the subsidy determination. Article 22.3 requires MOFCOM to explain how the evidence supported its conclusion, and why MOFCOM chose to disregard arguments from the United States. MOFCOM's single sentence does not qualify as adequate, and therefore China breached its obligation under Article 22.3.

F. MOFCOM's Determination of the "All Others" CVD Rate was Inconsistent with Articles 12.7, 12.8, 22.3, and 22.5 of the SCM Agreement

122. The petition identified two U.S. exporters/producers of GOES: AK Steel and ATI.[201] MOFCOM made no attempt to identify whether any other U.S. exporters/producers might exist. Rather, MOFCOM notified the identified producers and the U.S. Embassy of the initiation of the investigation and requested that the U.S. Embassy "notify the relevant exporters and producers."[202]

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[198] United States, Anti-Subsidy Investigation on Imported Grain Oriented Flat-Rolled Electrical Steel Originating in the United States/Comments on the Preliminary Determination, (Dec. 30, 2009), at pg. 4. (US-4)

[199] United States, Countervailing Duty Investigation on Imported Grain Oriented Flat-Rolled Electrical Steel Originating in the United States/Comments on the Final Disclosure, (Mar. 30, 2010), at pg. 6. (US-12)

[200] Final Determination at, pg. 36. (US-28)

[201] Petition, at pg. 6. (US-1)

[202] Preliminary Determination, at, pg 3. (US-5)

123. In the preliminary determination, MOFCOM published an "all others" subsidy rate of 12 percent, the same rate as that published for ATI.[203] An "all others" rate is the subsidy rate applicable to all companies not individually investigated — that is, it is the rate applicable to companies other than the respondents AK Steel and ATI.

124. In the final determination, MOFCOM published an "all others" subsidy rate of 44.6 percent, a rate more than two times higher than the highest rate for an investigated company.[204] In short, MOFCOM increased the all others rate to 44.6 percent, even though the highest rate found for either investigated company remained the 12 percent rate for ATI.[205] Neither in the final disclosure nor the final determination is there any explanation as to how or why MOFCOM arrived at a figure of 44.6 percent; the final disclosure merely refers to Article 21 of its regulations which authorizes the use of facts available.[206]

125. In so applying this subsidy rate to exporters/producers that were neither identified nor notified of the investigations, MOFCOM's measure breached the obligations set forth in Articles 12.7, 12.8, 22.3, and 22.5 of the SCM Agreement. \

1. MOFCOM's Determination of the "All Others" CVD Rate was Inconsistent with Article 12.7 of the SCM Agreement

126. As the Appellate Body noted in *EC-Tube or Pipe Fittings*, "Article 12 of the SCM Agreement as a whole 'set[s] out evidentiary rules that apply throughout the course of the … investigation, and provide[s] also for due process rights that are enjoyed by 'interested parties' throughout … an investigation.'"[207] Article 12.1 provides that:

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[203] Id. at pg. 55.

[204] Final Determination, at pg 49. (US-28); Final Disclosure at 31. (US-26)

[205] Preliminary Determination, at pg. 43. (US-5)

[206] Final Disclosure at 31. (US-26) Article 21of China's regulations reads as follows:

> The interested parties and the government of an interested country (region) shall provide authentic information and relevant documentation to the Ministry of Commerce in the process of the investigation. In the event that any interested party or the government of any interested country (region) does not provide authentic information and relevant documentation, or does not provide necessary information within a reasonable time limit, or significantly impedes the investigation in other ways, the Ministry of Commerce may make determinations on the basis of the facts available.

Regulations of the People's Republic of China on Countervailing Measures - English translation, G/SCM/N/1/CHN/1/Suppl.3.

[207] *EC – Pipe Fittings* (AB), para. 138 (quoting Appellate Body Report, *EC – Bed Linen (Article 21.5 - India)*, para. 136). (emphasis added in *EC – Tube or Pipe Fittings*)

> Interested Members and all interested parties in a countervailing duty investigation shall be given notice of the information which the authorities require and ample opportunity to present in writing all evidence which they consider relevant in respect of the investigation in question.

127. Article 12.7 provides:

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

128. A panel interpreting the provision stated that "recourse to facts available is permissible only under the limited circumstances where an interested Member or interested party: (i) refused access to necessary information within a reasonable period; (ii) otherwise fails to provide such information within a reasonable period; or (iii) significantly impedes the investigation."[208]

129. Given the obligation under Article 12.1 to give an interested party notice of what information is required of them, the use of facts available is further conditioned on the investigating authority specifying in sufficient detail the information required, and making the interested party aware that failure to supply such information will result in a determination based on facts available.

130. In *Mexico – Definitive Anti-Dumping Measures on Beef and Rice*, which involved Article 6.8 of the AD Agreement (the first sentence of which is almost identical to Article 12.7 of the SCM Agreement[209]), the Appellate Body said that an exporter must be given the opportunity to provide information required by an investigating authority before the latter resorts to facts available that can be adverse to the exporter's interests. An exporter that is unknown to the investigating authority is not notified of the information required, and thus is denied an opportunity to provide it. Accordingly, the Appellate Body found that the Mexican authorities breached Article 6.8 by using facts available contained in the petition to calculate dumping margins for exporters that the authorities did not investigate and did not give notice of the information required by the investigating authority.[210]

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[208] *US – Anti-Dumping and Countervailing Duties (China)*

[209] The first sentence of Article 6.8 of the AD Agreement reads: "In cases in which any interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation, preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available."

[210] *Mexico – Rice (AB)*, paras. 258-264.

131. As explained elsewhere in this submission, resort to facts available is limited to the use of substantiated information on the record solely for the purposes of filling gaps in the record to arrive at a and accurate conclusion with respect to subsidization or injury. As the Appellate Body noted in *Mexico – Beef and Rice*,

> 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. [211]

a. MOFCOM Failed to Identify and Notify Other Exporters/Producers of GOES of the Pending Investigation and the Information Required of Them

132. As stated above, the petition in this investigation identified two U.S. exporters/ producers of GOES. MOFCOM made no attempt to identify the existence or location of any U.S. exporters/producers existed other than the two identified in the petition. Rather, MOFCOM notified the identified producers and the U.S. Embassy of the initiation of the investigation. MOFCOM requested that the U.S. Embassy "notify the relevant exporters and producers:"

> On June 1, the Investigating Authority published the initiation notice, handed over the initiation notice and the public version of the petition to the embassy officials in Beijing of the US and Russia, and asked them to inform their domestic exporters and producers respectively. Meanwhile, MOFCOM informed the known subject producers and exporters and the Petitioners about the initiation and sent the initiation materials to the public information consultation room of MOFCOM for consulting.[212]

133. Although MOFCOM does not give any explanation of its reasoning, MOFCOM appears have determined that by failing to register as respondents, "all other" exporters/producers failed to provide MOFCOM with necessary information and thereby triggered the use of facts available. In so doing, China acted inconsistently with its obligations under Article 12.7 by using facts available contained in the petition to calculate dumping margins for exporters that the authorities did not investigate.

b. MOFCOM Appears to Have Applied a Rate that Incorporates Programs Specifically Found Not to be Countervailable

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[211] Id. at para 294.

[212] Preliminary Determination, pg. 3 (US-5)

134. In applying facts available to "all other" U.S. exporters/producers of GOES, MOFCOM did so in a manner that was adverse to the interests of such exporters/producers. The highest subsidy rate found for either investigated company remained the 12 percent rate for ATI.[213] Neither in the final disclosure nor the final determination is there any explanation as to how or why MOFCOM arrived at a figure of 44.6 percent for "all others." While final disclosure does refer to Article 21 of its regulations which authorizes the use of facts available, MOFCOM provided no explanation as to why Article 21 of its regulations was applicable or why adverse facts were warranted.[214]

135. Although it is unclear from MOFCOM's determination and disclosure material exactly how MOFCOM calculated the all others rate, MOFCOM appears to have used the same facts available used to calculate AK Steel's and ATI's rates and used the uncorroborated and unsupported factual assertions contained in the petition and in petitioners' August 10, 2009 Estimate of the Subsidy Margin of Each Subsidy Program Concerning the Grain Oriented Flat-Rolled Electrical Steel Originating in the United States to obtain the facts available all others rate of 44.6 percent.[215]

136. As noted above, the highest rate found for an investigated company was 12 percent. The only way in which a facts available rate of 44.6 percent could be obtained was by inclusion of additional programs alleged in the petition, but specifically found by MOFCOM not to be countervailable.

137. Specifically, in the Final Determination, MOFCOM made the determination that the Employee Retirement Income Guarantee program and the subsidy alleged under the Medicare Prescription Drug, Improvement, and Modernization Act were "not specific according to the CVD regulations." With respect to the "special environment immunity for the steel industry in the United States," MOFCOM found that there was "no financial contribution according to the CVD regulations." Finally, MOFCOM found that the Economic Recovery Tax Act of 1981, the Tax Reform Act of 1986, and the Steel Import Stabilization Act of 1984 had terminated prior to the period of investigation. Thus, to the extent that such non-countervailable programs are factored into

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[213] Id. at pg 43.

[214] Final Disclosure at 31. (US-26). Article 21 of the Regulations of the People's Republic of China on Countervailing Measures - English translation reads as follows:

> The interested parties and the government of an interested country (region) shall provide authentic information and relevant documentation to the Ministry of Commerce in the process of the investigation. In the event that any interested party or the government of any interested country (region) does not provide authentic information and relevant documentation, or does not provide necessary information within a reasonable time limit, or significantly impedes the investigation in other ways, the Ministry of Commerce may make determinations on the basis of the facts available.

G/SCM/N/1/CHN/1/Supp.3.

[215] Estimate of the Subsidy Margin of Each Subsidy Program Concerning the Grain Oriented Flat-Rolled Electrical Steel Originating in the United States, Aug. 10, 2009 (US-33)

MOFCOM's calculation of the all others rate, MOFCOM ignored substantiated facts already on the record of the investigation in applying facts available to other U.S. producers/exporters.

138. In light of the legal and factual considerations set forth above, China's application of facts available to calculate an adverse subsidy rate with respect to other producers/exporters of GOES failed to satisfy the requirements of Article 12.7 of the SCM Agreement. As set forth in detail above, recourse to facts available pursuant to Article 12.7 is limited to situations where an interested party either refuses access to necessary information within a reasonable period of time, otherwise fails to provide access to the necessary information within a reasonable period, or significantly impedes the investigation. Moreover, recourse to facts available pursuant to Article 12.7 is conditioned on an investigating authority's, pursuant to Article 12.1, having notified an interested party of the information required and providing the party ample opportunity to present the relevant information.

139. There is no evidence that MOFCOM made any attempts to notify any interested party other that the two identified in the petition of the investigation and the information required of them by MOFCOM. Without notice of the investigation and the information required of interested parties subject to the investigation, no other unidentified U.S. producers/exporters can be said to have refused access to the required information, or otherwise failed to provide access to the information within a reasonable period. Neither can other unidentified U.S. producers/exporters be said to have significantly impeded an investigation of which they were unaware. Indeed, in its final determination, China did not justify its resort to facts available based on any of these justifications.

140. Further, as discussed above, recourse to facts available does not permit the investigating authority to use information in whatever way it chooses. Rather, the use of facts available must take into account all the substantiated facts provided by an interested party and remain limited to those facts that may replace the information that an interested party refused access to or failed to provide.

141. Having made no independent attempt to notify other producers/exporters of the investigation, the information that would be required of them in that investigation, or the fact that failure to participate and provide certain information in that investigation would result in a determination based on facts available, China's application of facts available to calculate an adverse subsidy rate with respect to other producers/exporters of GOES failed to satisfy the requirements of Article 12.7 of the SCM Agreement.

2. China Acted Inconsistently with Article 12.8 of the SCM Agreement by Failing to Disclose the Essential Facts Under Consideration Regarding its Calculation of the "All Others" Subsidy Rate

142. In its Final Determination, MOFCOM established an all others subsidy rate of 44.6 percent. As explained elsewhere in this submission, MOFCOM's calculation of the all-others subsidy rate

was inconsistent with Articles 12.7 and 22.3 of the SCM Agreement. Additionally, because it failed to inform the United States and other interested parties "of the essential facts under consideration" which formed the basis for this calculation in time for the United States and other interested parties to defend their interests, MOFCOM's calculation of the all others subsidy rate also was inconsistent with Article 12.8 of the SCM Agreement.[216]

a. MOFCOM's Determinations and Disclosures

143. In the Preliminary Determination, MOFCOM established an all others subsidy rate of 12 percent.[217] The preliminary subsidy rates for AK Steel and ATI were 11.7 percent and 12 percent, respectively.[218] MOFCOM did not explain how it arrived at the 12 percent all others rate in the Preliminary Determination.

144. Prior to the Final Determination, MOFCOM released its Final Disclosure, in which it revealed that it had nearly quadrupled the all others subsidy rate to 44.6 percent.[219] The only explanation in the Final Disclosure for such a large increase in the rate was that "[t]he margin for all other American companies was calculated based on information submitted by the petitioners pursuant to article 21 of the CVD regulations."[220] Article 21 of China's CVD regulations pertains to facts available, so it can be deduced that MOFCOM's increase of the all others subsidy rate was based on facts available. However, MOFCOM did not disclose the facts that led it to conclude that the use of the facts available was justified for all other U.S. companies. It also did not disclose the facts that led it to conclude that 44.6 percent was a justifiable rate or the calculations performed to determine this rate.

145. The United States objected to MOFCOM's Final Disclosure and its unexplained increase in the all others subsidy rate.[221] Noting MOFCOM's lack of explanation of its determination of the preliminary all others subsidy rate, the United States then stated: "Even more troubling, however, is that in the final disclosure, and again without explanation, MOFCOM determined a rate of 44.6 percent for all other U.S. companies not investigated, almost quadrupling the rate from the preliminary determination."[222] Ignoring these comments, MOFCOM, in the Final Determination,

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[216] An "all others" rate is the subsidy rate applicable to all companies not individually investigated — that is, it is the rate applicable to companies other than the respondents AK Steel and ATI.

[217] Preliminary Determination, pg. 43 (US-5).

[218] Id.

[219] Final Disclosure (US-26).

[220] Id.

[221] United States, Countervailing Duty Investigation on Imported Grain Oriented Flat-Rolled Electrical Steel Originating in the United States/Comments on the Final Disclosure, (Mar. 30, 2010) (US-12)

[222] Id.

imposed a final all others subsidy rate of 44.6 percent.[223] MOFCOM explained its final all others rate by stating that for "other U.S. companies who did not submit the questionnaire responses," it determined the subsidy rate "according to the information submitted by the petitioner...."[224] Again, at no time prior to the Final Determination did MOFCOM disclose to the United States or other interested parties the essential facts under consideration that formed the basis for the near quadrupling of the all others subsidy rate, other than stating that the rate was based on information from the petitioners pursuant to article 21 of China's CVD regulations.

b. MOFCOM Failed to Disclose the Essential Facts Under Consideration Forming the Basis for the All Others Subsidy Rate, Thus Depriving the United States and U.S. Companies of Their Ability to Defend Its Interests

146. Article 12.8 of the SCM Agreement provides:

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

147. In *Mexico – Olive Oil*, the panel stated that the "essential facts" referenced in Article 12.8 are not just any facts on the record. Rather, they are "the specific facts that underlie the investigating authority's final findings and conclusions in respect of the three essential elements – subsidization, injury and causation – that must be present for the application of definitive measures."[225] That panel noted that a preliminary determination may be one means of making the required disclosure of essential facts, but that "if new 'essential facts', *i.e.*, facts that bring about a change in the authority's findings relating to subsidization, injury or causation, are incorporated into the record after the issuance of the preliminary determination, than that determination by definition could not satisfy the disclosure obligation in Article 12.8."[226]

148. In the present case, MOFCOM did not identify the essential facts that formed the basis for its imposition of a 44.6 percent all others subsidy rate. As described above, its disclosure consisted of a single sentence: "The margin for all other American companies was calculated based on

[223] Final Determination, pg. 48. (US-28)

[224] Id.

[225] *Mexico – Olive Oil*, para. 7.110.

[226] Id.

information submitted by the petitioners pursuant to article 21 of the CVD Regulations."[227] Noticeably absent from this disclosure are the following types of facts that would be the basis for MOFCOM's decision:

- The facts that led MOFCOM to conclude that resorting to the use of the facts available was appropriate. These facts would include the actions by all other companies (who were not notified by MOFCOM of the need to participate in the investigation) that caused MOFCOM to conclude that the use of the facts available was justified.

- The facts that led MOFCOM to conclude that a 44.6 percent subsidy rate was an appropriate rate applicable to all other companies, especially in light of the fact that the subsidy rates for the two respondent companies were substantially lower than 44.6 percent.

- The facts underpinning the calculation of that 44.6 percent rate, and the details of the calculation itself.

149. These facts are essential because they form the basis for any investigating authority's determination to apply a facts available subsidy rate. Pursuant to Article 12.7 of the SCM Agreement, facts available may be used if an interested Member or interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period of time, or significantly impedes the investigation. Therefore, MOFCOM must have relied upon a factual determination that the actions of the companies covered by the all others rate met the requirements of Article 12.7, either through refusal of access to, or failure to provide, information, or through significantly impeding the proceeding. It must also have had a factual basis for its determination that 44.6 percent was an appropriate rate. However, it did not disclose the facts leading to these conclusions.

150. MOFCOM's failure to disclose the essential facts is particularly troublesome given that MOFCOM changed its calculation, and the basis for its calculation, of the all others subsidy rate from the Preliminary Determination to the Final Determination. In the Preliminary Determination, MOFCOM did not invoke the facts available as the basis for the all others subsidy rate, and the preliminary rate was 12 percent. Upon changing its methodology in the Final Determination, MOFCOM made no attempt to disclose the facts underlying its new approach.

151. Without the required disclosure of the types of essential facts described above, the United States and interested U.S. companies were not able to understand, much less evaluate and, if

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[227] Final Disclosure (US-26)

necessary, rebut MOFCOM's increase of the all others subsidy rate. For example, the United States and interested U.S. companies had no opportunity to argue why MOFCOM's decision to rely upon the facts available was inappropriate, because MOFCOM never disclosed the factual basis for this decision.[228] MOFCOM's determination might have been based on MOFCOM's perception that interested parties refused access to necessary information, that they failed to provide necessary information, or that they significantly impeded the investigation. Regardless, without disclosure of the facts underlying MOFCOM's decision to apply facts available, the United States and interested U.S. companies were unaware of the factual basis for MOFCOM's determination and therefore could not adequately defend its interests. MOFCOM did not even disclose what information was not provided by the other unidentified U.S. producers/exporters or by the United States.

152. Likewise, without disclosure of the factual information MOFCOM used to calculate the 44.6 percent all others subsidy rate, the United States and interested U.S. companies were not able to argue that this rate was inappropriate. MOFCOM only disclosed that the rate was "based on information submitted by the petitioner."[229] However, merely stating that a rate is based on information submitted by the petitioner does not meet the disclosure requirements of Article 12.8 of the SCM Agreement. MOFCOM provided no indication of exactly what information from the petitioners it used, and, without knowing this, there was no way for the United States and interested U.S. companies to determine whether the information was a reasonable surrogate for an all others rate. In short, the United States and interested U.S. companies were not able to defend their interests.

153. For these reasons, China acted inconsistently with Article 12.8 of the SCM Agreement through MOFCOM's failure to disclose the essential facts under consideration which formed the basis for its determination of the all others subsidy rate.

c. Article 22.3

154. As discussed above, Article 22.3 obliges MOFCOM to "set forth, or otherwise make available through a separate report, in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities." This obligation applies to the public notice of any preliminary or final countervailing duty determination.

155. MOFCOM ignored its duty to explain because it did not provide any rationale for its decision in the final determination to apply adverse facts available to all other U.S. producers/exporters of GOES that it neither notified of the investigation, nor made aware of the consequences of not providing the information requested in that investigation.

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[228] As the United States pointed out at the time, "MOFCOM has not explained how any exporters that would be subject to this all-others rate have failed to cooperate in the investigation." Id.

[229] Final Disclosure (US-26).

G. MOFCOM's Determination of the All others rate in the Final Antidumping Duty Determination Is Inconsistent with Article 6.8 of the Antidumping Agreement

156. In the Final Determination, MOFCOM applied the all others dumping rate of 64.8 percent to unexamined U.S. producers/exporters. It did so despite the fact that the dumping rates for the two respondents, AK Steel and ATI, were 7.8 percent and 19.9 percent, respectively.

157. MOFCOM's explanation for its all others dumping margin was that it relied upon Article 21 of its Anti-Dumping Regulation and "the best information available and facts available and the information submitted by the respondent companies to make [the] determination on dumping and dumping margin" for all other U.S. companies.[230]

1. MOFCOM's Use of Facts Available Was Inconsistent with Article 6.8

158. Articles 6.1 and 6.8 of the AD Agreement, and paragraph 1 of Annex II, provide that an investigating authority may only apply a dumping margin based on the "facts available" to a company for failing to provide information[231] if the authority has first specifically asked the party to provide the information and been refused.

159. Article 6.8 states as follows:

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

160. Thus, Article 6.8 establishes that an investigating authority may only resort to the facts available where an interested party "refuses access to" or otherwise "does not provide" information that is "necessary" to the investigation, or otherwise "significantly impedes" the investigation. An investigating authority may not assign a margin based on adverse facts available when the authority has not requested the information in the first place.

161. Article 6.1 of the AD Agreement then qualifies Article 6.8 further by establishing that the

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[230] Final Determination, pg 30. (US-28)

[231] A failure to provide requested information is not the only situation that can lead to a facts available margin. For example, an investigating authority may have recourse to the facts available if requested data is provided but does not withstand scrutiny at verification.

investigating authorities must indicate to the interested parties the information that they require:

> All interested parties in an anti-dumping investigation shall be given notice of the information which the authorities require and ample opportunity to present in writing all evidence which they consider relevant in respect of the investigation in question.

162. Article 6.1 thus establishes that an investigating authority that has decided to include a particular exporter or producer "in the antidumping investigation" cannot simply announce that it has initiated the investigation and place the burden on the producer or exporter to come forward and "appear." Rather, the investigating authority must affirmatively reach out to the interested party and "give notice" of the information that it requires.[232] As the panel stated in Argentina – Definitive Anti-dumping Measures on Imports of Ceramic Floor Tiles from Italy, "an investigating authority may not fault an interested party for not providing information it was not clearly requested to submit."[233]

163. Paragraph 1 of Annex II of the AD Agreement then reiterates this point by requiring investigating authorities to ensure that respondents receive proper notice of the rights of the investigating authorities to use the facts available:[234]

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

164. In the view of the panel in Argentina – Ceramic Tiles, "the inclusion, in an Annex relating specifically to the use of best information available under Article 6.8, of a requirement to specify in detail the information required, strongly implies that investigating authorities are not entitled to resort to best information available in a situation where a party does not provide certain information

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[232] The term "interested parties" is not limited to parties that have shipped during the POI or that have responded to a published initiation notice. Article 6.11(i) defines "interested parties" to include "an exporter or foreign producer or the importer of a product subject to investigation, or a trade or business association a majority of the members of which are producers, exporters or importers of such product."

[233] "*Argentina – Floor Tiles*, para. 6.54 .

[234] *United States – Hot-Rolled Steel AB*, para. 79 (stating that paragraph 1 of Annex II "is specifically concerned with *ensuring* that respondents receive proper notice of the rights of the investigating authorities to use facts available . . . .").

if the authorities failed to specify in detail the information which was required."[235]

165. Thus, Articles 6.1 and 6.8, and paragraph 1 of Annex II, firmly establish that an investigating authority must make known to the exporters or producers the information that is required of them.

166. In the GOES investigation, MOFCOM only sent its antidumping questionnaire to the two producers/exporters that the petitioners identified in the petition. MOFCOM made no attempt to even identify whether any other U.S. exporters/producers might exist. Rather MOFCOM notified the identified producers and the U.S. Embassy of the initiation of the investigation and requested that the U.S. Embassy "notify the relevant exporters and producers."[236] By applying facts available to the unexamined firms when it never sent them copies of the antidumping questionnaire or took any other steps to ensure that they had received the notice that the AD Agreement requires, China breached Article 6.8 of the AD Agreement and paragraph 1 of Annex II.

2. China Acted Inconsistently with Article 6.9 of the Antidumping Agreement by Failing to Disclose the Essential Facts Under Consideration Regarding its Calculation of the "All Others" Dumping Rate

167. In its Final Determination, MOFCOM established an all others dumping rate of 64.8 percent. As explained elsewhere in this submission, MOFCOM's calculation of the all-others dumping rate was inconsistent with Articles 6.8, 12.2, and 12.2.2, and Annex II, of the Antidumping Agreement. Additionally, because it failed to inform the United States and other interested parties "of the essential facts under consideration" which formed the basis for this calculation in time for the United States and other interested parties to defend their interests, MOFCOM's calculation of the all others dumping rate also was inconsistent with Article 6.9 of the Antidumping Agreement.

a. MOFCOM's Determinations and Disclosures

168. In the Preliminary Determination, MOFCOM established an all others dumping rate of 25 percent. MOFCOM explained its determination as follows: "Regarding the other U.S. companies who failed to register responses or to submit responses, in accordance with Article 21 of the *Anti-Dumping Regulation*, the Investigation Authority decided to adopt the obtained and best information available to make the determination as for dumping and dumping margin."[237] Article 21 of China's Anti-Dumping Regulation pertains to the use of facts available. However, MOFCOM

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[235] *Argentina – Floor Tiles*, para. 6.55.

[236] Preliminary Determination, pg 3. (US-5)

[237] Id. at pg. 17.

provided no further explanation of its calculation of the all others dumping rate, and it did not disclose the information forming the basis for the calculation of this rate.

169. Prior to the Final Determination, MOFCOM released its Final Disclosure to the United States and interested parties. In the Final Disclosure, MOFCOM revealed that it was increasing the all others dumping rate to 64.8 percent.[238] MOFCOM's explanation was that the "margin for all other American companies was calculated based on transaction information of the respondents pursuant to Article 21 of the Antidumping Regulations."[239] Again, MOFCOM provided no further information. It did not disclose the particular "transaction information" that it used to calculate the all others rate or the facts leading it to conclude that a rate of 64.8 percent, which represented a substantial increase of the rate from the Preliminary Determination, was appropriate.

170. In the Final Determination, MOFCOM applied the all others dumping rate of 64.8 percent. It did so despite the fact that the dumping rates for the two respondents, AK Steel and ATI, were substantially lower that 64.8 percent – that is, 7.8 percent and 19.9 percent, respectively. Again, MOFCOM's proffered explanation was that it relied upon Article 21 of its *Anti-Dumping Regulation* and "the best information available and facts available and the information submitted by the respondent companies to make [the] determination on dumping and dumping margin" for all other U.S. companies.[240]

b. MOFCOM Failed to Disclose the Essential Facts Under Consideration Forming the Basis for the All Others Dumping Rate, and the United States Was Deprived of Its Ability to Defend Its Interests as a Result

171. Article 6.9 of the Antidumping Agreement provides:

> The authorities shall, before a final determination is made, inform all interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures. Such disclosure should take place in sufficient time for the parties to defend their interests.172. The obligation in Article 6.9 applies to: (1) essential facts, as opposed to reasoning, that (2) form the basis for the decision to apply definitive measures.[241] The purpose of Article 6.9 is to make clear to interested parties the information on which the investigating authority will rely in deciding whether to apply definitive

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[238] Final Disclosure (US-26)

[239] Final Disclosure (US-26)

[240] Final Determination, pg. 30 (US-28)

[241] *See Argentina – Poultry*, para. 7.223.

measures.[242]

173. In the present case, MOFCOM did not identify the essential facts that formed the basis for its imposition of a 64.8 percent all others dumping rate. As described above, its disclosure consisted of a single sentence: "The margin for all other American companies was calculated based on transaction information of the respondents pursuant to Article 21 of the Antidumping Regulations."[243] Noticeably absent from this disclosure are the following types of facts that would be the basis for MOFCOM's decision:

- The facts that led MOFCOM to conclude that a 64.8 percent all others dumping rate was an appropriate rate applicable to all other companies, especially considering that the dumping rates for the two respondent companies were substantially lower than 64.8 percent.

- The particular "transaction information" from the two respondents that formed the basis for the 64.8 percent dumping rate.

- The facts underpinning the calculation of the 44.6 percent rate, and the details of the calculation itself.

174. These facts strongly suggest that facts available were used to calculate the all others dumping rate. For example, it is evident that MOFCOM only used *some* of the "transaction information" of the two respondents as the factual basis for the 64.8 percent all others rate. If it had used *all* of those respondents' information, it would not have arrived at an all others rate that is so divergent from the respondents' rates. However, there is no way to know, from the disclosure provided by MOFCOM, which transaction information it used.

175. Without the disclosure of the types of essential facts described above, the United States was not able to defend against MOFCOM's increase of the all others dumping rate. The United States was deprived of the ability to argue that the particular transaction information MOFCOM used as the basis for the all others rate was inappropriate. Further, it was deprived of the ability to argue that the all others rate calculation was incorrect. In short, the United States and other interested parties are left to guess at the basis for MOFCOM's decision that a 64.8 percent rate is a legitimate all others dumping rate when the two calculated rates are 7.8 and 19.9 percent.

176. For these reasons, China acted inconsistently with Article 6.9 of the Antidumping Agreement through its failure to disclose the essential facts under consideration which formed the

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[242] *See Guatemala – Cement*, para. 8.229.

[243] Final Disclosure (US-26)

basis for its determination of the all-others dumping rate.

3. MOFCOM Failed to Explain Its Determination

177. Article 12.2 of the AD Agreement provides:

> Public notice shall be given of any preliminary or final determination . . . . Each such notice shall set forth, or otherwise make available through a separate report, in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities.

178. Article 12.2.2 of the AD Agreement further provides:

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

179. As mentioned above, MOFCOM's Preliminary Determination and Final Disclosure each contained a single sentence regarding its decision to apply facts available to all U.S. producers/exporters that it did not examine.[244] Clearly, the factual and legal basis for MOFCOM's resort to facts available pursuant to Article 21 of its regulations constitute material issues of fact and law considered. These issues go to the very heart of their determination of what margin to apply to unexamined producers/exporters.

180. Consequently, Article 12 of the AD Agreement required that MOFCOM provide in sufficient detail the findings and conclusions that lead to application of facts available pursuant to Article 21 of its regulations. The single conclusory sentence contained in the Preliminary and Final Determinations does not satisfy this requirement.

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[244] Preliminary Determination, pg. 17 ("Regarding the other US companies who failed to register responses or to submit responses, in accordance with Article 21 of the Anti-Dumping Regulation, the Investigation Authority decided to adopt the obtained and best information available to make the determination as for dumping and dumping margin.") (US-5).; Final Disclosure at 41 ("The margin for all other American companies were calculated based on transaction information of the respondents pursuant to Article 21 of the Antidumping Regulations.") (US-26)

181. Similarly, Article 12.2.2 of the AD Agreement required, among other things, that MOFCOM provide "all relevant information" on the relevant facts underlying its determination that recourse facts available was warranted in the calculations of the "all others" rate. MOFCOM did not satisfy this obligation. The Final Determination does not contain any facts supporting the finding that unexamined U.S. producers/exporters refused access to, or otherwise did not provide, necessary information within a reasonable period or significantly impeded the investigation, as required by the AD Agreement.

182. MOFCOM's Final Determination lacks any meaningful description of the facts upon which it based its decision to apply adverse facts available to unexamined U.S. producers/exporters. Accordingly, China's determination violates Articles 12 and 12.2.2 of the AD Agreement.

H. China's Conduct of the GOES Investigation Breached Article 1 of the AD Agreement

183. Article 1 of the AD Agreement provides that "[a]n antidumping measure shall be applied only under the circumstances provided for in Article VI of GATT 1994 and pursuant to investigations initiated and conducted in accordance with the provisions of this Agreement" (emphasis added; footnote omitted). Because China's conduct of the GOES investigation breached numerous other provisions of the AD Agreement, China also breached Article 1.

I. China Breached Article VI:2 of GATT 1994 By Levying an Antidumping Duty Greater Than the Margin of Dumping

184. Article VI:2 of GATT 1994 provides in pertinent part that:

> In order to offset or prevent dumping, a contracting party may levy on any dumped product an antidumping duty not greater in amount than the margin of dumping in respect of such product. For purposes of this Article, the margin of dumping is the price difference determined in accordance with the provisions of paragraph 1. . . .

As noted by the Panel in *U.S. – 1916 Act*, Article VI and the AD Agreement form an "inseparable package of rights and disciplines."[245] Thus, "Article VI should not be interpreted in a way that would deprive it or the Anti-Dumping Agreement of meaning."[246]

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[245] *United States – Anti-Dumping Act of 1916* (*Panel*), para. 6.97 (*quoting Argentina – Footwear*, para. 81, which used this language to describe the relationship between Article XIX of GATT 1994 and the Safeguards Agreement).

[246] Panel Report, *U.S. – 1916 Act (EC)*, para. 6.97.

185. As demonstrated in the immediately preceding sections of this submission, China impermissibly assigned an adverse facts available margin to other U.S. producers/exporters that China did not examine in this investigation. As a result of the adverse assumptions made in assigning that margin to those companies, the antidumping duty levied on their products was "greater in amount than the margin of dumping in respect of such products" which could permissibly have been calculated in accordance with the provisions of the AD Agreement. Because the duties China levied on these "all others" companies were, and continue to be, greater in amount than the appropriate margin of dumping, China violated Article VI:2 of GATT 1994.

J. The Price Effects Analysis in MOFCOM's Final Determination was Inconsistent with China's WTO Obligations

186. MOFCOM's Final Determination contains a single injury analysis pertinent to both the antidumping and countervailing duty investigations. An important finding underlying the injury determinations is that the allegedly dumped and subsidized imports had significant price effects on the like domestic product. This finding and MOFCOM's price effects analysis fail to satisfy WTO requirements in three important respects.

187. First, MOFCOM never disclosed several pieces of information critical to its price effects analysis. MOFCOM's Injury Disclosure Document omits several facts critical to the price effects analysis. MOFCOM's failure to disclose essential facts which formed the basis for its decision to apply definitive measures violates Article 6.9 of the AD Agreement and Article 12.8 of the SCM Agreement.

188. Second, the Final Determination provides no more information about the factual basis for the price effects analysis than did the injury disclosure document. In the Final Determination, MOFCOM repeatedly makes conclusory assertions about the "low price policy" of the exporters without providing any factual basis that would support a conclusion that the prices charged for the imports under investigation were actually lower than the prices charged by the domestic industry. By the same token, MOFCOM acknowledges but provides no more than a conclusory rebuttal, unsupported by any factual analysis, to arguments on pricing raised by parties opposing imposition of measures. MOFCOM's failure to explain findings and provide reasons why it rejected relevant arguments raised by the parties is inconsistent with Article 12.2.2 of the AD Agreement and Article 22.5 of the SCM Agreement.

189. Third, MOFCOM's findings that the dumped and subsidized imports had significant price effects fail to reflect an objective examination of the evidence in the record and/or are unsupported by positive evidence. By basing its determinations on such unsupported findings, China breached Articles 3.1 and 3.2 of the AD Agreement and Articles 15.1 and 15.2 of the SCM Agreement.

1. MOFCOM's Failure to Disclose Facts Critical To Its Price Effects

Analysis Violates Article 6.9 of the AD Agreement and Article 15.8 of the SCM Agreement

190. As explained in Section III(B) above, although the price effects finding was a central pillar of the affirmative injury determination, MOFCOM disclosed strikingly few facts pertinent to pricing in its Injury Disclosure Document. The price effects analysis in MOFCOM's Final Determination reflects the same lack of detail evident in its Injury Disclosure Document. The findings are cursory and most lack any apparent evidentiary basis.

191. A review of the Injury Disclosure Document indicates that MOFCOM never disclosed to the parties several pieces of information central to its price effects analysis.

(a) It did not disclose any information about price levels for the domestically produced product.

(b) It did not disclose the source for the information it did provide concerning pricing trends for the domestically-produced product.

(c) It did not provide any comparisons between prices for the domestically produced product and prices for the imports under investigation. As stated above, in the Final Determination MOFCOM disclosed for the first time that prices for the domestically produced product were lower than those for the imports under investigation during the first quarter of 2009. This was the sole disclosure of price comparisons MOFCOM made at any point in the investigation.

(d) It did not provide any information either evidencing or describing the purported "strategies" that the exporters of GOES from Russia and the United States devised or implemented to undercut prices for the domestically produced product.

(e) It did not disclose any information concerning the levels or trends of the domestic industry's costs.

192. MOFCOM's repeated concealment of facts central to its price effects analysis is directly contrary to the requirement articulated in the AD Agreement and SCM Agreement that authorities disclose "essential facts." Article 6.9 of the AD Agreement states that:

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

Article 12.8 of the SCM Agreement is worded almost identically; it requires that the authorities inform "all interested Members" in addition to all interested parties.

193. One previous panel has stated that to trigger the disclosure requirement in Article 6.9 of the AD Agreement (which is essentially identical to the one in Article 15.8 of the SCM Agreement),[247] there must be: (1) a fact (as opposed to reasoning) and (2) that it form the basis for the decision to impose a definitive measure.[248]

194. It is evident that each of the items listed in paragraph 191 above that MOFCOM failed to disclose is an objective "fact." Moreover, nothing in the Injury Disclosure Document or the Final Determination states that any factual material on which MOFCOM relied could not be disclosed because of confidentiality concerns.

195. It is similarly evident that each of the facts that MOFCOM failed to disclose was critical to its analysis of price effects, which in turn was critical to its affirmative injury determination. Information about pricing levels is essential to an analysis of pricing, yet MOFCOM disclosed no data on levels of prices for the domestically produced product, did not disclose how it derived any data on which it relied in ascertaining prices for the domestically-produced product, and prior to reaching the Final Determination did not disclose the results of any pricing comparisons between the domestically produced product and the imports under investigation. It also failed to disclose any information about the domestic industry's costs, although it relied on the domestic industry's supposed inability to recover its costs in its price suppression analysis. MOFCOM's failure to disclose numerous factual elements critical to its analysis of price effects directly violates the requirements of Article 6.9 of the AD Agreement and Article 15.8 of the SCM Agreement.

196. MOFCOM's failure to disclose the information underlying its finding that the exporters adopted a "pricing strategy" of lower prices was particularly problematic. This finding was one of the central underpinnings of MOFCOM's price effects analysis, and directly implicated the exporters' own activities. MOFCOM's failure to disclose the nature of the "pricing strategy" and how it was manifested seriously impaired the parties' ability to defend their interests in the investigation, frustrating a principal purpose of Article 6.9 of the AD Agreement and Article 12.8 of the SCM Agreement.

197. Accordingly, the Panel should conclude that MOFCOM's failure to disclose numerous facts central to its price effects analysis is inconsistent with Article 6.9 of the AD Agreement and Article 12.8 of the SCM Agreement.

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[247] Panels have typically accorded the same interpretation to identically, or nearly identically, worded provisions of the AD Agreement and SCM Agreement. See, *e.g.*, *United States – DRAMS CVD (AB)*, para. 7.353; *United States – Softwood Lumber IV*, paras. 7.24-7.28.

[248] *Argentina – Poultry*, paras. 7.223-7.225.

2. MOFCOM's Measures were Based on Cursory and Unsupported Findings Concerning Price Effects and are Inconsistent with Article 12.2.2 of the AD Agreement and Article 22.5 of the SCM Agreement

198. MOFCOM's Final Determination contains essentially no more information concerning the price effects analysis than does the Injury Disclosure Document. The price effects analysis is based on several conclusory assertions that importers of the merchandise under investigation had "policies" or "strategies" of charging low prices. The Final Determination does not specify the nature of these "strategies," explain how these "strategies" were implemented, or identify any price comparisons it had conducted which would illustrate or corroborate these "strategies."

199. The WTO Agreements require that authorities provide more than cursory assertions to justify their decisions to impose definitive antidumping and countervailing duty measures. Under Article 12.2.2 of the AD Agreement:

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

Article 22.5 of the SCM Agreement contains virtually identical wording.[249]

200. It cannot be disputed that MOFCOM's analysis of price effects was a consideration which led to the imposition of definitive measures. Articles 3.1 and 3.2 of the AD Agreement and Articles 15.1 and 15.2 of the SCM Agreement require an authority to undertake a price effects analysis as part of an injury determination. MOFCOM's conclusion that the imports under investigation caused significant price effects is an essential component of its affirmative injury determination, which in turn is a prerequisite to China's imposition of definitive measures.

201. Consequently, Article 12.2.2 of the AD Agreement and Article 22.5 of the SCM Agreement required, among other things, that MOFCOM provide "all relevant information" on the relevant facts underlying its price effects analysis. MOFCOM did not satisfy this obligation. The Final Determination does not contain any facts supporting the finding that the importers of the

[249] Article 22.5 of the SCM Agreement modifies one of the cross-references found in Article 12.2.2 of the AD Agreement, and eliminates the other. Neither cross-reference is pertinent to this dispute.

merchandise under investigation had a "policy" or "strategy" of charging low prices. Because it does not provide any information concerning price levels for the domestically-produced product, the Final Determination similarly does not contain any facts that would support a finding that prices for the merchandise under investigation were at any time lower than prices for the domestically produced product.[250]

202. MOFCOM also failed to satisfy its obligation under Article 12.2.2 of the AD Agreement and Article 22.5 of the SCM Agreement to provide "the reasons for the acceptance or rejection of the relevant arguments or evidence by the exporters and importers." MOFCOM"s Final Determination indicates that the parties opposing imposition of measures submitted arguments and evidence in support of the proposition that the imports under investigation did not have significant price effects. The Russian exporters maintained that Chinese producers were the actual price leaders in the Chinese GOES market. U.S. exporter ATI maintained its prices were higher than those charged by the Chinese producers.[251]

203. MOFCOM's response to these arguments was communicated in a single sentence: "The relevant evidence shows that the low price policy was adopted when selling the subject merchandise in the Chinese market and forced Petitioners to drop the price of like products and caused the differential between price and cost to continue decreasing."[252] As demonstrated above, this conclusion was utterly without any evidentiary basis. Nowhere in the Injury Disclosure Document or the Final Determination did MOFCOM identify the facts underlying this conclusion, such as the nature of the "low price policy" or the means of its implementation. Thus, MOFCOM's response to the arguments asserted was entirely conclusory.[253] Such a cursory "because we said otherwise" response cannot be the type of reason for rejecting an argument that an authority must provide under Article 12.2.2 of the AD Agreement and Article 22.5 of the SCM Agreement.

204. MOFCOM's Final Determination is devoid of any meaningful description of numerous facts critical to the price effects analysis and fails to provide more than a cursory response to the parties' arguments. Such deficiencies are inconsistent with Article 12.2.2 of the AD Agreement and Article 22.5 of the SCM Agreement.

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[250] As previously stated, the Final Determination provides no statement that any information was omitted because of confidentiality concerns.

[251] Final Determination, sec. V(III)(3). (US-28)

[252] Id.

[253] MOFCOM also cites, without expressly adopting, the argument of the petitioners that "the Investigating Authority made a detailed comparison between the import price of the subject merchandise and the price of the like product of the Chinese industry." Id. We have previously demonstrated that neither the Injury Disclosure Document nor the Final Determination contains any information concerning prices of the domestically produced product, much less a "detailed comparison" between these undisclosed prices and the four average unit value computations disclosed for the cumulated subject imports.

3. MOFCOM's Measures were Based on Conclusory Price Effects Analysis and are Inconsistent with Articles 3.1 and 3.2 of the AD Agreement and Articles 15.1 and 15.2 of the SCM Agreement

a. General Considerations

205. We have previously demonstrated that MOFCOM's analysis of the price effects of the imports under investigation fails to disclose critical facts and contains reasoning that is largely conclusory. While these defects support a conclusion that MOFCOM violated procedural obligations under the WTO Agreements, the absence of pertinent facts also deprives MOFCOM's findings of significant price effects of evidentiary support. Consequently, the price effects analysis does not conform to the standards established in Articles 3.1 and 3.2 of the AD Agreement and Articles 15.1 and 15.2 of the SCM Agreement.

206. Article 3.1 of the AD Agreement states that:

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

Article 15.1 of the SCM Agreement is worded identically, except that it uses the term "subsidized imports" where Article 3.1 of the AD Agreement refers to "dumped imports."

207. Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement impose two important requirements on authorities that make injury determinations. The first is that the determination be based on "positive evidence." The Appellate Body has referenced with approval a description of "positive evidence" as "evidence that is relevant and pertinent with respect to the issue being decided, and that has the characteristics of being inherently reliable and trustworthy."[254]

208. The second requirement is that the injury determination involve an "objective examination" of the volume of the dumped or subsidized imports, their price effects, and their impact on the domestic industry. The Appellate Body has stated that, to be "objective," an injury analysis must be "based on data which provides an accurate and unbiased picture of what it is that one is examining" and be conducted "without favouring the interests of any interested party, or group of interested

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[254] *Mexico – Rice* (AB), paras. 163-64. *See also EC– Pipe Fittings (AB)*, para. 7.226, *upheld on this issue*, WT/DS219/AB/R (adopted 18 August 2003).

parties, in the investigation."[255] Furthermore, the requirement that the examination be "objective" mandates that "the 'examination' process must conform to the basic principles of good faith and fundamental fairness."[256]

209. Article 3.2 of the AD Agreement and Article 15.2 of the SCM Agreement describe further the nature of the examination that authorities must conduct to determine the price effects of dumped or subsidized imports. Article 3.2 of the AD Agreement states that "[w]ith regard to the effect of the dumped imports on prices, the investigating authorities shall consider whether there has been significant price undercutting by the dumped imports as compared with the price of a like product of an importing Member, or whether the effect of such imports is to depress prices to a significant degree or prevent prices increases, which otherwise would have occurred, to a significant degree." Article 15.2 of the SCM Agreement is worded identically, except that it uses the term "subsidized imports" where Article 3.1 of the AD Agreement uses the term "dumped imports."

b. Price Undercutting Analysis

210. In its Final Determination, MOFCOM does not expressly make a finding of significant price undercutting (or lack thereof) by the imports under investigation. Nevertheless. several of its findings suggest that an essential predicate of the price effects analysis is that prices for the imports under investigation were lower than the prices for the domestically produced product. This is highlighted by the multiple references to the "low price" policy or strategy purportedly adopted by the exporters of the merchandise under investigation, as well as the finding that "the sharp drop of the price [of imports] in Q1 2009 significantly undercut and suppressed the price of domestic like products."[257]

211. MOFCOM's price undercutting findings are not based on positive evidence. Most notably, the finding of significant price undercutting in the first quarter of 2009 could not have been based on any evidence. MOFCOM acknowledged that it "did not conclude that the price of the imported subject merchandise was lower than the price of the domestic like product in Q1 of 2009."[258]

212. MOFCOM's various findings about "low price" policies and strategies are similarly not based on positive evidence. Indeed, as discussed above, MOFCOM never disclosed any underlying facts that might corroborate these conclusions. Reviewing the final determination, there are two conceivable types of material MOFCOM may have reviewed – even if it did not disclose or discuss them – that might have been pertinent to "low price" findings. Neither, however, meets the

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[255] *Mexico – Rice* (AB), para. 180.

[256] *United States – Hot-Rolled Steel (AB),* para. 193.

[257] Final Determination (US-28), sec. V(III)(3)

[258] Id., sec. VII(II)(5)

"positive evidence" standard.

213. First, MOFCOM might have reviewed pricing or value information for domestically produced articles and compared these with the disclosed average unit value information for the imports under investigation. In one portion of the final determination, MOFCOM states, without elaboration or citation, that "the relevant content of the determination undertakes a comparative analysis of price."[259] The problem with this statement is that the relevant portion of the final determination does not indicate how MOFCOM undertook such a comparison, what pricing or value data MOFCOM may have used in making such a comparison, or the results of any comparison for periods other than the first quarter of 2009. Such bald assertions do not constitute evidence of any sort, much less positive evidence.

214. Second, MOFCOM intimates that the "strategy" that the exporters followed in charging low prices is reflected in various unspecified and undisclosed "contracts and original records from the price formulation provided by Petitioners."[260] Even if MOFCOM's failure to identify or describe meaningfully the nature of the "records" it is referencing can be disregarded, such "records" cannot constitute positive evidence of "low prices" absent some proof that the "records" reflected the prices the exporters actually charged. MOFCOM provides no such documentation. Additionally, MOFCOM's finding that the exporters of the products under investigation had a "strategy" of selling at prices lower than domestic producers cannot be reconciled with MOFCOM's admission that the imports under investigation were not priced lower than domestically produced products during the first quarter of 2009.

215. Moreover, insofar as they may have been based on price comparisons, MOFCOM's price undercutting findings were also not based on an objective examination. MOFCOM did not collect information in a manner designed to yield accurate or unbiased information about price levels. Instead, MOFCOM either failed to collect or simply ignored evidence that would have provided accurate, representative, and credible information about pricing.

216. Initially, nothing in MOFCOM's Injury Disclosure Document and Final Determination supports the conclusion that the authority relied or referenced any information about actual pricing levels. The only "pricing" information MOFCOM ever references in its injury determination consists of average unit values for the imports under investigation. In certain circumstances, average unit value data may serve as a reliable proxy for pricing information. For this to occur, however, each group of products being compared must be relatively similar. Otherwise, differences in average unit values may reflect changes or variations in product mix, not differences in pricing. In its Final Determination, MOFCOM acknowledges that GOES is not a homogenous product, but

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[259] Id., sec. VII(II)(4)

[260] Id., sec. V(III)(3)

one that includes steel of various grades and characteristics.[261] In light of the variety of different GOES products available in China, MOFCOM was obliged to provide a reasoned explanation why average unit value data provided a reliable substitute for pricing data. It did not do so.

217. Furthermore, the customs data from which MOFCOM obtained its value information would have permitted separate reporting of average unit values for imports from the United States and imports from Russia. Despite this, MOFCOM instead only disclosed – and presumably only relied upon – a blended number reflecting an aggregate value for combined Russian and U.S. imports.[262]

218. Prior panels have emphasized that Article 3.2 of the AD Agreement and Article 15.2 of the SCM Agreement do not require an authority to use any particular type of price undercutting analysis.[263] The United States does not contend that there is a single correct methodology for examining price comparisons in conducting such an analysis.

219. Nevertheless, the analytical methodology an authority uses to examine price undercutting must conform with the "objective examination" standard specified in Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreements. MOFCOM's apparent analytical methods, considered in their entirety, do not conform to this standard.

220. As previously discussed, the parties disputed whether the imports under investigation were actually sold at lower prices than the domestically produced product. Both Russian and U.S. exporters argued to MOFCOM that Chinese producers were price leaders and offered lower prices than did the exporters of the merchandise under investigation.[264] To evaluate these arguments fairly, an authority would need to generate and examine data that reasonably reflected prices domestic producers, on the one hand, and importers, on the other, charged to their customers.

221. However, to the extent MOFCOM's price comparison methodology can be discerned, it actively frustrated, rather than facilitated, any comparison of actual pricing practices. MOFCOM combined Russian and U.S. transactions into a single comparison, although it could at the minimum have evaluated each country's data separately. It used average unit value data without explaining whether the imports under investigation and the domestically produced product had comparable product mixes or whether the product mix remained constant throughout the period investigated. It also collapsed all transactions for 2006. 2007, and 2008 into a single price observation covering the

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[261] Id., secs. III(1) (noting at least two different grades of GOES imported from the United States and produced in China), sec. V(1) (noting that GOES produced in China has varying electromagnetic properties).

[262] Id., sec. III(1)

[263] *EC – Countervailing Measures on DRAM Chips*, para. 7.331; *EC – Pipe Fittings* (Panel Report), para. 7.277.

[264] Id., sec. V(III)(3).

entire calendar year. Thus, MOFCOM manipulated the data so as to minimize their accuracy and comprehensiveness. Because such action cannot be characterized as being accurate, biased, or in good faith, it does not satisfy the "objective examination" standard of Article 3.1 of the AD Agreement or Article 15.1 of the SCM Agreement.[265]

222. Thus, MOFCOM's price undercutting findings are unsupported by any data disclosed by the authority. To the extent they reflect any analysis at all, they are based on methodology that is both opaque and profoundly flawed. Accordingly, the price undercutting findings is inconsistent with Articles 3.1 and 3.2 of the AD Agreement and Articles 15.1 and 15.2 of the SCM Agreement.

c. Price Depression Analysis

223. According to the information MOFCOM disclosed, the only period in which prices for the domestically produced product declined was during the first quarter of 2009. Prices rose between 2006 and 2007, and between 2007 and 2008.[266]

224. The sole price depression finding MOFCOM makes is that "[b]ecause subject merchandise was kept at a low price, and the import volumes of subject merchandise increased greatly since 2008, domestic producers had to lower their prices to keep market share."[267] MOFCOM does not specify what period this finding concerns, although presumably it concerns some time after 2008.

225. No positive evidence exists to support this finding for 2008. Notwithstanding the increase in the quantity of the imports under investigation that year, domestic prices did not decline, but rose by 14.53 percent.[268]

226. No positive evidence exists to support this finding for the first quarter of 2009. Subject import volume, relative to apparent consumption in China, did not increase "greatly" during that period. To the contrary, the increase in the subject imports' market share, 1.17 percent, was virtually the same as the increase in the domestic industry's market share, which was 1.04 percent.[269] Moreover, the price of the imports under investigation during that year was not "low." To the contrary, MOFCOM found that they were higher than the prices for the domestically produced product.[270]

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[265] *See Mexico – Rice*, AB Report, paras. 18-183 (authority's actions limiting period of investigation "selective" and skewed to favor domestic industry, violating "objective examination" requirement).

[266] Injury Disclosure Document (US-27), sec. VI(4).

[267] Final Determination (US-28), sec. V(III)(3).

[268] Injury Disclosure, (US-27), sec. VI(4).

[269] Id.,secs. V(2), VI(8).

[270] Final Determination (US-28), sec. VII(1)(5).

227. MOFCOM's price depression finding is not merely devoid of evidentiary support, it is contradicted by the only available evidence. Accordingly, MOFCOM's price depression analysis is inconsistent with Articles 3.1 and 3.2 of the AD Agreement and Articles 15.1 and 15.2 of the SCM Agreement.

d. Price Suppression Analysis

228. At several points in its Final Determination, MOFCOM finds that the imports under investigation had significant price-suppressing effects during the latter portion of the period of investigation. In the discussion on price effects, MOFCOM states that the domestic industry's cost-price differential was sharply lower in the first quarter of 2009 than it was during the first quarter of 2008.[271] In the discussion of causal link, MOFCOM asserts that "[s]ince 2008, the sales price for the domestic like product has failed to cover rising costs."[272] As was the case with its price depression findings, MOFCOM's price suppression findings do not satisfy the requirements of Articles 3.1 and 3.2 of the AD Agreement and Articles 15.1 and 15.2 of the SCM Agreement.

229. Any price suppression finding that MOFCOM may have made concerning 2008 is unsupported by positive evidence. As previously discussed, MOFCOM disclosed no information about the domestic industry's cost levels or trends during the period of investigation. Consequently, there is no evidence – and nothing beyond MOFCOM's naked assertion – to support a finding that costs rose that year. In any event, the information that MOFCOM did disclose indicates that in 2008 the domestic industry's sales volumes rose by 14.83 percent. Because prices rose by an almost identical percentage, sales revenues increased by 19.91 percent, and pre-tax profits increased by 1.24 percent.[273] Because profits increased, the only information that MOFCOM disclosed indicates that the domestic industry's revenues rose more rapidly than did its costs.[274] This is hardly consistent with the usual understanding of price suppression, i.e., that prices and sales revenues have not increased commensurately with costs.

230. Article 3.2 of the AD Agreement and Article 15.2 of the SCM Agreement state that authorities are to examine whether the effect of dumped or subsidized imports is "to prevent price increases, which otherwise would have occurred, to a significant degree" (emphasis added). China does not identify any evidence, or provide any reasoned explanation, that would illustrate how, in light of the increasing prices that the domestic GOES industry was able to receive for its product in 2008, and the increasing profits it earned that year, the imports under investigation prevented price

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[271] Id., sec. V(III)(3).

[272] Id., sec. VI(I).

[273] Injury Disclosure, (US-27), sec. VI(3)-(6).

[274] As previously discussed, MOFCOM did not disclose any meaningful information concerning the evolution of the Chinese industry's costs.

increases that were significantly greater than those that actually occurred. The cursory discussion that MOFCOM provides to support any finding on price suppression for 2008 lacks a discernible evidentiary basis and fails to respond to the inquiry Article 3.2 of the AD Agreement and Article 15.2 of the SCM Agreement direct an authority to address.

231. By contrast, MOFCOM's price suppression finding for the first quarter of 2009, a period where declining profits indicate that the industry was not fully able to recover changes in costs, fails to reflect an objective examination of the record. The crux of MOFCOM's finding is that the "great increase" in the quantity of imports under investigation during the first quarter of 2009 was the cause of adverse changes in the domestic industry's price-cost differential.[275]

232. In making this finding, however, MOFCOM relied on data concerning only the final three months of a 39 month period of investigation. MOFCOM did not examine the entire data it had collected for the period of investigation to ascertain whether there was a nexus between increasing quantities of subject merchandise, on the one hand, and significant price suppression by the domestic industry, on the other. Had MOFCOM conducted such an examination, it would have found that no such nexus existed.

233. For example, from 2006 to 2007, the quantity of imports under investigation increased.[276] Despite this increase, the domestic industry's prices and profits increased as well.[277] The information disclosed by MOFCOM indicates no evidence of price suppression, and MOFCOM did not find that the increased volume of imports from 2006 to 2007 had any price-suppressing effects.

234. From 2007 to 2008, the quantity of imports under investigation increased by 60.6 percent.[278] Notwithstanding this, the domestic industry's prices and profits again increased.[279] Thus, the information MOFCOM disclosed – particularly concerning increasing profitability – demonstrates that, in the aggregate, the Chinese GOES industry during 2008 was able to increase revenues even more rapidly than its costs rose, notwithstanding a large increase in the quantity of imports under investigation. As previously discussed, there is no evidentiary support, and no explanation by MOFCOM, to support any finding that during 2008 the increasing quantity of imports under investigation significantly limited the domestic industry's ability to raise prices.

235. In its Final Determination, MOFCOM examined the performance of the domestic industry during the entirety of its three and one-quarter year period of investigation when it considered such

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[275] Final Determination,(US-28), sec. V(III)(3).

[276] Injury Disclosure, (US-27), sec. V(I).

[277] Id., secs. VI(4), (6).

[278] Id., sec. V(I).

[279] Id., secs. VI(4), (6).

an examination would support the conclusions it desired to make. For example, in an effort to rebut an argument the United States raised about the relationship between the domestic industry's capacity increases and its inventory buildups during the latter portion of the period of investigation, MOFCOM cited data from the entire period of investigation to support a finding that over the period of investigation "[t]here is not any direct, corresponding relationship between the change in production capacity and inventories."[280] If MOFCOM had conducted its investigation objectively, it would have engaged in a similar inquiry concerning whether there was any "direct, corresponding" relationship over the entire period of investigation between increases in the volume of imports and the ability of the domestic industry to recover increasing costs. As previously stated, such an examination would have concluded that there was no such relationship.

236. Instead, MOFCOM examined the data for the first quarter of 2009 in isolation. MOFCOM's skewed, out-of-context analysis of price suppression for the first quarter of 2009 fails to reflect the objective examination required by Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement.

237. MOFCOM made findings that the imports under investigation undersold the domestic like product, that these imports caused significant price depression, and that the imports prevented price increases that would have otherwise occurred. As we demonstrated above, these findings variously are contradicted by the disclosed evidence, lack any discernible support in the record, or fail to reflect an objective examination of the evidence that MOFCOM did disclose. Because each of the price effects findings is either unsupported by positive evidence and/or fails to reflect an objective examination, they do not satisfy the standards of the AD Agreement and the SCM Agreement. Consequently, MOFCOM's findings of significant price effects are inconsistent with Articles 3.1 and 3.2 of the AD Agreement and Articles 15.1 and 15.2 of the SCM Agreement.

K. The Causation Analysis in MOFCOM's Final Determination is Inconsistent with China's WTO Obligations

238. MOFCOM's Final Determination contains a single causal link analysis pertinent to both the antidumping and countervailing duty determinations. MOFCOM organized the causal link analysis in a manner that purports to conform to the requirements of Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement.

239. The substance of MOFCOM's causal link analysis, however, falls well short of these requirements. MOFCOM's causal link analysis relies on findings unsupported by positive evidence that do not reflect an objective examination of the record. MOFCOM failed to examine all relevant evidence. Furthermore, MOFCOM concluded without foundation that the imports under

[280] Final Determination (US-28), sec. VII(II)(1)(9). We discuss this finding – which itself does not reflect an objective examination – in greater detail in section IV(J)(1). below.

investigation were the sole source of injury to the domestic industry. As explained below, because of these deficiencies MOFCOM's causal link analysis is inconsistent with Articles 3.1 and 3.5 of the AD Agreement and Articles 15.1 and 15.5 of the SCM Agreement.

240. MOFCOM's investigation and analysis of causal link suffers from procedural as well as substantive defects. In its causal link analysis, China committed violations of Article 6.9 of the AD Agreement and Article 12.8 of the SCM Agreement and of Article 12.2.2 of the AD Agreement and Article 22.5 of the SCM Agreement similar to those in its price effects analysis.

1. MOFCOM's Examination of Causal Link is Inconsistent with Articles 3.1 and 3.5 of the AD Agreement and Articles 15.1 and 15.5 of the SCM Agreement

241. As explained in Section III(B), MOFCOM's Injury Disclosure and Final Determination reveal the flawed basis for its causation findings. Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement specify an authority's obligation to ascertain that dumped or subsidized imports are causing injury. Article 3.5 of the AD Agreement states:

> It must be demonstrated that the dumped imports are, through the effects of dumping, as set forth in paragraphs 2 and 4, causing injury within the meaning of this Agreement. The demonstration of a causal relationship between the dumped imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities. The authorities shall also examine any known factors other than the dumped 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. Factors which may be relevant in this respect include, inter alia, the volume and prices of imports not sold at dumping prices, contraction in demand or changes in the patterns of consumption, trade restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry.

Article 15.5 of the SCM Agreement has virtually identical language, with references to "subsidized imports" rather than "dumped imports" and "subsidies" instead of "dumping."[281]

242. Additionally, an authority's factual findings under Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement must comply with the "positive evidence" and "objective examination" requirements articulated in Article 3.1 of the AD Agreement and Article 15.1 of the

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[281] Additionally, Article 15.5 of the SCM Agreement sets forth in a footnote the language placed in the parenthetical clause of the first sentence of Article 3.5 of the AD Agreement.

SCM Agreement respectively.[282] We discussed the nature of these requirements in Section IV.J.3. above. As we demonstrate below, three aspects of MOFCOM's causation analysis fail to conform to the requirements of Articles 3.1 and 3.5 of the AD Agreement and Articles 15.1 and 15.5 of the SCM Agreement.

a. Use of Price Effects Findings

243. As previously discussed, MOFCOM relied heavily on its findings that the imports under investigation had significant price effects in finding a causal link between the imports under investigation and any injury sustained by the Chinese GOES industry. As explained above, each price effects finding is inconsistent with Articles 3.1 and 3.2 of the AD Agreement and Articles 15.1 and 15.2 of the SCM Agreement because it is contrary to the disclosed evidence, lacks a discernible factual basis, and/or fails to reflect an objective examination of the record. Because MOFCOM has not established that the imports under investigation had any significant price effects on the domestically produced product, a necessary element of its causal link analysis fails. Accordingly, because of its failure to demonstrate significant price effects, China has failed to demonstrate that dumped or subsidized imports are causing injury, as required by the first sentence of Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement.

b. Overexpansion and Overproduction by the Domestic Industry

244. MOFCOM failed to satisfy the requirements of Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement in examining the domestic industry's rapid increases in capacity during the period of investigation. MOFCOM erroneously concluded that the industry's consequent overproduction and inventory buildup could not have been a cause of any of the difficulties that the domestic industry was experiencing during the first quarter of 2009.

245. The second and third sentences of Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement require an authority to examine "all relevant evidence" before it both to ascertain whether there was a causal link between the dumped and subsidized imports and the injury experienced by the domestic industry and to examine whether factors other than the dumped or subsidized imports were also causing injury. In other words, before reaching the conclusion that the dumped and subsidized imports were a cause of any difficulties experienced by the domestic industry, an authority must examine other known factors and assess whether any such factor was also a cause of injury.

246. MOFCOM did purport in its Final Determination to examine the domestic industry's rapid capacity expansion and its consequent overproduction and inventory buildups as an alternative cause of injury to respond to arguments that the United States had made in its Comments on the

[282] *See EC – DRAMS*, para. 7.272.

Final Disclosure Document. MOFCOM's examination was patently inadequate, however. None of the three reasons MOFCOM provides to support its conclusion that the capacity expansion, overproduction, and inventory buildup could not have contributed to the domestic industry's difficulties during the first quarter of 2009 is supported by positive evidence, or reflects an objective examination of the record.

247. MOFCOM's first stated reason why the domestic industry's capacity expansion, overproduction, and inventory buildup was not a cause of injury is that "[t]he increase in domestic demand promoted an increase in production capacity."[283] Nothing in the record disclosed by MOFCOM, however, supports the view that increasing demand for GOES in China justified the domestic industry's enormous capacity increases. During the period examined by MOFCOM, the largest annual increase in apparent Chinese consumption of GOES was 22.80 percent, and the rate of increase actually slowed after 2007.[284] How historic rates of increased demand that never exceeded 22.80 percent annually during the period examined justified capacity increases of 53.67 percent in 2008 and 80.13 percent in the first quarter of 2009 is not self-evident from the disclosed data.[285] Nor is it ever explained by MOFCOM. Instead, the sole conclusion that the disclosed data permits is that the Chinese GOES industry, particularly in 2008 and the first quarter of 2009, expanded capacity far in excess of any historical or projected increase in domestic demand.

248. MOFCOM's second stated reason in support of its conclusion is that "[t]here is not any direct, corresponding relationship between the change in production capacity and overhangs." MOFCOM asserts that when capacity increased in 2007, inventories did not increase.[286]

249. MOFCOM's assertion that there is no discernible correlation between capacity increases and inventory buildups during a period when capacity and production increased far more rapidly than demand is not only counterintuitive, it is incorrect. MOFCOM disregards that the domestic industry's capacity increase conformed far more closely to the rate of demand increase in 2007 than it did in subsequent periods. In 2007, capacity increased by 12.53 percentage points more than demand. By contrast, the equivalent differentials during 2008 and between the first quarters of 2008 and 2009 were respectively 35.58 percentage points and 67.67 percentage points.[287] Because of the different circumstances characterizing 2007 and subsequent periods, MOFCOM had no basis

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[283] Final Determination, (US-28), sec. VII(II)(1)(9).

[284] Injury Disclosure, (US-27). sec. VI(1).

[285] Id*,* sec. VI(15).

[286] Final Determination, (US-28), sec. VII(II)(1)(9).

[287] Injury Disclosure, (US-28), sec. VI(1), (15). The various documents MOFCOM issued record the 2007 increase in capacity differently. The preliminary determination states that the 2007 increase in capacity was 5.33 percent. Preliminary Determination, (US-5), sec. VI(IV)(1). The Injury Disclosure Document states that the 20007 increase in capacity was 35.33 percent. Injury Disclosure Document (US-27), sec. VI(15). MOFCOM provided no reason for the discrepancy; we have used the higher figure provided in the Injury Disclosure Document.

for treating 2007 and the first quarter of 2009 as comparable. Equating the first quarter of 2009 with 2007 was inconsistent with an objective examination of the record.

250. Additionally, an objective examination would have reviewed the data for all available periods. It is true that inventories fell in 2007, when the difference in the rates of growth of capacity and demand was relatively modest. By contrast, in both 2008 and the first quarter of 2009, the periods where MOFCOM found some declines in the Chinese industry's performance, inventories increased dramatically when capacity increased at far faster rates than it did in 2007 and the differences between capacity and demand increases were also far larger.[288] An objective examination that encompassed all data in the record would reveal that when capacity increased at a substantially greater rate than demand, inventories rose more frequently than they did not. Moreover, the data in the record simply corroborated the common-sense proposition that the greater the disparity in increases between capacity and production, on the one hand, and demand, on the other, the more likely inventories would rise. MOFCOM's contrary conclusion that there was no correlation between capacity increases and inventory increases did not consider all relevant data and was unsupported by positive evidence.

251. MOFCOM's third stated reason is that "the volume of imports of the subject merchandise did not increase at a constant speed." While MOFCOM's reasoning is not entirely clear, the crux of its position appears to be that the increase in imports under investigation was so rapid, the entire inventory overhang in the first quarter of 2009 can be attributed to the imports under investigation.[289]

252. There is no discernible basis in the record for MOFCOM's finding. While the quantity of imports from Russia and the United States did increase during the period examined by MOFCOM, the period was also one of steadily growing domestic demand. Moreover, the domestic industry achieved increases in market penetration similar to those of cumulated imports from Russia and the United States. From 2006 to 2008, the market share of the cumulated imports under investigation increased by 2.1 percent; the domestic industry's market share increased by 1.9 percent.[290] Between the first quarter of 2008 and the first quarter of 2009, market shares increased almost identically: that of the cumulated imports under investigation by 1.17 percent, that of the domestic industry by 1.04 percent.[291] This was not a case where the imports under investigation were taking market share away from the domestic industry; instead, the imports under investigation and the domestic industry were growing both absolutely and relative to apparent consumption.

253. MOFCOM provides no positive evidence to support the conclusion that the imports under

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[288] Injury Disclosure, (US-27), sec. VI(14).

[289] Final Determination, (US-28), sec. VII(II)(1)(9).

[290] Derived from Injury Disclosure, (US-27), secs. V(2), VI(8).

[291] Id., sec. V(2), VI(8).

investigation were the sole cause of the massive rise in inventory levels between the first quarter of 2008 and the first quarter of 2009.[292] Instead, the domestic industry was at least in substantial share responsible for this increase because of its decisions to expand capacity and production between the first quarters of 2008 and 2009 far in excess of any actual or historical increase in domestic demand. Consequently, China acted inconsistently with Articles 3.1 and 3.5 of the AD Agreement, and Articles 15.1 and 15.5 of the SCM Agreement, by not examining all relevant evidence in its examination of causal link and by making findings in its causal link analysis unsupported by positive evidence that did not reflect an objective examination of the record.

254. MOFCOM is correct, however, in identifying the massive inventory overhang as a source of the domestic industry's difficulties during the first quarter of 2009. The inventories, which were increasing during the first quarter of 2009 far more rapidly than the imports under investigation, were a cause of oversupply in the market. This oversupply of domestic product provided domestic producers with a strong incentive to cut prices. Indeed, this would suggest why prices for the domestically produced product, whose supply increased massively during the first quarter of 2009, fell during that period much more sharply than prices for the imports under investigation, whose supply grew at roughly the same rate as demand.[293]

255. Thus, while there is no positive evidence to support MOFCOM's conclusion that the imports under investigation were the sole cause of the large increase in inventories during the first quarter of 2009, the record does indicate that the domestic industry's overly rapid increase in capacity and production contributed appreciably to that overhang and therefore to the declines in pricing and industry performance to which that overhang significantly contributed. In other words, the overexpansion and overproduction of the domestic industry was a known factor contributing to the difficulties the industry experienced during the first quarter of 2009.

256. Because there was a known factor other than the dumped or subsidized imports that was causing injury, MOFCOM needed to examine this factor and ensure it did not attribute to the imports under investigation the injury due to this factor to satisfy the requirements of Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement. MOFCOM did not purport to conduct such a non-attribution analysis, however. Consequently, China failed to comply with the third sentences of Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement.

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[292] MOFCOM has disclosed no data that would permit a comparison between the increase in domestic production, on the one hand, and the aggregate increases in sales of the Chinese industry and the imports under investigation, on the other.

[293] Injury Disclosure, (US-27), sec. VI(4); Preliminary Determination (US-5), sec. III(1). It is noteworthy that MOFCOM referenced in the Preliminary Determination that prices for the merchandise under investigation were only 1.25 percent lower in the first quarter of 2009 than interim 2008 (as opposed to the 30.25 percent decline in the price of the domestically produced product during this same interval), but did not disclose this fact again in either the Injury Disclosure Document or the Final Determination.

257. For the foregoing reasons, MOFCOM's findings concerning the causal link between the imports under investigation and the injury sustained by the domestic industry do not conform with the requirements of Articles 3.1 and 3.5 of the AD Agreement and Articles 15.1 and 15.5 of the SCM Agreement.

2. MOFCOM's Failure to Disclose Information Concerning Non-Subject Imports is Inconsistent with Article 6.9 of the AD Agreement and Article 12.8 of the SCM Agreement

258. As discussed above in Section IV.C, Article 6.9 of the AD Agreement and Article 12.8 of the SCM Agreement each requires authorities to inform all interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures in sufficient time for the parties to defend their interests.

259. Because MOFCOM purported to consider whether imports not subject to investigation were a cause of material injury to the domestic industry, facts pertaining to such imports were essential to its causal link analysis. Indeed, Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement each specify "the volume and prices" of imports that are not dumped and/or subsidized as a pertinent factor in analysis of causation.

260. Notwithstanding this, MOFCOM disclosed no information concerning the volume or prices of imports from sources other than Russia and the United States.[294] This is notwithstanding that such information could presumably be generated from the same public customs data that MOFCOM used to ascertain the volume and average unit values of imports from Russia and the United States. MOFCOM's failure to disclose any data concerning imports from other countries made it impossible for parties (including the United States) to prepare any type of meaningful argument on the role imports from sources other than Russia and the United States may have played in contributing to any material injury sustained by the domestic GOES industry.[295]

261. Thus, as with the case with much of the price effects analysis, MOFCOM concealed from the parties evidence critical to its determination. Consequently, MOFCOM's failure to disclose any empirical information about imports from sources other than Russia and the United States is inconsistent with the requirements of Article 6.9 of the AD Agreement and Article 12.8 of the SCM

[294] The Injury Disclosure Document provides no information whatsoever concerning imports from sources other than Russia and the United States. The Preliminary Determination contains the same three-sentence analysis, devoid of empirical information, that is in the Final Determination. Preliminary Determination (US-5), sec. VII(II)(5).

[295] While it is true that the parties may have been able to generate such public information themselves, the WTO Agreements do not place the burden on the parties to attempt to ascertain what public sources of information that the authorities may be using. Instead, Article 6.9 of the AD Agreement and Article 12.8 of the SCM Agreement place on the authorities the burden of informing the parties of the essential facts under consideration.

Agreement.

3. MOFCOM's Cursory and Fact-Free Analysis of Non-Subject Imports is Inconsistent with Article 12.2.2 of the AD Agreement and Article 22.5 of the SCM Agreement

262. The discussion of imports from sources other than Russia and the United States in MOFCOM's Final Determination was essentially devoid of information. The three-sentence analysis contained no empirical information concerning the volume and value of imports from sources other than those under investigation.

263. As discussed in section V.J.2 above, Article 12.2.2 of the AD Agreement and Article 22.5 of the SCM Agreement require authorities to provide "all relevant information on matters of fact and law" leading to the imposition of definitive measures. Information on the volume and prices of imports from sources other than Russia and the United States was directly relevant to MOFCOM's finding that these imports were not a source of injury to the domestic industry. Indeed, Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement require an authority to examine "the volume and prices of imports" that are not dumped or subsidized as an element of non-attribution analysis. MOFCOM's finding that imports not under investigation were not a cause of injury was in turn a basis for its conclusion that the imports under investigation were the sole cause of the injury.

264. The Final Determination, however, disclosed no information supporting its finding, despite the fact that the information in question would not have been confidential. The cursory nature of MOFCOM's three-sentence discussion concerning imports from sources other than Russia and the United States, and the lack of any factual substantiation for MOFCOM's conclusion, essentially renders MOFCOM's conclusion impossible to review.

265. The requirements of Articles 12.2.2 of the AD Agreement and Article 22.5 of the SCM Agreement are intended to avoid such opacity in decision making. Consequently, China acted inconsistently with its obligations under these two provisions by failing to provide any factual information underlying its finding about the supposed lack of effect from imports from sources other than Russia and the United States.

L. China's Conduct of the GOES Investigation Breached Article 10 of the SCM Agreement

266. Finally, Article 10 of the SCM Agreement provides that

> Members shall take all necessary steps to ensure that the imposition of a countervailing duty on any product of the territory of any Member imported into the territory of another Member

> is in accordance with the provisions of Article VI of GATT 1994 and the terms of this Agreement. Countervailing duties may only be imposed pursuant to investigations initiated and conducted in accordance with the provisions of this Agreement and the Agreement on Agriculture.

267. Because China's conduct of the GOES investigation breached numerous other provisions of the SCM Agreement, China also breached Article 10.

V. Conclusion

268. For the reasons set forth in this submission, the United States respectfully requests the Panel to find that China's measures, as set out above, are inconsistent with China's obligations under the GATT 1994, SCM Agreement, and Antidumping Agreement. The United States further requests, pursuant to Article 19.1 of the DSU, that the Panel recommend that China bring its measures into conformity with the GATT 1994, SCM Agreement, and Antidumping Agreement.

TABLE OF EXHIBITS

EXHIBIT NO.	DESCRIPTION
US-1	ITC, Grain-Oriented Silicon Electrical Steel from Italy and Japan, 1994
US-2	Petition for Antidumping and Countervailing Duty Investigation by the Grain Oriented Flat-rolled Electrical Steel Industry in the People's Republic of China, Apr. 29, 2009
US-3	United States Questionnaire Response, Aug. 17, 2009
US-4	United States, Anti-Subsidy Investigation on Imported Grain Oriented Flat-Rolled Electrical Steel Originating in the United States/Comments on the Preliminary Determination, (Dec. 30, 2009)
US-5	MOFCOM, Preliminary Determination of Anti-Dumping Investigation against Imported GOES originating in the US and Russia and of Anti-Subsidy Investigation against Imported GOES originating in the US, Dec. 20, 2009
US-6	MOFCOM, Initiation of Anti-subsidy Investigation on Imported Grain Oriented Flat-rolled Electrical Steel Originating in the US, No.41, June 1, 2009
US-7	MOFCOM, Initiation of Antidumping Investigation on Imported Grain Oriented Flat-rolled Electrical Steel Originating in the US and Russia, No. 40, June 1, 2009
US-8	AK Steel, New Subsidy Questionnaire Response, Sept., 21, 2009
US-9	AK Steel Revised Original Questionnaire Response, Exhibit I.II.ii
US-10	AK Steel, Second Supplemental Questionnaire Response, Oct, 12, 2009 **(Contains BCI)**
US-11	AK Steel, Original Questionnaire Response, Aug. 10, 2009 **(Contains BCI)**
US-12	United States, Countervailing Duty Investigation on Imported Grain Oriented Flat-Rolled Electrical Steel Originating in the United States/Comments on the Final Disclosure, (Mar. 30, 2010)
US-13	AK Steel, Response to Deficiency Letter, 9/9/09
US-14	AK Steel, Revised Questionnaire Response, Sept. 9, 2009 **(Contains BCI)**

US-15	AK Steel Revised Original Questionnaire Response, Exhibit II.3, Customer Lists **(Contains BCI)**
US-16	Petition for Additional Subsidy Programs, June 20, 2009
US-17	MOFCOM, Additional Initiation Notice for Countervailing Duty Investigation, No. 60, Aug. 19, 2009
US-18	AK Steel, First Supplemental Questionnaire Response, Sept. 28, Oct 9, 2009 **(Contains BCI)**
US-19	AK Steel, Third Supplemental Questionnaire Response, Oct, 23, 2009 **(Contains BCI)**
US-20	AK Steel, Fourth Supplemental Questionnaire Response, Oct, 26, 2009
US-21	AK Steel, Fifth Supplemental Questionnaire Response, Nov. 5, Nov. 6, 2009
US-22	AK Steel, Request to Verify Customer Lists, Jan. 12, 2009
US-23	AK Steel, Comments on Preliminary Determination, Exhibit 1, Customer Lists **(Contains BCI)**
US-24	MOFCOM, the Disclosure Letter for Fundamental Facts of the Verification on AK Steel Corporation in the GOES Anti-Subsidy Investigation, Mar. 3, 2010 **(Contains BCI)**
US-25	MOFCOM, Disclosure Letter for Fundamental Facts of the Verification on AK Steel Corporation in the GOES Anti-Dumping Investigation," Mar. 3, 2010 **(Contains BCI)**
US-26	March 15, 2010, Memorandum Regarding The Factual Disclosure On The Dumping Margin and Ad Valorem Subsidy Rate for Grain Oriented Flat-Rolled Electrical Steel Antidumping and Countervailing Cases
US-27	MOFCOM, Notice regarding Industrial Injury Investigation Information Disclosure concerning the Antidumping investigation against Imported GOES Originated from the United States and Russia and the Anti-subsidy investigation against Imported GOES Originated from the United States, Mar. 7, 2010
US-28	MOFCOM, Final Determination in Anti-Dumping and Anti-Subsidy Investigations on GOES Imports from the US and Russia, No. 21, Apr. 10, 2010
US-29	United States, Comment Regarding the Initiation Based on the New Allegations, (Aug. 17, 2009)

US-30	Petition, Appendix 15, Exhibit 2, "Paying the Price for Big Steel"
US-31	Petition Appendix 15, Exhibit 1, "Subsidies to the U.S. Steel Industry"
US-32	ATI, Comments on MOFCOM's Disclosure of the Calculation of the Dumping Margins concerning the GOES Antidumping Investigation, Mar. 25, 2010
US-33	Petitioner's Estimate of the Subsidy Margin Document