

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

**SECOND WRITTEN SUBMISSION OF
THE UNITED STATES OF AMERICA**

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Table of Reports

SHORT FORM	FULL CITATION
<i>EC – Fasteners (AB)</i>	Appellate Body Report, <i>European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China</i> , WT/DS397/AB/R, adopted 28 July 2011
<i>Guatemala – Cement II</i>	Panel Report, <i>Guatemala – Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico</i> , WT/DS156/R, 17 November 2000
<i>Japan – DRAMS (AB)</i>	Appellate Body Report, <i>Japan – Countervailing Duties On Dynamic Random Access Memories from Korea</i> , WT/DS336/AB/R, adopted 28 November 2007
<i>Mexico – Olive Oil</i>	Panel Report, <i>Mexico – Definitive Countervailing Measures on Olive Oil from the European Communities</i> , WT/DS341/R, adopted 21 October 2008
<i>Mexico – Rice (AB)</i>	Appellate Body Report, <i>Mexico – Definitive Anti-Dumping Measures on Beef and Rice; Complaint with Respect to Rice</i> , WT/DS295/AB/R, adopted 20 December 2005
<i>Mexico – Steel Pipes and Tubes</i>	Panel Report, <i>Mexico – Anti-Dumping Duties on Steel Pipes and Tubes from Guatemala</i> , WT/DS331/R, adopted 24 July 2007, DSR 2007:IV, 1207
<i>US – Hot-Rolled Steel (AB)</i>	Appellate Body Report, <i>United States – Anti-dumping Measures on Certain Hot-Rolled Steel Products from Japan</i> , WT/DS184/AB/R, adopted 23 August 2001
<i>US – Softwood Lumber Dumping (Panel)</i>	Panel Report, <i>United States – Final Dumping Determination on Softwood Lumber from Canada</i> , WT/DS264/R, adopted 31 August 2004, as modified by the Appellate Body Report, WT/DS264/AB/R
<i>US – Softwood Lumber (AB)</i>	Appellate Body Report, <i>United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada</i> , WT/DS257/AB/R, adopted 17 February 2004, DSR 2004:II, 571

I. Introduction

1. In its first written submission, the United States explained that several 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 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. China's responses to the U.S. claims fail to address the substance of the U.S. arguments. In examining China's justifications for its measures in this case, it is useful to focus on what MOFCOM actually found as reflected in its determinations and disclosures, not on the *post-hoc* rationalizations provided by China for purposes of this dispute. As we discuss below, China's first written submission often ignores MOFCOM's actual findings or tries to rewrite them. In some instances, China seeks to justify its measures by referring instead to alleged U.S. practice. In other instances, China has replied with broad assertions that the AD and SCM Agreements create no obligations with respect to the issues that the United States has raised, and that China is free to do whatever it chooses. China is incorrect. The AD and SCM Agreements do place relevant obligations on China, and China has failed to rebut the U.S. *prima facie* case that China has breached these obligations.

3. This submission will focus on some key issues, including issues that have arisen as a result of China's replies to the Panel's questions.

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

4. Article 11.3 of the SCM Agreement requires an investigating authority to determine whether an application meets the requirements in Article 11.2 to include "sufficient evidence" of financial contribution, benefit, and specificity in order to initiate an investigation of an alleged subsidy. To meet the standard for "sufficient evidence" under Article 11.2, an application must contain a "degree of actual evidence."¹ Statements of conclusions unsubstantiated by facts cannot satisfy Article 11.2.² When reviewing an investigating authority's determination of what constitutes sufficient evidence for purposes of Article 11.3, a panel should "determine whether an unbiased and objective investigating authority would have found that the application contained

¹ *Mexico – Steel Pipes and Tubes (Panel)*, para. 7.24. (discussing Article 5.2 of the AD Agreement).

² *Guatemala – Cement II (Panel)*, para. 8.53. (discussing Article 5.2 of the AD Agreement); *see also U.S. – Softwood Lumber V (Panel)*, para. 7.78. (discussing Article 5.2 of the AD Agreement). ("Statements and assertions, unsubstantiated by any evidence do not constitute sufficient evidence").

sufficient information to justify the initiation of the investigation.”³ The requirement under Article 11.3 is that the determination by an investigating authority must occur at the time of initiation – a deficiency in the application cannot be “cured” by information submitted later in the course of an investigation.

A. China's interpretation of Article 11 of the SCM Agreement is erroneous

5. While there are parallels between SCM Agreement Article 11 and AD Agreement Article 5, it is important to note the textual differences between Article 5.2 of the AD Agreement and Article 11.2 of the SCM Agreement. As noted in the U.S. answers to Panel question 3, China’s reliance on panel reports interpreting Article 5.2 of the AD Agreement in support its position regarding Article 11 of the SCM Agreement is misplaced. Article 11.2 of the SCM Agreement refers to an application including “sufficient evidence” of the existence of a subsidy, whereas Article 5.2 of the AD Agreement only refers to “evidence” of the existence of dumping. Likewise, Article 11.2(iii) refers to “evidence,” whereas Article 5.2(iii) only refers to “information.”⁴

6. Thus, China’s reliance in its first written submission on panel reports interpreting the AD Agreement for its propositions that all that is needed is “the inclusion of raw information,”⁵ and that information need not be linked with allegations,⁶ is misplaced in the context of the SCM Agreement. China perpetuates the error in its answers to the Panel’s questions.⁷ In contrast to the low standard advocated by China, the text of the SCM Agreement makes clear that what is required is *sufficient evidence*.

B. The Application Presented Insufficient or No Evidence Indicating a Countervailable Subsidy for Several Programs

7. As explained in the U.S. first written submission, the evidence provided in the application in support of applicants’ claims with respect to several programs was nonexistent or otherwise not sufficient to support initiation. While China asserts that initiation of the countervailing duty investigation was consistent with Article 11 of the SCM Agreement, the following demonstrates that, for each alleged subsidy, the petition contained serious gaps that would have prevented any reasonable investigating authority from concluding that the evidence provided was sufficient to

³ U.S. – *Softwood Lumber V (Panel)*, para. 7.78. (discussing Article 5.3 of the AD Agreement).

⁴ U.S. Response to the First Set of Panel Questions, para. 10.

⁵ China First Written Submission, para. 22.

⁶ China First Written Submission, paras. 26-27.

⁷ China Response to the First Set of Panel Questions, paras. 3-6.

support initiation.

1. Medicare Prescription Drug, Improvement and Modernization Act of 2003

8. For the Medicare allegation, the most significant flaw in the allegation was the absence of any evidence indicating that the alleged subsidy was specific. There was no evidence provided to indicate that “sponsors of retiree healthcare benefit plans that include a qualified prescription drug benefit” was a *de jure* or *de facto* specific group. The only document cited by applicants was an AK Steel annual report indicating that the company signed up for the program,⁸ and China asserts that other evidence contained elsewhere in the petition supported its initiation decision.

9. Regarding China’s first assertion, China’s reasoning turns the notion of specificity on its head. According to China, in making the statement in its Annual Report that it sponsors benefit plans including a qualified prescription drug benefit, AK Steel somehow self-declared that the program was specific to it. Nothing in the annual report suggests, however, that it was anything more than a statement of the fact that the company happened to provide healthcare plans including the prescription drug benefit – not that the company was the *only* such company to do so, or that it was one of a limited group of such companies. As noted in our answers to Panel question 1, “an applicant must provide sufficient evidence to indicate that the subsidy is specific to an enterprise or industry or group of enterprises or industries under the provisions of Article 2” of the SCM Agreement.⁹ China fails to cite any evidence in this regard. China cannot claim that the evidence was not “reasonably available,” as information on the law is readily available via simple internet search.

10. Regarding China’s comment that MOFCOM’s determination to initiate on this program was supported by evidence provided elsewhere in the petition on government support to the U.S. steel industry,¹⁰ it is unclear how such evidence would be relevant to this particular allegation. Adopting China’s logic would allow an applicant to point to any general policy pronouncements, regardless of when they were made and how divorced they are from the separately alleged subsidies, as evidence of whether an alleged subsidy is specific. Citing irrelevant information about steel industry support from decades ago cannot overcome the fact that the applicant did not provide any evidence indicating that a prescription drug benefit for retired persons was somehow specific.¹¹

⁸ China First Written Submission, para. 34.

⁹ U.S. Response to the First Set of Panel Questions, para. 5.

¹⁰ China First Written Submission, para. 36.

¹¹ See U.S. First Written Submission, para. 78.

2. Economic Recovery Tax Act of 1981

11. As the United States explained in its First Submission, the Economic Recovery Tax Act of 1981 ceased to operate 27 years prior to the period of investigation. In the case of this allegation, the application contained no evidence indicating that the Economic Recovery Tax Act provided any benefits during the period of investigation.¹²

12. China responds by arguing that subsidies may be allocated over a period of time, and the SCM Agreement does not provide guidance for determining when or how to allocate subsidy benefits over time.¹³ China’s response, however, is beside the point, as it does nothing to address the fact that the application failed to provide any evidence indicating that the Economic Recovery Tax Act provided any benefits during the period of investigation. Article 11.3, read together with Article 11.2, requires something more than simply referencing a law that expired decades ago. China’s speculation after the fact that allocation is sometimes appropriate does nothing to satisfy the requirement that the application provide sufficient evidence of the existence of a subsidy. The application did not reference allocation, nor did it even claim, let alone provide evidence, of any ongoing benefit from the legislation.

3. Tax Reform Act of 1986

13. As with the Economic Recovery Tax Act of 1981, in the case of the Tax Reform Act of 1986, the applicant failed to provide any evidence indicating that a benefit could exist from subsidies allegedly provided 24 years before the period of investigation.¹⁴ In response, China makes the same argument as with the Economic Recovery Tax Act of 1981. Again, China’s response does nothing to address the fact that the application contained no evidence indicating that the Tax Reform Act of 1986 provided any benefits during the period of investigation.

4. Steel Import Stabilization Act of 1984

14. Regarding the Steel Import Stabilization Act of 1984, the application was deficient with respect to “financial contribution”. In fact, the application did not allege that the voluntary restraint agreements (“VRAs”) established under this Act constituted one of the four types of financial contributions enumerated in Article 1.1(a)(1) of the SCM Agreement. Rather, applicants appeared to allege that the VRAs constituted a price support mechanism within the

¹² See U.S. First Written Submission, para. 78; U.S. Oral Statement at the First Panel Meeting, para. 8. See also Honduras Third Party Oral Statement (courtesy translation), paras. 6-7.

¹³ China First Written Submission, para. 38.

¹⁴ See U.S. First Written Submission, para. 78; Honduras Third Party Oral Statement, paras. 6-7.

meaning of Article 1.1(a)(2).¹⁵

15. China claims that “the United States does not dispute in its own challenge that VRAs were concluded pursuant to this federal law - by definition an act of government - and that the result was a financial gain to the U.S. steel industry.”¹⁶ However, the sole evidence relied upon by the applicant merely stated that the VRAs “effectively provided” steel producers with a price support mechanism.¹⁷ In other words, there was no evidence that the VRAs constituted “price support” as that term is used in the SCM Agreement. Rather, the evidence provided only indicated that the VRAs under the Steel Import Stabilization Act of 1984 could have the *effect* of “price support.” Nothing in the evidence provided by the applicant indicated that the U.S. Government actually supported steel prices, for example, by instituting a price support mechanism for steel. Thus, the evidence supporting this allegation was insufficient.

5. Indiana Steel Industry Advisory Service

16. As described in the U.S. response to the Panel’s questions, there was no evidence of any of the financial contributions enumerated in SCM Agreement Article 1.1(a).¹⁸ The sole information in the petition consisted of this statement: “State of Indiana forms Steel Advisory Commission to examine state and federal laws affecting the steel industry and to consider industry problems such as foreign competition and economic decline.”¹⁹ The applicant states that this constitutes the provision of a good or service other than general infrastructure. While China argues that the program was “indicative” of a financial contribution,²⁰ no evidence was provided indicating that a study would be performed and, if it was, whether that would be available to the steel industry. Further, there is no indication of what the benefit under such a program would (or could) be.²¹

17. The application simply makes the assertion that “the government undertook a project which should had been founded by companies with large expense [sic]”²² with absolutely no

¹⁵ See Exhibit CHN-2, at 80.

¹⁶ China First Written Submission, para. 42.

¹⁷ See Exhibit US-31, at 2.

¹⁸ U.S. Response to the First Set of Panel Questions, para. 2.

¹⁹ Exhibit US-31, pg. 3.

²⁰ China First Written Submission, para. 44.

²¹ See U.S. First Written Submission, para. 78.

²² Exhibit CHN-2, pg. 81.

support for this assertion. China acknowledges the absence of evidence when it merely states that the program “quite plausibly” could have constituted a financial contribution.²³ “Plausibility” is not “evidence.” Indeed, it is common for governments to periodically review their laws in light of the economic situation and obtain expert views. This is a typical governmental function and is not a “financial contribution” to the steel industry. This should have been evident on the face of the application. China’s response suggests that it was relying on MOFCOM to initiate an investigation into the program to bolster the deficient application. This clearly does not meet the standard for sufficient evidence as set out in Article 11.²⁴

6. Grace Periods for Compliance with the Clean Air Act

18. The allegation regarding the grace periods, or “special immunity,” for compliance with the Clean Air Act contains a similar deficiency as that for the Steel Import Stabilization Act of 1984. The application appeared to allege that steel companies were given a three-year postponement for compliance with certain environmental standards in the Clean Air Act.²⁵ The applicant claimed that this “special environmental immunity is virtually an income support to the steel industry.”²⁶ Again, however, there was insufficient evidence of actual “income or price support” within the meaning of Article 1.1(a)(2) of the SCM Agreement.

19. Evidence that a government phases in its environmental regulatory requirements or compliance standards differently for some industries as compared to others is not sufficient evidence of income or price support. Under China’s theory, any time an applicant produces evidence that a government phases in requirement for one industry on a different schedule than another, there would be sufficient evidence to justify an investigation of whether there is income or price support. Indeed, this is all that was alleged – that the U.S. Government phased in the regulatory requirements for the steel industry differently than it did for some other industries. These allegations however are not linked to income or price support – there was no evidence that these regulatory requirements, or the phase in period for them, had any connection to the income level of, or price levels for, the industry. Accordingly, there was insufficient evidence supporting the applicant’s claim of income or price support with respect to this allegation.

20. Further, with regard to benefit, the evidence indicated that the grace periods, or “special environmental immunity,” ended on December 31, 1985.²⁷ The applicant failed to provide

²³ China First Written Submission, para. 44.

²⁴ See also U.S. Oral Statement at the First Panel Meeting, para. 6; U.S. Response to the First Set of Panel Questions, paras. 2, 9.

²⁵ See Exhibit CHN-2, at 84; Exhibit CHN-4, at 147.

²⁶ Exhibit CHN-2, at 84.

²⁷ See Exhibit CHN-2, at 84; Exhibit CHN-4, at 147.

evidence indicating how a benefit could exist from a grace period that expired more than 20 years prior to the start of the period of investigation.²⁸ In response, China makes the same argument as with the Economic Recovery Tax Act of 1981, and the Tax Reform Act of 1986. Likewise, China’s response does nothing to address the fact that the application contained no evidence indicating that the grace periods expiring in 1985 provided any benefits during the period of investigation.

7. Electricity

21. Regarding the electricity allegation, while the U.S. government regulates the provision of electricity, as do most countries, the U.S. government does not set retail electricity prices for the country. The evidence provided in the petition was consistent with these facts. Further, the evidence provided does not support applicants’ assertion that the United States government sets preferential prices for certain industries or regions. Specifically, price differentiation is not in and of itself evidence of specificity and China cannot point to any evidence indicating that the U.S. government (or any state or local government) sets prices in a discriminatory fashion. Lastly, to the extent that applicants argued that subsidies were provided to the electricity producers, China cannot point to any evidence in the application indicating that such subsidies would pass through to the steel industry.

22. China cites the initial petition as containing evidence of “the long history of government support to the U.S. steel industry.”²⁹ However, the initial petition does not contain any information, or even argue, that, for example, through electricity, the steel industry received a financial contribution or benefit, or that a subsidy to the steel industry was specific. Reliance on such general information, disconnected from the alleged subsidy, cannot be a substitute for the requirement that an applicant provide sufficient evidence regarding each of the elements of an alleged subsidy.

8. Natural Gas

23. Regarding the natural gas allegation, the evidence provided by applicants in the application was insufficient to support a claim that the alleged subsidy was specific to an industry or company. Rather, the evidence clearly showed that the natural gas market was deregulated as of 1985, at which time users negotiated directly with producers to set prices.³⁰ MOFCOM simply chose to ignore this information and rely on unsubstantiated statements by applicants that were contradicted by the evidence they themselves provided.

²⁸ See U.S. First Written Submission, para. 78

²⁹ China First Written Submission, para. 48.

³⁰ See U.S. First Written Submission, para. 78

24. Further, the evidence provided did not support applicants’ assertion that the U.S. government sets preferential prices for certain industries or regions. China argues that price differentiation “indicates the possibility of financial contribution, benefit, and specificity.”³¹ “Possibility” is not “evidence.” Price differentiation is not in and of itself evidence of specificity and China cannot point to any evidence provided indicating that the U.S. government (or any state or local government) sets prices, let alone sets prices in a discriminatory fashion.

25. China’s argument suggests that MOFCOM initiated an investigation into the program to bolster the deficient application. This clearly does not meet the standard for sufficient evidence as set out in Article 11.³² Lastly, to the extent that applicants argue that subsidies were provided to the natural gas producers, China cannot point to any evidence provided indicating that such subsidies would pass through to the steel industry.

9. Coal

26. Applicants’ allegation with regard to the provision of coal hinged on the argument that the United States has subsidized the coal industry and that this somehow benefits the steel industry. However, China cannot point to any evidence provided indicating that such subsidies would pass through to the steel industry; instead, this was simply asserted by applicants and accepted by MOFCOM.³³ China likewise cannot point to any evidence indicating that the United States government (or any state or local government) sets the price for coal or in any way provides preferential terms to the steel industry when selling coal.

27. China cites the initial petition as containing evidence of “the long history of government support to the steel industry.”³⁴ However, the initial petition does not contain any information, or even argue, that, for example, through coal, the steel industry received a financial contribution or benefit, or that a subsidy to the steel industry was specific. As with the other subsidy allegations for which China relies on these generalities, general information, disconnected from the alleged subsidy, cannot be a substitute for the sufficient evidence regarding each of the elements of an alleged subsidy that the applicant is required to provide in order for an investigating authority to initiate a subsidy investigation.

10. 2003 Economic Stimulus Plan of Pennsylvania

³¹ China First Written Submission, para. 49.

³² See U.S. Response to the First Set of Panel Questions, para. 9.

³³ See U.S. First Written Submission, para. 78.

³⁴ China First Written Submission, para. 51.

28. The petition did not contain sufficient evidence of specificity regarding the 2003 Economic Stimulus Plan of Pennsylvania. While it appears that the applicant made an allegation of specificity in fact, within the meaning of Article 2.1(c) of the SCM Agreement,³⁵ a single reference to “traditional industries, especially manufacturing,” is not sufficient evidence of specificity in fact. Noting that there are steel production facilities in Pennsylvania does not constitute evidence that steel is a “favored” industry in Pennsylvania, nor that this stimulus plan was limited to the steel industry. This is not sufficient evidence indicating that the subsidy was used by a limited number of “certain enterprises” (as that term is defined in Article 2 of the SCM Agreement), was predominantly used by certain enterprises, was granted in disproportionately large amounts to certain enterprises, or that there was something in the manner in which discretion was exercised in granting the subsidy that indicated specificity in fact.

29. China claims that “having documented both the presence of the respondents in Pennsylvania and the government’s emphasis on ‘traditional’ Pennsylvania industries, ‘especially manufacturing,’ the application met the Article 11.2 standard.”³⁶ These facts alone are however utterly inadequate to support an allegation of specificity. Regarding China’s reliance on the statement in the plan relating to “[r]esources that allow our traditional industries, especially manufacturing, to access new technology to enhance their productivity,” this was only one focus of the 2003 Economic Stimulus Plan of Pennsylvania. The applicant’s own evidence revealed that there were *six other focal points* of the plan. These included economic and community development projects; investments in rural, urban, and suburban sites; capital resources for small cities and communities; real estate and business development; and high-growth firms.³⁷

30. Thus, even if the plan was in part aimed at providing “resources that allow our traditional industries, especially manufacturing, to access new technology to enhance their productivity,” the evidence demonstrated that the plan equally sought to serve a wide variety of economic sectors, industries, and firms.

31. China again relies on the theory that, coupled with “evidence from the initial petition concerning pervasive government support to the steel industry,”³⁸ it had an adequate basis to initiate consistent with the standard required by Article 11.2. Adopting China’s logic would allow an applicant to point to any general policy pronouncements, regardless of when they were made and how divorced they are from the separately alleged subsidies, as evidence of whether an alleged subsidy is specific. Reliance on such general information, disconnected from the alleged

³⁵ Exhibit CHN-5, pp. 27-28.

³⁶ China Response to the First Set of Panel Questions, para. 9.

³⁷ Exhibit CHN-8.

³⁸ China First Written Submission, para. 55.

subsidies, cannot be a substitute for the requirement that an applicant provide sufficient evidence regarding each of the elements of an alleged subsidy.

11. Pennsylvania’s Alternative Energy Funding Program

32. Regarding Pennsylvania’s Alternative Energy Funding program, the application was inadequate in at least two respects. First, regarding specificity, in the application, the applicants argued that Pennsylvania’s Alternative Energy Funding program was de facto specific to the steel industry due to the fact that a limited number of industries and enterprises received grants under the program. It noted that by “looking at the full range, the applicants could easily discover the fact that ... most ... grantees were from energy or steel industries.” Further, it argued that of these grantees, the steel industry “was absolutely one of the most important receivers. [sic]”³⁹ It is unclear how these statements are sufficient to indicate that this program is specific to an enterprise or industry or groups of enterprises or industries.

33. Second, regarding benefit, China argues that applicants were able to meet the standard for sufficient evidence by presenting “the implication of a program focused on clean energy in relation to an industry know to be high polluting.”⁴⁰ China further argues that applicants are not required to provide evidence of actual benefits in order for the investigating authority to initiate. But China does not address the fact that the United States provided evidence that for the most part, this program was not operational during the POI, and therefore, could not have provided benefits during the POI. For the one part of the program that was operational, prior to initiation the United States provided evidence that the respondent companies received no benefits.⁴¹ MOFCOM ignored this evidence when initiating an investigation of this program.

C. No Unbiased or Objective Investigating Authority Would Have Initiated an Investigation under SCM Agreement Article 11.3 Based on the Conjecture Contained in the Application

34. China claims that “it is ... clear that MOFCOM carefully examined the application.”⁴² China asserts that the fact that MOFCOM did not initiate on all of the programs alleged by the applicants demonstrates that MOFCOM engaged in a careful examination of the petition, and therefore did not breach SCM Agreement Article 11.3. China’s assertions, however, are belied

³⁹ Exhibit CHN-2, pg. 30.

⁴⁰ China First Written Submission, para. 58.

⁴¹ See Exhibit US-29, at pg. 8 (“With respect to the eight projects funded, neither the two GOES producers nor any other steel company was the applicant. A copy of the relevant pages from the CFA website has been provided to MOFCOM.”).

⁴² China First Written Submission, para. 68.

by the facts. Instead of carefully examining the application and accompanying evidence, MOFCOM merely accepted the applicants' allegations as is, or initiated an investigation based on sheer speculation regarding the "possibility" of a subsidy, apparently intending to bolster the otherwise deficient application after initiating its investigation.

35. Article 11.3 requires that the authority "review the accuracy and adequacy" of the application to determine whether the evidence is sufficient to justify the initiation of an investigation. Regarding the Medicare Prescription Drug, Improvement and Modernization Act of 2003, for instance, it is clear that MOFCOM made no attempt to analyze the information provided by applicants to determine whether it was a sufficient basis for support initiation. Regarding the Economic Recovery Tax Act of 1981, Tax Reform Act of 1986, and Clean Air Act allegations, instead of carefully reviewing the evidence provided by applicants to determine whether it was sufficient to support the claims made in the application, MOFCOM simply accepted applicants' assertions that a program that was terminated in the 1980s could continue to provide benefits during the POI. With respect to the Indiana Steel Industry Advisory Service, and Steel Import Stabilization Act of 1984, MOFCOM initiated an investigation on the basis of nothing more than pure speculation.

36. MOFCOM's decision to initiate an investigation into the electricity, coal, natural gas, the 2003 Economic Stimulus Plan of Pennsylvania, and Pennsylvania's Alternative Energy Funding programs serve as particularly egregious examples of MOFCOM's cavalier approach to initiation. Despite the clear deficiencies in the petition, and a submission by the United States highlighting the inadequacies of these subsidy allegations,⁴³ MOFCOM initiated an investigation of these programs.⁴⁴ In each of the instances, by initiating an investigation based on the "simple assertion, unsubstantiated by relevant evidence" contained in the application, China breached Article 11.3..

III. 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

37. As explained in the first written submission, China 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. China responds by asserting that, *inter alia*, the "main point" was easily derived from the body of the petition and subsequent "non-confidential analysis," and that exceptional circumstances existed to justify the absence of non-confidential summaries. In doing so, China disregards the obligations contained in Article 12.4.1 of the SCM Agreement and Article 6.5.1 of the AD Agreement.

⁴³ Exhibit US-20.

⁴⁴ U.S. First Written Submission, para. 80.

A. China’s submissions reflect a fundamental misunderstanding of SCM Agreement Article 12.4.1 and AD Agreement Article 6.5.1

38. Article 12.4.1 of the SCM Agreement and Article 6.5.1 of the AD Agreement require Members to require parties to furnish adequate non-confidential summaries that allow for a reasonable understanding of the substance of the confidential information, so that interested parties can defend their interests. In the event that “exceptional circumstances” exist, the absence of adequate non-confidential summaries is justifiable. However, for “exceptional circumstances” to exist, a party must provide an explanation as to why summarization is not possible.

39. First, China appears to suggest in its submissions that it need only require “adequate” non-confidential summaries if an interested party objects to the manner in which confidential information is summarized. China asserts, for instance, that: “It is important for the Panel to understand that China would certainly review any challenge by a party to the classification of information as confidential and any claim by a party that such information as is claimed to not be susceptible to summarization is susceptible to summarization if these issues were raised by a party during the course of an investigation.”⁴⁵ Following this logic, a party would also have to dispute the non-confidential summaries provided before China would review the non-confidential summaries for adequacy. In fact, China makes this very point in its submission.⁴⁶

40. Yet, whether an interested party objects during the proceeding to the adequacy of a summary is irrelevant to the question of whether the summaries were in fact adequate. The obligation to require adequate non-confidential summaries applies regardless of whether an interested party objects to their adequacy during the proceeding. As the panel observed in *Mexico – Beef and Rice*, “the investigating authority is not allowed to rely on the initiative of the interested parties for the fulfilment of obligations which are really its own.”⁴⁷ The obligations contained in SCM Article 12.4.1 and AD Agreement Article 6.5.1 rest with China, not interested parties.

1. So-called “non-confidential analysis” is irrelevant

41. Second, China’s response reflects the mistaken view that its obligation to ensure that the interested parties furnish adequate non-confidential summaries during the course of the investigation may be excused if it is able to point to some subsequent “non-confidential analysis” contained in its own determinations that provides some indication of the confidential information submitted by the interested party. For instance, China asserts that “the non-confidential

⁴⁵ China First Written Submission, para. 82.

⁴⁶ China First Written Submission, paras. 102, 107.

⁴⁷ *Mexico – Beef & Rice (Panel)*, para. 7.199.

summaries provided in the petition itself were later supplemented by non-confidential analysis provided by MOFCOM in its determination, and by the parties in their arguments to MOFCOM.⁴⁸ China makes a similar claim in its answers to the Panel’s questions.⁴⁹ Even if the documents China points to themselves contained adequate non-confidential summaries, which they do not, China’s statements reflect a fundamental misunderstanding of the obligations contained in the SCM and AD Agreements.

42. China’s position does not accord with a reasonable interpretation of Articles 6.5.1 and 12.4.1. Under these provisions, parties must have a “reasonable understanding of the substance of the information submitted in confidence,” and thus be able to defend their interests. To adequately defend their interests, parties must have access to adequate non-confidential summaries *during* the course of the investigation, not after the investigating authority has drawn conclusions based on the submitted information. *Ex post facto* “non-confidential analysis” is beside the point. Once the determination is made, the parties’ ability to defend their interests has been compromised.

2. China’s position does not accord with available guidance

43. Third, China asserts that the agreements do not provide sufficiently detailed guidance on the requirement to furnish adequate non-confidential summaries,⁵⁰ and therefore the patently inadequate non-confidential summaries it made available should be found consistent with its obligations. China’s argument, however, is belied by the text of the provisions themselves, as well as how the provisions have been applied.

44. It is notable that a panel interpreting SCM Agreement Article 12.4.1 has examined a similar argument. In *Mexico – Olive Oil*, for instance, the panel emphasized that a public version of a document where confidential information has simply been redacted is unlikely to qualify as an adequate non-confidential summary, as what is required by SCM Agreement Article 12.4.1 are adequate non-confidential *summaries*: “[w]here confidentiality is claimed with respect to a specific document... the provision of a public version of that document, from which confidential information has simply been removed, may not necessarily satisfy the requirements of Article 12.4.1.” In this regard, it noted that “what is required to be summarized pursuant to Article 12.4.1 is the confidential information,” and “[t]he remaining non-confidential parts of the document may not, by themselves, be sufficient to convey a ‘reasonable understanding’ of the substance of the confidential information.” While there may be circumstances in which the

⁴⁸ China First Written Submission, para. 84.

⁴⁹ China Response to the First Set of Panel Questions, para. 41 (“both the petitioners *and the Chinese authority* provided a sufficient non-confidential summary....”).

⁵⁰ *See e.g.*, China Response to the First Set of Panel Questions, para. 32.

remaining information is sufficient, and no additional summary required, these circumstances are “likely to be limited.”⁵¹

45. Here, China argues that adequate non-confidential summaries are unnecessary, as, according to China, the United States could easily understand the “main point”⁵² derived from the body of the petition. This justification of its failure to provide adequate non-confidential summaries is unsupported by any prior panel or Appellate Body reports. Whatever China means by this statement, it suggests both an admission that the non-confidential summaries in this case were inadequate and a remarkably nonchalant view of its responsibility to comply with Article 6.5.1 and Article 12.4.1.

46. Regarding China’s claims of exceptional circumstances, as noted in our oral statement, neither the petition nor the documents prepared by MOFCOM during the course of the investigation ever asserted that summarization was not possible or otherwise justified the absence of meaningful non-confidential summaries. China’s *post hoc* rationalizations cannot satisfy the requirement in Articles 12.4.1 and 6.5.1 that “a statement of the reasons why summarization is not possible must be provided.”⁵³ The Appellate Body held that a statement of reasons why summarization is not possible must be provided in the record.⁵⁴ China’s *post-hoc* rationalizations that exceptional circumstances existed justifying the inadequate non-confidential summaries should therefore be rejected.

B. The Purported Non-confidential Summaries Contained in Part II of the Petition are Inadequate

47. As the United States explained in its submissions, the non-confidential summaries contained in Part II of the petition were utterly inadequate. In its responses to the Panel’s questions, China claims on one hand that “MOFCOM cannot say what the ‘purpose’ of the drafter might have been”⁵⁵ regarding Part II, and on the other hand that “petitioners included a separate section of the petition (i.e. designated as Part II) to identify each category of information for which confidential treatment was requested...and to ensure that other parties fully understood what information was redacted.”⁵⁶ The shifting rationales should be disregarded by the panel and the focus should be on the application itself. The application itself demonstrates that the

⁵¹ *Mexico – Olive Oil (Panel)*, para. 7.87- 7.88.

⁵² China First Written Submission, paras. 99-100.

⁵³ U.S. Oral Statement, para. 19.

⁵⁴ *EC – Fasteners (AB)*, para. 544; *see also* EU Third Party Oral Statement, paras. 11, 13.

⁵⁵ China Response to the First Set of Panel Questions, para. 35.

⁵⁶ China Response to the First Set of Panel Questions, para. 39.

applicants intended the purported non-confidential summaries contained in Part II of the application to be linked with the information redacted.⁵⁷ Yet the purported non-confidential summaries were inadequate.⁵⁸

48. Setting aside the fact that Part II in fact contains the purported non-confidential summaries, the following demonstrates that, for each category of confidential information, the application was inadequate as it contained no summary at all, or contained unlabelled trend lines, or year-over-year percentage changes without the necessary context of absolute values and without any justification from the applicants why there were exceptional circumstances that precluded more detailed summarization. Because of these errors, the interested parties were unaware of the content of such information and consequently were unable to submit meaningful comments or evidence in response to such information. In this circumstance, without access to meaningful non-confidential summaries of the information submitted in confidence, the interested parties' ability to defend their interests was impaired. As a result, China breached SCM Agreement 12.4.1 and AD Agreement 6.5.1.

**1. Output of the Applicants, Total Output of the GOES in China,
Proportion of the Applicants' Output in China's Total Output**

49. The U.S. challenged the non-confidential summary for a category of confidential information regarding the output of applicants. Significantly, at no point does China assert that the non-confidential summary provided was adequate. Instead, China asserts either that "the details are not needed"⁵⁹ or that the "main point" was standing and that this was somehow evident from other information provided.

50. Regarding China's claim that "the point here is standing,"⁶⁰ standing was never challenged. China even adds the term "standing," when the petition does not contain a single reference to "standing." Instead of providing an adequate non-confidential summary, China would require respondents to engage in guesswork to surmise an understanding, or "the point," of the substance of the confidential information.

51. China even offers an "Appendix 13" which purports to adequately summarize the output of applicants.⁶¹ The petition, when discussing "output of petitioner," does not contain a single

⁵⁷ U.S. Response to the First Set of Panel Questions, para. 21.

⁵⁸ U.S. First Written Submission, paras. 83-87.

⁵⁹ China First Written Submission, para.93.

⁶⁰ China First Written Submission, para.93.

⁶¹ China First Written Submission, para. 96.

citation to Appendix 13. It is impossible to ascertain whether applicants relied on Appendix 13 for the output of the applicants, let alone whether Appendix 13 provides an adequate non-confidential summary.

2. About the Chinese Industry

52. Regarding trends in domestic consumption, applicants stated that “In 2008, apparent consumption of GOES in China was [] tons, indicating a growth of about 50% over 2006.”⁶² It is impossible to gain a reasonable understanding of the substance of this redacted information, as “growth of about 50%” could mean 100 to 150, or 100,000 to 150,000. In this case, unaware of the absolute values associated with the reference to “growth of about 50%,” respondents were unable to submit meaningful comments or evidence in response to this information. Again, China would require respondents to engage in guesswork to surmise a reasonable understanding. China also cites Appendix 13, despite the fact it was not cited by the applicants when discussing domestic consumption.⁶³

53. Regarding trends in domestic production, the applicants indicates that “output of the Chinese domestic industry was [] tons in 2006, [] tons in 2007 and [] tons in 2008. In comparison with the growth of imports, output by the Chinese domestic manufacturers grew not so rapidly. [sic]”⁶⁴ The information is simply redacted. China insisted, however, that “no more was required,” and that “the main point” is derived from the second sentence.⁶⁵ The second sentence, however, does nothing to shed light on the contents of the redacted information – it indicates nothing about the absolute quantity of output during the years in question.

54. China also attempts to rely on percentage changes provided 50+ pages later in the petition to argue that the redacted information was somehow discoverable from other parts of the petition.⁶⁶ This is simply not credible. In this case, China would require respondents to engage in a fishing expedition for the missing data. China also cites its favorite Appendix 13, despite the fact it is not cited by the applicants when discussing domestic production.⁶⁷

55. Regarding trends in domestic prices, the applicants wrote “while the sales price of the applicants at the same time was \$[]/ton; price of the subject imports was always lower than that

⁶² Exhibit US-2, pg. 5.

⁶³ China First Written Submission, para. 101.

⁶⁴ Exhibit US-2, pg. 5.

⁶⁵ China First Written Submission, para. 99.

⁶⁶ China First Written Submission, para. 99.

⁶⁷ China First Written Submission, para. 101.

of the applicants.”⁶⁸ The information is simply redacted. China insists that “no more was required,”⁶⁹ and again cites “the main point,” which purportedly is that import values are lower than the unit values of the applicants.⁷⁰ Yet, this supposed “main point” does nothing to shed light on the contents of the redacted information in this case.

56. China also points to “unlabeled” trend lines provided in a section of the petition that is disconnected from the “China domestic industry” discussion, claiming that the trend lines were not labeled due to confidentiality concerns.⁷¹ Though it does not elaborate on these concerns, China apparently is claiming that exceptional circumstances existed such that summarization was not possible. This post-hoc rationalization should be rejected. The applicants never indicated that summarization was not possible – it simply failed to adequately summarize the information.

3. Similarity or Likelihood of Production Techniques

57. In the petition, the applicants wrote “the petitioners adopt the following techniques: [confidential, not specified].”⁷² The information is simply redacted. Regarding applicants failure to adequately summarize confidential information regarding production techniques, China first asserts that “the issue was not seriously contested before the investigating authorities.”⁷³ This is irrelevant, as explained above in Section III.A. China then asserts that the preceding two paragraphs provide a general overview, which provides enough detail regarding the redacted information.⁷⁴ These paragraphs assert that the production techniques of applicants and respondents are the same. However, without information shedding light on the redacted information, respondents could not comment meaningfully on whether the production techniques were in fact the same. In this case, the omission prevented the respondents from answering the allegation that the products were in fact like products.

4. Change of Price

58. Regarding pricing data, China asserts that the information was adequately summarized by trend lines. Yet in this case respondents could not comment meaningfully on the trend line

⁶⁸ Exhibit US-2, pg. 5.

⁶⁹ China First Written Submission, para. 100.

⁷⁰ China First Written Submission, para. 100.

⁷¹ China First Written Submission, para. 100.

⁷² Exhibit US-2, pg. 9.

⁷³ China First Written Submission, para. 102.

⁷⁴ China First Written Submission, para. 103.

without the label providing context, or provide evidence to rebut the proposition. Respondents could not identify changes in the average price, or even the percentage changes in price. China claims that the trend lines were not labeled due to confidentiality concerns.⁷⁵ China apparently is claiming that exceptional circumstances existed such that summarization was not possible. Again, this post-hoc rationalization should be rejected. The applicants never indicated that summarization was not possible – it simply failed to adequately summarize the information.. China also misleadingly cites a U.S. point that trend lines are an acceptable form of summarization.⁷⁶ Nowhere did the United States indicate however, that *unlabeled* trend lines would be acceptable.

5. Dumping Margin of GOES Imports from the United States

59. Regarding the dumping margin calculations, China asserts that “absent some claim that the petition did not adequately allege dumping - a claim not presented - the U.S. has a hard time complaining.”⁷⁷ As noted above in Section III.A, whether a party submits a claim is irrelevant to the question of whether confidential information was adequately summarized. China also asserts that the United States could have performed reverse engineering to obtain the redacted data.⁷⁸ The fact China is insisting that respondents engage in reverse engineering itself is an admission that the non-confidential summary was inadequate. Yet again, China would require respondents to make educated guesses regarding information for which no non-confidential summary was provided.

6. Apparent Consumption of GOES in China

60. Regarding the absence of adequate summaries for confidential information submitted by applicants regarding apparent consumption of GOES in China, China claims that the information would be evident from Table 23 of the petition,⁷⁹ from percentage changes discussed 50+ pages earlier on page five of the petition, or from Table 32,⁸⁰ which contains more percentage changes. Yet the information in question is entirely redacted from Table 23. Furthermore, the percentage changes China references on page 5 consist of nothing more than the statement that “In 2008, apparent consumption of GOES in China was [] tons, indicating a growth of about 50% over

⁷⁵ China First Written Submission, para. 104.

⁷⁶ China First Written Submission, para. 104.

⁷⁷ China First Written Submission, para. 107.

⁷⁸ China First Written Submission, para. 108.

⁷⁹ Exhibit US-2, pg. 56.

⁸⁰ Exhibit US-2, pg. 64.

2006.”⁸¹ As noted earlier, it is impossible to gain a reasonable understanding of the substance of this redacted information, as “growth of about 50%” could mean 100 to 150, or 100,000 to 150,000.

61. Regarding Table 32, again, it is impossible to gain a reasonable understanding of the substance of this information without the proper contextual framework, which was simply redacted. China claims that the numbers in Table 32 correspond to the numbers on page five, 60 pages earlier. Instead of requiring adequate summaries, China appears to expect respondents to somehow discern the substance by piecing together a puzzle of data and information scattered throughout the petition. China also cites Appendix 13, despite the fact it is not cited by the applicants.⁸²

7. Suppressing or Depressing Effects on Domestic Prices

62. For this category, China cites percentage changes in domestic average unit values.⁸³ Year-over-year percentage changes do not reveal the significance in the absolute changes. For example, an increase in actual volume from 1 to 2 is a 100 percent increase, and an increase from 100 to 200 is also a 100 percent increase. The latter increase, however, is far more significant. China points to “unlabeled” trend lines, claiming that the trend lines were not labeled due to confidentiality concerns.⁸⁴ Though it does not elaborate on these concerns, China apparently is relying on exceptional circumstances. This post-hoc rationalization should be rejected. The applicants never indicated that summarization was not possible – they simply failed to adequately summarize the information.

8. Influence on the Chinese Domestic Industry

63. A significant portion of the injury indicia data is missing some or all of the non-confidential summary information. MOFCOM did not show year-over-year percentage changes on a consistent basis for the domestic industry for all indicators. Thus, in this case it is impossible to assess all of the relevant factors in relation to each other and to the volume of subject imports in order to examine material injury and causal link. Also, as noted above, year-over-year percentage changes do not reveal the significance in the absolute changes. For example, an increase in actual volume from 1 to 2 is a 100 percent increase, and an increase from 100 to 200 is also a 100 percent increase. The latter increase, however, is far more significant. Thus, the selective year-over-year percentage changes that were provided did not give the

⁸¹ Exhibit US-2.

⁸² China First Written Submission, para. 114.

⁸³ China First Written Submission, para. 119.

⁸⁴ China First Written Submission, para. 118.

respondents enough information to defend their interests.

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

A. China’s Portrayal of the Facts Is Misleading, and Is Contracted by the Record

1. The Companies Engaged with MOFCOM on its Terms Throughout the Investigation

64. While China repeatedly asserts that the respondents “refused” to respond to MOFCOM’s questions⁸⁵ and “seriously impeded” the investigation,⁸⁶ a closer examination of the evidence demonstrates otherwise. China’s highly selective account of the questionnaires and responses obscures several basic facts indicating both the extraordinarily burdensome requests made by MOFCOM and the fact the U.S. companies engaged with MOFCOM on its terms throughout the investigation.

65. Following is a summary of events as reflected in the record of the case. Exhibit US-37 also provides a detailed account of events.

August 2009

66. In its original questionnaire, MOFCOM gave the following general instructions for the respondents:

Please read questions carefully before answering. When answering a question, please write the question down first and put your answer directly below it and point out the support evidence to it. If the question does not apply to you, please write down explicitly, “this question does not apply to my company” and state the reasons.⁸⁷

67. In addition, MOFCOM posed the following questions under the heading “government procurement programs” relating to the applicants’ government procurement allegations:

- (1) Please answer all the questions listed by Annex I.

⁸⁵ China First Written Submission, para. 148.

⁸⁶ China First Written Submission, para. 171-173.

⁸⁷ Exhibit US-11, at 6. Exhibit US-14, at 6.

- (2) Does your company attend bidding when selling products to government? If yes, please explain the specific bidding procedure and bidding rules as well as the agencies and departments to which your company submit bid tender.
- (3) Please provide all the relevant information (not limited to the subject merchandise), in the form of tables, regarding government procurement signed within the POI as well as those not performed within the POI, which includes: the specific names of the purchaser, purchasing time, name of purchased products, the supply quantity, {value}, price, payment and the contract progress, etc. The contract, bid tender etc related evidence shall be provided. The selling price of the involved products that are sold to other private purchaser shall be provided as well.
- (4) Please provide the information regarding domestic sales of all the products in POI, in the form of tables. The quantity and {value} of each product sold to each client shall be provided.⁸⁸

68. In response to questions 2 and 3, AK Steel answered that, as demonstrated by the sale data for subject merchandise provided in the parallel AD proceeding, the company did not sell any GOES to any government entity during the POI. AK Steel continued: “{a}s a result, this alleged subsidy program is not relevant to AK Steel.”⁸⁹ ATI provided a similar answer.⁹⁰ Pursuant to MOFCOM's instructions, AK Steel noted that no government procurement was signed during the POI, therefore, the question was inapplicable.

69. In response to question 4, which only relates to the POI, and which does not contain the proviso “not limited to the subject merchandise” found in question 3, AK Steel referred MOFCOM to the sale data for subject merchandise provided in the parallel AD proceeding.⁹¹

⁸⁸ China First Written Submission, para. 147.

⁸⁹ Exhibit US-11, at 21-22.

⁹⁰ Exhibit US-38, at 19. (“not applicable”). In response to this section of the questionnaire as a whole, ATI responded as follows:

This question does not apply to Allegheny Ludlum or the ALC Affiliates because no subsidies provided pursuant to the Airport and Airway Improvement Act of 1982; the Surface Transportation Assistance Act of 1982; or the Intermodal Surface Transportation Efficiency Act of 1991 benefitted the Subject Merchandise or like or similar products during the POI and the 14-year period prior to March 1, 2008.

⁹¹ Exhibit US-11, at 21-22.

ATI indicated that the question was “[n]ot applicable.”⁹² In light of the fact that AK Steel and ATI did not use the alleged program, and none of the predicates for reporting data in response to Part (3) were met, the summary quantity and value data requested in Part (4) were superfluous.

70. In its deficiency letter issued August 10, 2009, regarding government procurement, MOFCOM appears to request transaction data, but at the same time explains that if the facts are such that the request is not applicable, the respondents should demonstrate inapplicability:

The prima facie evidence owned by the Investigating Authority showed that your company's products (not limited to the product concerned) could have been sold to the USG or public bodies, or have been sold to contractors of relevant projects who have been bound by the Buy America Act. There was a possibility that the prices of these transactions was higher than then market prices and consequently brought benefit to your company. Therefore, So long as your company's products were sold in the domestic market, the transactions shall be reported. If your company was of the view that, regarding the product concerned and your company's other products, there was no purchase from the government or public body, or there was no transaction bound by the Buy America Act, it was your company who shall bear the burden of proof.⁹³

September 2009

71. In response, AK Steel attached a customer list to its revised questionnaire response, dated September 9, 2009, showing that the government did not purchase any AK Steel products during the POI – including products unrelated to subject merchandise and revised its narrative response to address the question as clarified by the deficiency letter.⁹⁴ In its separate deficiency letter response, also dated September 9, 2009, AK Steel explained that it was impossible to know what its customers did with its products. AK Steel’s customer list and explanation are responsive to the deficiency letter.⁹⁵ Thus AK Steel did not impede the investigations; it explained why the question was not applicable. Moreover, MOFCOM did not follow-up with any additional questions on this subject or otherwise suggest that AK Steel’s explanation was not adequate. AK Steel only learned of MOFCOM’s dissatisfaction with its response when MOFCOM issued the Preliminary Determination.

72. ATI attached a customer list to its revised questionnaire response and pointed to the financial statements submitted with its original questionnaire response to establish the fact that

⁹² Exhibit US-38, at 19.

⁹³ Exhibit CHN-19, at 3. Exhibit CHN-20, at 3.

⁹⁴ Exhibit US-14, at 25.

⁹⁵ Exhibit US-13, at 3.

ATI made no sales of subject merchandise to the U.S. government. ATI also pointed out that MOFCOM could confirm the inapplicability of the question to ATI when MOFCOM conducts the on-site verification:

This Allegheny Ludlum did not sell the Subject Merchandise to the government under the Airport and Airway Improvement Act of 1982, the Surface Transportation Assistance Act of 1982, or the Intermodal Surface Transportation Efficiency Act of 1991 during the POI. In Exhibit I-8 Allegheny Ludlum identifies the name of each customer that purchased the subject merchandise during the POI. The customer list in Exhibit I-8 provides conclusive evidence that the Airport and Airway Improvement Act of 1982, the Surface Transportation Assistance Act of 1982, and the Intermodal Surface Transportation Efficiency Act of 1991 are not applicable because Allegheny Ludlum did not sell the Subject Merchandise to any public bodies government during the POI. Further evidence that Allegheny Ludlum did not sell GOES to any public entities during the POI is provided in ATI's consolidated annual report, wherein ATI explains: "Grain-oriented electrical steel is used in power transformers where electrical conductivity and magnetic properties are important. Nearly all of our grain-oriented electrical steel products are sold directly to end-use customers." See Exhibit I to our Response to the Enterprise Questionnaire on GOES Anti-Subsidy Investigation submitted on August 10, 2009. (2008 Financial Statements, at f-6). Public entities do not constitute "end-use customers."

Therefore, in accordance with the reporting instructions set forth on the Bureau's anti-subsidy questionnaire, the questions in Annex I are not applicable to Allegheny Ludlum. During Bureau's on-site verification of the books and records of Allegheny Ludlum and the U.S. government, moreover, the Bureau will have an opportunity to examine to confirm the identities of Allegheny Ludlum's customers and to confirm the veracity of Allegheny Ludlum's questionnaire response.

* * *

The Bureau's request for information regarding Allegheny Ludlum's sales of non-subject merchandise is contrary to China's commitments under Articles 10 and 12.11 of the SCM Agreement and Article VI of the GATT and the standard anti-subsidy practices in other Member countries. This request is particularly inappropriate given the confidential nature of the information being requested - the names, selling prices, and quantities for all products sold to all clients during the POI by Allegheny Ludlum, ATI Funding, and ATI. This is exceptional request is overly-burdensome, unreasonable, and will yield information that is completely irrelevant to the determination of whether GOES benefited from countervailable subsidies during the POI.

Furthermore, as explained in response to question 1 above, this question is not applicable because Allegheny Ludlum did not sell the Subject Merchandise to the government

during the POI.⁹⁶

December 2009

73. In the preliminary determination issued December 14, 2009, MOFCOM reacts to AK Steel’s customer list provided months earlier:

In the response resubmitted on September 9, 2009, AK Steel Corporation provided only a customer list for sold products to prove that the government did not exist in the customer list. AK Steel Corporation also indicated that “even if the government ultimately overpaid for a project incorporating steel that may have originated with AK Steel, the company or other kind of entity that received the overpayment would not provide any of that overpayment to AK Steel, which received only a market-determined price for its product.” However, AK Steel did not provide any evidence for its claim. The respondent Allegheny Ludlum Corporation only provided the customers of the subject merchandise, and pointed out that it did not sell the subject merchandise to any government agencies, and that GOES products were directly sold to end users. The two companies did not respond based on the requirements of the questionnaire again.

Because the respondent companies did not provide transaction information, the investigation authority could not determine whether their products were sold to the government or public bodies or their project contractors, and whether anything was abnormal in transaction prices, etc. Therefore, the transaction price between the respondent companies and the entity which might have received overpayment cannot be proved to be market price.⁹⁷

74. This appears to be the *first instance* where MOFCOM highlights a need for transaction data *without conditions*. In the original questionnaire, for example, MOFCOM requested transaction data for “government procurement signed within the POI.” AK Steel and ATI pointed out that there was no “government procurement signed within the POI.” In the deficiency letter, MOFCOM requested transaction data, but permitted the respondents to prove that the government did not purchase their products, or that other transactions were not subject to the alleged procurement programs.

75. In response to MOFCOM’s approach in the preliminary determination, AK Steel submitted the sales data for subject merchandise as an exhibit to its comments on the preliminary

⁹⁶ Exhibit US-39, at 21-22.

⁹⁷ Exhibit US-5, at 29.

determination about a week before the verification began.⁹⁸ ATI appeared to have decided that it was no longer had an opportunity to engage with MOFCOM, as it concluded that MOFCOM had a pre-determined result in mind. As demonstrated by MOFCOM’s treatment of AK Steel’s sales data, ATI’s decision was correct.

January 2010

76. In its CVD verification memo, MOFCOM acknowledges that the sales data is at least partially responsive, but nonetheless rejects the sales data because of past supposed “non-cooperation”:

Since the investigation authority had already given explanations to relevant issues and offered the respondent a chance of re-submitting the responses, the investigation regret to see that AK Steel Corporation still didn't answer the questions for Government Procurement Program as required by the questionnaire. Therefore, though AK Steel Corporation provided some of its domestic sales data in the Comments on Preliminary Determination, the investigation authority would not verify those sales data in the anti-subsidy verification.⁹⁹

MOFCOM therefore refused to verify the sales data, which were already in its possession, and had been verified in the parallel AD proceeding. Regarding the customer lists, AK Steel submitted a written request to verify the customer lists. MOFCOM, however, did not verify the lists.¹⁰⁰

77. As noted in our opening statement to the first panel meeting, China nonetheless complained that the companies’ failure to provide transaction data prior to the verification denied MOFCOM “the ability to plan efficiently” for verification.¹⁰¹ To the extent that MOFCOM may have suffered any inconvenience, however, this was simply the result of its own questionnaire and the apparent differences between the instructions in the questionnaire and what MOFCOM actually wanted. If MOFCOM deemed transactional data necessary from the outset without regard to whether a company participated in government procurement during the relevant period needed the data, its questionnaire should have so stated from the outset.

78. At no point did the U.S. companies refuse to cooperate with the investigation. The companies cooperated, responded to MOFCOM’s questionnaires, and to the extent they did not

⁹⁸ Exhibit US-23.

⁹⁹ Exhibit US-24, at 3.

¹⁰⁰ U.S. First Written Submission, para. 105.

¹⁰¹ China First Written Submission, para. 151.

provide information it was because MOFCOM’s own questionnaires did not require it. When AK Steel provided the data after the preliminary determination (data that were already in the hands of the investigators), MOFCOM chose not to either verify it or use the information to develop a verification plan.

2. China’s Assertion that MOFCOM Did Not Request 15 Years of Sales Data for Federal-level Procurement Laws Is Misleading

79. China asserts that “nowhere in the final determination nor in the preliminary determination that preceded it did MOFCOM specify that ‘facts available’ was being applied for the companies’ refusal to provide 15 years of sales data,” and that MOFCOM’s emphasis was on “the failure of the companies to provide POI data as requested in the initial questionnaire,” as indicated by its calculating the subsidy rate based on one year of sales.¹⁰² In its answers to Panel question 18, China now asserts that it did not request 15 years of sales data relating to the federal-level procurement laws.¹⁰³

80. China’s assertions are belied by the facts. MOFCOM did indeed ask for fourteen years of sales data beyond the POI. Whether this request came in the original or new subsidy questionnaire is immaterial, especially in light the fact that the new subsidy questionnaire was issued to the parties on August 26, 2009, the same day of MOFCOM’s meeting and deficiency letters.

81. In its original questionnaire, at Part 3, MOFCOM requested sales information for government procurement “not performed within the POI,”¹⁰⁴ or according to China’s third re-translation of MOFCOM’s questions on this topic, procurement “signed within the POI as well as those for which performance has started but remained unfulfilled by the end of the POI.”¹⁰⁵ On page 17 of the new subsidy allegation questionnaire response, MOFCOM asks for sales data for all products during the POI and the prior 14 years, for both state- and federal-level procurement laws: “Please provide, during the POI and the 14 years before the POI, the sales situation of all the products under the influence of Pennsylvania Steel Products Procurement Act *and purchasing American goods clause of other Acts*.”¹⁰⁶ The only other procurement Acts alleged in the

¹⁰² China First Written Submission, para. 153.

¹⁰³ China Response to the First Set of Panel Questions, para. 67.

¹⁰⁴ China First Written Submission, para. 147.

¹⁰⁵ China Response to the First Set of Panel Questions, Para. 61.

¹⁰⁶ Exhibit US-8.

questionnaires issued at that time are federal procurement laws.¹⁰⁷

82. Both of MOFCOM’s requests are predicated on the existence of government procurement transactions. In the original questionnaire, MOFCOM asked for volumes of information for “signed” procurement contracts and sales of “involved” products to private parties. In the new subsidy questionnaire, MOFCOM asked for sales “under the influence” of any “Buy American” law. In the absence of any procurement sales, a company would have no transactional data to report, and the quantity and value data requested by MOFCOM for the POI in the original questionnaire would be irrelevant.

83. It is also important for the Panel to consider that China has acknowledged in paragraph 154 of its first written submission, and in paragraphs 68-72 of its answers to the Panel’s questions, that 14/15 (93.3 percent) of the sales data MOFCOM requested for the alleged procurement program were not necessary. While, MOFCOM’s desire for such sensitive competitive information appeared to be unlimited, and according to the explanation in paragraph 67 of China’s Responses to the Panel’s questions, its request was motivated by curiosity, rather than necessity.¹⁰⁸

3. There are No Facts available on the Record Supporting MOFCOM’s Choice of a 100% Utilization Rate

84. There are no facts available on the record to support MOFCOM’s conclusion that the respondents sold all of their output to the government. As explained in our first written submission, the only facts available on the record suggest that, at most, AK Steel could have sold 29 percent of its output to the government, as part of infrastructure and manufacturing sales.¹⁰⁹ China responds by arguing that the annual report containing the 29 percent figure did not cover the POI, and the proposal to use the 29 percent figure for utilization purposes was submitted too late in the process.¹¹⁰

85. The 29 percent sales figure for infrastructure and manufacturing sales comes from AK Steel’s audited financial statements and annual report. Notwithstanding MOFCOM’s apparent concern that this percentage may not have held true for the entire POI, which did not correspond to a calendar year, the reality is that, on the same page on which the annual report shows the 29

¹⁰⁷ Exhibit US-11.

¹⁰⁸ “The later request was based on a desire to better understand trends in the market for various products and pricing patterns that might illuminate utilization under the various ‘Buy American’ provisions under investigation.” China Response to the First Set of Panel Questions, para. 67.

¹⁰⁹ U.S. First Written Submission, paras. 97-99.

¹¹⁰ China First Written Submission, paras. 182-184.

percent sales figure for the infrastructure and manufacturing segment, the annual report states that 26 percent of the company’s U.S. sales fell under the infrastructure and manufacturing segment in 2007.¹¹¹ These figures demonstrate stability in the sales figures to this particular market segment over 24 months. It defies reason to suggest that the first two months of 2009 would be so drastically different from the preceding 24 months that MOFCOM would reject the figures entirely, and a review of AK Steel’s later financial reporting would demonstrate that it was not. Regarding China’s assertion that the proposal to use the 29 percent figure was untimely filed, AK Steel’s annual report was actually contained in the Application. AK Steel proposed the use of the 29 percent figure from that report after seeing MOFCOM’s unreasonable course in the preliminary determination.

86. The only evidence of government purchases to which China cites to in the final determination is a passage indicating that, with respect to “one responding company” (China did not indicate which company), MOFCOM found that “the annual report reflecting its operating status clearly recorded government purchases of its products.”¹¹² This passage in the final determination does not indicate whether or not these purchases were made pursuant to one of the programs at issue. Further, China does not explain how this purported evidence of some government purchases by one respondent company brought the respondent companies from 0 percent utilization (as reflected in the detailed customer lists submitted by the respondent companies) to a finding of 100 percent utilization for both respondent companies.

4. MOFCOM Could Have Verified the Information But Chose Not To

87. MOFCOM could have verified that AK Steel or ATI did not sell to any government entity at verification. As reflected in our first written submission at paragraphs 93-95, it was reasonable for the U.S. companies to assume that this would occur. When the course MOFCOM was taking became clear in the preliminary determination, AK Steel re-submitted the sales data, which was already in MOFCOM’s possession as part of AK Steel’s anti-dumping questionnaire response.

88. MOFCOM issued the Preliminary Determination on December 10, 2009, slightly more than six months after the parallel antidumping and countervailing duty investigations were initiated. MOFCOM issued its verification notice to AK Steel less than two weeks later on December 23, 2009. This notice was provided prior to the deadline for submission of comments on the Preliminary Determination. AK Steel timely filed on December 30, 2009 its comments on the Preliminary Determination, including the detailed transactional data for GOES sales.¹¹³

¹¹¹ Exhibit US-9, at 4.

¹¹² China First Written Submission, para. 179, n. 152.

¹¹³ Exhibit CHN-21, Exhibit US-23.

89. MOFCOM began verification of the antidumping and countervailing duty questionnaire responses filed by ATI on January 5, 2010, and the antidumping and countervailing duty questionnaires filed by AK Steel on January 8, 2010.¹¹⁴ MOFCOM first conducted verification at AK Steel’s Butler Works (beginning on January 8, 2010) and moved to AK Steel’s corporate headquarters on January 11, 2010. Thus, MOFCOM’s visit to the production facility began more than one week after submission of the transactional data, and the verification at company headquarters began just under two weeks after the data were submitted. As the Panel is aware, MOFCOM verified the same transactional data in the antidumping proceeding.

90. The 29 percent figure rejected by MOFCOM as the maximum possible percentage of AK Steel sales that could have been relevant to the alleged procurement programs, which focused on research and development funds and construction contracts for infrastructure,¹¹⁵ was provided in the Application¹¹⁶ before MOFCOM required AK Steel to translate into Chinese and re-submit the same document in the deficiency letter issued to AK Steel on August 26, 2009.¹¹⁷ Thus, this information was before MOFCOM well before verification began.

91. Notably, MOFCOM does not have standard timetables or schedules for events in antidumping and countervailing duty investigations. Any purported difficulty analyzing the GOES transactional data timely provided in comments on the Preliminary Determination is a product of MOFCOM’s own scheduling, which was not based on any statutory or regulatory requirements but rather the agency’s own assessment of when events should take place. It was unreasonable to schedule verification on a timeline that would allegedly make it difficult for MOFCOM to verify data that was timely submitted by AK Steel in response to the Preliminary Determination.

B. China’s Claim that the U.S. Companies Seriously Impeded the Investigation Is Not Credible

92. If MOFCOM was serious about verifying the U.S. companies’ utilization of the government procurement programs its questions to the companies and its actions during the course of the investigation would seem to indicate otherwise. China itself notes:

it was likely that the customer in an indirect transaction would, at a minimum, provide specifications that required steel melted and poured in the United States, or otherwise manufactured in the United States, consistent with the various origin requirements of the

¹¹⁴ Exhibit CHN-11.

¹¹⁵ Exhibit CHN-2.

¹¹⁶ Exhibit CHN-3, at 2.

¹¹⁷ Exhibit CHN-19.

Buy American provisions at issue.

FOOTNOTE 36: For example, the FHWA Buy American Provision requires any project funded under the Federal-aid Highway Program to use only steel or manufactured goods that are 100 percent made in the United States unless one of the circumstances supporting a waiver of this requirement applies. Contractors may receive certificates from the manufacturer certifying that the steel or iron is domestically produced. *See* Exhibit US-3, p. 131.¹¹⁸

93. Yet China continues to insist that the only evidence that it would enable it to determine whether the U.S. companies were benefitting from government procurement programs was the companies' transaction information for all products from the POI and 14 years prior and the aggregate quantity and value data as requested in questions 3 and 4 of the questionnaire, and the "sales situation" requested in the New Subsidy Questionnaire. If China's theory of subsidization was in fact as China now states it to be, it is unclear why China did not pursue a more direct path to examining the companies' possible utilization of the government procurement programs was not pursued. China did not ask a single question relating to customer specifications on the U.S. companies' sales to unaffiliated, non-government customers. Nor did China ask a single question relating to whether the U.S. companies issued any manufacturer certificates "certifying that the steel or iron is domestically produced."

94. Additionally, China made no attempts to use the information that the U.S. companies did provide. ATI and AK both supplied MOFCOM with customer lists, yet MOFCOM asked no questions about these customers, their specifications, or their certification requirements.

95. Further, before MOFCOM had made clear that the antidumping proceeding and the CVD proceeding constituted separate records, AK Steel had pointed MOFCOM to its response to the AD proceedings in which it had provided detailed sales information with respect to sales of GOES.¹¹⁹ The same investigators handled both cases and would have had in their possession AK Steels sales information since the earliest stages of the investigation. There is nothing in China's regulations that would prevent MOFCOM from using this information for purposes of verifying AK Steel's responses to the antisubsidy questionnaire. Yet there is no indication that MOFCOM's investigators used this information to conduct the sort of analysis that China now claims was essential to their evaluation of the program purported to represent almost one quarter of the total level of alleged subsidization in this case. If they had performed such an analysis, they did not use it to direct any questions to AK Steel or to develop any agenda items at verification.

¹¹⁸ China Response to the First Set of Panel Questions, para. 60.

¹¹⁹ Exhibit US-11, at 22.

96. Given the various additional means that MOFCOM had at its disposal to evaluate the U.S. companies' claims with respect to utilization of the government procurement programs and MOFCOM's failure to make use of any of them, China's claim of that the U.S. companies seriously impeded the investigation simply are not credible.

97. Moreover, China's argument that MOFCOM could review such summary data to uncover "anomalous transactions" makes no sense.¹²⁰ As outlined above, MOFCOM's questionnaire did not request transaction-specific data in the absence of any procurement-related sales; it had only requested a "tabulation of all domestic sales by product ... including quantity, value, and customer."¹²¹ Such data would not provide the information necessary to perform the analysis China purports it intended to perform.

V. 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

98. As demonstrated in the U.S. first written submission, MOFCOM acted inconsistently with Article 12.2.2 of the AD Agreement by failing to make available to each U.S. exporter the final dumping calculations that it performed for such exporter. China does not deny that MOFCOM failed to provide to ATI the actual, final dumping calculations that it performed for ATI, and that it failed to provide to AK Steel the actual, final dumping calculations that it performed for AK Steel. Rather, it claims that there is no obligation to do so under Article 12.2.2, and that the U.S. exporters in this investigation were able to replicate MOFCOM's calculations. As we demonstrate below, China's arguments are without merit.

99. Article 12.2.2 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 the 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.

100. This provision requires that if information on matters of fact that led to the imposition of final measures is relevant, then it must be made available, with due regard paid to the protection of confidential information. China argues that the language of Article 12.2.2 does not mandate the release of the final dumping calculations, but China's argument is contradicted by the text of

¹²⁰ China Response to the First Set of Panel Questions, para. 86.

¹²¹ See China Response to the First Set of Panel Questions, para. 73.

Article 12.2.2.¹²² Article 12.2.2 provides that the investigating authority’s final determination must contain “or otherwise make available through a separate report, all relevant information on the matters of fact . . . which have led to the imposition of final measures” As the United States has demonstrated, the calculations employed by an investigating authority to determine dumping margins, and the data underlying the authority’s calculations, constitute “relevant information on the matters of fact . . . which have led to the imposition of final measures” within the meaning of Article 12.2.2.

101. The ordinary meaning of the term “relevant” is “[b]earing on, connected with, or pertinent to the matter in hand.”¹²³ The final dumping calculations certainly are connected with, or pertinent to, the matter of the imposition of final measures. Indeed, few things are more connected with, or more pertinent to, the imposition of final duties than the calculations themselves, which are the means by which an investigating authority arrives at the final finding of dumping. Without calculations that indicate dumping, there would be no affirmative finding. Moreover, the calculations and data underlying those calculations constitute “information” as that term is used in Article 12.2.2. “Information” is “[c]ommunication of the knowledge of some fact or occurrence” or “[k]nowledge or facts communicated about a particular subject, event, etc.”¹²⁴ Dumping calculations certainly are “facts” that should be “communicated” about the imposition of final measures. Because Article 12.2.2 requires that “all” such “relevant information” on matters of fact which have led to the imposition of final measures be made available, it follows that Article 12.2.2 requires an investigating authority to release its final calculations to the affected interested parties.

102. China argues that the context of Article 12.2.2 indicates that this provision does not encompass the final dumping calculations performed by an investigating authority.¹²⁵ Here, China’s argument is nothing more than an attempt to distract from the text of Article 12.2.2 by focusing on the text of *other* provisions of Article 12.2. The theme running through China’s arguments is that Article 12.2 pertains only to “public notice” and to “explanation,” but China disregards the fact that Article 12.2.2 mentions the possibility of a “separate report” in addition to a “public notice,” and the fact that Article 12.2.2 itself does not even use the word “explanation.” China then delves into the particular provisions of Article 12.2; if anything, however, these other provisions support the U.S. position, not China’s.

¹²² See China First Written Submission, paras. 203-206 (China’s discussion of the exact language at issue in Article 12.2.2 is limited to the conclusory statement that this language does “not articulate any requirement that authorities provide the specific calculations of the margins of dumping.” *Id.* at para. 204).

¹²³ New Shorter Oxford English Dictionary, Clarendon Press, Oxford 1993, at 2356.

¹²⁴ New Shorter Oxford English Dictionary, Clarendon Press, Oxford 1993, at 1364.

¹²⁵ See China First Written Submission, paras. 207-214.

103. For example, China relies on the chapeau to Article 12.2, which states that a “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.”¹²⁶ Based on this language, China argues that all that is required under Article 12.2.2 is that an investigating authority provide “sufficient detail” on matters it considers “material.” However, China ignores the critical differences between Article 12.2.2 and the chapeau of Article 12.2. Article 12.2.2 itself does not speak of “sufficient detail” on matters the investigating authority considers “material.” Rather, it requires the investigating authority to make available “*all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures . . .*” This is a much different requirement than the general requirement in the chapeau of Article 12.2; it requires the provision of all relevant information on matters of fact, not just the provision of sufficient detail on findings and conclusions. This difference in language should be given effect.

104. Similarly, China relies on Article 12.2.1, and specifically points to the language in that provision that requires that a public notice or separate report “refer” to the matters of fact and law and contain a “full explanation” for the methodology leading to the dumping margins.¹²⁷ Again, this language is fundamentally different than the language in Article 12.2.2. Article 12.2.2 does not merely require that a public notice or separate report “refer” to matters of fact and provide “full explanation.” Rather, Article 12.2.2, by its express terms, requires that the public notice or separate report “make available” “*all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures . . .*” This is a separate requirement from the one imposed by Article 12.2.1.

105. China also argues that if any obligation to provide the final dumping calculations exists, it resides in Article 6.9 of the AD Agreement, not Article 12.2.2.¹²⁸ Article 6.9, however, pertains to disclosure of the essential facts *before* a final determination. The U.S. claim, on the other hand, pertains to the actual *final* dumping calculations. The final dumping calculations performed by an investigating authority cannot be disclosed prior to the final determination within the meaning of Article 6.9. However, Article 12.2.2 clearly encompasses the release of the final dumping calculations, because they are “relevant information on the matters of fact ... which have led to the imposition of final measures....”

106. Article 12.2.2 allows an investigating authority to use a “separate report,” and also mandates that “due regard be[] paid to the requirement for the protection of confidential

¹²⁶ See China First Written Submission, paras. 210-211.

¹²⁷ See China First Written Submission, paras. 212-213.

¹²⁸ See China First Written Submission, paras. 215-221.

information.”¹²⁹ It is not necessary to provide the dumping calculations performed for one exporter to the other exporter or to other interested parties, again because of the mandate to protect confidential information. It is not necessary that an investigating authority provide the final calculations before, or at the exact same time as, the final determination. All that was required in this case was for MOFCOM to make ATI’s final dumping calculations available to ATI, and to make AK Steel’s final dumping calculations available to AK Steel. MOFCOM’s failure to do so was inconsistent with its obligations under Article 12.2.2.

107. Finally, China’s assertion that the two exporters were able to replicate the dumping calculations on their own is unavailing.¹³⁰ First, even if the exporters were in fact able to replicate the calculations, this would not relieve China of its obligation under Article 12.2.2 to make available the actual dumping calculations that its investigating authority performed. As explained above, the actual final dumping calculations performed by an investigating authority are “relevant information” on “matters of fact” which have led to the imposition of final measures, and therefore they must be made available. This obligation exists regardless of whether the exporters in the investigation are sophisticated companies with their own ability to perform dumping calculations, or whether the exporters are smaller operations unfamiliar with dumping practice and therefore more dependent upon an investigating authority’s provision of information.

108. Moreover, in this case, MOFCOM did not even disclose sufficient information to allow the U.S. exporters to replicate the authority’s calculations. Clearly, the exporters themselves did not believe they could fully replicate MOFCOM’s calculations. As ATI explained to MOFCOM during the investigation, MOFCOM’s failure to release its calculations denied ATI “the opportunity to review those calculations for mathematical errors and to provide meaningful comments on the methodology MOFCOM used to calculate dumping margins. . . .”¹³¹

109. China appears to argue that because the respondent exporters might have been able to perform *their own* calculations, they were not prejudiced by MOFCOM’s failure to provide the actual calculations that *it* performed.¹³² China bases this argument on the documents and disclosures scattered throughout the investigation record that contained starting prices or figures, adjustments, and final figures. However, as discussed in the U.S. Response to Panel Question 27, this was insufficient.

110. Without access to the actual calculations performed, the exporters could not check MOFCOM’s methodology and math for errors. As Japan pointed out in its third party oral

¹²⁹ See U.S. Response to the First Set of Panel Questions, para. 28.

¹³⁰ See China First Written Submission, para. 222-224.

¹³¹ Exhibit US-32.

¹³² See China First Written Submission, paras. 222-223.

statement, all calculations must be provided because even a tiny mistake could result in a serious distortion of the dumping margin.¹³³ As an example, Japan noted that “an authority might mistakenly treat the unit of measurement of data in pounds in the margin calculations, although the data actually were reported in kilograms.”¹³⁴ Similarly, an investigating authority might mistakenly neglect to convert various expenses incurred in different markets to a common currency before deducting or adding those expenses in calculating normal value or export price. Such a mistake would not be apparent from the information provided by MOFCOM in this case. It is easy to envision other inadvertent errors, such as omitting a sale from the calculations, not deducting an expense that was intended to be deducted, or even simply misplacing a decimal point. Generally, without the actual calculations performed by the investigating authority, it is not possible to check the calculations against the methodological explanations given, to ensure that the authority has done what it explained it would do.

111. For these reasons, China acted inconsistently with Article 12.2.2 of the AD Agreement when MOFCOM did not make available the actual, final dumping calculations it performed for the two U.S. exporters in the underlying investigation.

VI. 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.

112. As noted in the U.S. oral statement, MOFCOM failed to explain its benefit determination because it did not provide in the preliminary determination any rationale that competitive bidding under U.S. procurement laws does not result in an acceptable market price. The final subsidy determination regarding U.S. procurement laws is inconsistent with Article 22.3 because it merely repeats the flawed discussion contained in the preliminary determination.

113. China’s preliminary determination asserts that because bids by U.S. producers are afforded a 25 percent price cushion, and some foreign producers are exempted, the “competitive bidding does not reflect true market conditions.”¹³⁵ China even argues that MOFCOM never conceded that competitive bidding exists in the United States.¹³⁶ China claims that, in the final determination, “MOFCOM not only quantified the amount of foreign steel excluded from Buy American projects as part of U.S. consumption, but also quantified the price difference between

¹³³ Japan Third Party Oral Statement, para. 3.

¹³⁴ *Id.*

¹³⁵ China First Written Submission, paras. 229-230.

¹³⁶ China First Written Submission, para. 230.

North American prices and non-North American prices based on the submissions of AK Steel.”¹³⁷

114. There are a number of errors in these assertions. First, MOFCOM conceded that competitive bidding exists: in the quote cited by China, MOFCOM indicates: “the Investigating Authority found that, according to provisions in the Buy American Act and other regulations, *although there is competitive bidding process...*”¹³⁸ Furthermore, the purported reasoning cited to by China does nothing to explain its *benefit* determination. All MOFCOM did was conclude that the U.S. price was higher than foreign prices,¹³⁹ and that some foreign producers are excluded from the competitive bidding process, leading to a distorted market.

115. Under Article 14(d) of the SCM Agreement, the authorities are to use market prices in the country of purchase unless they establish that those prices are so distorted that the market price is unusable. MOFCOM’s flawed logic appears to be based on the assumption that any government involvement in a market leads to a distorted market with prices that are unusable as a benchmark price. Prior reports of the Appellate Body interpreting Article 14(d) directly contradict MOFCOM in this regard:

We agree with the Panel that “[t]he text of Article 14 (d) [of the] SCM Agreement does not qualify in any way the ‘market’ conditions which are to be used as the benchmark ... [a]s such, the text does not explicitly refer to a ‘pure’ market, to a market ‘undistorted by government intervention’, or to a ‘fair market value’. This is confirmed by the Spanish and French versions of Article 14(d), neither of which supports the contention that the term “market” qualifies the term “conditions” so as to exclude situations in which there is government involvement.¹⁴⁰

116. Thus, as Korea noted in its third party submission, “the Appellate Body makes clear that a search for a viable market under Article 14 does not mean a search [for] a pure market without any element of governmental involvement.”¹⁴¹ The Appellate Body also affirmed that under Article 14(d) of the SCM Agreement, the authorities are to use market prices in the country of purchase in the first instance: “...[The] guideline requires that the method selected for calculating the benefit must relate or refer to, or be connected with, the prevailing market conditions in the country of provision, and must reflect price, quality, availability, marketability, transportation and other conditions of purchase

¹³⁷ China First Written Submission, para. 234.

¹³⁸ China First Written Submission, para. 229 (quoting CHN-17, at 33-34).

¹³⁹ China First Written Submission, para. 234.

¹⁴⁰ *U.S. – Softwood Lumber (AB)*, para. 87.

¹⁴¹ Korea Third Party Oral Statement, para. 43.

or sale, as required by Article 14(d). (footnote omitted).”¹⁴²

117. The fact that one foreign company may have been excluded from what China admitted was a competitive bidding process does not mean that a given transaction was not conducted based on prevailing market conditions.¹⁴³ If this were the case, the procurement practices of several WTO members would be called into question. Also, if the U.S. government was the *only*, or a *predominant* purchaser of the subject merchandise, then sellers may align their prices with the government purchase price, possibly leading to a market insulated from the forces of supply and demand. Or, if the government was both the buyer and seller of the subject merchandise, then an investigating authority could find a market insulated from the forces of supply and demand. Neither of those scenarios apply to this case.¹⁴⁴

118. Regarding MOFCOM’s benefit determination, Article 22.3 thus requires the investigating authority to provide explanation on how it found that market prices resulting from the competitive bidding process were distorted.¹⁴⁵

VII. MOFCOM’s Determination of the “All Others” CVD Rate was Inconsistent with Articles 12.7 and 12.8

A. MOFCOM’s Notification to the United States Government, AK Steel, and ATI and MOFCOM’s Placement of the Application in a Public Reading Room and Publication of the Notices of Initiation are Irrelevant to the U.S. Claims regarding China’s Calculation of the “All Others” CVD Rate

119. As the United States explained in its previous submissions, China’s application of facts available to calculate an adverse subsidy rate with respect to unknown, unidentified producers/exporters of GOES that were not notified 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, failed to satisfy the requirements of Article 12.7 of the SCM Agreement. In response, China argues that:

¹⁴² U.S. – *Softwood Lumber (AB)*, para. 96.

¹⁴³ Korea Third Party Oral Statement, para. 43.

¹⁴⁴ In fact, the U.S. government did not purchase subject merchandise. U.S. First Written Submission, para. 18.

¹⁴⁵ Japan Third Party Oral Statement, para. 34 (“MOFCOM, thus, would be required to provide explanation on how MOFCOM found that the competitive bidding price was unable to accept as the market price and was higher than the market price based on the evidence on the record. Such explanation must be in sufficient detail.”).

MOFCOM provided notice to the immediate respondents, including the U.S. Government, AK Steel, and ATI. It also placed a copy of the received petition in its public reading room and published public notices of initiation. To MOFCOM’s knowledge, notice was thereby given to each known interested party as defined by Article 12.9 of the SCM Agreement of the implications of initiation and the consequences for failing to cooperate with the investigation.¹⁴⁶

120. However, the fact that MOFCOM provided notice to the U.S. Government, AK Steel, and ATI is irrelevant to the question of the WTO-consistency of China’s application of facts available to companies subject to the 44.6% “all others” subsidy rate. Likewise, placing a copy of the petition in a reading room and publishing notices of initiation is not sufficient to justify the application of facts available. As the United States noted in its first written submission, MOFCOM made no attempt (apart from requesting that the U.S. Embassy “notify the relevant exporters and producers”) to identify the existence or location of any U.S. exporters/producers other than the two identified in the petition.”¹⁴⁷ China now acknowledges that “there are no other U.S. producers” of GOES.¹⁴⁸ This begs the question of what basis China had to apply adverse facts available to nonexistent entities for failure to cooperate.

121. Without notice of the investigation and the information required of interested parties subject to the investigation, the unidentified, unknown (indeed non-existent) other U.S. producers/exporters cannot be said to have refused access to the required information, or otherwise failed to provide access to the information within a reasonable period as required under Article 12.7 when read in the context of Article 12.1 before resort to facts available.

122. Neither can such producers/exporters be said to have significantly impeded an investigation of which they were unaware. As the Appellate Body has noted with respect to the analogue to SCM Article 12.7 in the AD Agreement, 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.¹⁴⁹ An exporter that does not exist cannot be said to have impeded an investigation.

123. With respect to Article 12.8, China claims that “notice and thereby disclosure was given to all known producers/exporters.” Again this statement is irrelevant, as the rate at issue is the “all

¹⁴⁶ China First Written Submission, para. 238.

¹⁴⁷ U.S. First Written Submission, para. 132.

¹⁴⁸ China Response to the First Set of Panel Questions, para 13.

¹⁴⁹ *Mexico – Rice (AB)*, paras. 258-264.

others” rate applied to unidentified, unknown producers.

B. China Does Not Refute the U.S. Argument that MOFCOM Ignored Substantiated Facts on the Record to Calculate the “All Others” Rate

124. In addressing the U.S. claim that the facts available applied in calculating the “all others” rate were inappropriate because MOFCOM completely ignored contradictory evidence on the record in resorting to such facts, China simply notes that the information MOFCOM relied upon was from the applicants’ August 10, 2009 submission estimating the subsidy margin to be derived from the programs under investigation.¹⁵⁰ Later, in its responses to the Panel’s questions, China acknowledges that many of these programs were “found by MOFCOM not to confer countervailable subsidies on the two known respondents.”¹⁵¹

125. In fact, China’s “all others” calculation appears to include non-countervailable programs representing over one-half the 44.6 percent “all others” rate. These non-countervailable programs include:

Programs are not specific according to China’s CVD Regulations

- Subsidy under the Pension Benefit Guarantee program (~1.913%)¹⁵²
- The subsidy under the Medicare Prescription Drug, Improvement, and Modernization Act (~0.497%)¹⁵³

Programs that do not provide a financial contribution according to China’s CVD Regulations

- Subsidy under the special environment exemption program for the steel industry in the United States (~3.038%)¹⁵⁴

Programs terminated before the POI and the prior 14 years

- Subsidy under the Economic Recovery Tax Act of 1981 (~3.587%)¹⁵⁵
- Subsidy under the Tax Reform Act of 1986 (~1.373%)¹⁵⁶

¹⁵⁰ China First Written Submission, Para. 239.

¹⁵¹ China Response to the First Set of Panel Questions, para. 48.

¹⁵² Exhibit US-28, at 49; Exhibit US-33, at 13.

¹⁵³ Exhibit US-28, at 49; Exhibit US-33, at 12.

¹⁵⁴ Exhibit US-28, at 49; Exhibit US-33, at 17.

¹⁵⁵ Exhibit US-28, at 49; Exhibit US-33, at 13.

¹⁵⁶ Exhibit US-28, at 49; Exhibit US-33, at 14.

- Subsidy under the Steel Import Stabilization Act of 1984 (~12.436%)¹⁵⁷

126. Even if China could successfully justify applying facts available in this instance, it cannot justify applying a rate that includes programs specifically found not to be “specific according to {China’s} CVD regulations”, not to confer a “financial contribution according to {China’s} CVD regulations”, or to have been “terminated before the POI and the prior 14 years”.¹⁵⁸ As discussed in our first written submission, 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. China has failed to provide any explanation that would suggest its actions were consistent with these requirements.

C. China’s Single Sentence in the Final Determination Did not Discharge its Article 12.8 Obligation

127. As demonstrated in the U.S. first written submission, MOFCOM failed to disclose the essential facts under consideration regarding its calculation of the “all others” subsidy rate, and therefore it acted inconsistently with Article 12.8 of the SCM Agreement. In response, China argues that it discharged its obligations under Article 12.8 to inform the interested parties “of the essential facts under consideration” which formed the basis of the “all others” calculation in time for the parties to defend themselves through MOFCOM’s statement in the final determination that “[f]or other U.S. companies who did not register nor submit the questionnaire responses, the Investigating Authority made a determination on ad valorem subsidy rate based on the information submitted by the applicants pursuant to Article 21 of the Regulations on Countervailing Measures.”¹⁵⁹ Thus, the issue before the Panel is whether this single statement in the Final Disclosure is sufficient under Article 12.8. Contrary to China’s claims, this sentence does not supply “the essential facts under consideration which form the basis for the decision” to apply facts available to the unknown, unidentified companies.

128. As China has admitted, the “all others” rate was based upon the facts available. However, as documented in the U.S. first written submission, the Final Disclosure did not disclose the essential facts under consideration forming the basis for the decision to rely upon the facts available. For example, absent from China’s statement are any facts that led MOFCOM to conclude that resorting to facts available was appropriate. In particular, since China now acknowledges that there were no other U.S. producers/exporters of GOES (and, therefore, no

¹⁵⁷ Exhibit US-28, at 49; Exhibit US-33, at 15.

¹⁵⁸ Exhibit US-28, at 49.

¹⁵⁹ China First Written Submission, para. 240.

other companies that were subject to MOFCOM’s investigation), China should have identified the facts that led it to determine that the conditions set forth in Article 12.7 were satisfied. Also, absent but no less essential to MOFCOM’s determination were the facts that led MOFCOM to determine that a 44.6 percent CVD rate was appropriate to apply to such companies. This is especially so given that the rates for the two respondent companies were substantially lower than 44.6 percent and given that the 44.6 percent figure apparently reflected inclusion of at least a dozen programs that were determined not to be countervailable.

129. That the United States may have been able to divine some of the essential facts through guesswork from the information provided¹⁶⁰ is of no consequence here. The burden is on China to disclose the essential facts, not on the United States to guess at them. Moreover, putting those facts aside, the facts that led China to determine that nonexistent companies that were not subject to the investigation nevertheless could be deemed non-cooperative for not having registered to participate in this investigation remains a mystery to the United States.

130. In its first written submission, China does not even attempt to demonstrate that MOFCOM disclosed such essential facts. Accordingly, the Panel should find that MOFCOM 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.

VIII. MOFCOM Acted Inconsistently with Article 6.9 of the AD Agreement by Failing to Disclose the Essential Facts Under Consideration Regarding Its Calculation of the “All Others” Dumping Rate

131. As demonstrated in the U.S. first written submission, MOFCOM also failed to disclose the essential facts under consideration regarding its calculation of the “all others” dumping rate, and therefore it acted inconsistently with Article 6.9 of the AD Agreement. MOFCOM’s disclosure consisted of the following 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.” As with the U.S. claim regarding the CVD “all others” rate, the issue before the Panel is whether this single statement in the Final Disclosure is sufficient under Article 6.9. It plainly is not.

132. Indeed, China offers little response to the U.S. claim. Its defense appears to be that MOFCOM could not disclose the essential facts under consideration because doing so would have revealed the business confidential information of the responding companies. However, China does not explain why MOFCOM failed to disclose the facts forming the basis for its decision to apply the facts available in the first place. These facts would not be confidential to the two responding companies. These facts would include the actions by all other U.S. companies that indicated to MOFCOM that these companies refused access to, or otherwise did not provide,

¹⁶⁰ China First Written Submission, para. 240.

necessary information within a reasonable period, or that they significantly impeded the investigation.

133. Moreover, with respect to China's claim of confidentiality, China provides no explanation for why MOFCOM could not have publicly summarized the information used or at least identified the calculation methodology it employed. Disclosure of the essential facts is particularly important here, because it is difficult to understand how MOFCOM used the information of the two respondent companies and arrived at an “all others” dumping margin that is more than three times as high as the margin for one such company and eight times as high as the margin for the other company.

134. In sum, China’s attempt to rebut the U.S. argument is unconvincing. Accordingly, MOFCOM acted inconsistently with Article 6.9 of the AD Agreement by failing to disclose the essential facts under consideration regarding its calculation of the “all others” dumping rate.

IX. The Price Effects Analysis in MOFCOM’S Final Determination was Inconsistent with China’s WTO Obligations

A. Price Effects and Underselling Findings were Critical to MOFCOM’S Analysis

135. For the most part China has failed to respond to the arguments of the United States in its first written submission describing how MOFCOM’s price effects analysis fails to satisfy WTO requirements. China variously ignores the U.S. arguments, mistakenly claims that they are irrelevant, or attempts to defend the MOFCOM analysis by recasting it. We initially discuss two fundamental ways in which China improperly mischaracterizes MOFCOM’s price effects analysis before proceeding to address China’s response to the specific claims asserted by the United States.

136. First, China suggests that MOFCOM’s price effects findings were unnecessary to support its affirmative injury determination. China asserts that “many of the adverse volume trends noted by MOFCOM as the basis for its finding of material injury reflect the volume effects of the large and growing presence of unfairly traded imports.”¹⁶¹ In its closing statement at the first panel meeting, China contended that the “volume effects alone establish a legally sufficient causal link.”¹⁶²

137. Significantly, China has cited nothing from MOFCOM’s Final Determination supporting its current view that the findings on price effects were merely an alternative ground supporting the affirmative injury determination. This distinction is critical because the Panel’s review centers

¹⁶¹ China First Written Submission, para. 332.

¹⁶² China Closing Statement at the First Panel Meeting, para. 10.

around those findings the authority actually made, and not findings that the Member attempting to defend the authority’s action may choose to assert after the fact. As the Appellate Body stated in *Japan – DRAMs*:

In our view, it follows from the requirement that the investigating authority provide a reasoned and adequate explanation for its conclusions, that the underlying rationale behind those conclusions be set out in the investigating authority’s determination. It is on the basis of the rationale or explanation provided by the investigating authority that a panel must examine the consistency of the determination with a covered agreement, including whether the investigating authority has adequately explained how the facts support the determination it has made. Just as a panel must focus in its review on the rationale or explanation provided by the investigating authority in its report, so, too, is the respondent Member precluded during the panel proceedings from offering a new rationale or explanation *ex post* to justify the investigating authority’s determination.¹⁶³

138. MOFCOM could not and did not base its injury determination on volume effects alone. There was no correlation during the period of investigation between subject import volume, which increased throughout the period, and negative trends in the domestic industry’s sales quantities, inasmuch as the domestic industry’s sales also rose throughout the period, as did its employment and wages.¹⁶⁴ China’s assertion to the Panel that the domestic industry was “losing market share because of these surging volumes of unfairly traded imports,”¹⁶⁵ cannot be reconciled with the facts disclosed by MOFCOM, which indicated that the industry’s market share was higher in 2008 than in 2006 and was higher in the first quarter of 2009 than in the first quarter of 2008.¹⁶⁶ Similarly, China’s assertion that the domestic industry experienced “declining profitability” after 2007,¹⁶⁷ cannot be reconciled with MOFCOM’s disclosure that the pre-tax profit of the Chinese GOES industry increased each year from 2006 to 2008.¹⁶⁸ It was not until the first quarter of 2009 that key indicia of performance for the Chinese GOES industry such as sales prices and pre-tax profit began to decline.¹⁶⁹ During the same period, the domestic industry’s sales quantities

¹⁶³ *Japan – DRAMs (AB)*, para. 159. *See also U.S. – Hot Rolled Steel (AB)*, para. 55 (based on Article 17.6(i) of AD Agreement).

¹⁶⁴ Essential Facts Disclosure, CHN-29, secs. V(1), VI(3), VI(10), VI(12).

¹⁶⁵ China Closing Statement at the First Panel Meeting, para. 10.

¹⁶⁶ Essential Facts Disclosure, CHN-29, sec. VI(8).

¹⁶⁷ China Closing Statement at the First Panel Meeting, para. 10.

¹⁶⁸ Essential Facts Disclosure, CHN-29, sec. VI(6).

¹⁶⁹ Essential Facts Disclosure, CHN-29, secs. VI(4), VI(6).

increased, as did its market share.¹⁷⁰ Consequently, whatever injury the Chinese GOES industry may have sustained during the first quarter of 2009 was due to lower prices and per-unit revenues, not to reduced output or market share.¹⁷¹

139. MOFCOM’s Final Determination confirmed that price effects findings were critical to its injury analysis. A substantial proportion of MOFCOM’s finding of causal link was devoted to detailing the supposed price effects of the imports under investigation. Significantly, the price effects were the sole factor that MOFCOM used to attempt to tie the imports under investigation to the declines in profitability and sales revenues during the first quarter of 2009.¹⁷² MOFCOM itself perceived its price effects findings as essential to its injury analysis, and not merely an alternative grounds for finding injury, as China now alleges.

140. The second way China fundamentally mischaracterizes the MOFCOM determination concerns the underselling analysis. China argues that MOFCOM did not need to make findings on underselling, did not do so, and was not obliged to undertake *any* analysis comparing prices of the domestically produced product with those of the imports under investigation.¹⁷³ It goes so far to assert that none of MOFCOM’s findings “depends on the actual level of subject import prices at various points in time.”¹⁷⁴ As we explain below in the discussion of MOFCOM’s findings on price suppression and price depression, China’s statement that MOFCOM did not attempt to undertake any comparative analysis of the prices of the domestically produced product and the imports under investigation is simply wrong. China has acknowledged that MOFCOM made findings about the “low prices” of subject imports.¹⁷⁵ Put differently, MOFCOM purported to rely on information about the price levels of the imports, and found that these price levels were “low” in comparison with the domestic like product.

¹⁷⁰ Essential Facts Disclosure, CHN-29, secs. VI(3), VI(8).

¹⁷¹ China asserted at the first Panel meeting that the United States conceded that the Chinese industry was injured. China Opening Statement at the First Panel Meeting, para. 48. This is not accurate. Rather, the United States has challenged numerous elements of MOFCOM’s analysis and findings leading up to its ultimate finding of injury, thus, the United States is in essence challenging MOFCOM’s ultimate conclusion that the Chinese industry was injured by subject imports.

¹⁷² Final Determination, CHN-16, sec. VI(Causal Link)(1). We note that the translation of the Final Determination submitted as CHN-16 has two sections that are both denominated section VI.

¹⁷³ China First Written Submission, para. 300 (“MOFCOM instead relied primarily upon the price suppression and price depression analysis that did not depend on precise pricing information”), para. 316 (“[i]nformation about pricing levels might have been relevant, but was not essential given the pricing analysis MOFCOM actually undertook.”).

¹⁷⁴ China First Written Submission, para. 304.

¹⁷⁵ China First Written Submission, para. 296. *See also* China Opening Statement at the First Panel Meeting, para. 57.

141. In its first written submission, the United States explained at length why the conclusions that MOFCOM reached concerning price comparisons were not supported by positive evidence, did not reflect an objective examination, and consequently were inconsistent with Articles 3.1 and 3.2 of the AD Agreement and Articles 15.1 and 15.2 of the SCM Agreement.¹⁷⁶ China does not challenge or even respond to this U.S. argument, other than mistakenly to contend that it is irrelevant because MOFCOM made no findings whatsoever on comparative prices. In so doing, China has essentially conceded that there is no positive evidence to support a finding that prices for the imports under investigation were lower than prices for the domestically produced product at any time during the period of investigation.¹⁷⁷

B. MOFCOM’s Findings of Price Depression Are Inconsistent With Articles 3.1 and 3.2 of the AD Agreement and Articles 15.1 and 15.2 of the SCM Agreement

142. Under Article 3.2 of the AD Agreement and Article 15.2 of the SCM Agreement, the pertinent inquiry is whether “the effect of such imports is otherwise to depress prices to a significant degree or to prevent price increases, which otherwise would have occurred, to a significant degree.” Consequently, with respect to price depression, the sole inquiry is not whether prices declined, as China now asserts.¹⁷⁸ It is whether they declined to a significant degree and whether the decline was the effect of the dumped or subsidized imports. We have explained to the Panel why examination of the relative price levels of the domestically produced and imported merchandise is essential to a complete analysis of price effects.¹⁷⁹

143. MOFCOM made findings that price depression was the effect of the imports. China largely ignores these findings, presumably because it cannot establish that they were supported by positive evidence and reflected an objective examination of information, as required by Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement.

144. MOFCOM found that “a pricing policy aiming at *setting a price to a level lower than that of the domestic like product* was adopted when selling the product concerned in [the] China

¹⁷⁶ U.S. First Written Submission, paras. 210-222.

¹⁷⁷ We explained this concept in greater detail in the U.S. Response to the First Set of Panel Questions, paras. 58-63.

¹⁷⁸ China Response to the First Set of Panel Questions, para. 131.

¹⁷⁹ U.S. Response to the First Set of Panel Questions, paras. 53-57 (We also agree with the position stated by the European Union on this issue in paragraph 25 of its Oral Statement).

market and that forced applicants to lower the price of like products.”¹⁸⁰ It also stated that “due to the impact of the large quantity of product concerned at a *low price*, the normal production and sales of the domestic industry in China was depressed and the sales price decreased.”¹⁸¹ Thus, contrary to China’s current argument, MOFCOM did not rely exclusively on import volume to explain the domestic industry’s price declines. Instead, it stated that the imports caused price depression because of their low prices. This indicates that MOFCOM’s price depression finding relied on comparisons between “low” import prices and purportedly higher prices for domestically produced products, notwithstanding China’s repeated statements that MOFCOM did not conduct a “price undercutting” analysis.

145. China now admits that “it may be necessary to have more precise information to ensure that the comparison of domestic and import prices is in fact reasonable and objective.”¹⁸² There is no such substantiation for MOFCOM’s findings of “low” import prices. Indeed, we have previously demonstrated that there is no positive evidence supporting any finding that the imports were priced below the levels of the domestically produced product,¹⁸³ and that any such findings could not have resulted from an objective examination.¹⁸⁴ As previously stated, China has not attempted to respond to or rebut these claims.¹⁸⁵

146. In its first written submission, China criticizes the United States for overlooking price depression that supposedly occurred in 2008.¹⁸⁶ MOFCOM, however, never made a finding that price depression occurred in 2008. All it did was to repeat an assertion from the applicants’ comments that “at the end of 2008 and beginning of 2009, GOES prices in the Chinese market

¹⁸⁰ Final Determination, CHN-16, sec. VI(Industry Injury)(III)(3) (emphasis added).

¹⁸¹ Final Determination, CHN-16, sec. VI(Industry Injury)(IV)(1) (emphasis added).

¹⁸² China Response to the First Set of Panel Questions., para. 131.

¹⁸³ U.S. First Written Submission, paras. 211-214.

¹⁸⁴ U.S. First Written Submission, paras. 215-221.

¹⁸⁵ Significantly, in summarizing the types of confidential and nonconfidential information on which MOFCOM relied in making its price depression and price suppression findings, China does not reference *any* comparisons of the prices or average unit values of the domestically produced product and the imports under investigation. China Response to the First Set of Panel Questions, para. 117.

¹⁸⁶ China First Written Submission, paras. 281-290. *See also* China Response to the First Set of Panel Questions, paras. 119-22.

decreased.”¹⁸⁷ MOFCOM’s actual finding, which is repeated in the second and third paragraphs following its recitation of the applicants’ claim, is that the price trend was “rising-then-dropping,”¹⁸⁸ The logical way to read this finding is that MOFCOM was relying on the pricing trends disclosed in its opinion. The only information disclosed in the opinion arguably pertaining to prices for the domestically produced product showed average unit values increasing in 2008 by 14.53 percent.¹⁸⁹ Thus MOFCOM’s sole finding concerning 2008 price levels was that prices increased that year.

147. Even accepting *arguendo* China’s contention that MOFCOM did make a finding of price depression during “late” 2008, such a finding is still insufficient to satisfy the standards of the Agreements. Initially, the Agreements concern “significant” price depression. Whatever MOFCOM found, it did not explain why any price declines that may have occurred during the last quarter of 2008, following sizeable increases during the prior quarters of that year, were significant and China does not even suggest that there is support for such a finding in the record.

148. Additionally, any MOFCOM finding of price depression during “late” 2008 would not reflect an objective examination. China now argues that MOFCOM conducted a quarterly analysis for domestic price levels during 2008.¹⁹⁰ China does not contend, and there is no indication in the portions of the MOFCOM record disclosed to the Panel, that MOFCOM conducted any similar quarterly analysis concerning other factors pertinent to whether price depression was the effect of the imports. Without the comprehensive quarterly analysis that MOFCOM failed to conduct, the record indicates no more than increasing imports were coincident with increasing domestic prices for certain portions of 2008, but were coincident with declining prices for other portions of 2008. In such circumstances, attributing the price declines for a portion of the year to the imports under investigation is not a conclusion that “is reasoned and adequate, in light of the evidence on the record and other plausible alternative explanations.”¹⁹¹ MOFCOM’s use of quarterly data for 2008 only for the purpose of examining domestic price levels “was selective and provided only a part the picture” of what might have

¹⁸⁷ MOFCOM Final Determination, CHN-16, sec. VI(III)(3). Significantly, China itself has variously characterized what the applicants presented as a “comment,” an “argument,” and a “claim” – not as a MOFCOM finding. China First Written Submission, paras. 286, 288, 290. While China further states that material Allegheny Ludlum submitted corroborated applicants’ claim, China Response to the First Set of Panel Questions, para. 119, MOFCOM never cited the Allegheny Ludlum comments as evidentiary support for any finding.

¹⁸⁸ MOFCOM Final Determination, CHN-16, sec. VI(Industry Injury)(III)(3).

¹⁸⁹ MOFCOM Final Determination, CHN-16, sec. VI(Industry Injury)(III)(2).

¹⁹⁰ China Response to the First Set of Panel Questions, para. 119.

¹⁹¹ *U.S. – Anti-Dumping and Countervailing Duties (AB)*, para. 516.

caused any pricing declines in the fourth quarter.¹⁹² It was not consistent with of an objective examination of the data.¹⁹³

149. This can be illustrated by examining the 2008 customs data appended to the petition which is nowhere referenced in MOFCOM’s Preliminary Determination, Essential Facts Disclosure, or Final Determination, but which China introduced ostensibly to show the Panel that there was some information in the record that may have supported MOFCOM’s analysis.¹⁹⁴ These data indicate that the quantities of imports from Russia and the United States peaked during the third quarter of 2008 – which is when China now asserts that prices for domestically produced GOES reached their highest levels during the period of investigation.¹⁹⁵ During the last quarter of 2008, import quantities from Russia and the United States were well below their peaks of the third quarter, and imports from Russia and the United States constituted a declining percentage of total imports. Indeed, imports from sources other than Russia and the United States had their highest 2008 quarterly volumes during the fourth quarter.¹⁹⁶ If anything, an objective examination of the available quarterly data would have indicated that increasing subject import volumes were associated with increasing, not decreasing, domestic prices.

150. In sum, China’s defense of MOFCOM’s price depression analysis can be reconciled neither with the findings MOFCOM actually made nor an objective examination of the data in the record. China has not rebutted the U.S. demonstration that MOFCOM’s price depression analysis breaches Articles 3.1 and 3.2 of the AD Agreement and Articles 15.1 and 15.2 of the SCM Agreement.

C. MOFCOM’s Findings of Price Suppression Are Inconsistent With Articles 3.1 and 3.2 of the AD Agreement and Articles 15.1 and 15.2 of the SCM Agreement

¹⁹² See *Mexico – Rice (AB)*, para. 176. This is particularly true in light of information in the MOFCOM record that raw materials prices declined sharply during the fourth quarter of 2008. See Allegheny Ludlum Comments on Preliminary Determination, CHN-31, at 7-8. Yet MOFCOM’s determination does not reflect that it conducted any investigation at all, much less a quarterly analysis, of raw materials cost trends.

¹⁹³ See *Mexico – Rice (AB)*, paras. 176-84. We do not contend that MOFCOM was required to engage in either a quarterly or annual analysis. Instead, our argument is that MOFCOM was not engaging in an objective examination by examining prices for the domestically produced product on a quarterly basis in isolation and by ignoring information that undermines the conclusion that China now offers.

¹⁹⁴ Exhibit CHN-33. This information is presented in a more concise format and is aggregated on a quarterly and annual basis in Exhibit US-41, which is further explained in Section IX below.

¹⁹⁵ China Response to the First Set of Panel Questions, para. 121.

¹⁹⁶ Exhibit US-41.

151. As with price depression, China misunderstands the basic inquiry an authority must conduct under Article 3.2 of the AD Agreement and Article 15.2 of the SCM Agreement in examining price suppression. The pertinent question is not solely whether there has been any increase in the ratio of cost to sales while imports have been in the market. Instead, the inquiry encompasses whether (1) *the effect of the imports* is to prevent price increases, which otherwise would have occurred and (2) whether any failure of the domestic industry to achieve cost increases is *significant*.

152. China’s arguments defending MOFCOM’s findings of price suppression in 2008 fail to address the defects in the analysis MOFCOM conducted. As previously explained, the only information MOFCOM disclosed indicated that during 2008, prices for domestically produced GOES rose by 14.53 percent, which was the greatest annual increase recorded during the period of investigation.¹⁹⁷ Consequently, in order to satisfy the requirements of Article 3.2 of the AD Agreement and Article 15.2 of the SCM Agreement, MOFCOM would need to have established that the imports under investigation precluded the domestic industry from achieving price hikes significantly greater than 14.53 percent. This MOFCOM failed to do.

153. Materials China introduced to the Panel in connection with the first written submission raise serious questions about whether MOFCOM’s analysis of changes in the “price-cost differential” was objective. MOFCOM’s analysis assumes that the underlying cost structure of the industry was static from 2007 to 2008, and that the only factors that changed were the volume and pricing of the imports under investigation. But there were significant changes in the domestic industry’s structure from 2007 to 2008. According to the applicants, domestic producer Baosteel began production operations in May 2008.¹⁹⁸ When they begin production, steel production facilities frequently incur high start-up costs.¹⁹⁹ The increased costs associated with a new facility can skew any analysis of the industry’s ability to recover costs. But MOFCOM apparently did not examine, and certainly made no findings, whether the Chinese industry in 2007 and the Chinese industry in 2008 were actually comparable for purpose of cost comparisons.

154. Even assuming *arguendo* that a comparison of 2007 and 2008 cost data is valid, China overlooks a central point that is critical to the analysis required by Article 3.2 of the AD Agreement and Article 15.2 of the SCM Agreement. In certain circumstances, an industry may forego price increases for its own benefit, and not as a response to import competition. If an industry can sell greater quantities exercising some price restraint – which may be achieved either by cutting prices or by not fully passing through cost increases to purchasers – its overall revenues

¹⁹⁷ Final Determination, CHN-16, sec. VI(Industry Injury)(III)(2).

¹⁹⁸ Exhibit CHN-2, at 95, 102-03.

¹⁹⁹ See “Scheduling a Successful Start-Up,” Exhibit US-40, at 2 (noting that new steel production facilities can be characterized by various start-up problems which can seriously impact earnings).

and profits may increase despite the fact that the ratio of cost to sales revenues on a per unit basis will also be rising.

155. The experience of China’s GOES industry during 2008 illustrates this. During 2008, sales quantities of the Chinese GOES industry increased by 5.04 percent. Because, as previously explained, the prices the domestic industry charged also increased that year, sales revenues increased by 20.31 percent. As a result, the industry’s pre-tax profit increased by 1.24 percent in 2008.²⁰⁰ Thus, the information disclosed by MOFCOM indicates that, because it was able to garner additional sales, the Chinese industry’s financial condition improved in 2008 notwithstanding the increase in the per unit ratio of cost to sales revenues. In light of these circumstances, to satisfy the requirements of Article 3.2 and 15.2, MOFCOM needed to provide some reasoned explanation of why the change in the per-unit ratio was significant. It did not do so.

156. Instead of providing a reasoned explanation that considered all the evidence, MOFCOM simply assumed that the increase in the per-unit ratio of cost to sales revenues was the effect of the imports. Because this explanation was not reasonable in light of the facts before it, MOFCOM’s price suppression finding for 2008 does not satisfy the requirements of the Agreements.

157. In our first written submission, we demonstrated that MOFCOM’s finding of price suppression for 2009 was not based on an objective examination because MOFCOM examined the data for the first quarter of 2009 in isolation. Viewed as whole, the record does not indicate a correlation between increasing import volume and price suppression.²⁰¹

158. In response, China argues that the 2009 data indicate a continuation of the price suppression MOFCOM found in 2008.²⁰² Because there is no basis for a price suppression finding in 2008, MOFCOM’s finding for 2009 must fail as well.

159. Moreover, MOFCOM’s stated reason for finding that the increasing ratio of costs to sales revenues in the first quarter of 2009 was the effect of the subject imports was the purported “low price” strategy adopted by the importers under investigation.²⁰³ As we have explained both above and in our first written submission, there is no positive evidence that the imports followed a “low price” policy and China does not even attempt to defend this finding.

²⁰⁰ Essential Facts Disclosure, CHN-29, sec. VI(3), (5), (6).

²⁰¹ U.S. First Written Submission, paras. 231-236.

²⁰² China First Written Submission, paras. 275-276.

²⁰³ Final Determination, CHN-16, sec. VI(Industry Injury)(III)(3).

160. Consequently, MOFCOM’s price suppression finding for 2009 is not supported by positive evidence and does not reflect an objective examination. Both it and the 2008 finding fail to satisfy the standards of Articles 3.1 and 3.2 of the AD Agreement and Articles 15.1 and 15.2 of the SCM Agreement.

D. MOFCOM’s Failure to Disclose Facts Critical to Its Price Effects Analysis Breaches Article 6.9 of the AD Agreement and Article 15.8 of the SCM Agreement

161. China does not dispute that MOFCOM failed to disclose several pieces of information critical to its price effects analysis, as we demonstrated in our first written submission.²⁰⁴ China contends that the failure to disclose this information does not violate Article 6.9 of the AD Agreement and Article 15.8 of the SCM Agreement because the facts not disclosed either were not “essential” or were confidential. China’s arguments are without merit.

162. China does not dispute that it failed to disclose any information about price levels for the domestically produced product or any comparisons between prices for this product and the imports under investigation. China contends that such information was not essential because it did not rely on an underselling analysis.²⁰⁵ China is wrong. As previously discussed, even if China did not make a finding of significant underselling, it repeatedly referred to the purportedly “low prices” of the imports under investigation to justify its findings of price suppression and price depression. Information about the prices of the domestically produced product, and whether those prices were in fact above those of the imports, was an element essential to MOFCOM’s finding that import prices were “low.” Yet MOFCOM nowhere disclosed such information.²⁰⁶

163. Similarly, information about whether the domestically produced product is priced higher or lower than the imports under investigation would not normally be confidential. Consequently,

²⁰⁴ U.S. First Written Submission, paras. 190-197.

²⁰⁵ China First Written Submission, para. 316.

²⁰⁶ China suggested to the Panel at the First Substantive Meeting that public material elsewhere in the record may support a finding of “low” prices, including material in the petition. Even assuming that this proposition is true, it confirms China’s failure to comply with the obligations in the Agreements to disclose essential facts. Clearly, any information that China believes provides the sole public support for a finding in its determination is a fact essential to that determination. Yet China has twice told the Panel that MOFCOM disclosed essential facts through its Preliminary Determination and Essential Facts Disclosure; indeed, it has asserted that these documents contain “all” the essential facts. China First Written Submission, para. 306; China Opening Statement at the First Panel Meeting, para. 51. MOFCOM did not identify any of the facts alleged in the petition about pricing in these documents. Thus, to the extent China now considers these facts the basis of its determination, it has conceded that they were not included in the disclosure process MOFCOM undertook.

MOFCOM’s failure to disclose the information cannot be attributed to a desire to maintain confidentiality, notwithstanding China’s assertion that any essential information it did not disclose was confidential.²⁰⁷

164. Several other pieces of information that MOFCOM failed to disclose are not inherently confidential, and neither MOFCOM nor China has explained why they should be accorded confidential treatment. These include the following:

- (a) Information about the “pricing strategies” of the importers that MOFCOM purportedly obtained from third parties. MOFCOM did not explain, nor is it by any means self-evident, why information about the importers’ purported pricing policies was considered confidential to the third parties that supplied it.
- (b) Information about trends in domestic producers’ costs. This would be no more confidential than the other trend information concerning the domestic industry that MOFCOM disclosed.
- (c) General information about what aspects of domestic producers’ costs were increasing. To the extent that the domestic industry’s costs increased in 2009 – a matter on which MOFCOM made no express findings – information about the type of costs that increased is critical to understanding the basis of MOFCOM’s findings on price suppression and price depression. For example, it is impossible to ascertain whether any price declines towards the conclusion of the period of investigation merely reflected declines in raw materials costs. By the same token, it is impossible to ascertain from MOFCOM’s disclosure documents whether any increase in costs was due to changes in raw materials prices, or to factors entirely within the domestic industry’s control, such as increased factory costs due to the industry’s rapid expansion that began in 2008.

165. Additionally, should the Panel agree with China that MOFCOM found that prices for domestically produced GOES declined during the fourth quarter of 2008, the materials that China has disclosed since filing its first written submission indicate additional violations of its obligations to disclose essential facts. Information about quarterly price trends is essential to any finding that prices declined on a quarterly basis. Yet China disclosed this information for the first time only in response to questioning from the Panel.²⁰⁸ By contrast, the only information disclosed in the Preliminary Determination or Essential Facts Disclosure concerning domestic

²⁰⁷ China First Written Submission, paras. 307-08.

²⁰⁸ China Response to the First Set of Panel Questions, para. 121.

price levels in 2008 is annual trend data.²⁰⁹ China cannot claim that confidentiality concerns precluded disclosure of quarterly pricing trend data for the domestically produced product, inasmuch as it has now disclosed such data to the Panel.

166. Finally, MOFCOM never stated in its Final Determination that its injury determination relied upon confidential information. China first made such a contention when it filed its first written submission. China provides no explanation why MOFCOM could not provide non-confidential summaries of the information on pricing and costs it did not disclose, or explain why such nonconfidential summaries could not be provided.

E. 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

167. China’s attempts to justify why the conclusory assertions in MOFCOM’s Final Determination about the “strategies” purportedly used by importers to charge “low prices” for their products satisfy the provisions of Article 12.2.2 of the AD Agreement and Article 22.5 of the SCM Agreement are without merit. Indeed, China’s inability to identify what findings MOFCOM made and where it made them underscore how its action are inconsistent with the Agreements.

168. During the first Panel meeting, China suggested that all MOFCOM findings concerning price effects may not have been articulated expressly in the Final Determination. China has elaborated on its views in response to the Panel’s questions, stating that “China relied upon confidential information when making its findings on adverse price effects during the investigation.”²¹⁰ Such confidential information was not referenced in the Final Determination and China has still not identified what, if any, document may contain whatever confidential findings MOFCOM failed to articulate in the Final Determination. Nor has it made any such document available to the Panel. China’s unwillingness to state where MOFCOM made its price effects findings is irreconcilable with the requirements of the Agreements. Under the Agreements, the parties to an investigation, and the exporting Member, much less members of a dispute settlement panel, are not supposed to be placed in the position of guessing the basis for an authority’s findings. Articles 12.2.2 and 22.5 states that such findings should be made in a public notice or a separate report.

169. China also repeats an argument that it has used several times previously. It contends that because it did not make a finding concerning significant underselling, MOFCOM was not

²⁰⁹ Preliminary Determination, CHN-17, sec. VI(III)(2); Essential Facts Disclosure, CHN-29, sec. VI(4). As previously discussed, China contends that the Preliminary Determination and Essential Facts Disclosure contained “all” the essential facts. By contrast, MOFCOM never indicated it made any reliance on information in Allegheny Ludlum’s comments.

²¹⁰ China Response to the First Set of Panel Questions, para. 116.

required to provide reasoning to support its conclusory and undocumented findings about “low prices” and “pricing strategies.” We have already rebutted the premise of China’s argument in this respect, which is that “the findings on price suppression and price depression would stand regardless” of corroborating information.²¹¹ To the contrary, the findings about the purported “low prices” and “pricing strategies” of the imports under investigation are the principal and therefore essential underpinnings of MOFCOM’s conclusions concerning price depression and price suppression.

170. China then suggests that the Agreements only require authorities to address arguments they themselves deem “material.” China further posits that because MOFCOM deemed only information about volume “material” to its price effects analysis, it was essentially free to dispense with furnishing any findings or reasoning to rebut contrary arguments concerning the price levels of the imports.²¹²

171. China’s argument fails factually. As we have explained, MOFCOM did not attempt to justify its price effects findings or injury findings on volume data alone. Information about the supposedly “low” prices of the imports under investigation was critical to its analysis.

172. Moreover, as noted above, China has misread the Agreements by attempting to substitute the text in the chapeau of Article 12.2 of the AD Agreement and in Article 22.3 of the SCM Agreement for the text of Article 12.2.2 of the AD Agreement and Article 22.5 of the SCM Agreement.²¹³ China cannot persuasively argue that information as to the nature of the “policies” or “strategies” that importers purportedly employed to charge “low” prices is not relevant information, when MOFCOM specifically relied on findings concerning these purported “policies” and “strategies” in its price effects analysis.²¹⁴

X. The Causation Analysis in MOFCOM’S Final Determination is Inconsistent with China’s WTO Obligations

A. 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

173. China’s argument that the price effects analysis was unnecessary to MOFCOM’s

²¹¹ China First Written Submission, para. 323.

²¹² China First Written Submission, para. 327.

²¹³ See the discussion in Section V, above.

²¹⁴ As explained above, MOFCOM did not indicate, and it is not self-evident, why the information on which it relied should be treated as confidential.

conclusion of causal link cannot withstand even casual scrutiny. We explained in Section IX.A above that the price effects findings were an essential element of MOFCOM’s causal link analysis. Indeed, the longer of the two paragraphs of the discussion of causal link in MOFCOM’s Final Determination concerned the purported price effects of the imports under investigation.²¹⁵ Because MOFCOM’s analysis of price effects does not satisfy the requirements of the AD and SCM Agreements, 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.²¹⁶

174. China raises similarly unpersuasive arguments concerning MOFCOM’s examination of the Chinese GOES industry’s rapid expansion, the industry’s increasing production at a rate far greater than the increase in domestic demand, and the consequent inventory overhang that placed downward pressure on prices for GOES in China. China’s response to the U.S. argument that it violated Articles 3.1 and 3.5 of the AD Agreement and Articles 15.1 and 15.5 of the SCM Agreement by failing to perform a non-attribution analysis evinces a complete misunderstanding of these provisions.

175. In particular, China erroneously argues that the parties opposing imposition of duties had the obligation of submitting evidence to prove that the domestic industry’s excessive production and consequent inventory overhang contributed to its injury.²¹⁷ The only obligation that the Agreements place on the parties is that of identifying “known” factors of injury other than the imports under investigation that the authorities should examine. As China acknowledges,²¹⁸ U.S. exporter ATI brought to MOFCOM’s attention that overproduction was contributing to any difficulties that the domestic industry may have experienced since 2008.²¹⁹ Articles 3.5 and 15.5 state that “[t]he *authorities* shall also examine any known factor other than the [unfairly traded] imports which at the same time are injuring the domestic industry” (emphasis added). Consequently, the Agreements placed on MOFCOM the responsibility to conduct the requisite examination.

176. The insufficiency of the examination that MOFCOM purported to conduct is underscored by China’s failure to attempt to rebut the explanation in the U.S. first written submission why the excessive production and inventory overhang contributed to whatever difficulties the domestic

²¹⁵ Final Determination, CHN-16, sec. VI(Causal Link)(I).

²¹⁶ U.S. First Written Submission, para. 243.

²¹⁷ China First Written Submission, para. 357; *see also* China Opening Statement of First Panel Meeting, para. 57.

²¹⁸ China Response to the First Set of Panel Questions, para. 134.

²¹⁹ Allegheny Ludlum Comments on Preliminary Determination, CHN-31, at 9.

industry experienced during the latter portion of the period of investigation. Instead, China merely argues that the expanded capacity of the Chinese industry never exceeded apparent Chinese consumption of GOES.²²⁰ Neither China nor MOFCOM has disclosed sufficient information to permit verification of this claim. Even assuming *arguendo* that it is true, it is unresponsive to the argument. Instead, it merely reflects an assumption that an industry that increases its capacity should be able to displace all imports in the market – whether they are fairly traded or unfairly traded. The nature of this assumption is not intuitive, is not explained by China, and is not supported by any evidence disclosed by MOFCOM.²²¹ It cannot support MOFCOM’s patently inadequate analysis of the increases in production and inventories.

177. China additionally makes the assertion that the increased production could not have contributed to injury because “the domestic producers . . . did not produce more than the market could bear.”²²² This assertion, which corresponds with no finding MOFCOM made, is directly contradicted by the disclosed evidence. Far from having “restrained their new production,”²²³ Chinese producers used their increased capacity to increase production far beyond what the market demanded, resulting in sharply increasing inventories, particularly in the first quarter of 2009. Between the first quarters of 2008 and 2009, the domestic industry’s output increased by 55.23 percent, although demand only increased by 12.46 percent.²²⁴

178. China appears to argue that even if MOFCOM’s finding that the excess production and inventory overhang did not contribute to the domestic industry’s difficulties is unsupported by positive evidence, its failure to conduct a non-attribution analysis can still be excused because there is no demonstration that the effects of the excess production and injury overhang were “dramatic.”²²⁵ In other words, an authority has no obligation to conduct a non-attribution analysis

²²⁰ China First Written Submission, paras. 361-62; *see also* China Opening Statement of First Panel Meeting, para. 57.

²²¹ To the contrary, the assumption appears to be patently inconsistent with the applicants’ admission that certain Chinese purchasers had entered long-term contracts to purchase GOES from nonsubject sources such as Korea. Exhibit CHN-2, at 119. Indeed, substantial volumes of imports from sources other than the United States and Russia remained in the Chinese market even after the Chinese industry sharply increased its capacity in 2008. Exhibit CHN-33. *See also* Exhibit US-41.

²²² China First Written Submission, para. 363.

²²³ China First Written Submission, para. 366.

²²⁴ Essential Facts Disclosure, CHN-29, secs. VI(1), (2).

²²⁵ China First Written Submission, paras. 351-352; *see also* China Opening Statement of First Panel Meeting, para. 56. To the extent China’s argument may concern the question of the authority’s discretion in a non-attribution analysis to ascertain how the imports under investigation have contributed to material injury, it concerns an issue not before the Panel. Indeed, China continues

unless a party opposing imposition of duties can establish that a known factor other than the imports under investigation was causing “dramatic” effects. We explained above that the Agreements impose the obligation on authorities, not parties, to assess the effects of known causes of injury other than subject imports.

179. Even assuming that the authority conducted an examination and positive evidence supported a conclusion that the effects of factors other than the imports under investigation were not “dramatic,” there is still no basis for China’s argument. As a factual matter, MOFCOM did not find that the domestic industry’s overproduction and consequent inventory overhang had effects that were not “dramatic.” It found that the overproduction and inventory overhang were not a cause of injury – a finding unsupported by positive evidence. As a legal matter, China has cited no Agreement text, Panel report, or Appellate Body report supporting its view of when the non-attribution obligation is triggered. Certainly nothing in Article 3.5 of the AD Agreement or Article 15.5 of the SCM Agreement states that non-attribution analysis is only required for other known causes of injury with “dramatic” effects.

180. To the contrary, the Appellate Body report in *US – Hot-Rolled Steel* indicates that an authority is required to undertake a non-attribution analysis whenever other known factors are causing injury to the domestic industry.²²⁶ Our first written submission explained in detail why the overproduction and inventory overhang contributed to any difficulties experienced by the Chinese GOES industry,²²⁷ and China has not demonstrated that positive evidence supports MOFCOM’s contrary conclusion. Consequently, the Agreements required MOFCOM to undertake a non-attribution analysis. Because MOFCOM did not purport to do so, it has violated Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement.

B. MOFCOM’s Failure to Disclose Information Concerning Non-Subject Imports is Inconsistent with Article 6.9 of the AD Agreement and Article 15.5 of the SCM Agreement

181. China does not seriously dispute that neither MOFCOM’s Preliminary Determination nor its Essential Facts Disclosure contained any information about the volume and prices of imports of GOES from sources other than Russia and the United States. Nor does China seriously dispute that information concerning the volume and prices of imports from such sources is an essential element of the analysis of causation. Indeed, both Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement identify the volume and prices of imports that are fairly traded as

to maintain that the overproduction and inventory overhang “were not ‘causing’ the injury,” and that any difficulties experienced by the domestic GOES industry were solely caused by the imports under investigation. China Response to the First Set of Panel Questions, para. 155.

²²⁶ *U.S. – Hot-Rolled Steel (AB)*, paras. 223-224.

²²⁷ U.S. First Written Submission, paras. 247-255.

elements that are relevant, and should be examined, in the causation analysis.

182. While China does argue that certain information about trends in market share for nonsubject imports can be inferred from MOFCOM’s Preliminary Determination, this is neither responsive nor relevant to the U.S. claim. Information about market share trends is simply not the information about volume or prices that Articles 3.5 and 15.5 direct an authority to examine.

183. China also argues that MOFCOM was not required to disclose any further information about imports from other sources because “the interested parties made no further arguments on this issue.” China posits that the parties “could have developed information publicly.”²²⁸ China’s argument turns the purpose of the essential facts provisions of the Agreements on its head. These provisions exist not as a means for authorities to counter arguments the parties have made, but to require authorities to provide information to permit “parties to defend their interests.” Under the Agreements, those participating in the MOFCOM proceedings were not required to develop their own public sources of information or to speculate what public information the authority may be using. Indeed, China still has not disclosed to the Panel the nature of the information MOFCOM collected concerning non-subject imports.

184. Moreover, the only information that MOFCOM disclosed concerning imports from sources other than the United States and Russia prior to issuing its Final Determination was incomplete, if not misleading. The Preliminary Determination states that “the proportion of GOES volume from other countries and regions in total imports continued to drop.”²²⁹ While this passage suggests that nonsubject imports were declining, China now acknowledges that nonsubject imports actually *gained* market share in 2008.²³⁰

185. Additionally, China disclosed for the first time in connection with its first written submission detailed information about the volume and value of nonsubject imports in 2008. This information was submitted to MOFCOM as an exhibit to the petition which China furnished to the Panel as CHN-33. It should be emphasized, however, that this information does not encompass the entire MOFCOM injury period of investigation. Nor has China stated that this is the information MOFCOM actually used in any analysis of nonsubject imports.²³¹

186. The information in CHN-33 is a series of monthly reports for two distinct GOES tariff

²²⁸ China First Written Submission, para. 374.

²²⁹ Preliminary Determination, CHN-17, sec. VII(II)(5).

²³⁰ China First Written Submission, para. 374.

²³¹ Indeed, there appears to be a slight discrepancy between the 2008 quantity data for imports from Russia and the United States reported in the exhibit to the petition and that reported by MOFCOM. Compare Essential Facts Disclosure, Exhibit CHN-29, sec. V(1) with Exhibit US-41.

categories within MOFCOM’s investigation. In Exhibit US-41, we have reformatted this information in a manner that may be more easily analyzed by the Panel. The first page of this exhibit repeats on a single page the monthly data presented in CHN-33, provides an average unit value computation, and aggregates the monthly data for the entire year. The second page of the exhibit provides on both a quarterly and annual basis for the two GOES products combined information on the quantity, value, and average unit value of subject and nonsubject imports.

187. As US-41 indicates, the material in CHN-33 reveals important information about nonsubject imports nowhere disclosed by MOFCOM. In particular, despite the rise in subject import volume in 2008, the volume of nonsubject imports was much greater that year. Nonsubject imports constituted 60.5 percent of the quantity of total imports and were greater than subject imports during each quarter. Additionally, the average unit value of nonsubject imports was lower than that of subject imports for 2008. Significantly, the average unit value of nonsubject imports was lower than that of the imports under investigation during the third quarter of 2008, the quarter in which the volume of imports under investigation peaked.²³² Had MOFCOM satisfied its obligations under the Agreements and disclosed this information, as well as the comparable information for the other portions of its period of investigation, parties to the investigation – including the United States – may well have developed arguments concerning nonsubject imports. The absence of such arguments was not due to the irrelevance of the role of nonsubject imports in the injury determination. Instead, it was due to MOFCOM’s failure to satisfy its obligations to disclose information essential to any reasoned analysis of this issue.

C. 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

188. China’s sole response to our claim that MOFCOM’s analysis of nonsubject imports violated Article 12.2.2 of the AD Agreement and Article 22.5 of the SCM Agreement because it was devoid of information is the statement that nonsubject import market share increased only modestly in 2008. MOFCOM made no such finding. The finding MOFCOM did make, which is that nonsubject imports “continued to drop,” does not appear to be consistent with China’s current contention.²³³ The divergence between China’s proffered justification for the finding that nonsubject imports were not a cause of injury to the domestic GOES industry and MOFCOM’s stated justification indicates that the actual basis for the finding remains unclear. The Final Determination therefore does not contain “all relevant information on the matters of fact and law” which led MOFCOM to conclude that nonsubject imports were not causing injury to the Chinese GOES industry. Consequently, China has not satisfied the requirements of the Agreements.

²³² Exhibit US-41.

²³³ Final Determination, CHN-16, sec. VI(Causal Link)(II)(5).

189. Moreover, China’s current explanation of MOFCOM’s analysis concerning nonsubject imports cannot possibly constitute the “relevant information on the matters of fact and law” required by the Agreements because it is incomplete and cannot justify the conclusion MOFCOM made. China’s acknowledgment that nonsubject imports gained market share in 2008 cannot possibly serve as a factual justification for a conclusion that nonsubject imports were not a cause of injury.

XI. Conclusion

190. 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, the SCM Agreement, and the Antidumping Agreement.

TABLE OF EXHIBITS

US-38	Excerpt from <i>Allegheny Ludlum Questionnaire Response</i>
US-39	Excerpt from <i>Allegheny Ludlum Supplementary Response</i>
US-40	<i>Scheduling a Successful Start-Up, <u>Iron Age</u>, July 1992</i>
US-41	GOES: Imports into China