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

RESPONSES OF THE UNITED STATES OF AMERICA TO QUESTIONS FROM THE PANEL TO THE PARTIES FOLLOWING THE SECOND SUBSTANTIVE MEETING OF THE PANEL

December 23, 2011

China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-rolled Electrical Steel from the United States
(DS414)

Responses of the United States to Questions from the Panel to the Parties Following the Second Substantive Meeting of the Panel

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

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

1. The term "nature" is used in several provisions of the SCM Agreement. For example, in addition to Article 11.2(iii) and Article 4.5, it is also used in Articles 7.2, 15.7, 24.4, and 25.7. From these various contexts, it is clear that the meaning of the term "nature" will depend on the particular context involved. In Article 11.2(iii), as noted in our first written submission, the use of the term "nature of the subsidy in question," read in context with Article 11.3, indicates that an application must include sufficient evidence with regard to the nature of the subsidy to justify initiating an investigation. Such evidence would include whether or not a subsidy is specific since an investigation would not be warranted if a subsidy is not specific. Article 1.2 makes this clear in stipulating that Part V of the SCM Agreement only applies if a subsidy is specific.

2. Because the petitioner failed to provide sufficient evidence of specificity to merit initiation of a countervailing duty investigation with respect to certain programs alleged to constitute actionable subsidies, the petition did not meet the requirements of Article 11.2.

3. Article 7.2 is dealing only with actionable subsidies. Accordingly, the term "nature" as used there is not concerned with whether a subsidy is prohibited. However, it would be relevant for the Member requesting consultations to provide evidence as to whether the subsidy is specific. Similarly, in Article 15.7, the use of the term "nature" is part of the phrase: "nature of the subsidy or subsidies in question and the trade effects likely to arise therefrom." As a result, the term "nature" appears to go more to the economic effect of the subsidy and not to whether the subsidy is prohibited or actionable. Article 25 also appears aimed more at the economic impact of the subsidy.

4. The term "nature" appears in a different context in Article 4.5 than in Article 11.2(iii). There, the phrase is "nature of the measure" rather than "nature of the subsidy." As a result, the focus of the inquiry under Article 4.5 would appear to be different from that under Article 11.2(iii). Article 4.5 is located in Part II of the SCM Agreement, and Part II and Article 4 both are concerned with prohibited subsidies. As a result, it is reasonable for the focus of the term "nature of the measure" in Article 4.5 to be whether a measure constitutes a prohibited subsidy.

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

5. Under Article 1.1(a)(2) of the SCM Agreement, "price support" refers to a measure designed to support a price above that which would otherwise prevail. While previous panels and the Appellate Body have addressed price supports that appeared in the form of internal measures, none to date have considered an alleged price support that took the form of a border measure.[1]

6. The applicant alleged that a border measure in the form of a voluntary restraint agreement constituted a price support under Article 1.1(a)(2) of the SCM Agreement.[2] Whether or not "price support" includes border measures, the applicant failed to provide any evidence that the Steel Import Stabilization Act was designed as a price support, or that the U.S. Government supported steel prices. The only evidence provided was a single sentence stating the law "effectively provided" steel producers with a price support mechanism.[3] The statement offered by the applicant is mere assertion, unsubstantiated by any relevant evidence. Indeed, under the applicant's approach, any tariff or other border measure would be a form of price support, an approach that could cause the SCM Agreement to subsume large portions of other covered agreements, including tariff schedules under the GATT 1994.

(ii) Questions to the United States

3. With reference to paragraph 46 of China's first written submission, is China's characterization of the United States' challenge correct? In particular, has the United States limited its arguments to the so-called steel "stretch out" legislation of 1981 and not challenged the 1990 amendments to the Clean Air Act?

7. The United States is challenging the decision to initiate an investigation into the allegation that the three-year postponement for compliance with certain environmental standards in the Clean Air Act constituted a subsidy. As noted in our second written submission, this three-year period ended in 1985. The United States is not challenging China's investigation into the 1990 amendments to the Clean Air Act.

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[1] See e.g., *Canada – Dairy (Article 21.5) (AB)*; *EC – Sugar Subsidies (AB); Korea – Beef; U.S. – Upland Cotton*.

[2] Exhibit CHN-2, at 80.

[3] *See* Exhibit US-31, at 2.

(b) Non-confidential summaries

(i) Questions to the United States

9. We refer to the United States' argument at paragraph 62 of its second written submission that year-over-year percentage changes in average unit values do not provide an adequate summary of confidential data because they do not reveal the significance of the absolute changes in value. Could the United States explain how absolute changes could be revealed without disclosing the confidential information itself? Is it correct that the absolute average unit values for prices and for consumption was the confidential information being protected in the petition?

8. The applicant could reveal absolute changes without disclosing confidential information by reporting the absolute value as an average. For example, on page 60 of the application (Exhibit US-2), the applicant could have reported the price per ton as an average price per ton. Respondents would not have been able to identify the price per ton charged by the individual applicants. However, an average would have allowed the respondents to gain a reasonable understanding of the substance of the allegedly confidential information.

9. As noted in our second written submission, the year-by-year percentage changes by themselves did not allow the respondents to discern the significance of those changes.[4] Nor did the applicants provide a statement of reasons as to why a more detailed summarization was not possible with respect to this information, or for that matter any other information.

10. Because price and consumption data were never disclosed or adequately summarized in a non-confidential form, the United States cannot offer a definitive answer as to whether absolute average unit values for prices and for consumption were treated as confidential.

10. Could the United States explain the way in which the respondents' ability to gain a reasonable understanding of the substance of the confidential information was impaired by the fact that the purported non-confidential summaries relied upon by China were "scattered" throughout Part-I of the petition?

11. Table 23 of the Application (Exhibit US-2) provides a good illustration of why China's theory that scattering data throughout the application would suffice as a non-confidential summary is flawed and how – even assuming that these scattered references constituted a purported non-confidential summary (and not Part II, the section of the application so marked) – treating them as such would impair the respondents' ability to gain a reasonable understanding of the substance of the confidential information.

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[4] U.S. Second Written Submission, para. 62.

12. Table 23 purports to show apparent consumption of GOES in China. The data are simply redacted. Table 23 does not contain a cross-reference to any another page or section of Part I of the application. The only cross reference it contains is to Part II of the application. Thus, as a threshold matter, any interested reader would reasonably be led to believe that Part II contained the non-confidential summary. Part II, as the United States has explained, contained no such summary.

13. China now claims that vague percentage changes provided more than 50 pages earlier in the application, an additional table elsewhere in the application providing more percentage changes – together with Appendix 13, an attachment cited nowhere in the application, and Appendix 2, which was never disclosed to the parties – constitute an adequate non-confidential summary of the information redacted from Table 23.[5] Yet China fails to explain how any reasonable reader of the application could intuit from Table 23 that the information it contains was summarized in any of these locations.

14. Without knowing where the information was, under China's theory, summarized, and indeed, having been directed to a different section of the application, no reasonable reader could be expected to divine from the application the content of Table 23. Unaware of the content, respondents were unable to submit meaningful comments or evidence in response to the information it contained.[6] China's other arguments that scattering data throughout the application suffices as a non-confidential summary are similarly flawed, and treating them as such impairs the respondents' ability to gain a reasonable understanding of the substance of the confidential information .[7]

11. How does the United States respond to China's argument, expressed in paragraphs 109 and 115 of China's first written submission, that non-confidential summaries do not need to be provided for original source documents that provide the "evidence" supporting the numbers discussed generally and in non-confidential format in the narrative of the petition?

15. Nothing in the ordinary meaning of the text of the provisions at issue, read in context and in light of the agreement's object and purpose, supports the notion that there is an exception to the obligation to require adequate non-confidential summaries for original source documents.

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5 China Second Written Submission, paras. 111-115.

6 *Mexico – Steel Pipes and Tubes*, para. 7.380; *EC – Fasteners (AB)*, para. 542 (Discussing AD Agreement Article 6.5.1 as a transparency provision). See also *Mexico – Beef and Rice (AB)*, para. 292 ("[L]ike Article 6 of the *Anti-Dumping Agreement*, Article 12 of the *SCM Agreement* as a whole 'set[s] out evidentiary rules that apply throughout the course of the … investigation, and provide[s] also for due process rights that are enjoyed by 'interested parties' throughout … an investigation.'")

7 See e.g. China First Written Submission, paras. 99, 101, 122-127.

The provisions are clear: investigating authorities must require adequate non-confidential summaries. The only exception provided is that for exceptional circumstances in which information is not susceptible of summary; in these circumstances the provisions set out specific procedures that must be followed, none of which were followed in this case.

(c) Use of facts available for AK Steel and ATI

(i) Questions to the United States

16. At para. 93 of its second written submission, the United States asserts that "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.'" Similar arguments are also made at para. 24 of its oral statement at the second hearing. At para. 34 of China's oral statement at the second hearing, China contends that the United States has not challenged the substantive basis for MOFCOM's request for data on all sales. China also contends that the United States has not challenged the necessity of any of the data requested by MOFCOM. China makes a similar argument at para. 30 of its oral statement.

(i) Is the United States claiming that, in failing to ask questions relating to whether the U.S. companies issued any manufacturer certificates "certifying that the steel or iron is domestically produced", MOFCOM failed to request "necessary" information within the meaning of SCM Article 12.7? Please answer "yes" or "no".

16. No. Rather, the fact that MOFCOM did not ask for this information refutes China's assertion that the only evidence that 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.

17. MOFCOM had several means at its disposal to verify the U.S. companies' assertions that they did not utilize (directly or indirectly) the government programs at issue. Some of these means (particularly, using documents certifying or specifications requiring that the steel in question be melted and poured in the United States, or otherwise manufactured in the United States and therefore compliant with the requirements of the government procurement programs) would have been far more direct and probative than seeking aggregate quantity and value data, which we explained in our second written submission would be unlikely to yield relevant information.[8] Yet once it became clear that neither company had "government procurement signed" as contemplated by question 3 of the government procurement section of the

[8] *See* U.S. Second Written Submission, paras. 92-97.

questionnaire, China made no modifications to its line of inquiry; nor did China ask a single supplementary question relating to the documentary evidence that the U.S. companies provided with respect to their unaffiliated, non-government customers.

18. Given (i) 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, (ii) MOFCOM's failure to make use of any of them, and (iii) the U.S. companies' extensive engagement with MOFCOM on the relevant questions, including several narrative responses with supporting documentation demonstrating that they did not make sales to the government under the alleged programs,[9] China's assertions that facts available – and especially a facts available utilization rate of 100 percent – were necessary simply are not credible.

(ii) Is the United States claiming that certain information requested by MOFCOM was not "necessary" within the meaning of SCM Article 12.7 because it concerned the issue of indirect subsidization? Please answer "yes" or "no".

19. No. Rather, the U.S. companies responded to MOFCOM's information requests in accordance with MOFCOM's own explicit instructions as set forth in the questionnaire and deficiency letter. Even if one were to conclude that the U.S. companies' participation fell short of full cooperation (and as we have explained the evidence demonstrates that it did not), any purported failure to provide the aggregate quantity and value data requested by MOFCOM does not warrant resort to an adverse inference that 100 percent of the U.S. companies' sales were made at a premium pursuant to government procurement programs.

20. Further, the United States notes that MOFCOM itself has acknowledged that roughly 93 percent of the data it requested on the government procurement programs were not "necessary."[10]

(iii) Is the United States claiming that the quantity and value data requested by MOFCOM for non-GOES products was not "necessary"? Please answer "yes" or "no".

21. Yes. China has explained that MOFCOM asked for the quantity and value data to identify anomalous transactions. China's argument that MOFOCOM could review such summary data to uncover "anomalous transactions"[11] makes no sense. A "tabulation of all domestic sales by product … including quantity, value, and customer"[12] would not provide the

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9 *See* U.S. Second Written Submission, paras. 64-78.

10 China Response to the First Set of Panel Questions, paras. 67, 70.

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

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

information necessary to perform the analysis China purports MOFCOM intended to perform. Further, MOFCOM still could have verified the U.S. companies' claims that they had no government procurement signed during the period of investigation, but chose not to do so.

(iv) At para. 25 of its oral statement at the second hearing, the United States asserts that there was nothing preventing MOFCOM from using the databases filed in the AD proceeding to develop its verification strategy. Does the United States contend that, in light of data provided in the AD proceeding, sales data was not "necessary" in the CVD proceeding? Please answer "yes" or "no".

22. Yes. Unlike in the antidumping proceeding where the sales data were an essential part of the calculation, MOFCOM has made clear that it intended to use this information in the CVD investigation as a tool to inform its verification strategy. Thus, it was not necessary for AK Steel to provide the information to MOFCOM a second time. MOFCOM had the information and could have used it for its stated purpose if it so desired.

23. Before MOFCOM made clear that it would consider the antidumping proceeding and the CVD proceeding to have separate records, AK Steel pointed MOFCOM to its response in the AD proceedings in which it had provided detailed sales information with respect to sales of GOES.[13] The same investigative team conducted both the antidumping and countervailing duty verifications, which took place simultaneously. Respondents had no reason to believe that the investigators would ignore data in their hands, just because it had been filed in one proceeding versus the other. (As noted in previous submissions, it was not initially clear from either the questionnaire instructions or China's statutes and regulations that the records for the AD and CVD proceedings would be treated as separate.) The United States also points out that after filing a list of all customers for all products in its revised questionnaire response, AK Steel did, in fact, place its antidumping database on the record of the countervailing duty proceeding in comments timely filed on the unitary Preliminary Determination.[14] It makes no sense for China to argue that AK Steel's submission was untimely, given that it was filed in accordance with the comment and verification schedule set by MOFCOM.

24. Moreover, the same investigators handled both cases and would have had in their possession AK Steel's sales information since the earliest stages of the investigation. There is nothing in China's regulations that would prevent the single MOFCOM team conducting both investigations from using information filed in one proceeding in the other. 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 MOFCOM's evaluation of the program purported to represent almost one quarter if the alleged subsidization in this case. If they had performed such

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[13] Exhibit US-11, at 22.

[14] See Exhibit US-23. MOFCOM issued a single Preliminary Determination for the antidumping and countervailing duty investigations.

an analysis, they did not use it to direct any questions to AK Steel or to develop any agenda items at verification.

17. Please explain the basis for the United States' assertion, at para. 24 of its oral statement at the second hearing, that China has re-translated MOFCOM's questions twice in an attempt to improve the clarity thereof.

25. The United States was referring to the fact that China itself has been inconsistent regarding its translations of the "unambiguous" questions it asserts that MOFCOM posed to the company respondents.[15] In its first written submission, in response to the translation provided by the United States of certain questions from the original questionnaire, China provided an alternative translation, and indicated that the U.S. translation had incorrectly translated the term "value" as "amount."[16] China, however, translated the same Chinese word as "amount" in its translation of ATI's questionnaire response.[17] In its response to the first set of panel questions, China then revised its own translation of these questions.[18]

18. Please clarify at what stage, if any, AK Steel and ATI informed MOFCOM that they had no direct sales of non-GOES products to the United States Government.

26. On September 9, 2009, AK Steel indicated in its revised questionnaire response that "AK Steel did not sell GOES (or any other product) to any government entity during the POI" and attached a list of all customers for all products during the period of investigation 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.[19]

27. The United States understands that ATI did not inform MOFCOM as to whether or not it had direct sales of non-GOES products. Rather, pursuant to MOFCOM's instructions in the

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[15] China Second Written Submission, para. 52.

[16] China First Written Submission, para 147.

[17] See Exhibit CHN-18 at 13.

[18] China Answers to the First Set of Panel Questions, paras. 61, 70.

[19] Exhibit US-14, at 25, US-15, see also AK Steel Comments on Preliminary Determination, CHN-21, at 11. ("As already declared in its response to the questionnaire, AK Steel did not sell {the} product concerned or any other product{} to the USG during the investigation period.").

original questionnaire,[20] ATI explained why it believed that the questions relating to the government procurement programs in general and the questions related to non-subject merchandise in particular did not apply to the company, citing the fact that it had no direct sales of GOES products, explaining why non-GOES sales were not relevant to determining whether subsidies were provided to GOES, and noting that complying with the request would be burdensome and would require disclosure of sensitive information unrelated to the product under investigation, in particular the names, selling prices, and quantities for all products sold to all clients during the period of investigation.[21]

(iii) Questions to both parties

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

28. Annex II of the AD Agreement may provide relevant context for the purpose of interpreting Article 12.7 of the SCM Agreement. Annex II of the AD Agreement clarifies the conditions under which resort may be had to facts available in the context of an anti-dumping proceeding. The United States considers that Article 6.8 of the AD Agreement and 12.7 of the SCM Agreement provide for similar conditions for the use of facts available.

29. Although Article 12.7 of the SCM Agreement is virtually identical to Article 6.8 of the AD Agreement, the SCM Agreement does not contain an annex similar to Annex II to the AD Agreement. However, previous panels and the Appellate Body have noted that it is appropriate to analyze Article 6.8 and Article 12.7 in parallel, despite the absence of an analogue to Annex II in the SCM Agreement. For example, in *Mexico – Beef and Rice*, while the Appellate Body considered that there were important textual differences between the two provisions, it found that this did not mean that different conditions for the use of facts available existed in the context of Article 12.7, as compared to those made explicit in Annex II of the AD Agreement.[22] Indeed, it stated that "it would be anomalous if Article 12.7 of the SCM Agreement were to permit the use

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[20] See Exhibit US-11, at 6 ("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.").

[21] Exhibit US-39.

[22] *Mexico – Beef and Rice (AB)*, para. 291.

of 'facts available' in countervailing duty investigations in a manner markedly different from that in anti-dumping investigations."[23]

30. Furthermore, the *Declaration on Dispute Settlement Pursuant to the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 or Part V of the Agreement on Subsidies and Countervailing Measures*, adopted at Marrakesh at the conclusion of the Uruguay Round, recognized "with respect to dispute settlement pursuant to" the two agreements "the need for the consistent resolution of disputes arising from anti-dumping and countervailing duty measures."[24] This is especially relevant when the provisions are virtually identical and fulfill the same function in the same context, as is the case for Article 6.8 of the AD Agreement and 12.7 of the SCM Agreement.

31. Regarding the substance of the facts available obligation, as the Panel notes in question 25 below, the Appellate Body has observed that "recourse to facts available does not permit an investigating authority to use any information in whatever way it chooses" and "is not a licence to rely on only part of the evidence provided."[25]

32. Consistent with this reasoning, failing to use verifiable information and disregarding information that is provided in a timely manner constitutes a breach of Article 12.7 of the SCM Agreement. Similarly, the fact that an interested party has acted to the best of its abilities is a factor that should be taken into consideration when considering the use of facts available in the context of a countervailing duty examination.

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

33. As a threshold matter, the United States has not alleged that China acted inconsistently with Annex II, but rather the United States has used Annex II as context for purposes of interpreting Article 12.7 of the SCM Agreement, in order to demonstrate that China breached that provision.

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[23] *Mexico – Beef and Rice (AB)*, para. 295.

[24] *Declaration on Dispute Settlement Pursuant to the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 or Part V of the Agreement on Subsidies and Countervailing Measures*, adopted by the Trade Negotiations Committee on December 15, 1993.

[25] *Mexico – Beef and Rice (AB)*, para. 294.

34. The aggregate quantity and value data requested in part 4 of MOFCOM's question were not necessary to its analysis and the requested information was therefore not "necessary" within the meaning of Article 12.7 of the SCM Agreement. As explained in response to question 16(iii), above, a review of quantity and value data requested in part 4 would not identify anomalous transactions because such data are not specific to any individual transactions.

35. Even if MOFCOM's deficiency letter could be viewed as providing "an opportunity to provide further explanations" regarding non-GOES data, this would not excuse the various defects in China's use of facts available in the instant dispute. MOFCOM's decision to ignore the information submitted by AK Steel in its revised original questionnaire response (Exhibit US-15), its comments on the preliminary determination (Exhibit US-23), and other record information demonstrating that the U.S. companies did not participate in the alleged program is inconsistent with Article 12.7, which limits the use of facts available to circumstances in which a party "refuses access to or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation...". Read in conjunction with Annex II of the AD Agreement, this language requires an investigating authority to use all submitted information that is verifiable, appropriately submitted, and capable of being used without undue difficulty, and precludes an investigating authority from simply disregarding information that "may not be ideal in all respects."

25. The Appellate Body stated in Mexico-Beef:

> **We understand that recourse to facts available does not permit an investigating authority to use any information in whatever way it chooses....to the extent possible, an investigating authority using "facts available" in a countervailing duty investigation must take into account all the substantiated facts provided by an interested party, even if those facts may not constitute the complete information requested by the party...the facts available to the agency are generally limited to those that may reasonably replace the information that an interested party failed to provide.[26]**

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

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[26] *Mexico – Beef and Rice (AB)*, at para. 294.

36. As a preliminary matter, the United States would note that the text of Appellate Body reports is not a source of WTO law and, thus, using dictionary definitions to interpret what the Appellate Body meant when it referred to "substantiated facts" will not directly assist the Panel in its interpretation of Article 12.7.

37. When the statement from the *Mexico – Beef and Rice* report is read in its proper context, it is evident that the information provided by the interested parties, in so far as it is verifiable and usable, should be used.

38. Paragraph 292 of that report explains that "{t}his due process obligation - that an interested party be permitted to present all the evidence it considers relevant - concomitantly requires the investigating authority, where appropriate, to take into account the information submitted by an interested party." In footnote 350, the Appellate Body clarified that it had previously "found that the obligation in Article 6.1 of the Anti-Dumping Agreement - the counterpart to Article 12.1 of the SCM Agreement - is not satisfied where the investigating authority 'disregard{s}' information submitted by an interested party."[27] The Appellate Body went on to state that "Article 12.7 is intended to ensure that the failure of an interested party to provide necessary information does not hinder an agency's investigation. Thus, the provision permits the use of facts on record solely for the purpose of replacing information that may be missing, in order to arrive at an accurate subsidization or injury determination."[28] The emphasis under Article 12.7 is on using whatever facts are available, even if not ideal. This is in direct contrast to drawing adverse inferences from information that is not presented and not available as specifically contemplated elsewhere in the SCM Agreement, but not here.[29] When drawing an adverse inference, an investigating authority by definition is not relying on facts available, but rather choosing to infer the existence of certain facts from the *lack* of the availability of those facts.

39. This Appellate Body's statement about "substantiated facts" should be read in the light of the prior paragraphs in which the Appellate Body clarified that under Article 12.7, the authority is required to use the verifiable, positive information ("substantiated facts") duly presented by the interested parties. As set forth in our previous submissions, those facts included:

- the Application itself, which
  - alleged that the government procurement programs were in the construction sector and that the U.S. companies contracted directly with

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[27] *US – OCTG from Argentina (AB)*, para. 246.

[28] *Mexico – Beef and Rice (AB)*, para. 292, footnote 350.

[29] Annex V.7 of the SCM Agreement.

the government to supply steel,[30] and
- proffered AK Steel's10-K report, which indicated that the infrastructure and procurement segment represented no more than 29 percent of the company's business;[31]

- U.S. government representations that it did not purchase GOES from either company under investigation;[32]
- ATI's explanation that "Grain-oriented electrical steel is used in power transformers where electrical conductivity and magnetic properties are important. Nearly all of {its} grain-oriented electrical steel products are sold directly to end-use customers {i.e., not to the government or to government contractors}."[33]
- detailed customer lists showing no government purchases of GOES[34] or, with respect to AK Steel, no sales of any product to any government entity;[35]
- detailed customer- and transaction-specific sales databases provided by both U.S. companies in response to the antidumping questionnaire showing no sales of GOES to the U.S. government; and
- with respect to AK Steel, detailed customer- and transaction-specific sales databases specifically cross-referenced on the record in response to the initial countervailing duty questionnaire[36] and placed on the record as an attachment to a timely filed written submission.[37]

In its resort to and application of facts available, MOFCOM ignored all of the above verifiable, positive information regarding the U.S. companies' utilization of the government procurement programs. In so doing, MOFCOM's actions are in breach of China's obligations under Article

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30 Exhibit CHN-2 at 56, 79, and 82.

31 Exhibit CHN-2 at 60, Annex 15-4; *see also* Exhibit US-9.

32 *E.g.*, Exhibit 3 at 65 ("At the outset, the United States would note that, as discussed in more detail below, it has been unable to locate any record of any acquisitions of or transactions related to the subject merchandise under the procurement programs described by Applicants. This is not surprising, given that two of the programs relate to the construction of airport and highway infrastructure. GOES, which is primarily used in transformers, has no direct application in construction projects.").

33 *See* Exhibit US-39, at 21-22 (quoting from ATI's 2008 financial statements, which were submitted to MOFCOM as Exhibit I to ATI's response to the Enterprise Questionnaire on GOES Anti-Subsidy Investigation, August 10, 2009).

34 Exhibits US-13, US-14, US-15, and US-39.

35 Exhibit US-15.

36 Exhibit US-11.

37 Exhibit CHN-21; Exhibit US-23.

12.7 of the SCM Agreement.

(d) Article VI:2 of the GATT 1994

(i) Questions to the United States

26. If the Panel were to find in the United States' favour in relation to its claim under Article 6.8 and Annex II of the Anti-Dumping Agreement, would the Panel need to proceed to consider the United States' claim under Article VI:2 of the GATT 1994?

40. The United States notes that if the Panel were to find in the affirmative with respect to the U.S. Article 6.8 claim, China's measures would consequently also be in violation of Article VI:2 of the GATT 1994. Thus, very little additional analysis would be required of the Panel in order to make a ruling on the consequential GATT Article VI:2 claim.

41. As a result, the United States respectfully requests that the Panel consider and make findings on all claims.

27. The United States argues, at paragraph 185 of its first written submission, that the anti-dumping rate assigned to "all other" unknown exporters was "greater in amount than the margin of dumping…which could permissibly have been calculated". In the United States' view, what is the upper limit of the margin of dumping that could permissibly have been calculated for unknown exporters?

42. As noted in the U.S. first written submission[38] and as discussed during the second panel meeting, without any explanation as to how other unidentified and unexamined U.S. producers/exporters – that China has acknowledged did not exist at the time of investigation[39] – were determined to be uncooperative, China impermissibly assigned a margin of 64.8 percent to all other unidentified and unexamined U.S. producers/exporters in this investigation in breach of Article 6.8 of the AD Agreement. As a result of the adverse assumptions made in assigning that margin to those companies, the antidumping duty levied on their products was "greater in amount than the margin of dumping in respect of such products" which could permissibly have been calculated in accordance with the provisions of the AD Agreement.

43. In this investigation, MOFCOM had calculated actual dumping margins of 7.8 percent and 19.9 percent for the two U.S. companies that it individually investigated. An "all others" dumping rate based on one or both (whether as a simple average, weighted average or

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[38] U.S. First Written Submission, paras. 156-166, 185.

[39] China Response to the First Set of Panel Questions, para. 47.

otherwise[40]) of the dumping rates calculated for these companies could have been calculated and applied consistently with China's obligations under the WTO Agreement. Under the circumstances presented by this case, the rate resulting from this calculation would constitute the upper limit of the margin of dumping that could permissibly have been calculated for unknown exporters.

(e) Disclosure obligations

(i) Questions to both parties

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

44. The U.S. claims regarding Articles 6.9 and 12.2.2 of the AD Agreement, and Articles 12.8, 22.3, and 22.5 of the SCM Agreement challenge China's failure to provide the transparency it is required to provide under these agreements. The transparency obligations contained in these provisions are critical to the effective operation of the AD and SCM Agreements. Other provisions address the substantive adequacy of an investigating authority's determinations. Substantive aspects of a determination of injury, for instance, may be challenged under Article 15.1 of the SCM Agreement or Article 3.1 of the AD Agreement. Where a measure does not rest on the required foundation of transparency, the measure is inconsistent with the relevant covered agreement.

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

45. Article 22.3 of the SCM Agreement provides that an investigating authority must provide in "sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities." Accordingly, the focus is on the findings and conclusions actually reached by the investigating authorities. An investigating authority needs to disclose the basis for its findings and conclusions. Merely stating vague and conclusory assertions is insufficient.

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[40] The United States recognizes, however, that applying a weighted average of the two respondents' dumping rates as the all others dumping rate inadvertently could reveal the business confidential information of one of the two examined respondents. For example, if the basis for weight averaging the two rates was the sales volumes of the two respondents, then each respondent company, knowing its own sales volume, mathematically could calculate the other respondent's sales volume by using the all others weighted average.

46. Under Article 22.3, if an issue is "material," then it must be adequately explained. Other provisions may help explain which findings and conclusions that an investigating authority would be expected to make and thus help inform the inquiry under Article 22.3. It may not be necessary to reference the substantive matter at issue to decide if a "material" issue has been adequately explained**.** Similarly, whether those findings and conclusions are sufficient to support the imposition of a countervailing duty may be better analyzed under other provisions of the SCM Agreement.

(ii) Question to the United States

30. We refer to the United States' argument, at paragraph 191 of its first written submission, that China did not disclose the "essential facts under consideration" relating to the purported pricing "strategies" of the Russian and United States exporters. We note that the preliminary determination and final injury disclosure document included statements such as "a pricing policy aiming at setting the price to a level lower than that of the domestic like product was adopted when selling the product concerned to the Chinese market". Could the United States elaborate upon what further information regarding the purported pricing "strategies" it expected to be disclosed under Articles 6.9 of the Anti-Dumping Agreement and 12.8 of the SCM Agreement.

47. A statement such as "a pricing policy aiming at setting the price to a level lower than that of the domestic like product was adopted when selling the product concerned to the Chinese market" is merely conclusory and fails to provide the essential facts that support that statement. In its "Responses by the People's Republic of China to Panel Questions Posed on November 18 November 201l" ("China November 25 Submission"), China was able to provide nonconfidential information about the purported pricing "strategies" that MOFCOM found were adopted by some exporters of the merchandise under investigation. In particular, China provided in the first, third, and fourth paragraphs of its response to Panel question (b) nonconfidential information concerning the dates and nature of the interactions purportedly illustrating the "strategies" that MOFCOM found.[41]

48. MOFCOM did not disclose this information in either its Preliminary Determination or its Essential Facts Disclosure. China has twice told the Panel that MOFCOM satisfied its obligations to disclose "all" essential facts pursuant to Article 6.9 of the AD Agreement and Article 12.8 of the SCM Agreement through issuing the Preliminary Determination and Essential Facts Disclosure.[42] China has not identified any other mechanism MOFCOM used to satisfy its obligation to disclose essential facts.

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[41] China November 25 Submission at 2.

[42] China First Written Submission, para. 306; China Opening Statement at the First Panel Meeting, para. 51.

49. Had MOFCOM disclosed the nonconfidential information described in the China November 25 Submission's response to Panel question (b) during the investigation, the parties could have defended their interests by explaining why these materials do not provide positive evidence for MOFCOM's findings on pricing "strategies." Indeed, the United States was unable to assert such arguments to the Panel until it received the materials in China's November 25 Submission because neither it nor other parties to the investigation could formulate arguments during the investigation based on the "disclosures" MOFCOM made in its Preliminary Determination and Essential Facts Disclosure. These "disclosures" revealed nothing. They were instead cursory and conclusory assertions that provided no information concerning when, how, or by whom the pricing "strategies" were implemented. China's November 25 Submission indicates that MOFCOM could have disclosed meaningful information while respecting claims of confidentiality.

31. We refer to the United States' claim under Article 22.3 of the SCM Agreement, alleging that MOFCOM failed to disclose sufficient information on the findings and conclusions of law relating to the benefit determination for the bidding under the United States procurement laws. Does the United States consider it necessary for the Panel to reach a conclusion on this in relation to both the preliminary determination and the final determination?

50. Article 22.3 of the SCM Agreement provides that "Public notice shall be given of any preliminary or final determination...Each such notice shall set forth... in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities." The reference to "each such notice" indicates that the duty to explain under Article 22.3 applies to both the preliminary and final determination. The United States does not consider it necessary to reach a conclusion in relation to both the preliminary and final determination. The United States has requested that the panel make findings with respect to those measures identified in the panel request, in particular the final measure issued by MOFCOM. Having failed to adequately explain "in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities" in the preliminary determination and final determination, the investigating authority acted inconsistently with Article 22.3 of the SCM Agreement with respect to the final measure.

32. With reference to paragraph 115 of the United States' second written submission, how is any "flawed logic" used by an investigating authority relevant to the disclosure obligations under Article 22.3 of the SCM Agreement?

51. Paragraph 115 assumes, *arguendo*, that MOFCOM based its determination on the assumption that any government involvement in a market leads to a distorted market with prices that are unusable. However, without an adequate explanation, it is impossible to identify how MOFCOM arrived at its conclusion. An adequate explanation would have discussed how the level of government involvement distorted the market to such an extent that a price derived form

a competitive bidding price was unusable.

52. Article 22.3 of the SCM Agreement requires, "Each such notice shall set forth, or otherwise make available through a separate report, in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities." An investigating authority should adequately disclose its logic, not merely vague assertions.

(f) Price Effects
(i) Questions to the United States

35. At para. 221 of its first written submission, the United States contends that MOFCOM "could at the minimum have evaluated each country's data separately". Bearing in mind that MOFCOM cumulatively assessed the effects of subject imports from Russia and the United States, was MOFCOM required to evaluate each country's data separately? Please explain.

53. In its first written submission, the United States stated that it "does not contend that there is a single correct methodology for examining price comparisons."[43] The United States consequently did not argue that any particular price comparison method that MOFCOM used resulted in a *per se* violation of the requirement for an objective examination pursuant to Articles 3.1 and 3.2 of the AD Agreement and Articles 15.1 and 15.2 of the SCM Agreement. Instead, the U.S. claim is that "MOFCOM's apparent analytical methods, *considered in their entirety*, do not conform to this standard."[44]

54. The United States has identified deficiencies with three particular methods MOFCOM used. The first, and most serious, problem is that MOFCOM's price comparison analyses used average unit value (AUV) data instead of pricing data. As we have explained to the Panel, in the circumstances of this investigation the AUV data that MOFCOM used cannot serve as an objective or accurate surrogate for pricing data. The AUV data (I) combine into a single figure different grades of GOES whose values differ from each other, (ii) measure transactions for imported and domestically produced products at different levels of trade, and (iii) reflect transactions for imported and domestically produced products regardless of whether they represent an equivalent product mix.[45]

55. The second problem that we have identified with MOFCOM's price comparison analysis

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[43] U.S. First Written Submission, para. 218.

[44] U.S. First Written Submission, para. 219 (emphasis added).

[45] U.S. First Written Submission, paras. 215-221; U.S. Comments on China November 25 Submission (Dec. 14, 2011) ("U.S. December 14 Comments"), para. 7.

is that it collapsed all transactions for a calendar year into a single pricing observation.[46] In other words, MOFCOM did not even compare AUVs during the same month or the same quarter; it just aggregated all of the annual quantity and value data to compare annual AUVs. The objectivity and necessity of MOFCOM's use of a single annual AUV rather than actual contemporaneous price comparisons appear particularly dubious when considered in conjunction with China's assertion that MOFCOM used quarterly data for its price depression analysis. In other words, accepting China's assertions, MOFCOM shifted between annual and quarterly AUV data depending on the conclusion that it desired to reach.[47] Such investigative techniques do not reflect an objective examination.

56. The third problem that we have identified with MOFCOM's price comparison analysis is that it aggregated AUV data from Russia and the United States, which exacerbated the failure to compare products of the same grade and product mix. In conjunction with the other more fundamental deficiencies of MOFCOM's analysis, this rendered the data that MOFCOM used for price comparisons even less reflective of actual transaction prices for GOES. As we have stated, MOFCOM's methodology, when considered in its entirety, "actively frustrated, rather than facilitated, any comparison of actual pricing practices."[48]

57. China itself has acknowledged to the Panel that "[w]hen analyzing price undercutting, it may be necessary to have more precise information to ensure that the comparison of domestic and imported prices is in fact reasonable and objective."[49] Although MOFCOM"s determination focused on the purported effects the imports under investigation had on domestic price movements, a principal reason that MOFCOM found the imports had such effects was their "low" prices.[50] As the United States stated at the second panel meeting, there is no meaningful distinction as far as the need for a sufficient evidentiary basis between the "price comparisons" that MOFCOM purported to conduct and the "price undercutting" analysis that China states MOFCOM eschewed in this investigation.[51] Indeed, China has yet to explain how a price

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[46] U.S. First Written Submission, para. 221.

[47] China Response to First Set of Panel Questions, para. 121. We do not accept China's assertion that MOFCOM in fact used such quarterly data. U.S. Second Written Submission, para. 146; U.S. Opening Statement at Second Panel Meeting, para. 36.

[48] U.S. First Written Submission, para. 221.

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

[50] U.S. Second Written Submission, paras. 139-144; U.S. Opening Statement at Second Panel Meeting, para. 35.

[51] The United States does not contend that an authority is required to make a price undercutting finding. Instead, we maintain that some examination of the relative price levels of the domestically produced and imported articles is an important element of any analysis of price effects under Article 3.2 of the AD Agreement and Article 15.2 of the SCM Agreement. U.S. Response to First Set of Panel Questions, paras. 52-57.

comparison for purposes of a "price comparison" analysis is different from a price comparison for purposes of a "price undercutting" analysis or why the latter should be held to a lower standard of objectivity. In conducting the AUV comparisons that serve as the basis of its findings of "low" import prices, MOFCOM failed to examine the "more precise" information that China itself has stated is necessary to satisfy the requirement of an objective examination under the Agreements.

36. With regard to para. 86 of China's second written submission, does the United States accept that "price depression can result from the volume of subject imports"? Is it legally possible for an authority to determine that significant price depression was an effect of the volume of subject imports, irrespective of any findings regarding the price of such imports? Please explain.

58. Article 3.2 of the AD Agreement and Article 15.2 of the SCM Agreement do not reference "price depression" in isolation. Instead, they require than an authority examine whether "the effect of such {dumped or subsidized} imports is otherwise to depress prices to a significant degree." As the United States explained in response to question 31 of the first set of panel questions, "{e}xamination of relative price levels of the domestically produced product and the imports under investigation is an important element in ascertaining whether the price depression or suppression is actually the effect of the imports, as opposed to some other factor."[52]

59. Imports do not achieve volume gains in the abstract. If the volume of imports under investigation has increased, it is because purchasers have decided to purchase greater quantities of such merchandise. Purchasers – particularly sophisticated concerns such as the manufacturers of transformers that purchase GOES[53] – may have a variety of reasons for purchasing merchandise from a particular source. These may include considerations of quality, availability, or national laws or regulations requiring use of goods produced in the home market in certain circumstances. They may also include considerations of price.

60. "Low" prices constituted the sole reason that MOFCOM provided in its Final Determination as to why purchasers were purchasing greater quantities of GOES from Russia and the United States. MOFCOM expressly referred to "low" prices as the reason why the imports under investigation were increasing and taking market share from the domestically produced product in 2008.[54] Nevertheless, this is not an investigation in which, due to their volumes, subject importers were the only market participants increasing their sales. To the contrary, the domestic industry's sales quantities, sales revenues, and prices were all higher in

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[52] U.S. Response to First Set of Panel Questions, para. 56.

[53] *See generally* CHN-2 at 10.

[54] MOFCOM Final Determination, CHN-16, at 58, 61.

2008 than in 2007.[55]

61. Consequently, regardless of whether an authority could theoretically determine that price depression was solely a function of the volume of subject imports – a proposition we regard with skepticism – this is not such a case. MOFCOM did not find that increased import volume by itself led to price depression, it found that the reason for increased import volume was the purportedly "low" prices of the imports. Consequently, MOFCOM found a causal relationship between import price levels and price depression. The United States has argued that any such finding is unsupported by positive evidence and does not reflect an objective examination.

37. Please comment on China's argument (second written submission, para. 119) that "MOFCOM explained at length why the increase in domestic capacity was not itself the cause of any injury. It was the inability to make shipments - the loss of market share - that played the more significant role in causing the injury suffered by the domestic industry."

62. China's statement that loss of market share "played the more significant role in causing the injury suffered by the domestic industry" as compared to capacity increases implies that MOFCOM acknowledged that capacity increases played some role in causing injury, but that MOFCOM failed to undertake a specific analysis that established that any injury caused by capacity increases was not attributed to the imports under investigation. China's statement cannot be reconciled with MOFCOM's actions. MOFCOM specifically rejected the argument that capacity increases, overproduction, and inventory overhang caused injury on the basis that the United States "did not submit any evidence to substantiate" its argument.[56] MOFCOM consequently did not undertake a non-attribution analysis. China's statement is therefore another of its continuing efforts to rewrite MOFCOM's determination.

63. Additionally, China's assertion is refuted by the data in the record. As explained in the U.S. December 14 Comments, the domestic industry increased its capacity dramatically in 2008.[57] It used this increased capacity to increase production at a rate far greater than the rate at which demand was rising. MOFCOM's determination suggests that the industry took such action pursuant to an express Chinese government policy.[58] Consequently, even if the domestic industry in 2008 had maintained the peak percent market share it achieved in 2007, there still would have been an enormous inventory overhang relative to apparent consumption in 2008.[59]

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

56 MOFCOM Final Determination, CHN-16, at 72; *see also* China First Written Submission, para. 357.

57 U.S. December 14 Comments, para. 20.

58 *See* MOFCOM Final Determination, CHN-16, at 66.

59 U.S. December 14 Comments, para. 23.

Indeed, the domestic industry would have had excess production in 2008 even if there had been no imports of GOES from Russia and the United States.[60]

64. Moreover, notwithstanding the domestic industry's inability to ship all the GOES it produced in 2008, it was still able to increase its pre-tax profits.[61] It was not until the domestic industry cut prices drastically in the first quarter of 2009, while its market share was increasing, that industry profitability showed substantial declines.[62] As we explained in our December 14 comments, these sharp price declines were the result of the domestic industry attempting to reduce the enormous inventories that it had accumulated because of its overproduction.[63]

65. Consequently, MOFCOM's assertion that the industry's inability to ship all amounts it produced was caused by the subject imports, and was unrelated to the industry's increasing production far in excess of what domestic demand warranted, is unsupported by positive evidence.

38. With regard to MOFCOM's finding of price suppression, please comment on China's argument that "[t]he drop in per unit profits demonstrates the price-cost squeeze" (China's second written submission, para. 91). Why is MOFCOM's reliance on declining per unit profits to demonstrate price suppression inconsistent with Article 3 of the Anti-Dumping Agreement and Article 15 of the SCM Agreement?

66. The United States has not argued that Articles 3.1 and 3.2 of the AD Agreement and Articles 15.1 and 15.2 of the SCM Agreement require that authorities use a particular methodology in ascertaining whether the effect of dumped or subsidized imports is "to prevent price increases, which otherwise would have occurred, to a significant degree." Consequently, the United States has not contended that the use of any particular methodology for examining price suppression, including the sole fact that MOFCOM relied on unit profits, constitutes a breach of these provisions. However, in the context of the record evidence provided to MOFCOM in the GOES investigation, MOFCOM's reliance on the information alone, without considering other factors, resulted in a breach of Articles 3.1 and 3.2 of the AD Agreement and Articles 15.1 and 15.2 of the SCM Agreement.

67. While analysis of per unit profits may be a valid analytical tool in investigations in which the domestic industry has a stable cost structure and relatively stable production volumes, these were not characteristics of the domestic GOES industry during MOFCOM's period of

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60 U.S. December 14 Comments, paras. 23-24.

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

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

63 U.S. December 14 Comments, paras. 21-27.

investigation. The industry expanded dramatically, particularly in 2008 when a new entrant joined the industry.[64] As we have explained, steel producers invariably experience significant start-up costs when new production facilities come on line.[65] The Chinese GOES industry used its expanded capacity to increase production by over 69 percent between 2006 and 2008.[66]

68. MOFCOM's unit profitability analysis also is not objective or reliable because it did not consider the impact of changes in the cost component of unit profitability. MOFCOM performed no analysis of whether or not per unit profits declined simply due to higher costs associated with the start-up costs for Baosteel's new GOES production facility. The decline in the industry's per unit profit from first quarter 2008 to first quarter 2009 may have been due the fact that the first quarter of 2008 included only WISCO's data, whereas the first quarter of 2009 represented an average for WISCO and Baosteel. If Baosteel's per unit costs were higher than those of WISCO, these trend data for industry-wide per unit profits would not provide any indication of actual price suppression, much less price suppression caused by the subject imports. By failing to address these analytical issues, MOFCOM failed to comply with its obligations under the AD and SCM Agreements. The issue before the Panel is "whether the explanation for the conclusions reached by the investigating authority are reasoned and adequate in light of other plausible alternative explanations."[67]

69. Consequently, in the circumstances of this investigation, the profit per unit measure MOFCOM used to assess price suppression yielded skewed results that do not permit an meaningful assessment of the significance of year-to-year changes. By disregarding both changes in the industry cost structure and the positive effects of increased revenue, China's use of the profits per unit measure is inconsistent with the requirements of an objective examination.

39. Regarding the United States argument that there were changes to the underlying cost structure of the domestic industry, please comment on China's statement (para. 54 of China's oral statement at the second hearing) that such changes could not account for price suppression since the changes began in 2007, when price suppression was not occurring.

70. China's assertion does not appear to be supported by the record. At the conclusion of the MOFCOM period of investigation, there were two domestic producers of GOES in China – applicants WISCO and Baosteel.[68] According to the application, Baosteel first began production

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64 Exhibit CHN-2 at 95, 102-03.

65 Exhibit US-40. For additional materials illustrating this phenomenon see Exhibit US-42.

66 Derived from MOFCOM Essential Facts Disclosure, CHN-29, at 10.

67 *US – Truck Tyres (AB)*, para. 280. The Appellate Body cited many reports concerning disputes under the AD and SCM Agreements in support of this proposition. *Id.*, n. 619.

68 Exhibit CHN-2 at 8.

of GOES in May 2008.[69] The only pertinent information in the record available to the Panel and the United States indicates that, for purposes of the application, Baosteel did not provide MOFCOM with financial performance data for any period prior to 2008.[70] Thus, there is no basis to conclude that Baosteel would have reported expenses relating to its 2008 start-up costs in 2007. The fact that the per unit profits of Baosteel and WISCO combined may have been higher than those of WISCO alone does not indicate that prices were suppressed by the subject imports. Instead, that would only suggest that Baosteel had a higher per unit cost than WISCO.

71. The information disclosed by MOFCOM indicated that the domestic industry's capacity also increased in 2007, the year in which WISCO was the only domestic producer of GOES.[71] The information in the application, however, suggests that WISCO's expansion of capacity was not entirely the result of opening of new production facilities, but involved improving the efficiency of existing production facilities.[72] Improvements in existing WISCO facilities would be less likely to engender the same degree of start-up costs as opening an entirely new Baosteel facility. Thus, the limited available information in the record does not support China's assertion that the 2007 and 2008 expansions of industry capacity were comparable. Additionally, capacity increases were significantly larger in 2008 and the first quarter of 2009 than in 2007.[73]

40. Please comment on China's argument (para. 54 of its oral statement at the second hearing) that, in respect of changes to the underlying cost structure of the domestic industry, the United States "focus[ed] only on the start-up costs, not the revenue associated with the expanded volume of sales".

72. China's assertion is incorrect. The U.S. responses to the prior two questions addressed our principal concerns with how MOFCOM determined price suppression. These include MOFCOM's failure to account for changes in the industry's cost structure between 2007 and 2008 and its reliance on a profits-per-unit measure that yields skewed results in an industry where a new entrant is commencing operations.

73. Indeed, it is the United States, not China, that has focused on the revenue associated with the expanded volume of sales in 2008 by observing that both sales revenues and the amount of

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69 Exhibit CHN-2 at 99, 106-07.

70 Exhibit CHN-2 at 109, Table 40.

71 MOFCOM Preliminary Determination, CHN-17 at 58.

72 CHN-2 at 107 (during 2006 and 2007 "WISCO *improved* the production equipment to satisfy the booming demand of [the] domestic market, the *improvement* expand[ed] the production capability.") (emphasis added), 100 (WISCO "added equipment investment to enhance labor productivity.").

73 MOFCOM Essential Facts Disclosure, CHN-29, at 12.

pre-tax profit increased that year.[74] Furthermore, the United States has emphasized that an industry may rationally decide to sell greater quantities of goods at a lower margin to increase the total value of revenues and profits, as illustrated by the experience of the domestic GOES industry in 2008.[75] China has not meaningfully rebutted this proposition.

74. By contrast, it is China, not the United States, that has downplayed the revenues associated with the increasing volume of sales through its reliance on the profits-per-unit measure to assess price suppression. The United States explained in our response to question 38 how the profits-per-unit measure can conceal the beneficial effect of increasing sales volumes and revenues in an expanding industry. The United States explained in our response to question 38 how the profits-per-unit measure can conceal the beneficial effect of increasing sales volumes and revenues in an expanding industry.

41. Regarding para. 53 of China's oral statement at the second hearing, please comment on China's argument that because no arguments regarding the domestic industry's cost structure were presented to MOFCOM, it is unreasonable to expect MOFCOM to have addressed such arguments.

75. China's assertion has no basis in the AD or SCM Agreements. While certain provisions in the AD and SCM Agreements contain language limiting an investigating authority's responsibilities to arguments presented to it, Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement contain no such limitation. For example, the non-attribution obligation in Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement is limited to "any known factors" other than dumped or subsidized imports, and thus does not require an authority to consider all conceivable factors. Similarly, Article 12.2.2 of the AD Agreement and Article 22.5 of the SCM Agreement state that a public notice of an affirmative determination providing for the imposition of a definitive duty shall contain "reasons of the acceptance or rejection of arguments or claims made by the exporters and importers," limiting this obligation to claims or arguments actually asserted.

76. Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement provide no comparable limitation for an authority's obligation to conduct an objective examination of matters pertaining to the volume, price effects, and impact of dumped or subsidized imports that an authority must examine pursuant to Articles 3.2 and 3.4 of the AD Agreement and Articles 15.2 and 15.4 of the SCM Agreement. Indeed, the Appellate Body has characterized the obligations of Article 3.1 as "absolute." "They provide for no exceptions, and they include no qualifications."[76] Similarly, in *Mexico – Steel Pipes and Tubes*, the panel rejected a Mexican

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[74] MOFCOM Essential Facts Disclosure, CHN-29 at 10.

[75] U.S. Second Written Submission, paras. 154-155.

[76] *EC – Bed Linen (Article 21.5) (AB)*, para. 109.

argument that it should not consider a claim that the Mexican authority's use of a particular period of investigation violated the objective examination requirement of Article 3.1 because no party complained about the period of investigation during the administrative proceedings. The panel emphasized that "as the selection of the POI is linked to an investigating authority's obligation under Article 3.1 to conduct an objective examination of positive evidence, that authority is bound to satisfy its obligations whether or not this issue is raised by an interested party in the course of an investigation."[77]

77. Considerations of industry costs are directly pertinent to the inquiry under Article 3.2 of the AD Agreement and Article 15.2 of the SCM Agreement of whether the effect of dumped or subsidized imports is to "prevent price increases, which otherwise would have occurred, to a significant degree."[78] Consequently, MOFCOM had an affirmative obligation to ensure that it objectively examined industry cost data in its price suppression analysis, even if no respondent raised directly to MOFCOM the argument that the domestic industry's cost structure in 2008 would have been affected by the entry of a new producer that year. Moreover, the United States has properly brought to the Panel's attention MOFCOM's failure to conduct the objective examination required by the Agreements.

42. Does the United States agree with China's assertion, at para. 42 of its oral statement at the second hearing, that there is no dispute regarding the fact that subject import prices remained relatively low throughout the period? Does the United States dispute any of the facts set forth by China in that paragraph?

78. China's assertion in paragraph 42 of its opening statement at the second substantive panel meeting that "subject import prices remained relatively low throughout the period," in the context of a discussion concerning 2008 and the first quarter of 2009, contradicts factual findings in the MOFCOM Final Determination. MOFCOM acknowledged that, during the first quarter of 2009, the prices for the imports under investigation were higher than those for the domestically produced product.[79]

79. The United States also disagrees with this statement insofar as it concerns 2008 and earlier portions of the period of investigation. MOFCOM did not provide any evidence, much less positive evidence, from which it could make comparisons of prices of the domestically

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[77] *Mexico – Steel Pipes and Tubes*, para 7.259. *See also Mexico – Beef and Rice (AB)*, para. 7.114 (even if importers or exporters did not propose alternative to method of computing import volume suggested by applicant, Article 3.1 requires that authority "must actively seek out pertinent information" to conduct an objective examination).

[78] Costs are also pertinent to the inquiries relating to impact that an authority must conduct under Article 3.4 of the AD Agreement and Article 15.4 of the SCM Agreement concerning profits and factors affecting prices.

[79] MOFCOM Final Determination, CHN-16, at 70.

produced product and the imports under investigation.[80]

80. The United States also disagrees with elements of the two other assertions China made in paragraph 42 of its oral statement. One assertion is that "domestic prices were falling at the end of 2008 and early 2009." While the United States does not dispute that AUVs were falling during the first quarter of 2009, the United States does dispute that MOFCOM made any finding, or disclosed any evidence, that prices for the domestically produced product began to fall during the fourth quarter of 2008.[81]

81. The second assertion is that "domestic prices were not successfully covering the increasing costs, and so profitability was falling in 2008 and early 2009." While the United States does not dispute that the domestic industry's financial performance declined in the first quarter of 2009, MOFCOM disclosed no data concerning the domestic industry's purportedly "increasing costs."[82] In any event, as explained above, the industry may have had higher costs in the first quarter of 2009 relative to the first quarter of 2008 given that Baosteel's per unit costs were higher than those of WISCO. Moreover, MOFCOM found that during 2008, the industry's pretax profits reached their peak level during the period of investigation.[83]

43. Please comment on China's argument (para. 78 of its oral statement at the second hearing) that "the trend in inventories correlates with trends in subject imports and does not correlate with trends in domestic capacity or production".

82. The quotation in China's oral statement attempts to defend MOFCOM's finding that "[t]here was no direct corresponding relationship between the production capacity change and the inventory change."[84] MOFCOM's analysis is overly simplistic.[85] MOFCOM analyzed production capacity and inventory changes in a binary manner – simply ascertaining whether they rose or fell in a given yearly comparison. Because MOFCOM failed to analyze production and inventory changes in the context of changes in demand, it did not respond to the U.S. argument before it. MOFCOM acknowledged that this argument was that "the more likely cause of any problems experienced by the Chinese industry is the enormous increase in Chinese

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80 *See* U.S. First Written Submission, paras. 210-222; U.S. December 14 Submission, paras. 7-8. The United States also addressed this issue in the response to question 35 above.

81 U.S. Second Written Submission, paras. 146, 165; U.S. Oral Statement at Second Panel Meeting, paras. 36-37.

82 *See* U.S. First Written Submission, para. 191.

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

84 MOFCOM Final Determination, CHN-16, at 72.

85 *See* U.S. First Written Submission, paras. 248-250.

producers' inventories due to the domestic industry's incorrect assessment of demand and consequent expansion of production capacity, as opposed to the much more modest increase in subject import volumes."[86]

83. An objective examination of the U.S. argument would have assessed capacity increases in the context of demand increases. MOFCOM's finding, and China's defense of it, disregards that the domestic industry's capacity increase conformed far more closely to the rate of demand increase in 2007 than it did in subsequent periods. In 2007, capacity increased by 12.53 percentage points more than demand. By contrast, the equivalent differentials from 2007 to 2008 and from the first quarters of 2008 to the first quarter of 2009 were respectively 35.58 percentage points and 67.67 percentage points.[87] Because of the different circumstances characterizing 2007 and subsequent periods, MOFCOM had no basis for treating them as comparable.

84. Consequently, an objective examination of the data in the record would have corroborated the common-sense proposition that the greater the disparity in increases between capacity and production, on the one hand, and demand, on the other, the more likely inventories would rise. While inventories fell in 2007, the difference in the rates of growth of capacity and demand that year was relatively modest. By contrast, in both 2008 and the first quarter of 2009, the periods when MOFCOM found some declines in the Chinese industry's performance, inventories increased dramatically when capacity increased at far greater rates than it did in 2007 and the differences between capacity and demand increases were also far larger.[88] An objective examination that encompassed all data in the record would reveal that when capacity increased at a substantially greater rate than demand, inventories rose more frequently than when it did not. MOFCOM's contrary conclusion that there was no correlation between capacity increases and inventory increases did not consider all relevant data and was unsupported by positive evidence.

85. There is another difficulty with China's effort in its oral statement to show a correlation between subject import market penetration changes and inventory level changes. This is that the correlation attempts to prove a theory contrary to the facts in the record. The theory is that increasing subject import market penetration took market share away from the domestic industry, and the lost market share resulted in lost sales and the accumulation of inventories. The theory is contrary to the record in two respects. First, in no portion of the period of investigation did the domestic industry actually lose sales. To the contrary, sales quantities rose throughout the period of investigation.[89] Second, from the first quarter of 2008 to the first quarter of 2009

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[86] MOFCOM Final Determination, CHN-16 at 72 (emphasis added).

[87] MOFCOM Essential Facts Disclosure, CHN-29, at 9-10, 12.

[88] MOFCOM Essential Facts Disclosure, CHN-29, at 11.

[89] MOFCOM Essential Facts Disclosure, CHN-29, at 10.

(when the industry had its largest inventory levels), the Chinese industry's market share increased at roughly the same rate as the subject imports.[90]

86. Finally, China's use of 2007 data in its oral statement is highly selective. China relies on 2007 in its attempt to show a correlation between subject import market penetration levels and inventory levels. In contrast, when at the Second Panel Meeting the United States cited 2007 data to show the lack of a correlation during MOFCOM's period of investigation between subject import volumes, on the one hand, and the domestic industry's market share or its price levels, on the other,[91] China's representatives complained that such comparisons were irrelevant.

44. At para. 55 of its oral statement, the United States indicates that it has made estimates of demand, capacity and production for 2008. Based on those estimates, the U.S. concludes that the record indicates that even if the volume of imports under investigation had not increased by a single ton in 2008, there still would have been substantial domestic industry overproduction, and consequent inventory overhang, that year. (I) Please explain the relevant estimates made by the U.S. (ii) What estimates of demand, capacity and production has the U.S. made for 2008? (iii) How do such estimates indicate that that even if the volume of imports under investigation had not increased by a single ton in 2008, there still would have been substantial domestic industry overproduction, and consequent inventory overhang, that year?

87. The United States provided these estimates at paragraphs 20 through 24 of the U.S. December 14 Comments.

45. The United States indicated during oral arguments that it had identified a number of concerns regarding the average unit value comparison data submitted by China on 25 November 2011. Please explain the nature of those concerns.

88. The United States addressed these concerns at paragraphs 4 through 7 of the U.S. December 14 Comments.

(iii) Question to both parties

70. What meaning should be given to the word "otherwise" as used for the first time in the second sentence of Article 3.2 of the Anti-Dumping Agreement and Article 15.2 of the SCM Agreement? Does it suggest that an authority should first consider the possible

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[90] MOFCOM Essential Facts Disclosure, CHN-29, at 9-11. Because the domestic industry had a higher market share than the subject imports in 2008, *see* U.S. December 14 Submission, para. 21, during the first quarter of 2009, the quantity of shipments by the domestic industry would have increased by a much larger absolute amount than the quantity of shipments by imports.

[91] U.S. Opening Statement at Second Panel Meeting, para. 44.

existence of price undercutting, and then only consider the possible existence of price depression or price suppression in the event that no price undercutting is shown to exist? In other words, should the word "otherwise" be interpreted as referring to a situation other than one in which price undercutting exists? Or does the word "otherwise" mean "other than through price effects"? Please explain.

89. The United States does not believe that the word "otherwise," as used for the first time in the second sentence of Article 3.2 of the AD Agreement and Article 15.2 of the SCM Agreement, suggests that an authority that finds significant price undercutting by dumped or subsidized imports is relieved from the responsibility of further analyzing price depression and/or price suppression; nor does the United States believe that the word implies a particular sequence to price analysis.

90. As discussed previously, although Articles 3.2 and 15.2 do not require an authority to make a finding of significant price undercutting to find significant price effects, several considerations support the notion that the examination of price undercutting – or at least the relative prices of the domestically produced and imported merchandise – is important to a complete analysis of price effects.[92] Put differently, price undercutting, on the one hand, and price suppression and depression, on the other hand, while distinct inquiries, are analytically intertwined.

91. The second sentence of Article 3.2 of the AD Agreement and Article 15.2 of the SCM Agreement address analytical tools an authority is to use in assessing "the effect of the [dumped or subsidized] imports on prices." Thus, central to this analysis is the concept of an "effect." The Shorter Oxford English Dictionary defines "effect" as "[s]omething accomplished, caused, or produced; a result, a consequence."[93]

92. Price undercutting by dumped or subsidized imports, absent of context, is a condition or observation rather than "something caused" to the domestically produced product. Price undercutting by dumped or subsidized imports becomes an "effect" only if it leads to some consequential action affecting the domestic industry. This action may be a volume reaction, such as a loss of sales or market share. More commonly, however, this action will be at least in part a price reaction – with the domestic industry either cutting prices or restraining price increases in response to the lower prices offered by dumped or subsidized imports. Consequently, to evaluate whether price undercutting is tantamount to a significant price "effect," an authority will ordinarily need to conduct a further examination of price depression and/or suppression. Because analysis of price undercutting in isolation will generally be inadequate to support a conclusion of significant price effects because of dumped or subsidized imports, the word "otherwise" in Article 3.2 of the AD Agreement and Article 15.2 in the SCM

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92 U.S. Response to First Set of Panel Questions, paras. 56-57.

93 Shorter Oxford English Dictionary at 799 (6th ed. 2007).

Agreement should not be read to signal that an authority should conclude its analysis of price effects once it found significant price undercutting by dumped or subsidized imports.

93. Nevertheless, an authority could find significant price depression or suppression even if it did not find significant price undercutting. For example, imports may be able to obtain a price premium over the domestically produced product because of superior quality. In such circumstances, should import prices go down, prices for the domestic product may well follow suit to maintain the price differential attributable to quality differences.[94] Thus, price depression (or suppression) caused by dumped or subsidized imports may reflect a significant effect on domestic industry pricing caused in a way other than by price undercutting. The use of the word "otherwise" should consequently be construed in this manner to mean "in a way other than through price undercutting."[95]

[94] China does not claim that this situation is applicable to the dispute before the Panel. To the contrary, the data China has submitted to the Panel suggest that during much of the period of investigation, the Chinese industry was able to improve its performance significantly although its products were sold at higher average unit values than the imports under investigation.

[95] We observe that such a construction is consistent with the use of the phrase "d'une autre manière," meaning "in another way," in the French version of the Agreements.

Table of Exhibits

US-42	Additional Materials Illustrating the Significant Start-Up Costs Experienced with New Production Facilities

Table of Reports

Short Title	Full Case Title and Citation
Canada – Dairy (Article 21.5) (AB)	Appellate Body Report, *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products – Recourse to Article 21.5 of the DSU by New Zealand and the United States*, WT/DS103/AB/RW, WT/DS113/AB/RW, adopted 18 December 2001
EC – Bed Linen (Article 21.5) (AB)	Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India*, WT/DS141/AB/RW, adopted 24 April 2003
EC – Fasteners (AB)	Appellate Body Report, *European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*, WT/DS397/AB/R, adopted 28 July 2011
EC – Pipe Fittings (AB)	Appellate Body Report, *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/AB/R, adopted 18 August 2003
EC – Sugar Subsidies (AB)	Appellate Body Report, *European Communities – Export Subsidies on Sugar*, WT/DS265/AB/R, WT/DS266/AB/R, WT/DS283/R, adopted 19 May 2005
Korea – Beef (Panel)	Panel Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/R, WT/DS169/R, adopted 10 January 2001, as modified by the Appellate Body Report, WT/DS161/AB/R, WT/DS169/AB/R
Mexico – HFCS	Panel Report, *Mexico – Anti-Dumping Investigation of High-Fructose Corn Syrup (HFCS) from the United States*, WT/DS132/R, adopted 24 February 2000
Mexico – Steel Pipes and Tubes	Panel Report, *Mexico – Anti-Dumping Duties on Steel Pipes and Tubes from Guatemala*, WT/DS331/R, adopted 24 July 2007, DSR 2007:IV, 1207
Mexico – Beef and Rice (AB)	Appellate Body Report, *Mexico – Definitive Anti-Dumping Measures on Beef and Rice; Complaint with Respect to Rice*, WT/DS295/AB/R, adopted 20 December 2005

US – OCTG from Argentina (AB)	Appellate Body Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268/AB/R, adopted 17 December 2004
US – Truck Tyres (AB)	Appellate Body Repoort, *United States – Definitive Measures Affecting Certain Passenger Vehicles and Light Truck Tyres from China*, WT/DS399/AB/R, adopted 5 October 2011.
US – Upland Cotton (Panel)	Panel Report, *United States – Subsidies on Upland Cotton*, WT/DS267/R, adopted 21 March 2005, as modified by the Appellate Body Report, WT/DS267/AB/R