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CHINA - ANTI-DUMPING AND COUNTERVAILING DUTIES ON CERTAIN AUTOMOBILES FROM THE UNITED STATES

REPORT OF THE PANEL

Addendum

This *addendum* contains Annexes A to D to the Report of the Panel to be found in document WT/DS440/R.

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WORKING PROCEDURES OF THE PANEL

ANNEX A-1

WORKING PROCEDURES OF THE PANEL

1. In its proceedings, the Panel shall follow the relevant provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). In addition, the following Working Procedures shall apply.

General

2. The deliberations of the Panel and the documents submitted to it shall be kept confidential. Nothing in the DSU or in these Working Procedures shall preclude a party to the dispute (hereafter "party") from disclosing statements of its own positions to the public. Members shall treat as confidential information submitted to the Panel by another Member which the submitting Member has designated as confidential. Where a party submits a confidential version of its written submissions to the Panel, it shall also, upon request of a Member, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public.

3. The Panel shall meet in closed session. The parties, and Members having notified their interest in the dispute to the Dispute Settlement Body in accordance with Article 10 of the DSU (hereafter "third parties"), shall be present at the meetings only when invited by the Panel to appear before it.

4. Each party and third party has the right to determine the composition of its own delegation when meeting with the Panel. Each party and third party shall have the responsibility for all members of its own delegation and shall ensure that each member of such delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceedings.

5. The parties shall treat business confidential information in accordance with the procedures set forth in the Additional Working Procedures of the Panel Concerning Business Confidential Information, found in Annex 1 to these Working Procedures.

Submissions

6. Before the first substantive meeting of the Panel with the parties, each party shall submit a written submission in which it presents the facts of the case and its arguments, in accordance with the timetable adopted by the Panel. Each party shall also submit to the Panel, prior to second substantive meeting of the Panel, a written rebuttal, in accordance with the timetable adopted by the Panel.

7. A party shall submit any request for a preliminary ruling at the earliest possible opportunity and in any event no later than in its first written submission to the Panel. If the United States requests such a ruling, China shall submit its response to the request in its first written submission. If China requests such a ruling, the United States shall submit its response to the request prior to the first substantive meeting of the Panel, at a time to be determined by the Panel in light of the request. Exceptions to this procedure shall be granted upon a showing of good cause.

8. Each party shall submit all factual evidence to the Panel no later than during the first substantive meeting, except with respect to evidence necessary for purposes of rebuttal, answers to questions or comments on answers provided by the other party. Exceptions to this procedure shall be granted upon a showing of good cause. Where such exception has been granted, the Panel shall accord the other party a period of time for comment, as appropriate, on any new factual evidence submitted after the first substantive meeting.

9. Where the original language of exhibits is not a WTO working language, the submitting party or third party shall submit a translation into the WTO working language of the submission at the same time. The Panel may grant reasonable extensions of time for the translation of such exhibits

upon a showing of good cause. Any objection as to the accuracy of a translation should be raised in writing as promptly as possible, and in any case not later than **by the date of the written submission of the objecting Party due following the** submission of the translation. **In exceptional circumstances, the Panel may grant an extension to this deadline upon good cause shown.** Any objection shall be accompanied by a detailed explanation of the grounds of objection and an alternative translation.

10. To facilitate the maintenance of the record of the dispute and maximize the clarity of submissions, each party and third party shall sequentially number its exhibits throughout the course of the dispute. For example, exhibits submitted by the United States could be numbered USA-1, USA-2, etc. If the last exhibit in connection with the first submission was numbered USA-5, the first exhibit of the next submission thus would be numbered USA-6. China's exhibits could be numbered CHN-1, CHN-2, etc.

Questions

11. The Panel may at any time pose questions to the parties and third parties, orally in the course of a meeting or in writing.

Substantive meetings

12. Each party shall provide to the Panel the list of members of its delegation in advance of each meeting with the Panel and no later than 5.30 p.m. the previous working day.

13. The first substantive meeting of the Panel with the parties shall be conducted as follows:

a. The Panel shall invite the United States to make an opening statement to present its case first. Subsequently, the Panel shall invite China to present its point of view. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. In the event that interpretation is needed, each party shall provide additional copies to the interpreters. Each party shall make available to the Panel and the other party the final version of its statement, preferably at the end of the meeting, and in any event no later than 5.30 p.m. on the first working day following the meeting.

b. After the conclusion of the statements, the Panel shall give each party the opportunity to ask questions or make comments, through the Panel. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to the other party to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the other party's questions within a deadline to be determined by the Panel.

c. The Panel may subsequently pose questions to the parties. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

d. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with the United States presenting its statement first.

14. The second substantive meeting of the Panel with the parties shall be conducted as follows:

a. The Panel shall ask China if it wishes to avail itself of the right to present its case first. If so, the Panel shall invite China to present its opening statement, followed by the United States. If China chooses not to avail itself of that right, the Panel shall invite the United States to present its opening statement first. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. In the event that interpretation is needed, each party shall provide additional copies to the interpreters. Each party shall make available to the Panel and the other party the final version of its statement, preferably at the end of the meeting, and in any event no later than 5.30 p.m. of the first working day following the meeting.

b. After the conclusion of the statements, the Panel shall give each party the opportunity to ask questions or make comments, through the Panel. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to the other party to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the other party's questions within a deadline to be determined by the Panel.

c. The Panel may subsequently pose questions to the parties. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

d. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with the party that presented its opening statement first, presenting its closing statement first.

Third parties

15. The Panel shall invite each third party to transmit to the Panel a written submission prior to the first substantive meeting of the Panel with the parties, in accordance with the timetable adopted by the Panel.

16. Each third party shall also be invited to present its views orally during a session of this first substantive meeting, set aside for that purpose. Each third party shall provide to the Panel the list of members of its delegation in advance of this session and no later than 5.30 p.m. the previous working day.

17. The third-party session shall be conducted as follows:

a. All third parties may be present during the entirety of this session.

b. The Panel shall first hear the arguments of the third parties in alphabetical order. Third parties present at the third-party session and intending to present their views orally at that session, shall provide the Panel, the parties and other third-parties with provisional written versions of their statements before they take the floor. Third parties shall make available to the Panel, the parties and other third parties the final versions of their statements, preferably at the end of the session, and in any event no later than 5.30 p.m. of the first working day following the session.

c. After the third parties have made their statements, the parties may be given the opportunity, through the Panel, to ask the third parties questions for clarification on any matter raised in the third parties' submissions or statements. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to a third party to which it wishes to receive a response in writing.

d. The Panel may subsequently pose questions to the third parties. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the third parties to which it wishes to receive a response in writing. Each third party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

Descriptive part

18. The parties and third parties shall provide the Panel with executive summaries of the facts and arguments as presented to the Panel in each of their written submissions and in their oral presentations, within one week following the delivery to the Panel of the written version of the submission or oral statement concerned. Each executive summary of the parties shall be limited to no more than ten (10) pages. The executive summaries shall not serve in any way as a substitute for the submissions of the parties in the Panel's examination of the case. Third parties are requested to provide the Panel with executive summaries of their written submissions and oral statements of no more than five (5) pages each, within one week following the delivery to the Panel of the written version of the relevant submission. Paragraph 23 shall apply to the service of executive summaries.

19. The descriptive part of the Panel's report will include the procedural and factual background to the present dispute. Description of the main arguments of the parties and third parties will consist of the executive summaries referred to in paragraph 18, and these will be annexed as addenda to the report.

Interim review

20. Following issuance of the interim report, each party may submit a written request to review precise aspects of the interim report and request a further meeting with the Panel, in accordance with the timetable adopted by the Panel. The right to request such a meeting shall be exercised no later than at the time the written request for review is submitted.

21. In the event that no further meeting with the Panel is requested, each party may submit written comments on the other party's written request for review, in accordance with the timetable adopted by the Panel. Such comments shall be limited to commenting on the other party's written request for review.

22. The interim report shall be kept strictly confidential and shall not be disclosed.

Service of documents

23. The following procedures regarding service of documents shall apply:

a. Each party and third party shall submit all documents to the Panel by filing them with the DS Registry (office No. 2047).

b. Each party and third party shall file 8 paper copies of all documents it submits to the Panel. However, when exhibits are provided on CD-ROMS/DVDs, 5 CD-ROMS/DVDs and 5 paper copies of those exhibits shall be filed. The DS Registrar shall stamp the documents with the date and time of the filing. The paper version shall constitute the official version for the purposes of the record of the dispute.

c. Each party and third party shall also provide an electronic copy of all documents it submits to the Panel at the same time as the paper versions, preferably in Microsoft Word format, either on a CD-ROM, a DVD or as an e-mail attachment. If the electronic copy is provided by e-mail, it should be addressed to DSRegistry@wto.org, and cc'd to xxxxxxxxxx@wto.org and xxxxxxxxxx@wto.org. If a CD-ROM or DVD is provided, it shall be filed with the DS Registry.

d. Each party shall serve any document submitted to the Panel directly on the other party. Each party shall, in addition, serve on all third parties its written submissions in advance of the first substantive meeting with the Panel. Each third party shall serve any document submitted to the Panel directly on the parties and all other third parties. Service may take place in electronic format (CD-ROM, DVD, or e-mail attachment), if the party receiving service consents to such format. Each party and third party shall confirm, in writing, that copies have been served as required at the time it provides each document to the Panel.

e. Each party and third party shall file its documents with the DS Registry and serve copies on the other party (and third parties where appropriate) by 5.30 p.m. (Geneva time) on the due dates established by the Panel.

f. The Panel shall provide the parties with an electronic version of the descriptive part, the interim report and the final report, as well as of other documents as appropriate. When the Panel transmits to the parties or third parties both paper and electronic versions of a document, the paper version shall constitute the official version for the purposes of the record of the dispute.

ANNEX A-2

ADDITIONAL WORKING PROCEDURES ON BUSINESS CONFIDENTIAL INFORMATION

1. These procedures apply to any business confidential information (BCI) that a party wishes to submit to the Panel. For the purposes of these procedures, BCI is defined as any information that has been designated as such by the Party submitting the information, that is not available in the public domain, and the release of which would seriously prejudice an essential interest of the person or entity that supplied the information to the Party. In this regard, BCI shall include information that was previously submitted to China's Ministry of Commerce ("MOFCOM") as BCI in the anti-dumping and countervailing duty investigations at issue in this dispute. However, these procedures do not apply to information that is available in the public domain. In addition, these procedures do not apply to any BCI if the person who provided the information in the course of the aforementioned investigations agrees in writing to make the information publicly available.

2. The first time that a party submits to the Panel BCI as defined above from an entity that submitted that information in one of the investigations at issue, the party shall also provide, with a copy to the other party, an authorizing letter from the entity. That letter shall authorize both the United States and China to submit in this dispute, in accordance with these procedures, the confidential information submitted by that entity in the course of those investigations.

3. If an entity refuses to grant the authorization referred to in paragraph 2, a party may bring the situation to the attention of the Panel. The Panel shall consider what steps to take, which may include requesting information pursuant to Article 13 of the DSU.

4. No person may have access to BCI except a member of the Secretariat or the Panel, an employee of a party or third party, and an outside advisor for the purposes of this dispute to a party or third party. However, an outside advisor is not permitted access to BCI if that advisor is an officer or employee of an enterprise engaged in the production, export, or import of the products that were the subject of the investigations at issue in this dispute.

5. A party or third party having access to BCI shall treat it as confidential, i.e. shall not disclose that information other than to those persons authorized to receive it pursuant to these procedures. Each party and third party shall have responsibility in this regard for its employees as well as any outside advisors used for the purposes of this dispute. BCI obtained under these procedures may be used only for the purpose of providing information and argumentation in this dispute and for no other purpose.

6. The party submitting BCI shall mark the cover and/or first page of the document containing BCI, and each page of the document, to indicate the presence of such information. The specific information in question shall be placed between double brackets, as follows: [[xx,xxx.xx]]. The first page or cover of the document shall state "Contains business confidential information on pages xxxxxx", and each page of the document shall contain the notice "Contains Business Confidential Information" at the top of the page. In case of exhibits, the party submitting BCI in the form of an Exhibit shall mark it as (BCI) next to the exhibit number (e.g. Exhibit EU-1 (BCI)). Should the party submit specific BCI within a document which is considered to be public, the specific information in question shall be placed between double brackets, as follows: [[xx,xxx.xx]]."

7. Where a party submits a document containing BCI to the Panel, the other party or any third party referring to that BCI in its documents, including written submissions and oral statements, shall clearly identify all such information in those documents. All such documents shall be marked as described in paragraph 4. In the case of an oral statement containing BCI, the party or third party making such a statement shall inform the Panel before making it that the statement will contain BCI, and the Panel will ensure that only persons authorized to have access to BCI pursuant to these procedures are in the room to hear that statement.

8. The Panel will not disclose BCI, in its report or in any other way, to persons not authorized under these procedures to have access to BCI. The Panel may, however, make statements of conclusion drawn from such information. Before the Panel circulates its final report to the Members, the Panel will give each party an opportunity to review the report to ensure that it does not contain any information that the party has designated as BCI.

9. Submissions containing BCI will be included in the record forwarded to the Appellate Body in the event of an appeal of the Panel's Report.

ANNEX B

ARGUMENTS OF THE UNITED STATES

ANNEX B-1

EXECUTIVE SUMMARY OF THE FIRST WRITTEN
SUBMISSION OF THE UNITED STATES

I. INTRODUCTION

1. In this dispute, the United States challenges antidumping and countervailing duty measures imposed by China on certain automobiles from the United States. This is the third dispute settlement proceeding the United States has commenced against China concerning antidumping and countervailing duty measures targeting U.S. exports, owing to China's repeated failure to abide by the commitments it made when it joined the WTO.

II. STANDARD OF REVIEW

2. The applicable standard of review in this dispute is that stated in Article 11 of the DSU and Article 17.6 of the AD Agreement. Per these provisions, the Panel must examine whether MOFCOM's conclusions are "reasoned and adequate" in "light of the evidence." The standard of review recognizes that investigating authorities in anti-dumping and countervailing duty investigations may have to consider conflicting arguments and evidence and that they will need to exercise discretion. However, it does not entitle an investigating authority to automatic deference regarding the exercise of that discretion. To the contrary, the investigating authority is responsible for ensuring that its explanations reflect that conflicting evidence was considered.

III. PROCEDURAL FLAWS IN MOFCOM'S INVESTIGATIONS OF CERTAIN AUTOMOBILES FROM THE UNITED STATES

A. China Breached Article 6.5.1 of the AD Agreement and Article 12.4.1 of the SCM Agreement by Failing to Require the Provision of Adequate Non-Confidential Summaries

3. In this case, China acted inconsistently with its obligations under Article 6.5.1 of the AD Agreement and Article 12.4.1 of the SCM Agreement.

1. Article 6.5.1 of the AD Agreement and Article 12.4.1 of the SCM Agreement Require the Preparation of Non-Confidential Summaries Absent Exceptional Circumstances

4. An investigating authority that accepts confidential information from an interested party must also require that party to provide a non-confidential summary of such information.

2. The Non-Confidential Summaries Are Inadequate

5. In the investigations at issue, the petitioner did not present to MOFCOM any particular circumstances, let alone exceptional ones, that explained why the information in question was not susceptible to non-confidential summary. Yet MOFCOM failed to require the petitioner to prepare non-confidential summaries of information it submitted.

a. Sales to Output Ratio, Return on Investment, Salary, Apparent Consumption

6. For several categories of information, the petitioner simply redacted the information contained in the application, preventing the respondents from reviewing the data and leaving them in the dark about the substance of the information provided.

b. Other Economic Indicators

7. For a number of other data categories, the application indicates year-on-year percentage changes for the POI, but it does not provide a non-confidential summary of the actual values associated with the percentage changes. Due to the petitioner's extensive reliance on what it characterized as confidential information, the fact that MOFCOM did not require non-confidential summaries of the information that was capable of summary was a significant failure, which seriously compromised the ability of the United States and U.S. companies to respond to the petitioners' allegations.

B. China Breached Article 6.9 of the AD Agreement by Failing to Disclose the Calculations and Data Used to Determine the Existence of Dumping and Calculate Dumping Margins

8. China breached Article 6.9 of the AD Agreement by failing to disclose to interested parties the "essential facts" forming the basis of MOFCOM's decision to apply antidumping duties.

1. Article 6.9 of the AD Agreement Requires the Investigating Authority to Disclose to Interested Parties the Calculations and Data Used to Determine the Existence of Dumping and to Calculate Dumping Margins

9. The calculations relied on by an investigating authority to determine the normal value and export price – as well as the data underlying those calculations – constitute "essential facts" forming the basis of the investigating authority's imposition of final measures within the meaning of Article 6.9. These data are "facts" because they are things "known for certain to have occurred." The investigating authority aggregates, disaggregates or otherwise mathematically manipulates this adjusted data to calculate the normal value and export price. These calculations similarly are "facts" because they also represent things known to have occurred, as distinct from the investigating authority's reasoning or legal interpretation of those data.

2. MOFCOM Failed to Disclose the Calculations and Data it Used to Determine the Existence of Dumping and Arrive at the Dumping Margins

10. The calculations and related information MOFCOM should have made available include, but are not limited to: (1) all calculations performed with respect to the derivation of normal value; (2) all calculations performed with respect to the derivation of export price; and (3) all calculations performed with respect to the determination of costs of production. For normal value, export price, and costs of production, MOFCOM should have provided the details of any data adjustments or manipulations performed by MOFCOM on the data provided by each respondent, made available adjustments and revisions made by MOFCOM to the sales data provided by each respondent, and specifically identified any data provided by each respondent that was eliminated or rejected by MOFCOM. These facts were "essential" to MOFCOM's dumping determination because they formed the basis of its decision to apply definitive measures and the determination of the dumping margins.

11. MOFCOM's failure to make available the calculation data prevented the respondents from knowing basic information about how the dumping margins to which they would be subject had been determined. Without the actual calculations performed by the investigating authority, it is not possible to check the calculations against the methodological explanations given, to ensure the completeness and accuracy of the investigating authority's calculations.

IV. MOFCOM'S FLAWED ALL OTHERS DUMPING DETERMINATION

A. MOFCOM's Determination of the All Others Rate Is Inconsistent with Articles 6.8, 6.9, 12.2, and 12.2.2 of the AD Agreement

12. In the final determination, MOFCOM applied the all others dumping margin of 21.5 per cent to unexamined U.S. producers/exporters. It did so despite the fact that the dumping margin for the respondents ranged from 2 per cent to 8.9 per cent. MOFCOM's explanation for its all others

dumping margin was that, pursuant to Article 21 of its Anti-Dumping Regulation, it relied on "the best information available and facts that were adopted in the PD, and appl[ied] the dumping margin claimed in the petition" for all other U.S. companies.

1. MOFCOM's Use of Facts Available Is Inconsistent with Article 6.8 and Annex II of the AD Agreement

13. China acted inconsistently with Article 6.8 of the AD Agreement and paragraph 1 of Annex II because MOFCOM applied (apparently adverse) facts available, despite the fact that it did not notify the relevant producers of the information required of them, and the producers did not refuse to provide necessary information or otherwise impede the dumping investigation. Indeed, MOFCOM had no evidence that any interested party "refused access to" or otherwise "did not provide" information that was "necessary" to the antidumping investigation, or otherwise "significantly impeded" the antidumping investigation. As was the case in *China – GOES*, other exporters of subject merchandise were non-existent: no other U.S. exporters of automobiles existed at the time of the antidumping investigation of certain automobiles from the United States.

2. China 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

14. MOFCOM failed to inform the United States and other interested parties "of the essential facts under consideration" which formed the basis for this calculation in time for the United States and other interested parties to defend their interests.

a. MOFCOM's Determinations and Disclosures

15. In the preliminary determination, MOFCOM established an all others dumping rate of 21.5 per cent. MOFCOM explained its determination in a single sentence: "For other U.S. companies, in accordance with Article 21 of the AD regulations, the Investigating Authority decided, using available facts and the best information available, to apply the dumping margin claimed in the petition to these companies." Article 21 of China's Anti-Dumping Regulation pertains to the use of facts available. In the final determination, MOFCOM established a final all others dumping rate of 21.5 per cent. It did so despite the fact that the dumping rates for the other respondents ranged from 2 per cent to 8.9 per cent.

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

16. MOFCOM did not identify the essential facts that formed the basis for its imposition of a 21.5 per cent all others dumping rate. As described above, its disclosure consisted of a single sentence. Noticeably absent from its determination are the following types of facts that would be necessary to MOFCOM's decision to apply facts available: facts relating to whether or not the U.S. companies refused access to necessary information or significantly impeded the antidumping investigation; facts that led MOFCOM to conclude that a 21.5 per cent all others dumping rate was an appropriate rate applicable to all other companies; and facts underpinning the calculation of the 21.5 per cent rate, and the details of the calculation itself.

17. These facts are essential because they form the basis for MOFCOM's decision to apply a facts available all others dumping rate. Because MOFCOM did not disclose these essential facts, the United States and other interested parties were not able to understand, much less evaluate and, if necessary, rebut, MOFCOM's assessment or calculation of the all others dumping margin. Likewise, because MOFCOM did not adequately disclose the factual information used to calculate the 21.5 per cent all others rate, the United States and interested U.S. companies were not able to argue that this rate was inappropriate. Given the significant disparity between the "all others" rate and the rates calculated for the known exporters – the "all others" rate was more than twice as high as the margin for any of the investigated companies – a more detailed disclosure of the "essential facts" under consideration leading to the "all others" rate was required to allow the United States to defend its interests and those of potential future exporters.

3. MOFCOM Failed to Explain Its Determination

18. MOFCOM breached Article 12 of the AD Agreement because it failed to provide in sufficient detail the findings and conclusions that lead to application of facts available pursuant to Article 21 of its regulations.

V. MOFCOM'S FLAWED ALL OTHERS SUBSIDY RATE DETERMINATION

A. MOFCOM's Determination of the All Others Rate Is Inconsistent with Articles 12.7, 12.8, 22.3, and 22.5 of the SCM Agreement

19. In the final determination, MOFCOM applied the all others subsidy rate of 12.9 per cent to unexamined U.S. producers/exporters. MOFCOM's explanation for its all others subsidy rate was that it relied upon Article 21 of its CVD Regulation, and that it relied on facts available to make its determination for all other U.S. companies.

1. MOFCOM's Use of Facts Available Is Inconsistent with Article 12.7

20. China acted inconsistently with Article 12.7 of the SCM Agreement because MOFCOM applied facts available to producers that MOFCOM did not notify of the information required of them, and that did not refuse to provide necessary information or otherwise impede the countervailing duty investigation. Indeed, MOFCOM had no evidence that any interested party "refused access to" or otherwise "did not provide" information that was "necessary" to the investigation, or otherwise "significantly impeded" the investigation. As was the case in the investigation that was the subject of *China – GOES*, exporters of subject merchandise other than the named respondents did not exist at the time of the countervailing duty investigation. Therefore, China's application of facts available was improper, as it is logically impossible for a non-existent exporter to fail to cooperate.

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

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

a. MOFCOM's Determinations and Disclosures

22. In the preliminary determination, MOFCOM established an all others subsidy rate of 12.9 per cent. MOFCOM explained its determination in one single sentence: "For all other U.S. companies, in accordance with Article 21 of the CVD regulations, the Investigating Authority decided, by adopting facts available, to apply the *ad valorem* subsidy rate of General Motors LLC to these companies." Article 21 of China's CVD Regulation pertains to the use of facts available. However, MOFCOM provided no further explanation of its calculation of the all others subsidy rate. In the final determination, MOFCOM applied the all others subsidy rate of 12.9 per cent. MOFCOM's cursory explanation repeated that of its preliminary determination and final disclosure.

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

23. As in the AD proceeding, MOFCOM did not identify the essential facts that formed the basis for its imposition of a 12.9 per cent all others subsidy rate. As described above, its disclosure consisted of a single sentence. Noticeably absent from this disclosure are the facts that serve as the basis for MOFCOM's decision regarding the application of facts available, and in particular the facts that led MOFCOM to conclude that resorting to the use of the facts available was appropriate. These facts are essential because they form the basis for any investigating authority's determination to apply a facts available subsidy rate. Without disclosure of the facts underlying MOFCOM's decision to apply facts available, the United States and interested U.S. companies were

unaware of the factual basis for MOFCOM's determination and therefore could not adequately defend their interests.

3. MOFCOM Failed to Explain Its Determination

24. Article 22 of the SCM Agreement required that MOFCOM provide in sufficient detail the findings and conclusions that led to application of facts available pursuant to Article 21 of its regulations. The single, perfunctory sentence MOFCOM included in its determination and disclosure document does not satisfy this requirement.

VI. MOFCOM'S FLAWED INJURY DETERMINATION

25. MOFCOM's injury determination is inconsistent with Articles 3.1, 3.2, 3.5, and 4.1 of the AD Agreement and Articles 15.1, 15.2, 15.5, and 16.4 of the SCM Agreement.

A. MOFCOM's Narrow Definition of the Domestic Industry Is Inconsistent with Articles 3.1 and 4.1 of the AD Agreement and Articles 15.1 and 16.1 of the SCM Agreement

26. MOFCOM narrowly defined the domestic industry for the purpose of its injury investigation, such that the domestic industry that MOFCOM examined included only a fraction of domestic producers, limited to members of CAAM, the petitioner in the AD and CVD investigations. MOFCOM's determination to limit the definition of the "domestic industry" only to the petitioners "reduced the data coverage that could have served as a basis for its injury analysis and introduced a material risk of distorting the injury determination." Furthermore, MOFCOM excluded "a whole category of producers of the like product," (i.e. domestic producers that did not express support for the petition) and likely also joint ventures between international and Chinese-owned companies ("JVs"). This gave rise to "a material risk of distortion."

27. In addition to the skewing of the data inherent in MOFCOM's limitation of the domestic industry definition to those enterprises that were members of the group supporting the petition, the evidence suggests that the collective output of those enterprises represented a relatively small percentage of total domestic production in China. Under the circumstances of these investigations, where there has been no indication by MOFCOM that the domestic industry is fragmented or is so large that sampling would be necessary, MOFCOM's exclusion from the definition of the domestic industry of enterprises accounting for more than 60 per cent of domestic production resulted in a definition of the domestic industry that did not include a "major proportion" within the meaning of Article 4.1 of the AD Agreement and Article 16.1 of the SCM Agreement. The Appellate Body has explained that a "major proportion" means a "relatively high proportion of the total domestic production."

28. MOFCOM's definition of the domestic industry is inconsistent with the definition set out in Article 4.1 of the AD Agreement and Article 16.1 of the SCM Agreement, because it does not include enterprises that represent "a major proportion of the total domestic production" of automobiles. As a result, MOFCOM's injury determination, which was based on its flawed definition of the domestic industry, is inconsistent with Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement because it was neither objective nor based on "positive evidence."

B. MOFCOM's Price Effects Analysis Is Inconsistent with Articles 3.1 and 3.2 of the AD Agreement and Articles 15.1 and 15.2 of the SCM Agreement

29. Analyzing the effect of subject imports on the price of the domestic like product, MOFCOM found only price depression at the end of the period of investigation, i.e. interim 2009; MOFCOM did not find price suppression or price undercutting. MOFCOM's finding of price depression during interim 2009 is plainly contradicted by the evidence on the administrative record, and its consideration of price effects is neither objective nor based on "positive evidence."

30. In support of its price depression finding, MOFCOM asserted that "the average sales price of domestic like products varied the same as the import price of Subject products." However, MOFCOM's assertion that parallel pricing existed between the domestic like products and subject imports is plainly contradicted by the evidence on the administrative record. Additionally, merely

identifying parallel pricing would do nothing to explain how the effect of subject imports was to significantly depress prices for the domestic like products. MOFCOM did not provide sufficient reasoning and, in fact, said nothing in the final determination to explain how parallel pricing caused the depression of domestic prices.

31. MOFCOM failed to address evidence that subject imports oversold the domestic like products during the period in which MOFCOM identified price depression. Absent further explanation, the fact that subject imports were overselling the domestic like products calls into question MOFCOM's conclusion that the price depression observed was the effect of subject imports.

32. MOFCOM failed to make needed adjustments to the average unit values ("AUVs") used in its price effects analysis. The only "pricing" information MOFCOM referenced anywhere in its injury determination consists of AUVs for the imports under investigation and for the domestic like product. Indeed, MOFCOM used a single, annual AUV for each year of the period of investigation and a single AUV for interim 2009. While in certain circumstances, AUV data may serve as a reliable proxy for pricing information, for that to be the case, each group of products being compared should be relatively similar. Otherwise, differences in AUVs may reflect changes or variations in product mix, not differences in pricing. Here, the record evidence unequivocally indicates that "certain automobiles" is not a homogenous product and that the subject automobiles imported from the United States primarily fell into a different grade from those primarily sold by the Chinese domestic producers. MOFCOM's failure to make necessary adjustments to ensure price comparability, or, at the very least, explain why such adjustments were not necessary in this case, undercuts its conclusion that the price depression observed was the effect of subject imports.

33. MOFCOM failed to consider or address evidence that the market share of the domestic like products increased along with that of subject imports during the period in which MOFCOM found price depression. This undercuts its conclusion that the price decline of domestic like products observed was the effect of subject imports.

34. Finally, MOFCOM's price effects analysis, necessarily, is founded upon and constrained by its narrow definition of the domestic industry, which is itself inconsistent with Articles 3.1 and 4.1 of the AD Agreement and Articles 15.1 and 16.1 of the SCM Agreement. The flaws in MOFCOM's domestic industry definition also compromised MOFCOM's price effects analysis.

35. For these reasons, MOFCOM's price effects analysis was not based on positive evidence, nor did it involve an objective examination of the evidence, as required by Articles 3.1 and 3.2 of the AD Agreement and Articles 15.1 and 15.2 of the SCM Agreement.

C. China's Causation Analysis Is Inconsistent with Articles 3.1 and 3.5 of the AD Agreement and Articles 15.1 and 15.5 of the SCM Agreement

36. MOFCOM's causation analysis includes and relies upon a number of findings that are contradicted by the evidence on the administrative record before MOFCOM, and MOFCOM's determination is neither objective nor based on "positive evidence." Additionally, MOFCOM failed to base its determination on an examination of all relevant evidence before it and to examine any known factors other than dumped and subsidized imports that were injuring the domestic industry.

37. As an initial matter, MOFCOM's causation analysis is founded upon its faulty, narrow domestic industry definition, and relies heavily on MOFCOM's flawed price effects analysis. The flaws in MOFCOM's domestic industry definition and its price effects analysis taint the causation analysis. It follows that, if the bases upon which MOFCOM's causation analysis is founded are flawed, then the causation analysis is also flawed.

38. MOFCOM failed to address evidence that subject imports took market share from non-subject imports and not from the domestic like products. Evidence that subject imports did not take market share from the domestic like products undercuts MOFCOM's conclusion that subject imports were a cause of material injury to the domestic industry.

39. MOFCOM failed to account for the sharp decline in the Chinese industry's productivity throughout the period of investigation. The "productivity of the domestic industry" is expressly identified in Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement as a factor

that "may be relevant" to the causation analysis. MOFCOM's failure to address this factor in its analysis is plainly inconsistent with these provisions.

40. MOFCOM failed to recognize the lack of competition between subject imports and the domestic like product. The record evidence of limited competition between subject imports and the domestic like products is a further indication that subject imports were not a cause of the economic difficulties experienced by the domestic industry.

41. MOFCOM failed to take into account the sharp drop in demand in interim 2009. Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement expressly identify "contraction in demand or changes in the patterns of consumption" as a factor that "may be relevant" to the causation analysis. While MOFCOM discussed demand, its findings with respect to the impact of demand on its causation determination are not consistent with the evidence on the administrative record. The only part of the period of investigation in which MOFCOM found injury to have occurred coincided with the only instance of demand *contraction* during the period of investigation. Given that a contraction in demand would typically be expected to have an adverse effect on pricing in the market, MOFCOM's summary dismissal of this factor as having no injurious impact on the industry was deeply flawed.

42. MOFCOM failed to address other factors that may have caused injury to the domestic industry. First, MOFCOM ignored a decision by China to increase the sales tax on larger engine vehicles, and reduce the sales tax on smaller engine vehicles, and failed to consider the effect this may have had on the domestic industry. Second, MOFCOM failed to address the effect of increases in average wages and employment over the POI, coupled with decreases in productivity, on the domestic industry's pre-tax profits. These other known factors, which MOFCOM itself presented elsewhere in the final determination, were likely the cause of the decline in the domestic industry's pre-tax profits.

43. For all of these reasons, MOFCOM's causation analysis was not based on positive evidence and did not reflect an objective examination, as required by Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement. Further, MOFCOM failed to meet the requirements of Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement to properly demonstrate causation by examining all relevant evidence before it; by failing to examine certain known factors other than the dumped or subsidized imports which at the same time were injuring the domestic industry; and by failing to ensure that the injuries caused by these other factors were not attributed to the dumped or subsidized imports.

VII. CONSEQUENTIAL CLAIMS

44. In view of the claims set forth above, the United States considers that China has also acted inconsistently with Article VI of the GATT 1994, Article 1 of the AD Agreement, and Article 10 of the SCM Agreement, which only permit antidumping or countervailing duty measures to be applied under the circumstances provided for in Article VI of the GATT 1994 and conducted in accordance with the AD Agreement and the SCM Agreement.

VIII. CONCLUSION

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

ANNEX B-2

EXECUTIVE SUMMARY OF THE OPENING STATEMENT OF THE UNITED STATES AT THE FIRST PANEL MEETING

Mr. Chairperson, members of the Panel:

1. This is the third dispute settlement proceeding the United States has commenced against China concerning antidumping and countervailing duty measures targeting U.S. exports. Each of the disputes we have brought addresses similar problems under the same substantive provisions of the covered agreements, and we are concerned by China's repeated failure to abide by fundamental commitments that it made in the trade remedies area when it joined the WTO.

2. China, through its investigating authority, MOFCOM, has acted inconsistently with its obligations under the AD Agreement, the SCM Agreement, and Article VI of the GATT 1994. In particular, MOFCOM failed to adhere to a range of key WTO obligations relating to transparency and procedural fairness, and it once again went forward with final affirmative determinations in the face of wholly inadequate evidence of material injury that should have led to the termination of the investigations, not the imposition of duties.

3. China's responses to the U.S. claims are unpersuasive. China seeks to counter arguments the United States does not make; to divert attention from the claims the United States is actually pursuing; to minimize MOFCOM's numerous procedural failures; and to assert without any factual basis that MOFCOM engaged in a searching and critical evaluation of the facts and evidence before it. However, as the United States has shown, the conclusions that MOFCOM reached simply do not meet the standard, as described by a recent panel, of being "such reasonable conclusions as could be reached by an unbiased and objective investigating authority in light of the facts and arguments before it and the explanations given." Contrary to China's charge, it is not the case that the United States is seeking to "impose its mode of implementing the AD and SCM Agreements on other WTO Members." Rather, it is just that, when subjected to scrutiny, MOFCOM's investigations and determinations fail to meet the requirements of the AD and SCM Agreements and Article VI of the GATT 1994.

I. CHINA FAILED TO REQUIRE ADEQUATE NON-CONFIDENTIAL SUMMARIES OF CONFIDENTIAL INFORMATION

4. Under Article 12.4.1 of the SCM Agreement and Article 6.5.1 of the AD Agreement, when an interested party claims that certain information must be treated as confidential, an investigating authority must require the party to provide sufficiently detailed non-confidential summaries of the confidential information. In exceptional circumstances, if an interested party believes the confidential information is not susceptible of summary, an explanation of why must be provided to the investigating authority. We demonstrated in our first written submission that China failed to meet these requirements.

5. China argues that the respondents never objected to the sufficiency of the non-confidential summaries. However, there is nothing in the text of Articles 12.4.1 or 6.5.1 that relieves China of its obligations under those provisions in the absence of an "objection" from respondents. China made this same exact argument in *China – GOES*, and the panel there rejected it.

6. China also argues that the petitioner did in fact prepare adequate summaries, even though they were not labeled as such. However, for the categories of confidential information identified, China points to general statements in the petition addressing topics related to the confidential information, but these general statements are insufficient. The recent panel report in *China – GOES* makes clear that interested parties do not have "to infer, derive and piece together a possible summary of confidential information."

7. Two examples cited by China illustrate why China's approach is misguided. Table 19 from the petition, which we have reproduced as Exhibit USA-14, and Table 27 from the petition, which we have reproduced as Exhibit USA-15. In both of these tables, China points to a trend line that is

not labeled to indicate scale, and it relies on discussion where the key information is simply redacted.

8. China's approach to summaries would require interested parties to "infer, derive and piece together a possible summary of confidential information," contrary to the requirements of Articles 12.4.1 and 6.5.1. Because of these redactions and other shortcomings in summarization, in this case the respondents could not discern the substance of the information provided.

9. Additionally, we note that neither the petition nor the documents prepared by MOFCOM during the course of the proceeding ever asserted that summarization was not possible or otherwise justified the absence of meaningful non-confidential summaries.

10. Accordingly, China breached Article 6.5.1 of the AD Agreement and Article 12.4.1 of the SCM Agreement.

II. MOFCOM'S USE OF FACTS AVAILABLE TO DETERMINE THE "ALL OTHERS" CVD RATE IS INCONSISTENT WITH ITS OBLIGATIONS UNDER ARTICLE 12.7 OF THE SCM AGREEMENT

11. We turn now to MOFCOM's determination of the "all others" CVD rate. In the autos proceeding, the following U.S. exporters/producers of automobiles registered for the investigation: General Motors, Chrysler, Mercedes-Benz and its affiliated company Daimler, BMW, Honda, Mitsubishi, and Ford. Notwithstanding the fact that neither the petitioner nor MOFCOM identified any other U.S. producers or exporters of automobiles, China not only established an "all others" subsidy rate for unknown or unidentified producers, but applied facts available to arrive at this rate based on the purported lack of cooperation by these unknown or unidentified companies.

12. China claims that any unknown or unidentified companies were properly notified by virtue of the fact that MOFCOM placed a copy of the public version of the petition in a reading room in Beijing, published the notice of initiation, and notified the U.S. government.

13. This is not an adequate basis to resort to facts available. Under Article 12.1 of the SCM Agreement, all interested parties "shall be given notice of the information which the authorities require and ample opportunity to present in writing all evidence which they consider relevant." In that regard, an interested party cannot "refuse[] access to, or otherwise … not provide, *necessary* information" if it has not been given notice of "the information which the authorities *require*." As the Appellate Body has made clear, an exporter must be given the opportunity to provide information required by an investigating authority before the investigating authority resorts to facts available that can be adverse to the exporter's interests. By definition, 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.

14. The panel in *China – GOES* reviewed facts that are similar to the facts in this dispute. The *China – GOES* panel found that China acted inconsistently with Article 12.7 of the SCM Agreement, noting that "in the absence of being notified of the 'necessary information' in the context of a particular investigation, it is difficult to conclude that unknown exporters refused access to or failed to provide necessary information or otherwise impeded the investigation." The panel also observed that "a conclusion that non-existent exporters refused to provide information or impeded the investigation seems illogical."

15. As in *China – GOES*, in the absence of being notified of the "necessary information" in the autos proceeding, it is illogical to conclude that unknown exporters refused access to or failed to provide necessary information or otherwise impeded the investigation. And similar to *China – GOES*, no other exporters existed at the time of the autos investigation; it is logically impossible to argue in this dispute that a non-existent exporter failed to cooperate.

16. China's mere placement of a petition in a reading room and publication of a notice do not constitute a meaningful opportunity for a company to provide information. Accordingly, an unidentified or unknown exporter cannot be said to have failed to cooperate by not having located the petition or the notice of initiation in this case. Thus, by applying facts available to non-existent, unknown, or unidentified firms, China breached Article 12.7 of the SCM Agreement.

III. CHINA'S DETERMINATION OF THE "ALL OTHERS" RATE IN THE FINAL ANTIDUMPING DUTY DETERMINATION IS INCONSISTENT WITH ARTICLE 6.8 AND PARAGRAPH 1 OF ANNEX II OF THE AD AGREEMENT

17. For the "all others" dumping rate, as with the "all others" subsidy rate, notwithstanding the fact that neither the petitioner nor MOFCOM identified any other U.S. producers or exporters of autos, China applied a facts available dumping rate to unknown or unidentified exporters of autos. Notably, this "all others" dumping rate was more than twice as high as the highest rate calculated for an investigated company.

18. China again claims that it was permitted to apply facts available because it placed the petition in a reading room in Beijing and published the notice of initiation on its website. For the reasons described earlier, this is not a sufficient basis to deem unknown or unidentified producers or exporters uncooperative.

19. China further claims that, while the AD Agreement limits the antidumping rate that can be applied to known producers or exporters that are not individually examined, there are no such limits placed on unknown producers/exporters. Therefore, according to China, MOFCOM was within its rights to base the "all others" dumping rate on facts available. This argument, however, overlooks the clear direction in Article 6.1 and paragraph 1 of Annex II to notify all interested parties of the information that is required of them and to provide them with ample opportunity to provide all relevant information.

20. Understood in light of the obligation to notify interested parties of the information required of them, Article 6.8 and Annex II are intended to address situations where an interested party does not provide such information to or cooperate with the investigating authority. A failure to provide necessary information or a failure to cooperate cannot be found to have existed where no other producer or exporter was made aware of the information which the authorities require of it for purposes of that investigation. And where there was no other producer or exporter, they of course could not be aware of the investigation, much less the information required.

21. In *China – GOES*, the panel found that China acted inconsistently with Article 6.8 of the AD Agreement, and paragraph 1 of Annex II, for reasons similar to those provided in its findings under Article 12.7 of the SCM Agreement. The facts of the *China – GOES* dispute are similar to the facts of this dispute. The panel in this dispute should similarly find that China acted inconsistently with Article 6.8 and paragraph 1 of Annex II of the AD Agreement.

IV. CHINA BREACHED ARTICLE 12.8 BY FAILING TO DISCLOSE THE ESSENTIAL FACTS REGARDING THE CALCULATION OF THE "ALL OTHERS" SUBSIDY RATE

22. During the autos investigation, MOFCOM calculated the all others subsidy rate by applying "facts available." It did so without disclosing the essential facts forming the basis for its decision, contrary to Article 12.8 of the SCM Agreement. These essential facts included the facts that led MOFCOM to conclude that "facts available" was warranted. In *China – GOES*, the panel found that China acted inconsistently with the disclosure obligations under Article 12.8 of the SCM Agreement by not disclosing facts leading to the conclusion that applying "facts available" to calculate the "all others rate" was warranted. Accordingly, the panel in this dispute should find that China acted inconsistently with Article 12.8 of the SCM Agreement by not disclosing the essential facts forming the basis for its decision regarding final measures for "all other" U.S. companies.

V. CHINA FAILED TO DISCLOSE THE ESSENTIAL FACTS REGARDING THE CALCULATION OF THE "ALL OTHERS" DUMPING RATE, CONTRARY TO ARTICLE 6.9 OF THE AD AGREEMENT

23. China also acted inconsistently with Article 6.9 of the AD Agreement by failing to disclose the essential facts forming the basis of the "all others" dumping rate. MOFCOM's "all others" dumping rate was twice as high as the highest calculated rate. China justified its choice of this final rate as reliance on the "facts available."

24. However, prior to the final determination, China did not disclose the essential facts forming the basis for its decision. In response, China argues that it applied the AD rate alleged in the petition, and there were no adjustments or calculations that could have been disclosed. This

argument is inadequate. It ignores that an "essential fact" when an investigating authority seeks to resort to facts available would be the facts identified in Article 6.8 – that is, the facts that demonstrate an interested party has "refuse[d] access to, or otherwise d[id] not provide, necessary information … or significantly impede[d] the investigation." Further, MOFCOM also did not disclose any of the facts it employed to corroborate the margin information provided in the petition, or to decide that it was an appropriate margin for the "all others" rate.

25. In *China – GOES*, the panel found that China acted inconsistently with the disclosure obligations under Article 6.9 of the AD Agreement by not disclosing facts leading to the conclusion that applying "facts available" to calculate the "all others rate" was warranted.

26. By failing to disclose these essential facts in the autos proceeding, China acted inconsistently with Article 6.9 of the AD Agreement.

VI. CHINA FAILED TO DISCLOSE THE DATA AND CALCULATIONS UNDERLYING ITS DETERMINATION OF THE DUMPING MARGIN, CONTRARY TO ARTICLE 6.9 OF THE AD AGREEMENT

27. China also breached Article 6.9 of the AD Agreement because MOFCOM failed to disclose the data and calculations it performed to determine the existence and margin of dumping, including the calculation of the normal value and the export price for the respondents.

28. As just discussed, Article 6.9 of the AD Agreement requires the investigating authority to disclose the essential facts "under consideration which form the basis for the decision whether to apply definitive measures." Definitive measures are only applied if the normal value exceeds the export price, and the margin of dumping is based on the extent to which it does so. Therefore, the data and calculations used to determine the normal value and export price constitute "essential" facts. Without those facts, no affirmative dumping determination could be made, and no definitive duties could be imposed.

29. China asserts that the U.S. reading of Article 6.9 creates a disclosure requirement without limit. To the contrary, the first sentence of Article 6.9 has at least three limitations – it applies to *facts*, as opposed to other matters ; it concerns only the *essential* facts, as opposed to any and all facts; and it is limited to those essential facts that *form the basis of the decision to apply definitive measures*. The United States claim under Article 6.9 is firmly based on this text, and respects these limitations. Additionally, the first sentence of Article 6.9 must be read in context of the second sentence, which provides that that the aim of the requirement is "to permit parties to defend their interests." As the panel in *EC – Salmon* explained, the purpose of Article 6.9 is to "provide the interested parties with the necessary information to enable them to comment on the completeness and correctness of the facts being considered by the investigating authority" and "provide additional information or correct perceived errors."

30. China responds by arguing that it did disclose the essential facts. In doing so, China cites a passage of the final determination that merely states that China disclosed the essential facts. This is not enough. China does not cite any evidence showing that it disclosed the actual essential facts – the data and calculations – underlying the dumping margin determination. Thus, by failing to disclose the data and calculations it performed to determine the existence and margin of dumping, including the calculation of the normal value and the export price for the respondents, China has breached Article 6.9 of the AD Agreement.

VII. MOFCOM'S INJURY DETERMINATION IS INCONSISTENT WITH CHINA'S WTO OBLIGATIONS

A. MOFCOM's Narrow Definition of the Domestic Industry Is Inconsistent with Articles 3.1 and 4.1 of the AD Agreement and Articles 15.1 and 16.1 of the SCM Agreement

31. The petition in these cases was filed by the China Association of Automobile Manufacturers or "CAAM." We do not know who CAAM's members are – they were never identified. After initiating its investigations, MOFCOM published "Notifications for Registration to Participate" in the injury investigations. CAAM was the only domestic producer or association of domestic producers to respond to MOFCOM's notices. CAAM was then the only such domestic entity to which MOFCOM

issued the injury questionnaire, and CAAM was the only domestic entity that provided a response to the injury questionnaire. MOFCOM based its injury determination on data submitted only by CAAM. However, the producers for which CAAM provided data accounted for only about one-third of total domestic production for most of the period of investigation. It simply cannot be the case that MOFCOM had "ample data" with which to make an accurate injury determination when the domestic industry – as MOFCOM defined it – was limited only to enterprises that supported the petition and excluded more than 60 percent of total domestic production.

32. Article 4.1 of the AD Agreement and Article 16.1 of the SCM Agreement establish that the term "domestic industry shall be interpreted as referring to the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products." Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement require that a determination of injury be based on "positive evidence" and involve an "objective examination" of, *inter alia*, the impact of imports on the domestic producers of such products.

33. In *EC – Fasteners*, the Appellate Body explained that "to ensure the accuracy of an injury determination, an investigating authority must not act so as to give rise to a material risk of distortion in defining the domestic industry, for example, by excluding a whole category of producers of the like product." The Appellate Body also explained that there is a relationship between the proportion of domestic production included in the domestic industry definition and the likelihood that the injury determination will be distorted. In other words, in cases such as this, where the industry "coverage" is low, there is a heightened risk that the injury determination will be distorted.

34. In these investigations, the definition of the domestic industry was distorted because it was limited to entities that were willing to register to participate in the injury investigations, that is, domestic producers that supported the petition. This is similar to the situation in *EC – Fasteners*, where the domestic industry was defined on the basis of a willingness to be included in a sample. China attempts to distinguish the facts of the *EC – Fasteners* dispute, but, in fact, the situations are quite similar. In each case, the investigative procedure introduced a material risk of distortion, which was inconsistent with the obligation to conduct an objective examination.

35. China claims that it conducted "an open, inclusive, and transparent" investigation. In reality, MOFCOM's investigation bore none of these attributes, and the standard to which MOFCOM's investigation must be held is not whether it was "open, inclusive, and transparent;" the relevant question is whether it met the specific requirements of the AD and SCM Agreements. It did not.

36. China tries to refute an argument that the United States did not make; namely that MOFCOM categorically excluded data from joint ventures between international and Chinese-owned companies. What the United States argued is that MOFCOM's definition of the domestic industry was distorted because it included only those producers that supported the petition, namely CAAM's member companies (*i.e.*, the petitioners) or some subset thereof.

37. China disputes that MOFCOM defined the domestic industry as the petitioner CAAM's member companies. The final determination provides two strong indications that the domestic industry was indeed defined to encompass CAAM member companies or some subset thereof. First, the final determination makes clear that the only questionnaire response that MOFCOM received from domestic producers was from CAAM. There is no indication in the final determination that CAAM was reporting data for any company other than its member companies in that questionnaire response. Second, in discussing the definition of the domestic industry, MOFCOM stated that "there is evidence showing that the total production of like products from domestic industry represented by China Association of Automobile Manufacturers accounts for the main part of that of domestic like products," and that the "domestic enterprises mentioned above can represent the Chinese domestic industry." The unavoidable implication of this statement is that the domestic industry was defined as the CAAM member companies or some subset thereof.

38. China argues that no "freestanding distortion test" can be read into Article 4.1 of the AD Agreement and Article 16.1 of the SCM Agreement. The obligation to avoid distortion stems from Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement, which are overarching obligations that inform the rest of the injury determination. MOFCOM's definition of the domestic industry was distorted because it included only producers that supported the petition.

39. China's first written submission makes clear that only about one third of domestic production was included in MOFCOM's definition of the domestic industry for most of the period of investigation. While the AD and SCM Agreements do not provide a definition of "a major proportion," that does not mean that there are no limitations on how an investigating authority may define the domestic industry. As the Appellate Body explained in *EC – Fasteners*, a proper interpretation of the term "a major proportion" "requires that the domestic industry defined on this basis encompass producers whose collective output represents a relatively high proportion that substantially reflects the total domestic production."

40. The Appellate Body further explained that *in certain circumstances* it might be appropriate for investigating authorities to have some flexibility in interpreting "major proportion." However, in this investigation, MOFCOM neither described the domestic industry as fragmented nor identified any practical constraints on its ability to obtain information. Further, nothing in the final determination suggests that MOFCOM's investigation of automobiles involved any such special market situations that would warrant a lower threshold for defining "major proportion."

41. China seeks to excuse MOFCOM's failure to collect data covering a larger proportion of domestic production by noting that MOFCOM does not have the authority to compel interested parties to provide data for its investigations. However, there is no evidence that MOFCOM even made *any effort* to obtain information from additional producers on a voluntary basis. In fact, MOFCOM created a disincentive by requiring that producers apply to participate in the injury investigation as a prerequisite to submitting information.

42. MOFCOM stated in its final determination that it issued its injury questionnaire to "known" domestic producers. This is certainly not true. CAAM was not the only domestic producer or association of domestic producers that could have been "known" to MOFCOM. Indeed, MOFCOM by law would have approved all of the Sino-foreign joint ventures in the auto sector. It therefore would appear that MOFCOM simply closed its eyes to the existence of about two-thirds of the industry producing the domestic like product in China.

43. For these reasons, MOFCOM's definition of the domestic industry does not constitute "a major proportion of domestic production," within the meaning of Article 4.1 of the AD Agreement and Article 16.1 of the SCM Agreement. MOFCOM failed to ensure that the "domestic industry" was capable of providing "ample data" that would "ensure an accurate injury analysis." MOFCOM's injury determination, which was based on its definition of the domestic industry, was neither objective nor based on "positive evidence," as required by Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement.

B. MOFCOM's Price Effects Analysis Is Inconsistent with Articles 3.1 and 3.2 of the AD Agreement and Articles 15.1 and 15.2 of the SCM Agreement

44. Contrary to China's assertion, the United States does not merely challenge "certain narrow elements of MOFCOM's analysis" and ignore the big picture. The problem is that MOFCOM ignored the big picture, and the overall factual situation presented in the final determination simply does not support MOFCOM's conclusion with respect to price effects.

45. MOFCOM found that subject imports depressed prices for the domestic like product at the end of the period of investigation, in interim 2009, the first nine months of that year. That is the only adverse price effect that MOFCOM identified. MOFCOM made this finding despite the fact that subject imports were selling at much higher prices than the domestic like product. The average unit price of subject imports in interim 2009 was about RMB 411,000, while the average unit price of the domestic like product was about RMB 316,000. Moreover, the decline in the price of subject imports in interim 2009, as compared with interim 2008, was only 3.17 percent, compared to a decline for the domestic product of 10.13 percent.

46. This scenario presents a difficult question for China: how is it that a 3 percent decline in the price of the subject imports could have caused a 10 percent decline in the price of the domestic like product, when the imports were *overselling* the domestic product by such a wide margin? MOFCOM's explanation is cursory in the extreme and implausible on its face.

47. As an initial matter, we are puzzled by China's argument that MOFCOM was not required to make a finding of price undercutting. The United States did not argue in its first written submission that MOFCOM was required to make such a finding. The United States merely observed that MOFCOM did not make a finding of price undercutting, in order to identify with precision the type of price effects finding that MOFCOM *did* make.

48. MOFCOM gave two reasons for its conclusion that subject imports had depressed domestic prices in interim 2009: (1) "parallel pricing," and (2) the rising market share of subject imports, especially at the end of the period of investigation. Neither of these is sufficient to explain MOFCOM's price depression finding.

49. With respect to parallel pricing, MOFCOM's conclusion that the prices of the domestic like product and subject imports were moving in tandem is belied by the relevant data, which showed that these prices diverged significantly in 2007. The data on the record before MOFCOM plainly show that there was no price parallelism.

50. China takes issue with the U.S. argument that, because of a sharp divergence in prices in the 2006-2007 period, the record did not show parallel pricing. However, China's argument actually shows that MOFCOM's parallel pricing finding was at such a level of generality as to be virtually meaningless. According to China's preferred translation, the final determination states that "change trends of the price of product under investigation and the price of the domestic like product were *consistent basically*," and that they increased from 2006 to 2008 "*in general*." Observations at this level of generality are simply not enough for an investigating authority to, in the Appellate Body's words, "understand whether subject imports have explanatory force for the occurrence of significant depression . . . of domestic prices."

51. Furthermore, even if there had been parallel pricing, merely identifying the existence of such a price trend does nothing to explain how the effect of subject imports was to significantly depress prices for the domestic like products. MOFCOM said nothing in the final determination to explain how parallel pricing caused the depression of domestic prices.

52. MOFCOM's second reason for finding price depression in interim 2009 is equally unconvincing. MOFCOM found that the rising market share of subject imports, especially at the end of the period of investigation, resulted in price depression for the domestic like product. However, MOFCOM failed to explain this conclusion, which was, in fact, contradicted by other evidence. MOFCOM's final determination shows that the market share of the domestic like product *also increased* from interim 2008 to interim 2009, nearly as "sharply" as that of subject imports. In other words, subject imports were not taking market share from the domestic like product. Rather, both subject imports and the domestic like product took market share from Chinese producers not included in MOFCOM's definition of the domestic industry and from non-subject imports during this period. Under these circumstances, it is hard to see how the increase in market share of subject imports could have depressed the price of the domestic like product, and MOFCOM's determination gives no indication of how it considered these facts.

53. China argues that MOFCOM's finding of price depression in interim 2009 was explained by the increase in the volume or market share of subject imports, both throughout the period of investigation and in interim 2009. This is unpersuasive. The increases in the volume of subject imports in the 2006-2008 period were commensurate with rising consumption of the subject merchandise in the Chinese market. These increases resulted in only a very slight rise in the market share of subject imports, from 9.97 percent in 2006 to 10.74 percent in 2008. It is true that the domestic industry as defined by MOFCOM lost market share in the 2006-2008 period, but this was almost entirely because of gains made by Chinese producers not included in MOFCOM's definition of the domestic industry and third-country imports, not the subject imports.

54. The integrity of MOFCOM's finding that subject imports were responsible for price depression is also undercut by MOFCOM's use of average unit values or "AUVs." In light of the varying grades of the automobiles MOFCOM was comparing, MOFCOM should have made necessary adjustments to ensure price comparability, or, at the very least, it should have explained why such adjustments were not necessary. China argues that the relevant WTO agreement provisions do not require any specific methodology when examining price trends. But, as the Appellate Body recognized in *China – GOES*, although Articles 3.2 and 15.2 do not specify a particular methodology for evaluating price effects, a failure to ensure price comparability would not be consistent with the requirements

under Articles 3.1 and 15.1 that a determination of injury be based on "positive evidence" and involve an "objective examination" of the effect of subject imports on the prices of domestic like products.

55. China also maintains that MOFCOM established that there was a sufficient competitive overlap between subject imports and the domestic product to warrant the use of AUVs in the price effects analysis. The United States submits that MOFCOM's analysis (much of which occurred in the context of MOFCOM's discussion of the scope of the investigation and the definition of the domestic like product, and not in the context of a discussion of price effects) was at such a level of generality that it failed to establish the degree of competitive overlap that would make an analysis of price effects meaningful.

56. In sum, MOFCOM's finding of price depression during interim 2009 is not supported by the evidence on the record, and its consideration of price effects is not based on "positive evidence" and did not "involve an objective examination." Consequently, MOFCOM acted inconsistently with Articles 3.1 and 3.2 of the AD Agreement, and Articles 15.1 and 15.2 of the SCM Agreement, in conducting its price effects analysis.

C. China's Causation Analysis Is Inconsistent with Articles 3.1 and 3.5 of the AD Agreement and Articles 15.1 and 15.5 of the SCM Agreement

57. Not only is MOFCOM's causation analysis compromised by its flawed definition of the domestic industry and price effects analysis, but it also suffers from a number of other defects.

58. China suggests that the United States "selectively cit[ed] isolated data and ignor[ed] the complete picture," but it is MOFCOM that selectively cited the few elements of data that may have lent some support to its conclusion while ignoring the bulk of information on the record tending to suggest that no relationship of cause and effect existed between the subject imports and any difficulties experienced by the Chinese domestic industry.

59. China also argues that "[s]ubject imports need only be a 'cause,' not the sole or significant cause, and may be one of many causes and still satisfy Articles 3.5 and 15.5." While China's position is unobjectionable in this regard, it is also beside the point. Taking the evidence on the record before MOFCOM as a whole, *i.e.*, looking at the complete picture, there simply is no support for MOFCOM's conclusion that subject imports were in any way a cause of material injury to the Chinese domestic industry. When MOFCOM's causation analysis is subjected to scrutiny, it becomes clear that the evidence on which MOFCOM relied does not support the conclusion that MOFCOM reached, and the evidence that MOFCOM ignored provides further confirmation of MOFCOM's error.

60. MOFCOM relied on the increase in the volume and market share of subject imports to support its causation analysis, but again it failed to take into account that the market share of the Chinese domestic industry also increased, nearly as sharply as that of the subject imports, in interim 2009. China responds that MOFCOM fully examined the role of third country imports and found that they did not affect the causal link in this case. China misses the point. The question is not whether third-country imports injured the domestic industry in interim 2009, but whether the increase in the market share of subject imports in interim 2009 was at the expense of the domestic industry or of third country imports. China also argues that the United States should not have focused on interim 2009, but the development of subject imports prior to interim 2009 provided no basis for attributing injury to the domestic industry in interim 2009 to subject imports in prior years.

61. MOFCOM also failed to account for the significant decline in the domestic industry's productivity throughout the period of investigation. China argues that productivity was not a meaningful or significant factor to be examined when considering the causal link between subject imports and material injury because labor costs are a relatively insignificant part of the cost of manufacturing a vehicle in China. However, most of the decline in the domestic industry's pre-tax profits from interim 2008 to interim 2009 (a decline of RMB 493 million) can be attributed to the near-doubling of labor costs over this period (an increase of RMB 406 million).

62. MOFCOM also failed in its causation analysis to recognize the lack of competition between subject imports and the domestic like product. China attempts to rebut the U.S. arguments

concerning the lack of competition between subject imports and the domestic like product by pointing to the fact that subject imports undersold the domestic like product in one year of the period of investigation, in 2007. In fact, China's argument only serves to underscore the competitive disconnect between subject imports and the domestic product. This is because the underselling in 2007 had absolutely no effect on domestic prices, which rose in both 2007 (by 11 percent) and 2008 (by 17 percent).

63. Another defect in MOFCOM's causation analysis is that MOFCOM failed to take into account the sharp drop in demand in the Chinese market in interim 2009. China points to portions of the final determination in which MOFCOM dismissed declining demand as a cause of injury because the domestic industry "still kept increasing production and sales." It appears from the evidence on the administrative record that the domestic industry found itself in the unfortunate position of ramping up production just as demand fell sharply, and that it had to decrease its prices in interim 2009 in order to move its excess production. These actions are not properly attributable to subject imports, but rather to ill-considered decisions made by the domestic industry. It appears that MOFCOM did indeed attribute the injury from declining demand to the subject imports, contrary to the prohibition on doing so in Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement.

64. MOFCOM also failed adequately to address other factors that likely accounted for the challenges experienced by the Chinese domestic industry in interim 2009, such as the increase in the sales tax in China on larger engine vehicles, and the sharp increases in wages and employment, coupled with the decline in productivity, in the Chinese domestic industry in interim 2009.

65. In short, MOFCOM did not fulfil its obligations under the Agreements to establish a causal link between the imports under investigation and the injury sustained by the domestic industry, and its causation determination was not based on positive evidence and did not involve an objective examination. Consequently, China acted inconsistently with Articles 3.1 and 3.5 of the AD Agreement and Articles 15.1 and 15.5 of the SCM Agreement.

ANNEX B-3

CLOSING STATEMENT OF THE UNITED STATES AT THE FIRST PANEL MEETING

Mr. Chairman, Members of the Panel.

1. The United States would like to begin by thanking the Panel and the Secretariat staff for your efforts in the preparation for and conduct of this hearing. We hope that the discussion held here yesterday and today has been of use to the Panel as you grapple with the issues in this dispute.

2. As we noted in our opening statement, this is the third dispute that the United States has brought concerning China's application of trade remedy measures, and each of these disputes addresses similar problems under the same substantive provisions of the covered agreements. Indeed, a review of the panel report in *China – GOES* shows that China is making some of the same exact arguments here that it made in that dispute. For example, at paragraph 7.378 of that report, the panel writes: "China's position is that exporters or producers that did not register for the investigation were 'non cooperating' and therefore the application of facts available . . . was warranted." The *China – GOES* panel rejected that argument and many of China's other arguments. We believe the Panel here should find that panel's reasoning persuasive, and should likewise reject China's arguments in this dispute.

3. At times, listening to China's interventions during this meeting, it appeared that China was arguing that because MOFCOM followed its own procedures and exercised its seemingly boundless discretion, everything MOFCOM did in the autos investigations was consistent with China's WTO obligations. However, the fact that MOFCOM took certain steps and followed its own procedures is irrelevant to the issue of the WTO-consistency of its actions.

4. As we have shown, and as the third parties all seem to agree, the AD and SCM Agreements impose detailed procedural obligations and require a rigorous examination by investigating authorities so that the due process rights of interested parties are assured and so that when trade remedy measures are imposed, they are founded on positive evidence and an objective examination. The test is whether MOFCOM met the specific standards in the agreements, and in the autos investigations, MOFCOM's efforts fell far short.

5. The United States recognizes that the Panel is only at the beginning of its work, and we hope that our first written submission and our presentation over these past two days have been helpful for the Panel. We look forward to receiving the Panel's written questions and we will endeavor to provide responses that bring further clarity and understanding to the issues in this dispute.

6. The United States would like to conclude by again thanking the Panel and Secretariat for your time and attention to this matter.

ANNEX B-4

EXECUTIVE SUMMARY OF THE SECOND WRITTEN SUBMISSION OF THE UNITED STATES

I. INTRODUCTION

1. The U.S. first written submission demonstrated that China's investigating authority, the Ministry of Commerce for the People's Republic of China ("MOFCOM"), acted inconsistently with China's obligations under 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") when it investigated and imposed antidumping and countervailing duty measures on certain automobiles from the United States.

2. China responds with distraction, avoidance, and unsubstantiated assertion. China appears to argue that because MOFCOM followed its own procedures and exercised its seemingly boundless discretion, everything MOFCOM did in the investigations of certain automobiles was consistent with China's WTO obligations. However, the fact that MOFCOM took certain steps and followed its own procedures is irrelevant to the issue of the WTO-consistency of its actions. MOFCOM failed to meet many of the specific procedural and substantive requirements of the AD and SCM Agreements, and MOFCOM's conclusions fail to meet the standard, as described by a recent panel, of being "such reasonable conclusions as could be reached by an unbiased and objective investigating authority in light of the facts and arguments before it and the explanations given."

II. PROCEDURAL FLAWS IN MOFCOM'S INVESTIGATIONS OF CERTAIN AUTOMOBILES FROM THE UNITED STATES

A. China Breached Article 12.4.1 of the SCM Agreement and Article 6.5.1 of the AD Agreement Through MOFCOM's Failure to Require Non-Confidential Summaries

3. As the United States has explained, 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 respondents never objected to the purported non-confidential summaries, thus relieving China of its obligation to require adequate non-confidential summaries; and that general statements in the petition addressing topics related to the confidential information are, in fact, adequate. 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.

4. Relying on an improper interpretation of the SCM Agreement and AD Agreement, China argues that the purported non-confidential summaries are in fact contained in the petition. But a party submitting confidential information is required to provide a non-confidential summary of that information. If that party fails to submit the information, it is not sufficient to have a Member subsequently point to previously unspecified information elsewhere on the record that is not a summary of the specific confidential information at issue and claim that it serves as that non-confidential summary. Moreover, the purported non-confidential summaries in the petition are not, in fact, summaries. Instead, the petition only provides simple redactions, general statements that do not shed light on the redacted information's contents, unlabeled trend lines that provide no context that would allow respondents to provide meaningful comments, and year-over-year percentage changes that could have been adequately summarized without implicating confidentiality concerns. MOFCOM failed to require summaries of this information in a manner permitting a reasonable understanding of the substance of the data and information treated as confidential. Therefore, China breached Article 12.4.1 of the SCM Agreement and Article 6.5.1 of the AD Agreement.

B. China Breached Article 6.9 of the AD Agreement through MOFCOM's Failure to Disclose the Calculations and Data Used to Determine the Existence of Dumping and to Calculate Dumping Margins

5. As the United States has demonstrated, MOFCOM acted inconsistently with Article 6.9 of the AD Agreement by failing to disclose to interested parties the "essential facts" forming the basis of MOFCOM's decision to apply anti-dumping duties. This included a failure by MOFCOM to make available the data and calculations used to determine the existence and margins of dumping. China denies that MOFCOM failed to provide the actual data and calculations that formed the basis of its dumping determinations.

6. The United States has shown that the calculations relied on by an investigating authority to determine the normal value and export price, as well as the data underlying those calculations (such as various production costs and sales data), constitute "essential facts" forming the basis of the investigating authority's imposition of final measures within the meaning of Article 6.9. The calculations and data are "essential facts" because they are the "indispensable and necessary" facts considered by the investigating authority in determining whether definitive measures are warranted, *i.e.*: whether dumping has occurred and, if so, the magnitude of such dumping. In other words, without the calculations and data, no affirmative determination could be made and no definitive duties could be imposed. And, without disclosure of the actual calculations and data used, the interested parties cannot check the investigating authority's math for errors or whether the authority did what it purported to do.

7. None of the documents on the record support China's contention that it disclosed the margin calculations and underlying data. In response, China asserts that MOFCOM complied with Article 6.9 because it disclosed the essential facts. China cites the final determination, which only states that China disclosed the essential facts. China also asserts that it sent disclosure documents to the U.S. companies; however, China failed to submit these documents as exhibits in this dispute. China's statements are insufficient to establish as a fact that it did disclose the essential facts to interested parties. Rather, China, asserting as a fact that it did disclose essential facts regarding margin data and calculations to the U.S. companies, must offer evidence proving the fact that it has asserted. China does not, because it cannot, present any evidence showing that it disclosed the actual essential facts – the data and calculations – underlying the dumping margin determination.

C. MOFCOM's Determinations of the "All Others" Rates are Inconsistent with Articles 12.7 of the SCM Agreement, and Article 6.8 and Annex II of the AD Agreement

8. The United States has demonstrated that MOFCOM applied facts available to calculate, based on adverse facts available, an "all others" dumping margin and subsidy rate for unknown producers or exporters, which were not notified of the investigations, of the information that would be required of them in those investigations, or of the fact that failure to participate and provide certain information in those investigations would result in a determination based on facts available. By applying facts available with an adverse inference to these unknown producers or exporters, including those that did not export subject product during the investigation period, MOFCOM acted inconsistent with China's obligations under Article 6.8 and Annex II of the AD Agreement and Article 12.7 of the SCM Agreement.

9. In response, China argues that MOFCOM attempted to notify all producers or exporters by (1) posting a public notice on MOFCOM's website, (2) placing a copy of the initiation notices in a reading room in Beijing, (3) sending questionnaires to registered companies, and (4) requesting the U.S. Embassy to notify any other producers or exporters.

10. The fact that MOFCOM made certain notification attempts, however, is irrelevant to the WTO-consistency of China's applying adverse facts available to companies subject to "all others" rates in this dispute. As a matter of logic, the unknown (and even non-existent) "other" U.S. producers or exporters were not notified of the information required, and thus cannot be said to have (1) refused access to the necessary information, or (2) otherwise failed to provide access to the necessary information within a reasonable period as required under Articles 12.7 of the SCM Agreement and 6.8 of the AD Agreement.

11. Nor can an exporter that does not exist be said to have (3) significantly impeded an investigation. In response to the U.S. claim that no other exporters existed at the time of the investigation, China asserts that it "does not know if the other U.S. exporters and producers to which the all others rates apply are non-existent." This statement is not credible, and is belied by China's first written submission, in which China exhibits knowledge of the U.S. industry in describing it as "a mature industry with a relatively settled and small number of U.S. exporters and producers." China, thus, fails to rebut the U.S. argument that no other exporters existed at the time of the investigation. China has no basis to apply adverse facts available to nonexistent entities for significantly impeding an investigation.

12. Nor is it possible for unknown producers or exporters, or those that did not ship subject product during the investigation period, to significantly impede an investigation that they did not know about or could not participate in. These parties cannot be said to have refused or failed to provide necessary information to the investigating authority. As the Appellate Body has noted, an exporter must be given the opportunity to provide information required by an investigating authority before the latter resorts to facts available. An exporter that is unknown to the investigating authority is not notified of the information required, and thus is denied an opportunity to provide the required information.

13. China's own arguments demonstrate that its use of adverse facts available to calculate the "all others" AD rate is particularly unjustifiable. For example, MOFCOM applied the "all others" AD rate to Ford "since Ford did not have any exports during the POI, there was no export price." So, despite never indicating how Ford refused access to or failed to provide necessary information, or significantly impeded the investigation, MOFCOM applied the "all others" AD rate to Ford. Indeed, MOFCOM denied Ford's request for establishing an individual dumping margin in recognition of its cooperation in the investigation, since Ford did not have any exports during the investigation period. Thus, MOFCOM applied the adverse all others rate to Ford, even though MOFCOM acknowledged that it could not have participated in the antidumping investigation.

14. The U.S. first written submission noted that the panel in *China – GOES*, in regard to factual circumstances nearly identical to this dispute, found that China's attempts to notify the "all other" exporters of the necessary information required of them did not satisfy the precondition for resorting to facts available found in paragraph 1 of Annex II of the AD Agreement and, as a result, China acted inconsistently with Article 6.8 of the AD Agreement. The panel reached a similar conclusion with regard to Article 12.7 of the SCM Agreement. In dismissing China's arguments, the panel also rejected the same "policy" arguments that China is now offering in this dispute as insufficient for satisfying the preconditions for resorting to facts available.

15. Given the soundness of the *China – GOES* panel's reasoning, and the similar underlying facts and legal arguments in *China – GOES* and this dispute, the United States considers the panel's reasoning in *China – GOES* should be considered highly persuasive here.

16. In addition to not being relevant for the application of adverse facts available, MOFCOM's notification attempts are insufficient to justify its use of facts available to calculate the "all others" rates for four reasons. First, posting a public notice on MOFCOM's website is unlikely to provide sufficient notice to an exporter or producer unless that exporter or producer was actively reviewing MOFCOM's website. Also, China's description of posting its notice on a website as "wide dissemination" is inaccurate. China is using the phrase "wide dissemination" to characterize its mere placement of the notice on MOFCOM's website, as opposed to some other action, such as emailing the notice to potential exporters or producers.

17. Second, placing the initiation notices in a reading room is arguably even less likely to ensure an exporter or producer is notified of the investigations than placing it on MOFCOM's website. Both actions presuppose that the exporter or producer will be aware that there is a reason to check either the website or reading room with some frequency. With the reading room, it is unreasonable to expect an exporter or producer to be provided notice of an investigation by virtue of placing the document in a room, possibly thousands of miles away, with no additional targeted communication indicating that such an action by the investigating authority has taken place.

18. Third, China suggests that requesting the Embassy to contact any other exporters or producers also served to notify "all other" exporters or producers. But the obligation to notify

exporters or producers is on the investigating authority – not the Member where those exporters or producers might be located.

19. The United States considers that Article 6.8 of the AD Agreement and Article 12.7 of the SCM Agreement provide for similar conditions on the use of facts available and, therefore, Annex II may provide relevant context for the purpose of interpreting Article 12.7 of the SCM Agreement. The Appellate Body has previously rejected arguments similar to those China presents here, finding that no obligation exists for an Embassy to make its exporters or producers aware of the investigation.

20. Fourth, China argues that "MOFCOM's above-described notification efforts must have been effective, because additional U.S. producers and exporters beyond those identified in the petition registered for participation in the investigation and received questionnaires." China's assertion is beside the point. China's "all other" rates applies to companies that did not register or were otherwise unknown to MOFCOM, such as exporters and producers that began shipping after MOFCOM initiated or even concluded the investigation. These exporters or producers could not have failed to provide information or impeded MOFCOM's investigations. Nonetheless, under MOFCOM's calculations, they would still be subject to an all others rate based on adverse facts available. Such a calculation is inconsistent with the requirements of Article 6.8 of the AD Agreement and Article 12.7 of the SCM Agreement.

D. MOFCOM Acted Inconsistently with Article 6.9 of the AD Agreement and Article 12.8 of the SCM Agreement by Failing to Inform Interested Parties of the Essential Facts Under Consideration in Calculating the "All Others" Dumping Margin and Subsidy Rate

21. The United States demonstrated that China breached Article 6.9 of the AD Agreement and Article 12.8 of the SCM Agreement because MOFCOM failed to inform the interested parties of the "essential facts under consideration" that formed the basis for its calculation of the "all others" dumping margin and subsidy rate. Regarding the "all others" dumping and subsidy rates, MOFCOM failed to disclose the "essential facts under consideration" that formed the basis for its use of facts available in calculating the "all others" rates. MOFCOM also failed to disclose the "essential facts under consideration" that formed the basis for applying a 21.5 percent "all others" dumping rate, and a 12.9 percent all others" subsidy rate.

22. In response, China claims that "all pertinent facts contributing to MOFCOM's decision to apply facts available are laid out" by MOFCOM. China then rehashes the same arguments it uses to justify its use of facts available, and argues that these points comprise the essential facts under consideration in calculating the "all others" dumping margin and subsidy rate.

23. China's arguments miss the point. The purported facts offered by China are not facts – only conclusions unsupported by the record. Also, China does not provide any facts relating to how unknown U.S. companies, in fact, refused access to or failed to provide necessary information, or significantly impeded the investigation. Reviewing a similar set of facts, the panel in *China – GOES* found that China acted inconsistently with the covered agreements.

24. China's assertions that it disclosed, or that it was under no obligation to disclose, the essential facts relating to the calculation of the "all others" dumping margin are not persuasive. In the case of the "all others" antidumping rate, China simply states that it applied the margin alleged in the petition. That is not enough. Once an authority has determined that use of facts available is necessary in an investigation, further specific conditions are imposed on an authority's use of secondary sources (such as information supplied in an application or petition for initiation of an investigation).

25. Where a petition rate is used as facts available, an investigating authority, where practicable, should use special circumspection, checking the petition rate with other facts in order to ensure that it is appropriate to apply as facts available to the respondents in a given investigation. China did not disclose anywhere on the record the special circumspection applied by MOFCOM in its consideration of the petition rate in this dispute. China did not indicate any effort that it undertook to check against independent sources the accuracy of the information supplied by the petitioner in the reaching the petition rate. In its first written submission, China contends that because it based the "all others" dumping rate on the dumping margin alleged in the petition, the

calculation of the "all others" rate is somehow immune from disclosure and scrutiny. Exactly the opposite is true. A factual description of the steps MOFCOM took to check the accuracy of the petition rate is essential to MOFCOM's use of the petition rate.

26. Also, the antidumping rate, as described in the petition, is incomplete and does not provide a full understanding of how that rate was determined. The record does not reflect any efforts by MOFCOM to identify the missing information and verify the validity or reasonableness of the petition rate.

27. As in the AD proceeding, MOFCOM did not identify the essential facts that formed the basis for its imposition of a 12.9 percent all others subsidy rate. MOFCOM's disclosure of the all others subsidy rate consisted of a single sentence: "For all other U.S. companies, in accordance with Article 21 of the CVD regulations, the Investigating Authority decided, by adopting facts available, to apply the ad valorem subsidy rate of General Motors, LLC to these companies." Noticeably absent from MOFCOM's disclosure are the facts that serve as the basis for MOFCOM's decision regarding the application of the facts available, and in particular, that resorting to the use of General Motors' rate, the highest of the individual company rates, was appropriate.

E. MOFCOM Acted Inconsistently with Articles 12.2 and 12.2.2 of the AD Agreement, and Articles 22.3 and 22.5 of the SCM Agreement, by Failing to Explain its Determinations

28. The United States also demonstrated that China breached Articles 12.2 and 12.2.2 by failing to explain the "all others" dumping margin in the AD determinations, as well as Articles 22.3 and 22.5 of the SCM Agreement by failing to explain the "all others" subsidy rate in the CVD determinations. China has failed to rebut the United States arguments because it cannot cite to any explanation contained in the record that would be sufficient to satisfy the obligations contained in those articles.

29. Regarding the "all others" dumping margin, China cites to a passage of the final determination, which mirrors the statements contained in MOFCOM's Final AD Disclosure. In other words, MOFCOM did not provide any additional explanation in its final determination. Nowhere does China explain how a non-exporting producer refused to provide necessary information in the investigation. The United States has already explained why this statement fails to provide in sufficient detail the findings and conclusions that led to the application of facts available.

30. For the "all others" subsidy rate, China cites the following statement: "Regarding other companies, in accordance with Article 21 of *Countervailing Regulation*, the investigating authority decided to adopt facts available and applied the *ad valorem* subsidy rate of General Motors to them." This single, conclusory sentence echoes the abbreviated statement contained in MOFCOM's final disclosure. As above, MOFCOM did not provide any additional explanation in its final determination, and nowhere does China explain how a non-exporting producer refused to provide necessary information in the investigation. The United States has explained why this statement fails to provide in sufficient detail the findings and conclusions that led to the application of facts available, thus falling short of the requirements of Articles 22.3 and 22.5 of the SCM Agreement.

31. In *China – GOES*, the panel faulted China for failing to explain its use of facts available to calculate the "all others" rates. In particular, the panel stated that a failure to explain how unknown or non-existent exporters failed to cooperate is inconsistent with the covered agreements. These findings apply equally to the U.S. claims under Article 12 of the AD Agreement and Article 22 of the SCM Agreement. And, because of the similarity of the facts with the instant dispute, these findings are persuasive. Because MOFCOM failed to explain its use of adverse facts available in calculating the "all others" rates, China breached Articles 12.2 and 12.2.2 of the AD Agreement, and Articles 22.3 and 22.5 of the SCM Agreement.

III. MOFCOM'S FLAWED INJURY DETERMINATION

A. MOFCOM's Narrow Definition of the Domestic Industry Is Inconsistent with Articles 3.1 and 4.1 of the AD Agreement and Articles 15.1 and 16.1 of the SCM Agreement

32. MOFCOM's domestic industry definition in the antidumping and countervailing duty investigations of certain automobiles from the United States suffered from two principal flaws. First, it resulted in a definition of the domestic industry that was distorted because it included only producers that supported the petition. Second, it resulted in a definition of the domestic industry that did not include a major proportion of the total production of certain automobiles.

33. China responds to the U.S. claim that MOFCOM's definition of the domestic industry was distorted by arguing that the domestic industry as MOFCOM defined it included some joint ventures between international and Chinese-owned companies ("JVs") and MOFCOM did not "exclude," by which China means MOFCOM did not receive and reject any data from any domestic producer. China's responses are beside the point. The basis of the U.S. claim is *not* that MOFCOM excluded all JVs from its definition of the domestic industry or that it rejected data from any particular domestic producer that sought to provide it. The problem is that MOFCOM utilized a process that was likely to, and in fact did result in, a material risk of distortion in defining the domestic industry.

34. MOFCOM's decision to define the domestic industry as including only producers who voluntarily registered for participation in the injury investigations was similar to the approach in *EC – Fasteners (China)*, with which the Appellate Body found fault. MOFCOM created the very same kind of self-selection process, which introduced a material risk of distortion. There is no substantive difference between the willingness of producers to be included in a sample in *EC – Fasteners (China)* and the willingness of producers to respond to MOFCOM's notice and register to participate in the injury investigation here.

35. China's attempt to distinguish the facts of *EC – Fasteners (China)* fails. There was exactly the same kind of self-selection process among domestic producers here. CAAM, the petitioner, was the only domestic entity that responded to MOFCOM's notice, it was the only entity that registered to participate in the injury investigation, and it was the only entity that provided domestic industry data to MOFCOM. Beyond this, and more importantly still, China has belatedly explained in response to a question from the Panel that CAAM, in fact, self-selected from among its own members, providing to MOFCOM domestic industry data from *only eight of its member companies.*

36. It is highly unlikely that data from just eight companies, handpicked from among the domestic producers that comprise the membership of the petitioner, CAAM, could provide MOFCOM with "ample data" sufficient for an "accurate injury analysis" of the domestic industry. Given that MOFCOM had data from only eight companies that were handpicked by the petitioner, CAAM, and which represented only about 40 percent or less of domestic production for most of the period of investigation, MOFCOM was obligated to seek additional data on the condition of the domestic industry, or, at the very least, explain why it considered that more data was not necessary in light of the particular situation of the auto industry in China. MOFCOM failed to do so.

37. China suggests that "[a]nother critical distinction" between this dispute and *EC – Fasteners (China)* is that, in *EC – Fasteners (China)*, "the Appellate Body confronted the investigating authority's application of a 25% minimum benchmark, derived from the AD Agreement's standing provisions, for determining the existence of a 'major proportion.'" China is conflating two distinct lines of reasoning. The distinction that China attempts to draw between the situation in *EC – Fasteners (China)* and the situation in the underlying investigations is not relevant.

38. In addition to the skewing of the data inherent in MOFCOM's limitation of the domestic industry definition to eight of CAAM's member companies that supported the petition, the collective output of those eight companies represented a relatively small percentage of total domestic production of the like product. As China explained in its first written submission, "the percentages of total domestic production represented by MOFCOM's definition of the domestic industry for the period of investigation" were "54% in 2006, 34% in 2007, 34% in 2008, and 42% in Interim 2009."

39. Assuming these numbers to be correct, and in light of statements by the Appellate Body, relevant questions for the Panel to consider here include: Did MOFCOM have before it "wide-ranging information concerning the relevant economic factors"? Was MOFCOM's definition of the domestic industry "capable of providing ample data that ensure an accurate injury analysis"? Did the domestic producers MOFCOM examined represent "a relatively high proportion of the total domestic production"? The answer to all of these questions is no.

40. MOFCOM's exclusion from the definition of the domestic industry – or its failure to include in the definition of the domestic industry – enterprises accounting for more than 60 percent of domestic production for most of the period of investigation resulted in a definition of the domestic industry that did not include a "major proportion of the total production" within the meaning of Article 4.1 of the AD Agreement and Article 16.1 of the SCM Agreement. Accordingly, MOFCOM's injury determination, which was based on its definition of the domestic industry, was neither objective nor based on "positive evidence," as required by Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement.

B. MOFCOM's Price Effects Analysis Is Inconsistent with Articles 3.1 and 3.2 of the AD Agreement and Articles 15.1 and 15.2 of the SCM Agreement

41. In considering the effect of subject imports on the price of the domestic like product, MOFCOM concluded that, due to parallel pricing and the rising market share of subject imports, especially at the end of the period of investigation, subject imports depressed prices for the domestic like product in interim 2009. However, there was no parallel pricing, and any increase in market share of the subject products was not at the expense of the domestic like product, which also increased its market share at the same time. So, there simply is no support for MOFCOM's price depression finding.

42. China explains that MOFCOM found parallel pricing because the price movements of subject imports and the domestic like product were "consistent basically" and both increased from 2006 to 2008 "in general." China describes the price increase from 2006 to 2008 as "remarkably similar," noting that the "prices for subject imports increased approximately 88,000 RMB while prices for domestic like product increased approximately 84,000 RMB over that same time period." Finally, China suggests that the price declines from interim 2008 to interim 2009 were "comparable." The evidence on the administrative record does not support China's arguments. There was no price parallelism.

43. Ultimately, because MOFCOM requested data only for full-year 2006, 2007, and 2008, and the full interim periods for 2008 and 2009, there are only three data points on the record that one can look at to assess whether price parallelism existed. Specifically, there is the change from 2006 to 2007, the change from 2007 to 2008, and the change from interim 2008 to interim 2009. Even with just these three data points, though, the inescapable conclusion is that no price parallelism existed between subject imports and the domestic like product, both because prices did not consistently move in the same direction, and because when they did move together, the magnitude of the changes was significantly different. In light of the data, MOFCOM's conclusion that price parallelism existed was not, in the words of a recent panel, such a "reasonable conclusion[] as could be reached by an unbiased and objective investigating authority in light of the facts and arguments before it and the explanations given."

44. Furthermore, the situation here is identical to that described by the Appellate Body in *China – GOES*. MOFCOM and China have done nothing to elucidate "what explanatory force parallel price trends had for the depression . . . of domestic prices." Accordingly, because no price parallelism existed and, even if it had, MOFCOM did nothing to explain the relevance of parallel pricing in this case, MOFCOM's reliance on parallel pricing was unfounded and provided no support whatsoever for its price depression finding.

45. MOFCOM's reliance on the increasing market share of subject imports during interim 2009 likewise provided no support for its price depression finding. China argues that MOFCOM's finding of price depression in interim 2009 was explained by the increase in the volume or market share of subject imports, both throughout the period of investigation and in interim 2009. China's argument is unpersuasive.

46. The increases in the volume of subject imports in the 2006-2008 period were commensurate with rising consumption of the subject merchandise in the Chinese market. While the domestic industry as defined by MOFCOM lost market share in the 2006-2008 period, this was almost entirely because of gains made by Chinese producers not included in MOFCOM's definition of the domestic industry and third-country imports, not gains by subject imports. The domestic industry may have been lowering its prices in interim 2009 to recapture lost market share, as China suggests, but it was, for the most part, not market share that the domestic industry had lost to subject imports. Even if no party had raised this issue during the investigation, this would not excuse MOFCOM's failure to consider the volume and market share data and ensure that its determination was based on positive evidence and involved an objective examination.

47. An additional problem with MOFCOM's price effects analysis was its use of full-year or full-period average unit values ("AUVs"). China defends MOFCOM's use of AUVs in its price effects analysis by arguing that the relevant WTO agreement provisions do not require any specific methodology when examining price trends. China also argues that because MOFCOM was examining price trends over time and was not comparing absolute prices, adjustments to price to ensure price comparability were not necessary.

48. As the Appellate Body recognized in *China – GOES*, however, while Articles 3.2 and 15.2 do not specify a particular methodology for evaluating price effects, a failure to ensure price comparability would not be consistent with the requirements under Articles 3.1 and 15.1 that a determination of injury be based on "positive evidence" and involve an "objective examination" of the effect of subject imports on the prices of domestic like products. Contrary to China's view, the Appellate Body's emphasis on the importance of price comparability was not limited to an examination of price undercutting.

49. China argues that MOFCOM established that there was a sufficient competitive overlap between subject imports and the domestic like product to warrant the use of AUVs in the price effects analysis. The United States submits that MOFCOM's analysis (much of which occurred in the context of MOFCOM's discussion of the scope of the investigation and the definition of the domestic like product, and not in the context of a discussion of price effects) was at such a level of generality that it failed to establish the degree of competitive overlap that would make an analysis of price effects meaningful.

50. MOFCOM's flawed definition of the domestic industry compromised its analysis of price effects because pricing data from the limited part of the domestic industry from which MOFCOM obtained information cannot provide an understanding of the explanatory force of subject imports on the price of the domestic like product. China characterizes this argument as a "consequential claim" and argues that it must fail because each WTO provision must be examined on its own to determine whether a Member has acted inconsistently with the requirements of that provision.

51. China is mistaken. The United States does not merely rely on MOFCOM's flawed domestic industry definition to establish its claim that China has breached Articles 3.2 and 15.2. The United States has given a number of reasons in support of its claims, one of which is that the price effects analysis was premised on a flawed domestic industry definition. Taken together, the problems the United States has identified provide ample support for the conclusion that China has breached Articles 3.2 and 15.2.

52. In sum, MOFCOM's finding of price depression during interim 2009 is contradicted by the evidence on the record, and its consideration of price effects is not based on "positive evidence" and it did not "involve an objective assessment." Accordingly, MOFCOM acted inconsistently with Articles 3.1 and 3.2 of the AD Agreement, and Articles 15.1 and 15.2 of the SCM Agreement, in conducting its price effects analysis.

C. MOFCOM's Causation Analysis Is Inconsistent with Articles 3.1 and 3.5 of the AD Agreement and Articles 15.1 and 15.5 of the SCM Agreement

53. MOFCOM's causation determination in the antidumping and countervailing duty investigations of certain automobiles from the United States is inconsistent with Articles 3.1 and 3.5 of the AD Agreement and Articles 15.1 and 15.5 of the SCM Agreement. China responds to the U.S. claims by arguing that the focus should not be on interim 2009, though that is the only time in the period of investigation during which MOFCOM found that injury occurred, and that the

United States has "selectively cit[ed] isolated data and ignor[ed] the complete picture," which is simply untrue. China's arguments are unpersuasive.

54. The first sentence of Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement provides that "[i]t must be demonstrated that the [dumped or subsidized] imports are, through the effects of [dumping or subsidization] . . . causing injury" to the domestic industry. Pursuant to Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement, this demonstration must be based on positive evidence and involve an objective examination.

55. The causal chain identified by MOFCOM has subject imports, with increased volume and decreased price, causing the price of the domestic like product to decrease, which then caused various economic injuries to the domestic industry, including decreased profits and rate of return on investment. In fact, as we have shown, MOFCOM has failed to establish the requisite causal connection between subject imports and injury to the domestic industry.

56. All of the arguments we have made relating to MOFCOM's analysis of price effects apply with equal force to our claims relating to MOFCOM's causation determination. MOFCOM's finding that subject imports depressed domestic prices is without any foundation and cannot serve as a basis for MOFCOM's conclusion that subject imports caused injury to the domestic industry.

57. In its causation analysis, MOFCOM reasoned that, because domestic prices declined, so did "the increase margin of the sales revenue, pre-tax profits and the rate on return of investment of the domestic industry." The economic indicators showing that the domestic industry was suffering injury are all related to the industry's profits declining. Although declining profits can be correlated to declining prices, it seems much more likely that the injury experienced by the domestic industry was caused by the continuous decline in in the domestic industry's productivity and the near doubling of wages from interim 2008 to interim 2009, but MOFCOM simply ignored the role that the sharp drop in the domestic industry's productivity played in its financial performance.

58. The second sentence of Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement provides that "[t]he demonstration of a causal relationship between the dumped imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities." MOFCOM failed to examine all relevant evidence before it. Specifically, MOFCOM did not address evidence that subject imports took market share from non-subject imports and not from the domestic like product, and that the sharp decline in the industry's productivity and a near-doubling of wages from interim 2008 to interim 2009 hurt the domestic industry's profitability. While MOFCOM may have reported this evidence or noted the arguments of the parties in its final determination, MOFCOM failed to grapple with this evidence with any seriousness, and cannot be said to have based its causation determination on an "examination" of it within the meaning of Articles 3.5 and 15.5.

59. The third sentence of Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement provides that "[t]he authorities shall also examine any known factors other than the [subject] imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the [subject] imports." We have demonstrated that other known factors likely were the cause of the economic difficulties experience by the domestic industry. Specifically, declining productivity coupled with increasing wages and a decision by China to increase the sales tax on larger engine vehicles while reducing the sales tax on smaller engine vehicles were known factors. Each of these factors was reported in MOFCOM's final determination and they likely were causes of the injury to the domestic industry. Yet, MOFCOM failed to examine them in connection with its causation analysis and failed to meet its obligation not to attribute injuries caused by those other factors to subject imports.

IV. CONSEQUENTIAL CLAIMS

60. The U.S. first written submission explains that, in view of the claims we have set forth, the United States considers that China has also acted inconsistently with Article 1 of the AD Agreement and Article 10 of the SCM Agreement, which only permit antidumping or countervailing duty measures to be applied in accordance with the AD Agreement and the SCM Agreement. China argues that the United States has failed to make out a *prima facie* case for these consequential claims. China is incorrect.

61. Since it is impermissible to impose an antidumping measure except "in accordance with" the AD Agreement, if the Panel finds that China has breached any provision of the AD Agreement cited in the U.S. claims, then the Panel should also find that, as a consequence of imposing an antidumping measure not "in accordance with" the AD Agreement, China has also breached Article 1 of the AD Agreement. The same is true if the Panel finds that China has breached any provision of the SCM Agreement cited in the U.S. claims. The Appellate Body has explained that the complaining Member is "not required to advance further arguments to establish a consequential violation of Articles 10 and 32.1" of the SCM Agreement.

V. CONCLUSION

62. For the reasons set forth in the U.S. second written submission, along with those set forth in the other U.S. written filings and oral statements, the United States respectfully requests that the Panel find that China's measures are inconsistent with China's obligations under the AD Agreement and the SCM 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 AD Agreement and the SCM Agreement.

ANNEX B-5

EXECUTIVE SUMMARY OF THE OPENING STATEMENT OF THE UNITED STATES AT THE SECOND PANEL MEETING

Mr. Chairperson, members of the Panel:

1. The United States appreciates this opportunity to appear again before the Panel to provide further views on the reasons why China's anti-dumping ("AD") and countervailing duty ("CVD") measures on U.S. exports of certain automobiles are inconsistent with WTO rules. Our previous submissions and statements have addressed most of the arguments that China has made in response to our claims, and we continue to rely on the arguments we have presented before. In this statement, we will concentrate on those points that China made for the first time – or chose to re-emphasize – in its second written submission.

I. CHINA CANNOT DEFEND MOFCOM'S FLAWED PROCEDURES

2. We will first turn to the U.S. claims with respect to MOFCOM's failure to follow procedural obligations under the AD and SCM Agreements. We have demonstrated that MOFCOM's actions are inconsistent with Articles 6.5.1, 6.8, 6.9, 12.2, 12.2.2, and paragraph 1 of Annex II of the AD Agreement; and Articles 12.4.1, 12.7, 12.8, 22.3, and 22.5 of the SCM Agreement.

3. In its second written submission, China appears to repeat many of the same arguments it made in prior submissions. Its oral statement today also appears to repeat many of the same arguments it made in prior submissions. We will use our time today to respond to some of the points China emphasizes in its second written submission.

A. China Cannot Defend MOFCOM's Failure to Require Non-Confidential Summaries

4. First, I will discuss China's failure to require adequate non-confidential summaries of confidential information. This failure impaired the ability of the United States and other interested parties to defend their interests throughout the course of the investigation.

5. The United States demonstrated in our submissions that China failed to meet the requirements of Article 12.4.1 of the SCM Agreement and Article 6.5.1 of the AD Agreement. As we have explained, MOFCOM did not require adequate non-confidential summaries of confidential information contained in the petition. And, there is no explanation on the record from the domestic interested parties as to why the information was not susceptible to summarization.

6. In its second written submission and today, China disregards the obligations contained in the covered agreements. China also fails to justify the inadequate non-confidential summaries contained in the petition.

7. The United States has detailed various instances where China's interpretation of the covered agreements is flawed. For instance, China continues to insist that a party needs to dispute the non-confidential summaries provided before China would review the non-confidential summaries for adequacy.

8. As we have explained, however, China has no legal basis for this position. To the contrary, whether an interested party objects to summaries during the underlying proceeding is irrelevant to the question of whether the investigating authority has required summaries that are adequate. As the Panel found in *Mexico – Anti-Dumping Measures on 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." The *China – GOES* panel reached the same conclusion. The United States further refers the Panel to the reasoning used in these reports.

9. China also asserts that whether it has complied with the obligations contained in the covered agreements must be assessed in light of factors as set out in other Articles. As we have explained, this line of reasoning is incorrect. The text of the agreements does not support China's argument.

The obligation to provide adequate non-confidential summaries is an independent obligation not limited by other provisions of the covered agreements. Another recent panel – also reviewing a Chinese petition and China's obligation to require non-confidential summaries – came to the same conclusion.

10. The United States has also detailed the flaws in the purported non-confidential summaries offered by China. Not only is China wrong on the law; it is also wrong on the facts. The United States will not at this time review each individual category of confidential information contained in the petition to demonstrate the shortcomings in China's approach. Rather, at this time the United States will respond to a general assertion that China has made. China contends that the unlabeled trend lines contained in the petition are accompanied with percent changes, and that taken together, this information suffices for a non-confidential summary. For instance, this argument is reflected in paragraphs 10-12 of its oral statement delivered today.

11. China's argument has no merit. As the United States has explained, the unlabeled trend lines are inadequate because without a sense of scale, it is impossible to obtain a reasonable understanding of the substance of the confidential information. The United States has also noted that the percentage changes are flawed because they do not reveal the significance in the absolute changes. The same recent panel reviewing China's obligation to require non-confidential summaries agreed on both points.

12. Thus, China is asking the Panel to take inadequate trend lines, add them to defective percent changes – and then somehow the two in combination make China's actions consistent with the covered agreements. China's argument simply doesn't add up. The "very exercise of calculating an approximate figure... through a series of operations" suggests that the purported summaries are inadequate.

13. China's approach to summaries would require interested parties to "infer, derive and piece together a possible summary of confidential information," contrary to the requirements of the covered agreements. For these reasons, China breached Article 6.5.1 of the AD Agreement and Article 12.4.1 of the SCM Agreement.

B. China Cannot Defend MOFCOM's Failure to Disclose the Calculations and Data Used to Determine the Existence of Dumping and to Calculate the Dumping Margins

14. The United States will now turn to MOFCOM's failure to disclose the essential facts underlying its dumping margin calculation. In its previous submissions, the United States showed that China breached Article 6.9 of the AD Agreement because MOFCOM failed to disclose the "essential facts" forming the basis of its decision to apply anti-dumping duties, including the data and calculations it performed to determine the existence and margins of dumping.

15. China offers no new arguments. Rather, China continues to assert that the United States has not established a *prima facie* case solely because the United States has not submitted as exhibits the company-specific disclosure documents. It also asserts that it sent disclosure documents to the U.S. companies, and that these documents contain the essential facts. Despite acknowledging that the documents are in its possession, China failed to submit these documents as exhibits in this dispute. As noted, China highlights that these documents contain BCI, but it fails to indicate why the Panel's agreed-upon BCI procedures are insufficient to allow China to submit these documents for panel review.

16. China argues that "the United States has deprived the Panel of any ability to assess the adequacy of the disclosure letters under Article 6.9." Yet, it is China that is depriving the Panel of any ability to assess the adequacy of its disclosure letters because of its steadfast refusal to submit the documents as exhibits.

17. Now should the Panel wish to test the veracity of China's assertion relating to the content of its disclosure letters, it may exercise its authority under Article 13 of the DSU to request that China present the company disclosure letters that China has – up to this point – refused to submit. China acknowledges that the documents are in its possession; and the Panel's BCI procedures ensure that no party would be prejudiced if China submitted the documents. Furthermore, the reason why China possesses these documents, and that the United States does not, follows from the normal course of an anti-dumping proceeding. MOFCOM itself prepared and issued the

disclosures, and provided them directly to the private sector respondents. And, MOFCOM has never provided copies to the United States.

18. China refuses to submit the documents for panel review because MOFCOM failed to make available the dumping calculation, and data underlying those calculations, depriving the interested parties of their ability to defend their interests. At least one private sector respondent noted China's failure to provide the data and calculations underlying the dumping margin in its comments on MOFCOM's final disclosure. This is contained in Exhibit USA-20, which is attached to this statement. Specifically this respondent indicated that "MOFCOM did not provide sufficient information in the final disclosure…MOFCOM failed to explain in detail how the data came from in the final determination without calculation steps, detailed description, formula and program language, nor provided relevant calculation steps in the final disclosure." China's failure to disclose the essential facts is inconsistent with Article 6.9 of the AD Agreement.

C. China Breached its WTO Obligations in Using Facts Available to Determine All Others Rates

19. The United States has also demonstrated that China breached Article 6.8 and Annex II of the AD Agreement and Article 12.7 of the SCM Agreement by applying "facts available" to calculate an adverse dumping margin and subsidy rate for unknown producers or exporters that received no notice. In particular, these parties did not: (1) refuse access to necessary information within a reasonable period; (2) otherwise fail to provide such information within a reasonable period; or (3) significantly impede the investigation. As explained, the unknown (and even non-existent) "other" U.S. producers or exporters could not have been made aware of the information required as a matter of logic, and thus, cannot be said to have failed to cooperate under the covered agreements.

20. In its second written submission and today, China continues to assert that the actions taken by MOFCOM constitute sufficient notice to justify MOFCOM's resort to facts available. The United States has explained why these actions did not provide a reasonable basis for resorting to adverse facts available. It is telling that China does not argue that unknown producers or exporters were made aware of the information required, and thus met the notification requirement for resorting to facts available. And nowhere does China demonstrate with evidence that unknown producers or exporters refused access to or otherwise failed to provide necessary information within a reasonable period or significantly impeded the investigation. For instance, at paragraph 23 of its oral statement today, China states that "it would be futile for an investigating authority to continue to seek information from a party that has decided not to cooperate." But this is an unsubstantiated conclusion. China provides no evidence that unknown parties refused access to information, or significantly impeded the investigation, or otherwise decided not to cooperate.

21. Instead of applying the text of the relevant provisions, China makes a "policy" argument to justify its use of facts available for unknown exporters, stating that it was merely exercising its discretion, and that "it does not matter if the unknown exporters and producers do not exist or have chosen not to make themselves known."

22. China cannot brush off its responsibility to comply with the covered agreements. The United States agrees that investigating authorities may exercise discretion in calculating all others rates for unknown exporters, but as stated by the *China – GOES* panel, "this discretion should not extend to acting inconsistently with the express terms of" the covered agreements.

23. In our submissions, the United States has argued that China inappropriately applied facts available with an adverse inference to unknown producers or exporters. Specifically, China concluded that any company that did not register to participate in the investigation failed to cooperate. Based upon that unsubstantiated conclusion, China applied an adverse dumping margin and subsidy rate to these "other" U.S. companies. This approach is flawed.

24. Moreover, China's attempt to distinguish *China – GOES* from this dispute is unavailing because, contrary to China's suggestions, this dispute is not fundamentally different from *China – GOES.* China asserts that "in *China – GOES*, a key question before the panel was how MOFCOM derived the AD all others rate of 64.8 percent applied in that case." Here, China states, "there is no mystery about MOFCOM's derivation of this rate." China forgets to mention that a key question before the panel in *China – GOES* was whether MOFCOM applied facts available to calculate the all

others rates for unknown exporters in a manner consistent with the covered agreements. The identical question is before this Panel.

25. As explained, the *China – GOES* panel rejected the same arguments that China is now offering in this dispute as insufficient for satisfying the preconditions for resorting to facts available. The panel in *China –GOES* analyzed whether there is an obligation on unknown exporters to come forward after a general public notice of initiation. It also analyzed whether evidence existed of unknown exporters refusing access to or failing to provide information, or impeding the investigation. A recent panel reviewing China's use of facts available to calculate the all others rate for unknown exporters took a different approach, as China has noted, but it nonetheless concluded that China acted inconsistently with the covered agreements. Given the soundness of the *China – GOES* panel's reasoning, and the similar underlying facts and legal arguments in *China – GOES* and this dispute, the United States considers the panel's reasoning in *China – GOES* should be considered highly persuasive here.

26. The United States also demonstrated that China breached Article 6.9 of the AD Agreement and Article 12.8 of the SCM Agreement because MOFCOM failed to inform the interested parties of the essential facts under consideration that formed the basis of its calculation of the "all others" dumping margin and subsidy rate.

27. China argues that it disclosed the essential facts by largely repeating the arguments it makes in conjunction with its facts available argument, and then asserts that it disclosed "the totality of the facts on which MOFCOM based its all others rates decisions, and there are no other pertinent facts that MOFCOM could have disclosed."

28. As explained, China has failed to disclose any facts relating to how unknown or non-exporting U.S. companies, in fact, refused access to or failed to provide necessary information, or significantly impeded the investigation. Instead, China states that "MOFCOM found that all exporters and producers – including any not known to MOFCOM – were notified of its information requirements." China also states that "for any other exporters and producers that did not respond to MOFCOM's registration notices, MOFCOM found that they did not intend to cooperate." Yet, these are unsupported conclusions – they are not facts.

29. China also argues that "concerning MOFCOM's selection of the all others rates, all findings as well as conclusions, as well as supporting relevant information, are readily apparent from the record." As noted, in the case of the "all others" anti-dumping rate, China asserts that it applied the margin alleged in the petition. That is not enough. China did not indicate any facts regarding the steps it undertook to check against independent sources the accuracy of the information supplied by the petitioner in the reaching the petition rate. China simply accepted and then applied petitioner's alleged rate. And, as in the AD proceeding, MOFCOM did not identify the essential facts that formed the basis for its imposition of a 12.9 percent all others subsidy rate.

30. China also fails to rebut the U.S. demonstration that China breached its WTO obligations by failing to explain the all others dumping margin and subsidy rates. Rather, as above, China repeats its flawed attempt to distinguish this dispute from the *China – GOES* dispute. And the "straightforward rationale" that China asserts does nothing to explain how unknown exporters could have possibly (1) refused access to necessary information within a reasonable period, (2) otherwise failed to provide such information within a reasonable period, or (3) significantly impeded the investigation.

II. CHINA CANNOT DEFEND MOFCOM'S FLAWED INJURY DETERMINATION

31. The United States has demonstrated that MOFCOM's injury determination is inconsistent with Articles 3.1, 3.2, 3.5, and 4.1 of the AD Agreement and Articles 15.1, 15.2, 15.5, and 16.1 of the SCM Agreement. China has failed to offer the Panel anything that would explain or excuse the shortcomings of MOFCOM's injury determination.

A. MOFCOM's Narrow Definition of the Domestic Industry Is Inconsistent with Articles 3.1 and 4.1 of the AD Agreement and Articles 15.1 and 16.1 of the SCM Agreement

32. MOFCOM's domestic industry definition suffered from two principal flaws. First, it resulted in a definition of the domestic industry that was distorted because it included only producers that

supported the petition. Second, it resulted in a definition of the domestic industry that did not include a major proportion of the total production of certain automobiles. This has been our argument from the outset, and that is reflected in the U.S. first written submission.

33. China is mistaken when it asserts that the United States has "shifted its focus" away from joint ventures ("JVs"). In fact, throughout this dispute, only China has "focused" on JVs, in an effort to misrepresent the U.S. argument. The United States drew the Panel's attention to a U.S. respondent's argument that MOFCOM had "apparently" excluded JVs, and we pointed to other data on the record that "cast doubt on MOFCOM's assertion that it included JV producers in the industry." We raised that concern because the proportion of the domestic industry included in MOFCOM's definition was so low. At that point, due to China's lack of transparency, we did not know which companies were included in MOFCOM's domestic industry definition. We still do not know which companies were included, because China has concealed that information. But China now has told the Panel that the domestic industry, as MOFCOM defined it, included four JVs and four domestically owned enterprises. That may resolve the question of whether or not MOFCOM's definition of the domestic industry did or did not include JVs, but it does not get MOFCOM off the hook for defining the domestic industry inconsistently with the definition in Articles 4.1 and 16.1 and for failing to base its injury determination on positive evidence and an objective examination, as required by Articles 3.1 and 15.1.

34. It remains the case that MOFCOM utilized a process that was likely to, and in fact did, result in a material risk of distortion in defining the domestic industry. In *EC – Fasteners (China)*, the Appellate Body said that "to ensure the accuracy of an injury determination, an investigating authority must not act so as to give rise to a material risk of distortion in defining the domestic industry . . . ." China argues that "MOFCOM took no affirmative action to invite a material risk of distortion . . . ." However, a corollary to the Appellate Body's observation is that an investigating authority must not *fail to act* if doing so would give rise to a material risk of distortion. In this case, "MOFCOM took no affirmative action," and that itself is the problem.

35. MOFCOM's decision to define the domestic industry as including only producers who voluntarily registered for participation in the injury investigations created the very same kind of self-selection process about which the Appellate Body expressed concern in *EC – Fasteners (China)*. That introduced a material risk of distortion, and, despite China's protestations to the contrary, there was indeed a self-selection process. CAAM, the petitioner, was the only domestic entity that responded to MOFCOM's notice, CAAM was the only entity that registered to participate in the injury investigation, CAAM was the only entity that provided domestic industry data to MOFCOM, and, most importantly, CAAM, in fact, self-selected from among its own members, providing to MOFCOM domestic industry data from *only eight of its member companies.* On its website, CAAM identifies *dozens* of companies as being among its members. Yet, CAAM provided data from only eight of those members. "MOFCOM took no affirmative action" in response to CAAM's *self-selection* of data from just those eight companies.

36. The Appellate Body's specific concern in *EC – Fasteners* was that, "by defining the domestic industry on the basis of willingness to be included in the sample, the [investigating authority's] approach imposed a self-selection process among the domestic producers that introduced a material risk of distortion." There is no substantive distinction between what happened in *Fasteners* and what happened in this case.

37. The Appellate Body has also said that "'a major proportion of the total domestic production should be determined so as to ensure that the domestic industry defined on this basis is capable of providing ample data that ensure an accurate injury analysis." Data from just eight companies, handpicked by CAAM from among its members, did not provide MOFCOM with "ample data" sufficient for an "accurate injury analysis." It is very likely that the data selected by CAAM was from domestic producers posting the weakest performance, which would distort the injury analysis. MOFCOM did not even ask CAAM why it provided data only for these particular companies.

38. The Appellate Body has explained that investigating authorities "must actively seek out pertinent information" and may not "remain[] passive in the face of possible shortcomings in the evidence submitted. . . ." The domestic industry definition is central to the price, impact, and causation analyses required under Articles 3.2, 3.4, and 3.5 of the AD Agreement and Articles 15.2, 15.4, and 15.5 of the SCM Agreement, and it is potentially determinative of the

injury analysis. It is important that investigating authorities make active efforts to collect the information necessary to define the domestic industry in a comprehensive and objective manner.

39. When MOFCOM received data from only eight companies that were handpicked by the petitioner, CAAM, and which represented less than 40 percent of domestic production for most of the period of investigation, MOFCOM was obligated to seek additional data on the condition of the domestic industry, or, at the very least, explain why it considered that more data was not necessary in light of the particular situation of the auto industry in China. MOFCOM failed to do so.

40. China suggests that the United States argued for the first time at the first panel meeting that "the percentage of domestic production included in MOFCOM's definition of the domestic industry is too low on its face." China is mistaken. This is not a "new argument." It has been our argument from the beginning.

41. What is new is China's confirmation of "the percentages of total domestic production," which were "54% in 2006, 34% in 2007, 34% in 2008, and 42% in Interim 2009." Also new is China's revelation that the domestic industry examined by MOFCOM consisted of only eight of CAAM's member companies. The question is whether the proportion of total domestic production represented by these eight companies meets the definition of "a major proportion" in Article 4.1 of the AD Agreement and Article 16.1 of the SCM Agreement.

42. China argues that "the AD and SCM Agreements nowhere define a specific quantitative threshold required to satisfy the 'major proportion' test . . . ." That is correct, but it is beside the point. The proper inquiry should take into account the percentages in light of the process MOFCOM employed, which resulted in MOFCOM having before it data from only eight domestic producers, themselves just a small part of the membership of the petitioner, CAAM. The inquiry should also consider the absence of any discussion by MOFCOM in the final determination of the nature and composition of the auto industry in China or why MOFCOM could not seek additional information.

43. China maintains that investigating authorities should have "some latitude to adapt their injury analysis to the unique facts of each case." We do not dispute this, but there were no "unique facts" in this case to justify MOFCOM's low level of domestic industry coverage. MOFCOM did not even attempt to suggest that there were.

44. China's explanation that "MOFCOM lacks the authority to compel additional domestic producers to participate in the injury investigation" rings hollow. MOFCOM did not even attempt to collect additional information. Simply posting the questionnaire on a website is precisely the type of "passive" response to "possible shortcomings in the evidence submitted. . ." that panels and the Appellate Body have in the past said is not consistent with the obligation to investigate.

45. The Panel should ask: Did MOFCOM have before it "wide-ranging information concerning the relevant economic factors"? The answer is no. Was MOFCOM's definition of the domestic industry "capable of providing ample data that ensure an accurate injury analysis"? The answer is no. Did the domestic producers MOFCOM examined represent "a relatively high proportion of the total domestic production"? Once again, the answer is no.

46. Thus, the Panel should conclude that MOFCOM's exclusion from the definition of the domestic industry – or its failure to include in the definition of the domestic industry – enterprises accounting for more than 60 percent of domestic production resulted in a definition of the domestic industry that did not include a "major proportion of the total domestic production" within the meaning of Article 4.1 of the AD Agreement and Article 16.1 of the SCM Agreement. Accordingly, MOFCOM's injury determination, which was based on its definition of the domestic industry, was neither objective nor based on "positive evidence," as required by Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement.

B. MOFCOM's Price Effects Analysis Is Inconsistent with Articles 3.1 and 3.2 of the AD Agreement and Articles 15.1 and 15.2 of the SCM Agreement

47. We have demonstrated that there is no support for MOFCOM's price depression finding. There was no price parallelism. Even if there had been price parallelism, there is no evidence showing that the price of subject imports drove the price of the domestic like product. With respect to market share, MOFCOM's original explanation of the relevance of the market share data does

not hold up to scrutiny. China has now offered a *post hoc* rationalization, to which the Panel should give no credit, and even this new explanation does not accord with the evidence.

48. China continues to insist that the prices of subject imports and the domestic like product moved in parallel. However, the evidence on the administrative record does not support MOFCOM's conclusions or China's arguments. There was no price parallelism – not "basically," not "in general," not at all. During every time period during the period of investigation, the price of subject imports and the price of the domestic like product were moving in opposite directions or at very different rates in the same direction.

49. China criticizes the chart we presented in the U.S. opening statement at the first panel meeting as being "distorted." But China's own chart tells the same tale. We refer the Panel to exhibit USA-18, which we have passed out today. In this exhibit, we have placed the U.S. chart above China's chart on the same page. Unmistakably, in both graphs, the trend line for the price of subject imports crosses the trend line for the price of the domestic like product twice. That alone demonstrates that, by definition, the lines are not parallel. Indeed, during none of the three time periods for which MOFCOM presented data do the trend lines even approach being parallel. China's own graph confirms the non-existence of price parallelism.

50. It is not the United States, but MOFCOM and China that seek to look at "isolated" data points. China is not looking at the "whole POI;" it is just looking at the beginning and the end. China argues that "[p]erfect correlation in prices is not needed." As we have shown, though, there was no correlation at all. Accordingly, MOFCOM's conclusion that price parallelism existed was not, in the words of a recent panel, a "reasonable conclusion[] [that] could be reached by an unbiased and objective investigating authority in light of the facts and arguments before it and the explanations given."

51. Furthermore, and this may be an even more important point, neither MOFCOM in its final determination nor China in its submissions and statements to the Panel even attempts to explain *how* parallel pricing – even if there had been any – caused the depression of domestic prices. China has steadfastly refused even to address this issue. Neither MOFCOM in its final determination nor China here before the Panel has done anything to describe "what explanatory force parallel price trends had for the depression . . . of domestic prices."

52. Accordingly, because no price parallelism existed and, even if it had, MOFCOM did nothing to explain the relevance of parallel pricing in this case, MOFCOM's reliance on parallel pricing was unfounded and provided no support whatsoever for its price depression finding.

53. The volume and market share data on the administrative record likewise provide no support for MOFCOM's price depression finding. MOFCOM found price depression only during interim 2009. MOFCOM clearly could not have found any price depression for any period *prior* to interim 2009, because the price of the domestic like product was increasing during all of the rest of the period of investigation.

54. Left unanswered in MOFCOM's final determination, though, is the question: *how* did subject imports depress the price of the domestic like product? China suggests that the volume and market share data could explain how subject imports depressed the price of the domestic like product. To show why this is *not* the case, however, we have compiled the volume and market share data on the administrative record into charts in exhibit USA-19.

55. One possibility, since MOFCOM refers to increases in the volume of subject imports, is that, at an "economics 101" level, the market was flooded with volume in interim 2009, and that flood of volume drove down prices. The evidence does not support this theory. In fact, both total domestic production and total import volume were down in interim 2009, as compared to interim 2008. There was no flood of volume, and that cannot explain the price depression.

56. As another possibility, MOFCOM points in the final determination to the "significantly increased" market share of the subject imports "[e]specially at the end of the POI," that is, in interim 2009. As shown in the third chart in exhibit USA-19, though, entitled "Changes in Market Share," the market share of the domestic industry as defined by MOFCOM increased just as significantly as the market share of subject imports. Indeed, the domestic industry and subject imports nearly split in half a market share increase that came at the expense of market share ceded by third country imports and other domestic producers not included in the domestic

industry. It is implausible, then, that the increasing market share of subject imports could explain the price depression of the domestic like product in interim 2009.

57. China's new explanation offered during this dispute is not one that MOFCOM presented in its final determination, and the Panel should give China's *post hoc* rationalization no weight. It also lacks any support in the evidence.

58. In its second written submission, China highlights selected data from the 2006 to 2008 period and posits that "[t]he domestic producers' prices went up, and as a result, they lost market share *to surging subject imports*." China goes on to argue that, "[i]n effect, the domestic industry was forced to fight back against the increase in market share of subject imports by decreasing prices at the expense of profits." So, U.S. imports are the villain in China's story. The problem for China, though, is that there is no truth to this whatsoever. As the data show, the domestic industry lost market share to other domestic producers and to third country imports. It never lost any significant amount of market share to subject imports.

59. China argues that "domestic producers faced crippling loss of market share unless they likewise reduced prices in the face of massive import competition." The only massive import competition to which the domestic industry ever lost market share during the period of investigation was competition from third country imports. In interim 2009, the domestic industry took back market share from those third country imports. So, to the extent that there is any truth to China's new explanation that domestic producers lowered their prices in response to import competition over the entire period of investigation, that would establish that third country imports – not subject imports – were the cause of the price depression observed.

60. In its second written submission, China goes on at some length defending MOFCOM's use of average unit values ("AUVs") and MOFCOM's purportedly thorough examination of the issue of competitive overlap. We have shown previously why MOFCOM's use of AUVs was problematic, particularly in light of evidence on the record indicating that the subject imports and the domestic like product were sold in different grades. Despite China's forceful assertions to the contrary, the Appellate Body's emphasis on the importance of price comparability in *China – GOES* was not limited to an examination of price undercutting.

61. China's argument that the sales data submitted by a U.S. respondent was "unreliable" is not a finding MOFCOM made, and this *post hoc* rationalization deserves no credit. The data was provided to the U.S. respondent by CAAM, and MOFCOM itself relied on the sales data as support for its conclusion, so China cannot now ask the Panel to dismiss the data as unreliable.

62. China's insistence that MOFCOM "thoroughly examined the issue of competitive overlap" between the subject imports and the domestic like product does not withstand scrutiny. MOFCOM's mention of competitive overlap in the final determination was at such a level of generality that it failed to establish a degree of competitive overlap that would make an analysis of price effects meaningful.

C. MOFCOM's Causation Analysis Is Inconsistent with Articles 3.1 and 3.5 of the AD Agreement and Articles 15.1 and 15.5 of the SCM Agreement

63. Finally, we have demonstrated that MOFCOM's causation determination in these investigations is inconsistent with Articles 3.1 and 3.5 of the AD Agreement and Articles 15.1 and 15.5 of the SCM Agreement.

64. Fundamentally, the evidence simply does not support MOFCOM's conclusion that subject imports caused injury to the domestic industry. There was no basis for MOFCOM's finding that the price of the domestic like product was depressed by subject imports. All of the arguments we have made relating to MOFCOM's analysis of price effects apply with equal force to our claims relating to MOFCOM's causation determination. MOFCOM's finding that subject imports depressed domestic prices simply is without any foundation and thus cannot serve as a basis for MOFCOM's conclusion that subject imports caused injury to the domestic industry. For that reason alone, the Panel should find that China has breached Articles 3.1 and 3.5 of the AD Agreement and Articles 15.1 and 15.5 of the SCM Agreement.

65. Furthermore, as we have shown, there are still other problems with MOFCOM's causation determination. For example, MOFCOM dismissed without explanation the decline in apparent

consumption in interim 2009 as possibly causing injury to the domestic industry. Yet, this was the only instance of demand contraction during the entire period of investigation, and it coincided with the only part of the period of investigation during which the price of the domestic like product dropped. China argues that "Chinese automobile manufacturers produced vehicles in anticipation of sales levels, and did not simply build up production independently." It appears that the domestic industry was taken by surprise when demand contracted and it was forced to lower prices.

66. Similarly, MOFCOM failed to consider the domestic industry's declining productivity and increasing labor cost. An examination of the relevant data shows a nearly one-to-one correspondence between the decline in the domestic industry's pre-tax profits from interim 2008 to interim 2009 and the near-doubling of labor costs over the same period. The domestic industry's sagging productivity cannot simply be dismissed as insignificant without any explanation. Indeed, it is specifically identified in Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement as a factor that "may be relevant" to the causation analysis.

67. The explanations China offers now are not the explanations on which MOFCOM relied in its final determination. Moreover, China's arguments are not convincing. China argues that the domestic industry's profits were "very small" anyway. China cannot have it both ways. MOFCOM relied on its findings that pre-tax profit "fell sharply" and the "profitability of the domestic industry was badly affected" in interim 2009. China cannot now dismiss the declines in pre-tax profits and profitability as unimportant.

68. China also contends that the increase in labor costs in interim 2009 was not significant because overall unit costs declined in interim 2009. The answer to this, which MOFCOM also failed to examine or appreciate, is that overall costs would have declined even more, with a beneficial effect on the industry's profitability, were it not for the sharp increase in labor costs.

69. Lastly, as we have explained, MOFCOM failed to examine a sales tax change and failed to avoid attributing the injury caused by it to the subject imports. MOFCOM merely summarized the positions of the interested parties and then asserted, without explanation, that "Chinese tax policy is not the factor causing material injury to the domestic industry." MOFCOM was obligated to undertake an objective examination of any known factors and ensure that any injury caused by those factors was not attributed to subject imports. MOFCOM failed to do so.

ANNEX B-6

CLOSING STATEMENT OF THE UNITED STATES AT THE SECOND PANEL MEETING

Mr. Chairman, Members of the Panel:

1. The United States would again like to thank the Panel and the Secretariat staff for your efforts during this meeting and throughout the dispute. In light of the extensive submissions and statements that the parties have made already, we only have a few brief comments to make in closing.

2. This is the third time that the United States has brought a dispute concerning China's application of trade remedy measures. This dispute addresses problems that are similar to those addressed in the *China – GOES* and *China – Broiler Products* disputes, and this dispute concerns inconsistencies with the same substantive provisions of the covered agreements. As the panels did in *China – GOES* and *China – Broiler Products*, and as the Appellate Body did in *China – GOES*, the Panel here should find that China has yet again breached its WTO obligations.

3. Yet again, China has denied U.S. companies the opportunity to fully defend their interests by failing to require the petitioners to provide adequate non-confidential summaries of confidential information, and by failing to disclose the calculations and data used to determine the existence of dumping and calculate dumping margins.

4. Yet again, China has imposed "all others" anti-dumping and countervailing duty rates determined using adverse facts available, despite the absence of any non-cooperation by any U.S. companies.

5. Yet again, China has found material injury based on information provided by a small, self-selected subset of domestic producers, and has done so despite the absence of any causal connection between subject imports and the economic difficulties experienced by domestic producers.

6. In sum, the United States has established that China breached the procedural and substantive obligations set forth in the AD and SCM Agreements, and China failed to make an objective examination and determinations based on positive evidence. In its submissions and statements to the Panel, China has failed to rebut the U.S. case. Accordingly, for the reasons we have given throughout this dispute, the United States renews its request that the Panel find that China has acted inconsistently with its WTO obligations.

7. The United States would like to conclude by again thanking the Panel and Secretariat for your time and attention to this matter, and we likewise thank China for its participation in this proceeding. We look forward to responding to the Panel's written questions and providing further comments, which we hope will further clarify the issues in this dispute.

ANNEX C

ARGUMENTS OF CHINA

ANNEX C-1

EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION OF CHINA

I. Introduction

1. In this dispute, the United States claims that China's antidumping and countervailing duty investigations of certain automobiles from the United States were tainted by a number of procedural and substantive flaws. According to the United States, China's choices and determinations in carrying out its investigations resulted in final determinations that violate China's obligations under the AD Agreement and the SCM Agreement. The AD and SCM Agreements, however, provide considerable latitude to investigating authorities in conducting antidumping and countervailing investigations, permitting different approaches and findings by WTO Members that may nevertheless all be in compliance with these Agreements. Further, many of the U.S. claims in this proceeding represent an effort by the United States to impose *its* mode of implementing the AD and SCM Agreements on other WTO Members.

II. Factual Background

2. On November 6, 2009, MOFCOM initiated antidumping and countervailing duty investigations on certain automobiles from the United States with engine displacement equal to or greater than 2 liters (the scope was later amended to exclude automobiles with an engine displacement equal to or less than 2.5 liters). To ensure the broadest possible dissemination of its initiation notices, MOFCOM posted them on its Internet site and placed them in its public reading room. Additionally, MOFCOM requested that the U.S. Government provide its notices of initiation to any interested parties. The notices of initiation invited all interested parties to register for participation in MOFCOM's injury investigation, and also explained that MOFCOM "shall have the right to refuse to accept relevant materials" of interested parties that fail to register, "and shall have the right to determine based on the existing materials available."

3. On April 2, 2011, after gathering and evaluating information from interested parties, MOFCOM issued its Preliminary Determination, in which it calculated preliminary dumping margins and rates of subsidization for all known U.S. exporters and producers participating in its investigations, and preliminarily found that imports of the product under investigation caused material injury to the domestic industry. MOFCOM explained that it applied, as facts available, the alleged petition rate for the AD all others rate, and applied, as facts available, the highest calculated subsidy rate for the CVD all others rate.

4. On April 15, 2011, MOFCOM issued its pre-final injury determination disclosure letter to all interested parties. On April 18, 2011, prior to issuance of its final determinations, MOFCOM also sent letters to the U.S. Government and all U.S. exporters and producers participating in its antidumping and countervailing duty investigations, disclosing the basic facts on which MOFCOM based its dumping margin and subsidy rate calculations.

5. MOFCOM's Final Determination, issued on May 5, 2011 follows the same basic structure as the Preliminary Determination, but discusses additional information gathered by MOFCOM in its investigations and provides MOFCOM's responses to comments from interested parties. As in the Preliminary Determination, MOFCOM calculated dumping margins and rates of subsidization for all known U.S. exporters and producers participating in its investigations.

III. Standard of Review

6. Article 17.6(i) of the AD Agreement states the standard of review to be applied by panels with respect to challenges of domestic anti-dumping measures. Article 17.6(i) requires panels to determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. As long as the panel finds this to be so, the panel may not overturn the authorities' determination even if it would have reached a different conclusion. The same standard of review should be employed in challenges of the SCM Agreement.

IV. Arguments

A. MOFCOM's Treatment of Confidential Information was Fully Consistent with the Requirements of Article 6.5.1 of the AD Agreement and Article 12.4.1 of the SCM Agreement

7. The first claim of the United States is that the non-confidential summaries in MOFCOM's petition were inadequate. Article 6.5.1 does not require any specific type or specific level of detail or format for the non-confidential summaries to be provided. Rather, it must permit "a reasonable understanding of the substance of the information withheld in order to allow the other parties to the investigation an opportunity to respond and defend their interests." The non-confidential summaries in MOFCOM's petition were adequate to meet this standard.

8. In particular, the United States alleges that MOFCOM simply redacted the information contained in the application and that no non-confidential summary was provided. However, the U.S. arguments ignore significant portions of the non-confidential summaries provided. The United States' arguments fail to take into account the percentage changes depicted in the charts, the significant text providing additional information directly below each of the tables provided in the petition, as well as trend lines accompanying the charts showing changes in the indices over the period of investigation. Furthermore, it is important to note that no party objected to the adequacy of any of the non-confidential summaries provided in the petition during the course of investigations, indicating that the parties to the investigation did not believe that the non-confidential summaries had failed to provide "an opportunity to respond and defend their interests."

B. The United States Failed to Make a *Prima facie* Case with Respect to its Claims under Article 6.9 of the AD Agreement

9. As an initial matter, the United States proposes an interpretation of Article 6.9 that goes far beyond its literal bounds. Article 6.9 does not mandate the disclosure of *all* facts before an investigation authority, but only the "essential facts under consideration" underlying a decision to apply definitive AD measures.

10. The United States has failed to establish a *prima facie* case under Article 6.9, because the United States misconstrues the disclosure requirement of Article 6.9. On its face, Article 6.9 requires disclosure if essential facts to interested parties only before a final determination is made. It does not require disclosure during any other phase of an antidumping investigation, or in the actual final determination of an investigating authority to apply (or not apply) definitive duties. The United States, however, ignores the plain language of Article 6.9, alleging as inadequate MOFCOM's descriptions of its antidumping calculations in its preliminary and final determinations. However, because final determination logically cannot occur "before a final determination is made" for purposes of Article 6.9, the United States cannot substantiate its claim by alleging any deficiencies in that determination. Furthermore, MOFCOM issued a disclosure to all interested parties prior to its Final Determination, yet the United States omits *any* mention of MOFCOM's actual disclosure documents.

11. The United States confuses the requirements for a preliminary and final determination under Article 12.2 of the AD Agreement with those of a pre-final determination disclosure, as required under Article 6.9. To cite one key difference, Article 12.2 requires the provision by investigating authorities of "public notice" of preliminary and final determinations. Pre-final determination disclosure, on the other hand, typically – and often necessarily – entails the disclosure to individual interested parties of business confidential information. The conflation by the United States of the requirements for public notice of determinations with the requirements for disclosure of data underlying margin calculations constitute a fatal flaw under the standards for a *prima facie* case. For these reasons, the United States has failed to uphold its burden of articulating an adequate legal claim and establish a *prima facie* case.

C. MOFCOM's Determination of the AD All Others Rate was Permissible under the AD Agreement

12. The United States contends that China violated Articles 6.8, 6.9, 12.2, and 12.2.2 of the AD Agreement in its determination of the AD all others rate. However, MOFCOM lawfully determined to

apply, as facts available, the margin of dumping alleged in the petition. While the AD Agreement does not prescribe a particular methodology for the calculation of an all others rate, Article 6.8 of the AD Agreement and Annex II provides guidelines for filling gaps in the administrative record with facts available drawn from the petition.

13. China complied with Article 6.8 and Annex II of the AD Agreement. Contrary to the United States' assertion that MOFCOM did not provide the requisite level or type of notification of the investigation, China went to great lengths to ensure that all producers and exporters would be aware of its investigation. Specifically: (1) MOFCOM sought to ensure wide dissemination of its initiation notice by posting it on its website and placing it in MOFCOM's public reading room; (2) MOFCOM requested the U.S. government to inform all U.S. producers and exporters of its investigation; (3) MOFCOM sent its questionnaire to all U.S. producers and exporters identified in the petition, as well as to *additional four* U.S. producers and exporters that voluntarily registered for participation in the investigation. This level of notification represents the best effort that MOFCOM could reasonably be expected to undertake. Further, the United States does not explain what additional type of notification to potential interested parties MOFCOM could have offered in the circumstances of this case. In light of MOFCOM's broad notification of its investigation, MOFCOM could reasonably conclude that any unknown U.S. exporters and producers that did not register for participation in the investigation were aware of the initiation notice, and that any U.S. exporters and producers not responding had "refused" to participate in the investigation.

14. China's disclosure associated with its AD all others rate also complied with Article 6.9 of the AD Agreement. All of the pertinent facts contributing to MOFCOM's decision to apply facts available were laid out in MOFCOM's pre-final determination disclosure to the U.S. Government. MOFCOM was under no obligation to disclose its *reasoning* for its selection of the 21.5% all others rate. Nonetheless, even if MOFCOM were required to disclose the reasoning underlying its selection, MOFCOM's pre-final determination disclosure lays out the entire predicate for MOFCOM's application of the 21.5% rate as the AD all others rate. Finally, MOFCOM was under no obligation under Article 6.9 to disclose as essential facts any calculations underlying its selection of the AD all others rate. As MOFCOM explained in its pre-final determination disclosure to the United States, it applied the AD margin alleged in the petition. Meanwhile, the petition, which is outside the scope of the Article 6.9 disclosure obligation, clearly and fully lays out the data underlying the alleged margin of dumping. Because MOFCOM disclosed all pertinent facts, there were no additional facts that, if disclosed, might have permitted the United States to better defend its interests prior to the final determination.

15. Furthermore, China adequately explained its determinations for purposes of Article 12.2 and 12.2.2 of the AD Agreement, as the legal and factual bases for MOFCOM's determination of the all others rate are perfectly clear and straightforward from the administrative record.

D. MOFCOM's Determination of the CVD All Others Rate was Permissible under the SCM Agreement

16. The United States contends that China violated Articles 12.7, 12.8, 22.3, and 22.5 of the SCM Agreement in its determination of the all others rate. However, MOFCOM lawfully determined to apply, as facts available, the highest rate calculated for an individually investigated producer and exporter. MOFCOM also fully explained its reasoning, and disclosed all pertinent facts, in doing so. The SCM Agreement – like the AD Agreement – is silent with respect to the determination of all others, or residual, rates applicable to non-investigated respondents. Given the gap in the SCM Agreement, Article 12.7 provides guidelines for filling gaps in the administrative record with facts available drawn from the petition.

17. China complied with Article 12.7 of the SCM Agreement. China's arguments presented above with respect to China's efforts to ensure that all producers and exports were aware of the investigation apply equally with respect to the SCM Agreement. As explained above, this level of notification represents the best effort that MOFCOM could reasonably be expected to undertake. Further, the United States does not explain what additional type of notification to potential interested parties MOFCOM could have offered in the circumstances of this case. The SCM Agreement, like the AD Agreement, does not require China to continue pursuing the cooperation of interested parties that MOFCOM could reasonably assume, through non-responsiveness to a widely disseminated initiation notice, would not participate in its investigation.

18. Furthermore, China's disclosure associated with its all others rate complied with Article 12.8 of the SCM Agreement. China's arguments presented above with respect to selection of the AD all others rate apply equally to calculation of the CVD all others rate. China also adequately explained its determinations for purposes of Article 22.3 and 22.5 of the SCM Agreement, as the legal and factual bases for MOFCOM's determination of the all others rate are perfectly clear and straightforward from the administrative record.

E. China's Definition of the Domestic Industry was Fully Consistent with Articles 3.1 and 4.1 of the AD Agreement, and 15.1 and 16.1 of the SCM Agreement.

19. The United States alleges that MOFCOM improperly defined the domestic industry by excluding foreign joint ventures ("JVs"), and that the resulting group of domestic producers did not represent a "major proportion" of the total producers of the domestic like product for purposes of the AD and SCM Agreements.

20. Article 4.1 of the AD Agreement and Article 16.1 of the SCM Agreement provide considerable discretion to investigating authorities in defining a domestic industry. An investigating authority may lawfully define the domestic industry as all producers of the domestic like product, or as those producers comprising a "major proportion" of production of the domestic like product. The AD and SCM Agreements provide no definition of "major proportion," and panels have explained that the level of domestic production constituting a "major proportion" may be a level less than 50 per cent.

21. Furthermore, MOFCOM did not exclude JVs from the investigation. MOFCOM provided public notice inviting *all* domestic producers to participate in its injury investigation. MOFCOM also examined and included in its analysis data from *all* domestic producers that supplied injury data. MOFCOM's injury investigation neither contains nor implies an exclusion of any subset of the domestic industry. By its plain terms, the invitation to participate in the injury investigation was open to "any" domestic producer. It was also available, through placement in MOFCOM's public reading room, to any domestic producer that might have wished to participate in the investigation. Further, the Preliminary and Final Determinations are devoid of any statement or implication that MOFCOM excluded from its injury investigation data from any domestic producer. MOFCOM's above-described open process for gathering data on domestic production is confirmed by its April 15, 2011 Letter of Disclosure of Essential Facts.

22. MOFCOM explained in its Final Determination, in response to comments from interested parties, that it did not limit its definition of the domestic industry to Chinese-owned companies, and that it did not exclude JVs. Data in the public record of the investigation also demonstrates that MOFCOM, in its definition of the domestic industry, included production data for a greater extent of domestic production than represented by Chinese-owned producers, showing that the data captured by MOFCOM's definition of the domestic industry *did* include some amount of production by JVs.

23. Because MOFCOM did not exclude from the definition of the domestic industry a subset of Chinese production, it follows that the U.S. claim that MOFCOM failed the "distortion test" contained in Article 4.1 of the AD Agreement and Article 16.1 of the SCM Agreement as elucidated by the Appellate Body in *EC – Fasteners (China)* fails as a factual matter. Aside from the mistaken factual premise underlying the U.S. argument, the U.S. argument also fails as a matter of law because there is no freestanding distortion test contained in Article 4.1 of the AD Agreement and Article 16.1 of the SCM Agreement. The term "distortion" appears nowhere in these provisions, and the relevant text provides only that investigating authorities must base the definition of the domestic industry on a "major proportion" of domestic production. Further, the facts before the Appellate Body in *EC – Fasteners (China)* are distinguishable with the present case, as, unlike the investigating authority in *EC – Fasteners (China)*, MOFCOM did not engage in a self-selection process that affirmatively excluded certain producers from its definition of the domestic industry.

24. MOFCOM did, however, satisfy the "major proportion" test of Article 4.1 of the AD Agreement and Article 16.1 of the SCM Agreement. As explained above, MOFCOM did not exclude JVs or any other sector of the domestic industry in defining the domestic industry. In defining the domestic industry, MOFCOM conducted an open data-gathering process and included production data from all domestic producers that supplied such data. The record of the investigation also

plainly shows the percentages of total domestic production represented by MOFCOM's definition of the domestic industry for the period of investigation – i.e., 54% in 2006, 34% in 2007, 34% in 2008, and 42% in Interim 2009. MOFCOM reasonably concluded, based on an objective examination of the evidence supplied to it, that these percentages constituted a "major proportion" of domestic production for purposes of Article 4.1 of the AD Agreement and Article 16.1 of the SCM Agreement.

25. Finally, the Panel should reject the United States' claims that China's alleged violations of Article 4.1 of the AD Agreement and Article 16.1 of the SCM Agreement necessarily result in an injury determination for purposes of Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement. As an initial matter, the Panel should reject the U.S. allegation of a consequential violation because, for the reasons set forth above, China did not breach Article 4.1 of the AD Agreement and Article 16.1 of the SCM Agreement. Moreover, each article of the AD and SCM Agreements set forth distinct standards and obligations, and claims with respect to each article must be assessed independently and separately.

F. MOFCOM's Price Effects Analysis was Fully Consistent with Articles 3.1 and 3.2 of the AD Agreement, and 15.1 and 15.2 of the SCM Agreement

26. The United States claims that: (1) the record before MOFCOM did not show evidence of price undercutting; (2) subject imports and the domestic like product did not exhibit parallel pricing trends during the period of investigation; (3) MOFCOM erroneously relied on average values for purposes of its price analysis; and (4) MOFCOM failed to account for the fact that the market share of the domestic like product increased over the period of investigation. As discussed below, each of the United States' claims fail.

27. First, the plain text of Article 3.2 of the AD Agreement and Article 15.2 of the SCM Agreement states only that the investigating authorities "shall consider whether there has been a significant price cutting…or whether the effect of such imports is otherwise to depress prices to a significant degree or prevent price increases, which otherwise would have occurred, to a significant degree." Thus, the text in the relevant articles, along with prior panel determinations, makes clear that a price undercutting analysis is optional and that no specific methodology is required. MOFCOM based its price effects analysis on price depression. As a matter of logic, price depression or suppression can occur without price undercutting being present. Prices of domestic like products can be pushed down and depressed by competition with subject imports, even if those subject imports are priced higher at any single point in time than are the prices for the domestic like product. MOFCOM's Final Determination discusses in detail the evidence on which MOFCOM relied and its reasoning when reaching its price effects determination.

28. Second, the United States' claim that MOFCOM's finding of parallel pricing was not supported by the record and was based on an analysis of comparable prices over only an isolated period of time is simply incorrect. MOFCOM reviewed price trends based upon an analysis over the entire period of investigation, as supported by the record evidence. In addition, the argument of the United States relies in part on an incorrect translation of MOFCOM's reasoning in the Final Determination. The fact that MOFCOM did not rely solely on a single time period is in fact supported by the correct translation of the Final Determination, which states that "*{e}specially* at the end of the POI…its price decreased at the same time…" (emphasis added). MOFCOM's use of the term "especially" demonstrates that MOFCOM did not rely solely on the interim 2009 period, but rather was basing its parallel price analysis upon an examination of price trends over the entire period of investigation.

29. Third, the record evidence supports MOFCOM's finding that there was sufficient competitive overlap between subject imports and the domestic like product that use of average unit values was not inappropriate. Articles 3.2 of the AD Agreement and 15.2 of the SCM Agreement do not require an investigating authority to use model or category-specific prices rather than average unit values when conducting a price effects analysis, and in fact require no specific or particular methodology. The plain text of those Articles states only that an investigating authority "shall consider…whether the effect of such imports is otherwise to depress prices to a significant degree…" MOFCOM examined the issue of competitive overlap between subject imports and the domestic like product in both its Preliminary and Final Determinations. Thus, MOFCOM conducted an objective examination based on positive evidence of the competitive overlap between subject imports and the domestic like product.

30. In addition, the mere fact that there may be price differences between the various products included in the averages is not an indication of bias or lack of objectivity in the pricing analysis. MOFCOM's use of average prices is also supported by other factors: there is no evidence that the product mix changed substantially over time; MOFCOM did not manipulate the data it obtained in any way, nor did MOFCOM exclude any of the pricing data it examined; MOFCOM used the same methodology for examining both domestic and import prices, and was thus even handed and objective when analyzing price trends.

31. Fourth, the claim of the United States that MOFCOM failed to consider that the market share of the domestic like product increased at the same time as the market share of subject imports increased looks at just one isolated piece of data, and does not undercut MOFCOM's price depression finding. Over the entire period of investigation, the market share for imports from third countries was relatively stable, while the market share of subject imports increased by about 3.5 per cent. In addition, over the entire period of investigation, the market share of the domestic industry decreased while the market share of subject imports increased significantly.

32. As MOFCOM's domestic industry definition was not flawed, the United States' argument that MOFCOM's price effects analysis is necessarily compromised fails as a factual matter. In addition, the United States in effect argues that any violation of Article 4.1 of the AD Agreement and 15.1 of the SCM Agreement as a matter of law results in a violation of a Member's price effects analysis under Articles 3.2 of the AD Agreement and 15.2 of the SCM Agreement. As noted earlier, however, such "consequential" claims must fail.

G. MOFCOM's Causation Analysis was Fully Consistent with Articles 3.1, 3.4 and 3.5 of the AD Agreement, and 15.1, 15.4 and 15.5 of the SCM Agreement.

33. The United States focuses solely on certain isolated factors in MOFCOM's overall causation analysis in its effort to claim that MOFCOM failed to establish a causal link between subject imports and material injury to the domestic industry. The United States argues that: (1) MOFCOM failed to consider the fact that the domestic industry's market share increased in interim 2009; (2) MOFCOM failed to take into account a decline in the domestic industry's labor productivity over the period of investigation; (3) MOFCOM "failed to recognize" the alleged lack of competition between subject imports and the domestic like product; and (4) MOFCOM failed to address certain "other factors" that "may" have caused injury, including a change in China's tax policy. The United States' arguments, by selectively citing isolated data and ignoring the complete picture, run afoul of the applicable standards under Article 3.5 of the AD Agreement and 15.5 of the SCM Agreement. Subject imports need only be *a* "cause," and not the sole or significant cause, to satisfy Articles 3.5 and 15.5. Furthermore, when determining whether other facts might have been the cause of injury to the domestic industry, previous panel and Appellate Body reports make clear that there is no required method of analysis undertaking that examination.

34. First, MOFCOM fully accounted for the role of third country imports. In its arguments, the United States focuses entirely on a single period of time, interim 2009. However, in the Final Determination, MOFCOM examined statistical data for imports from all sources and specifically addressed the role of third country imports. MOFCOM found that, over the entire period of investigation, the market share of third country imports was relatively stable, while the market share of subject imports increased. Moreover, the volume of imports from third countries dropped more than did imports from the United States, further confirming that third country imports were not the cause of material injury. Thus, the record demonstrates that there was substantial competition between subject imports and domestic like products.

35. Second, MOFCOM did not fail to account for the drop in labor productivity. MOFCOM's causation analysis was based upon an overall review of the entire record. In the Final Determination, MOFCOM analyzed *sixteen* different indicia of the financial industry's health and performance over the period of investigation. The United States focuses solely on one piece of information, concerning labor productivity, and ignores the other fifteen indicia of the industry's health and performance over the period of investigation and their relationship to the causation analysis. Furthermore, an investigating authority is not required to examine in depth every possible issue. Given the low labor costs in China, a decline in labor productivity in the Chinese industry is not a key indicia of the health of the industry nor is it a significant or telling indicator

for MOFCOM's causation analysis. Nonetheless, contrary to the U.S. claims, MOFCOM did in fact examine labor costs. Specifically, in its Final Determination, MOFCOM noted in its analysis of the various factors it reviewed that "employment and average annual salaries increased…"

36. Third, MOFCOM fully examined the record evidence concerning competition between subject imports and the domestic like product, and fully accounted for that competition in its causation analysis. MOFCOM's Final Determination shows that the investigating authority conducted a comprehensive investigation on the product under investigation and the domestic like product in terms of "physical characteristics, performance, production process, product use, product substitution, perception of consumers and producers, sales channels, prices and so on." The investigation indicated that the two are similar and comparable, and compete with each other.

37. The United States also argues that the fact that subject imports oversold the domestic like products for part of the period of investigation undercuts MOFCOM's conclusion that subject imports and domestic producers competed with each other. But the fact that subject imports during some periods in the period of investigation oversold the domestic like product does not indicate that there was no competition between them. The finding of price undercutting is only *one* of the three possible findings that need to be found to support an adverse price effects finding. In any case, the U.S. argument ignores the fact that in 2007, subject imports were priced *lower* than was the domestic like product.

38. MOFCOM also fully accounted for the decline in apparent consumption in interim 2009. MOFCOM's Final Determination notes that even though apparent consumption declined in interim 2009 from the same period in 2008, sales of the domestic like product and the domestic industry's market share were able to increase over the same period. Thus, the fall in apparent consumption did not cause material injury.

39. The United States claim that MOFCOM ignored other possible causes of injury rests on a mistaken assumption concerning the appropriate application of the non-attribution standard. Article 3.5 and Article 15.5 do not specify any particular methodology that an investigation authority must follow when analyzing the role of other known factors. Furthermore, MOFCOM is not required to disprove a possible cause of injury. The burden is on the United States to establish the *prima facie* case that the effects of another factor broke the causal link. The United States has not met that burden. Moreover, MOFCOM examined and discussed a number of "other causes" so as to ensure that it was properly attributing material injury to the subject imports, including: the role of imports from third countries; the change in market demand; exports of the domestic like product; whether events of force majeure caused negative effects to the normal operation of the domestic industry; the role of changes in the consumption tax policy and purchase tax policy over the period of investigation.

40. Finally, MOFCOM's causation analysis is not compromised by its definition of the domestic industry and its price effects analysis. As explained above, the factual premise of the United States' argument is incorrect, as China's domestic industry definition and its price effects analysis were fully consistent with its obligations under the AD and SCM Agreements. In addition, the U.S. argument incorrectly presumes a direct, *per se* link between the obligations contained in Article 3.1 and 3.2 of the AD Agreement and 15.1 and 15.2 of the SCM Agreement with the obligations of causation set out in Articles 3.4 and 3.5 of the AD Agreement and 15.4 and 15.5 of the SCM Agreement. There is no such *per se* link. The United States bears the independent burden of establishing a *prima facie* case that the causation analysis failed to meet the standards set out in Articles 3.5 and 15.5, regardless of the Panel's findings on the definition of the domestic industry and MOFCOM's price effects analysis made under different Articles.

H. The United States Failed to Make a Prime Facie Case with Respect to its Consequential Claims

41. The Panel should reject the consequential claims of the United States for failure to make a *prima facie* case. To make a *prima facie* case of breach of a WTO agreement, the complaining party must provide both evidence *and* legal argument tying the alleged facts to *each* of the elements of a legal claim. Where there is a disconnect between the alleged facts and the legal claim, or no proper legal claim can be made out, a panel must conclude that the complaining party has not satisfied its burden to make out a *prima facie* case. While the United States claims that China has acted inconsistently with Article VI of the GATT 1994, Article 1 of the AD Agreement,

and Article 10 of the SCM Agreement, it does not specify any specific evidence or legal argument in making these claims, and instead relies on a blanket reference to "the claims set forth above," to support its claims. As such, the United States has failed to make out a *prima facie* case regarding these consequential claims

V. Conclusion

42. For the reasons set forth in this submission, China requests that the Panel find that MOFCOM's determinations in the underlying investigations were fully consistent with China's WTO rights and obligations.

ANNEX C-2

EXECUTIVE SUMMARY OF THE OPENING STATEMENT
OF CHINA AT THE FIRST PANEL MEETING

I. Introduction

1. This dispute is the latest in a series of U.S. challenges to China's trade remedy procedures. As the Panel considers the specific claims before it, China asks the Panel to bear in mind one important overarching consideration: China's trade remedy procedures are different from U.S. procedures, and this is acceptable under the AD and SCM Agreements. The Agreements provide considerable latitude to investigating authorities to adopt different procedures. China may legitimately adopt different trade remedy procedures from the United States, and these procedures may lead to different results than what the United States is used to under its own procedures. This does not mean that China is wrong.

II. MOFCOM Appropriately Required Adequate Non-Confidential Summaries

2. The first claim of the United States is that MOFCOM failed to require adequate non-confidential summaries of confidential information in the petition. The U.S.'s argument appears to rest on the mistaken premise that total disclosure is required. But Article 6.5.1 of the AD Agreement and Article 12.4.1 of the SCM Agreement only require that a non-confidential summary be in "sufficient detail" to permit a "reasonable understanding" of the "substance" of the information.

3. The use of the term "substance" is important, because it signals that each individual number or all aspects of the confidential information need not be summarized publicly, but rather that the non-confidential summary must be sufficient to allow an understanding of the overall "substance" of the information.

4. The New Shorter Oxford Dictionary defines the term "substance" as "the theme or subject of an artwork, and argument, etc., esp. as opposed to form or expression; the gist or essential meaning of an account, matter." The Dictionary further defines substance as "[t]he essential nature or part of a thing."

5. Article 31(1) of the Vienna Convention requires a provision to be interpreted "in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose." The "substance" of the confidential information at issue therefore should not be determined in isolation, but rather within its larger context. The non-confidential summaries at issue concern certain aspects of the petition's claims concerning injury, as defined in the AD and SCM Agreements. The "substance" of the particular information at issue, therefore, needs to be evaluated in the context of the substantive obligations set out in Articles 3.4 of the AD Agreement and 15.4 of the SCM Agreement.

6. Article 3.4 requires an investigating authority to determine injury through an evaluation of all relevant economic factors and indices that have a bearing on the industry, including actual or potential decline in certain factors, and actual or potential negative effects on various other factors. The petition focuses its injury allegations on the trends in the movements of various factors rather than the underlying absolute numbers themselves. This is demonstrated in the petitioner's summary injury paragraph, which argues that all the injury factors show "an adverse trend." Therefore, the "substance" that must be ascertainable pertains to the movement – or trends – of certain factors, and the relationship between the foreign and domestic products, rather than the absolute numbers that form the basis of determining such trends and relationships. As long as the non-confidential summaries are sufficient to allow a reasonable understanding of these trends – rather than the absolute numbers themselves – then the obligations of Articles 6.5.1 and 12.4.1 are satisfied.

7. Furthermore, the provisions of the relevant Articles do not require any specific type, or level of detail, or format, for the non-confidential summaries. In addition, as we noted above, the determination as to whether the non-confidential summaries permit a reasonable understanding of the "substance" of the information, must be evaluated in light of the relevant context that the confidential information at issue pertains to trend lines and movements over time of injury data.

The use of trend lines or percentage changes in these circumstances is appropriate to permit a reasonable understanding of the substance of the information at issue.

8. Also, the United States complains in a single conclusory sentence of its First Written Submission that, for certain data, only percentage changes were provided. Providing percentage changes is a common approach for non-confidential summaries. By showing year-to-year percentage changes, the summary provides a "reasonable understanding" of trends over time. While the United States seems to imply that using percentage changes is insufficient, the United States in *China – GOES* concedes that the use of percentage indices is sufficient.

9. The U.S. First Written Submission overlooks these principles and merely asserts that certain isolated tables contained in the petition were not adequately summarized. However, the U.S. arguments fail to take into account additional text provided below each of the tables, as well as additional tables contained in the non-confidential version of the petition that provide trend lines for the data in the tables. The non-confidential summary of the tables, the additional text below the tables, and the additional tables providing trend lines – taken together – more than adequately allow for a "reasonable understanding" of the "substance" of the information submitted.

10. China's First Written Submission explains why each of the U.S. claims concerning the public summaries is not correct. For example, concerning the sales-to-production ratio information in Table 19 of the petition, the U.S.'s assertion that "no non-confidential summary was provided" ignores the additional text directly below Table 19, which provided further information and context for the redacted information. Specifically, the additional text explains that while "foreign producers' production and sales increased and domestic apparent consumption grew, the proportion of products sold of domestic industry did not increase accordingly." The United States also ignores the related trend line showing changes in the sales-production ratio over the period of investigation. The trend line provided with the table showed the ratio increasing from 2006 to 2007 and generally decreasing from 2007 through the end of the period of investigation. As noted previously, Article 3.4 refers to actual and potential "decline" in sales, or in other words, the trend of sales over time. Taken together, this information in its proper context provides a "reasonable understanding" of the "substance" of the information at issue, particularly when examined in terms of its relationship with other public data such as apparent consumption and inventory shifts.

11. Finally, it is important to note that no party objected to the adequacy of any of the non-confidential summaries at issue. If interested parties felt that the non-confidential summaries had prejudiced their interests, then MOFCOM could have reviewed the situation and determined how to proceed. China is not arguing that there is an exhaustion requirement and that the failure to raise this issue during the course of the proceeding waives the U.S.'s right to raise it now, but the failure to do so does go to the merits of the underlying argument.

III. The United States Has Failed To Meet its Burden with Respect to its Claim under Article 6.9 of the AD Agreement

12. Rather than reiterating the elements of a *prima facie* case, China focuses its statements on why the United States failed to make out a *prima facie* case with respect to its claim under Article 6.9. Article 6.9 addresses a specific phase in an antidumping investigation – requiring disclosure of essential facts "before a final determination is made." Requiring disclosure at this specific point is logical in light of the stated purpose of Article 6.9, which is to provide interested parties with an adequate opportunity to defend their interests. Logically, the appropriate time to provide such disclosure is late in the investigation, when the investigating authority has gathered and verified relevant facts, but before reaching its final conclusions with respect to those facts. That is precisely what MOFCOM did in this case, when it provided letters of disclosure to all interested parties.

13. The U.S. First Written Submission, however, does not address any aspect of MOFCOM's pre-final determination disclosure letters, but only addresses MOFCOM's preliminary and final determinations. Specifically, the United States provides a long list of "calculations and related information" that it believes MOFCOM should have included in its determinations. The United States also complains of supposed "vague descriptions" of the establishment of normal value, and the export price provided in MOFCOM's determinations.

14. However, it is Article 12.2 of the AD Agreement, and not Article 6.9, that imposes requirements with respect to an investigating authority's public notices. In most cases, a pre-final determination disclosure will include business confidential information, requiring separate confidential disclosures to each interested party. Public determinations, in contrast, must not disclose any business confidential information. China thus cautions against the conflation of

Articles 6.9 and 12.2, which set forth distinct requirements for separate aspects of an antidumping investigation. The panel in *China – GOES* confirmed that Articles 6.9 and 12 serve fundamentally different purposes.

15. Thus, it appears the United States has alleged facts that do not "relate" to its legal arguments, failing to establish its *prima facie* case with regard to this claim. While the United States claims that China has violated Article 6.9, it points to evidence of alleged deficiencies in MOFCOM's public determinations, which are governed by a different article.

IV. MOFCOM's Determination of the AD and CVD All Others Rates was Permissible under the AD and SCM Agreements

16. At the core of the U.S. argument regarding MOFCOM's determination of the AD and CVD all others rate is the notion that MOFCOM did not do enough to alert all possible U.S. exporters and producers of its information requirements for the investigations. However, contrary to the U.S. claim that "MOFCOM made no attempt to even identify whether any other U.S. exporters/products might exist," MOFCOM took multiple steps in this respect: (1) MOFCOM posted its initiation notices on its website and placed them in its public reading room; (2) MOFCOM requested the U.S. government to inform all U.S. producers and exporters of its investigations; and (3) MOFCOM sent its questionnaires to all U.S. producers and exporters identified in the petition, as well as to a number of additional U.S. companies that voluntarily registered for participation in the investigations.

17. Together, these steps constituted a reasonable and comprehensive notification effort. Indeed, while the United States complains that MOFCOM should have done more, the United States does not explain what additional steps MOFCOM might have taken. Under these circumstances, it does not seem reasonable to conclude, as the United States implies, that MOFCOM should have gone to unspecified greater lengths to publicize the fact of its investigation and its information requirements.

18. Furthermore, MOFCOM made clear from the outset that the consequence of a decision not to register for participation in the investigations could be the application of facts available. Thus, China believes that any U.S. producers and exporters that did not register for participation must have known of the investigations, and decided not to participate. Accordingly, MOFCOM reasonably concluded that such U.S. producers and exporters "refused" to provide the necessary information, and thereby lawfully resorted to facts available. China submits that the *China – GOES* panel did not take into account MOFCOM's reasonable conclusion that any producers and exporters not responding to the initiation notices had decided to refuse to participate in the investigations. Following the logic of the *China – GOES* panel, MOFCOM would have been required to supply full questionnaires to unknown parties that had already decided not to participate in the investigations.

19. For the same reasons, China also disagrees with Japan's comment in its Third Party Submission that the AD Agreement "requires that authorities give notice of specific information to an interested party from which the specific information is needed." This comment correctly interprets the AD Agreement as to known interested parties. However, this logic does not extend to scenarios in which the interested party is unknown and has decided not to cooperate.

20. The United States' reliance on *Mexico – Rice* is also misguided. In that case, the Appellate Body found that the investigating authority improperly applied facts available before providing all exporters with the opportunity to provide the information required to calculate AD rates. In the present case, MOFCOM pursued a multi-faceted notification approach that *did* provide the required opportunity. China believes it is reasonable, in the circumstances of this case, to conclude that any other unknown U.S. producers and exporters knew of MOFCOM's investigations, and could have registered and obtained the full questionnaires. Indeed, the Appellate Body in *Mexico – Rice* emphasized that, what is reasonable to expect of an investigating authority, as far as notification of foreign producers and exporters is concerned, "will depend on the circumstances of each case."

21. As for MOFCOM's disclosure of its all others rate methodologies under Article 6.9 of the AD Agreement and Article 12.8 of the SCM Agreement, the United States is attempting to stretch the obligations to mandate a breadth and depth of disclosure that is not required. MOFCOM fully disclosed the facts underlying its determination that unknown U.S. producers and exporters refused to participate in the investigations, including its finding that unknown producers and exporters were aware of MOFCOM's investigations, but decided not to participate anyway. There were no other facts that could have been disclosed.

22. With respect to MOFCOM's *choice* of rates, the United States' belief that MOFCOM should have disclosed the reasoning behind its 21.5% AD all others rate and 12.9% CVD all others rate must fail, because the requirement to disclose "essential facts" does not extend to the disclosure of reasoning. As for the claim that MOFCOM was required to disclose factual details underpinning the calculation of the all others rates, there was nothing more China could have disclosed. In the case of the AD all others rate, MOFCOM simply applied the rate alleged in the petition; in the case of the CVD all others rate, MOFCOM simply applied the highest calculated rate.

23. Finally, the United States challenges the adequacy of MOFCOM's determinations for purposes of AD Agreement Articles 12.2 and 12.2.2, and SCM Agreement Articles 22.3 and 22.5. Simply put, the legal and factual bases for MOFCOM's all others rates are clear and straightforward from the administrative record. Also, this case is fundamentally different from *China – GOES*. In that case, the question before the panel was how MOFCOM derived an AD all others rate that differed from any other alleged or calculated rate. In this case, there is no such question: It is clear that MOFCOM applied the alleged petition rate as the AD all others rate, and the highest calculated CVD rate as the CVD all others rate.

V. MOFCOM Properly Defined the Domestic Industry

24. As explained in its First Written Submission, China's definition of the domestic industry was consistent with the requirements of Article 4.1 of the AD Agreement and Article 16.1 of the SCM Agreement.

25. First, both the AD and SCM Agreements provide considerable discretion to investigating authorities in defining a domestic industry. The Agreements present an investigating authority with a choice to define a domestic industry as *all* producers of the domestic like product, or as those producers accounting for a "major proportion" of domestic production of the like product. Indeed, the United States does not appear to challenge China's choice to define the domestic industry in this case based on the "major proportion" option of the AD and SCM Agreements.

26. Second, the United States is wrong in claiming that MOFCOM categorically excluded joint ventures from its definition of the domestic industry. As China explained in its First Written Submission, MOFCOM provided public notices inviting *all* domestic producers to participate in its injury investigation. Also, MOFCOM's Final Determination made clear that it included information from *all* domestic producers that supplied injury data, and did not exclude joint ventures of foreign automobile companies and Chinese automobile enterprises.

27. Third, Table 1 of China's First Written Submission refutes the U.S. theory that MOFCOM excluded joint ventures from its definition of the domestic industry. Table 1 shows that during 2006 and Interim 2009, the total number of autos produced by those in the domestic industry who chose to participate in MOFCOM's investigation exceeded the number of autos produced during the same periods by the domestically owned Chinese producers. The included production volume demonstrates that MOFCOM included some production of joint ventures in its definition of the domestic industry.

28. Given the available data on the actual volume of production covered by MOFCOM's definition of the domestic industry, there is no need to evaluate the U.S. claim that market share data demonstrates MOFCOM's exclusion of joint venture production from the definition of the domestic like product. As explained in China's First Written Submission, market share data, under these circumstances, are a poor proxy for actual production data.

29. The AD and SCM Agreements do not define "major proportion." Therefore, as noted by the Appellate Body in *EC – Fasteners*, an investigating authority is granted some flexibility to adjust "major proportion" to what is reasonable.

30. Table 1 in China's First Written Submission sets forth the percentages of total domestic production captured in MOFCOM's definition of the domestic industry, for each year of the period of investigation. The percentages varied during this period, ranging from 54 percent in 2006 to 42 percent in Interim 2009. These percentages are comparable to those at issue in *Argentina – Poultry*, in which the panel agreed that the investigating authority had satisfied the "major proportion" test. In the absence of any specific quantitative threshold, and because MOFCOM included all data supplied by domestic producers, MOFCOM has satisfied the "major proportion" test in this case.

31. Finally, the United States relies on the Appellate Body in *EC – Fasteners* to read a freestanding distortion test into Article 4.1 of the AD Agreement and Article 16.1 of the SCM Agreement. However, the AD and SCM Agreements contain no freestanding distortion test.

Additionally, *EC – Fasteners* is not directly analogous for several reasons. For one, in that case the EU engaged in what the Appellate Body described as a "self-selection process," affirmatively excluding several domestic producers that had supplied production information. Also, the EU erroneously related its definition of the domestic industry to the 25 percent standing threshold, artificially suppressing the volume of domestic production incorporated into its definition of the domestic industry. MOFCOM did not do this here.

VI. MOFCOM's Price Effects Analysis was Consistent with WTO Obligations

32. Next, the United States claims that MOFCOM's price effects analysis was not consistent with Articles 3.1 and 3.2 of the AD Agreement, and Articles 15.1 and 15.2 of the SCM Agreement. While the United States seems to assert that there is only one way to conduct a price effects analysis, and because China did not follow this method, its findings are wrong. However, the relevant Articles provide discretion to investigating authorities, so long as they undertake an objective examination based on positive evidence. Such discretion is appropriate because, by its very nature, a price effects analysis is highly fact-specific and dependent on the particular circumstances of each case.

33. Moreover, unlike the circumstances in *China – GOES* and *China – X-Ray Equipment*, MOFCOM did not make a price undercutting finding. This is important because in a price undercutting analysis, a comparison of absolute price levels is more critical to the ultimate finding as to whether the subject imports were priced above or below the price for the domestic like product. Thus, in a price undercutting analysis, adjustments to absolute price levels might be necessary in some circumstances. In contrast, MOFCOM made a finding of price depression in this case. In a price depression analysis, an investigating authority is determining whether prices for the subject imports push down in relative terms prices for the domestic like product, examining price trends over time rather than comparing absolute price levels. For these reasons, adjustments to price to ensure comparability are not needed to the extent required in an undercutting analysis.

A. MOFCOM Was Not Required To Make a Finding of Price Undercutting

34. In this case, MOFCOM did not make a price undercutting finding, and the United States does not claim that MOFCOM did. Much of the U.S. argument rests on its mistaken assumption that a finding of price undercutting must be made to support an adverse price effects analysis. However, Articles 3.2 of the AD Agreement and 15.2 of the SCM Agreement allow a Member to base an adverse price effects finding on price undercutting "or" price depression "or" price suppression. The text thus makes clear that any one of these three possible findings is sufficient to support an adverse price effects finding. As the Final Determination clearly demonstrates, MOFCOM found price depression in this case.

B. MOFCOM's Finding of Parallel Price Trends Was Supported by the Record

35. The United States claims that MOFCOM's finding of parallel pricing was based on an analysis of comparable price levels only in interim 2009, rather than over the entire period of investigation. MOFCOM's Final Determination, however, shows a clear relationship between prices for subject imports and domestic like products throughout the full period of investigation. As the Final Determination explains, prices for subject imports and domestic like products increased substantially from 2006 through 2008, but then fell in tandem in interim 2009 relative to prices in interim 2008, showing parallel movements. The existence of parallel pricing helped to confirm that the declining prices for subject imports acted to depress prices for the domestic like product. The Appellate Body in *China – GOES* has confirmed that parallel price trends can support a price depression analysis.

36. Finally, the United States relies on the fact that from 2006 to 2007, the price of subject imports decreased by about eight percent, but prices for the domestic like product increased. But the United States fails to account for the fact that the period 2006 through 2007 was when subject import volumes skyrocketed, and domestic producers lost significant market share. While the United States is correct that prices did not move in parallel in this isolated one year time period, the fact that domestic producers in 2007 lost massive market share to subject imports when domestic producers' prices went up, demonstrates the debilitating competition they faced with unfairly priced subject imports.

C. MOFCOM Reasonably Used Average Prices

37. When conducting its adverse price effects analysis, MOFCOM used average prices. The United States argues that MOFCOM should have used some unidentified assortment of individual models when conducting its price analysis. However, Articles 3.2 of the AD Agreement and 15.2 of

the SCM Agreement do not require an investigating authority to use model or category-specific prices when conducting a price effects analysis. Indeed, they require no specific methodology at all, but rather leave that to the discretion of the investigating authority based on the particular facts of each case.

38. The U.S. reliance on the decisions in *China – GOES* is misplaced. As explained above, the panel and Appellate Body in that case were looking at the use of average prices in the context of price *undercutting*, not price depression. This same reasoning distinguishes the more recent panel decision in *X-Ray Equipment*.

39. In addition, the use of averages has some advantages because it allows MOFCOM and other investigating authorities to examine prices for all sales, not just some sales. Here the fact that there is no evidence that the product mix changed over time further supports the use of average prices when looking at relative price trends. Also, MOFCOM did not exclude any of the pricing data it received, nor did it manipulate the data in any way. MOFCOM used the same methodology for examining both domestic and import prices, and was thus even-handed and objective when analyzing price trends.

40. The United States relies entirely on a single chart submitted by one U.S. respondent. As discussed further below, however, MOFCOM examined the issue of competitive overlap between subject imports and the domestic like product in detail, and concluded that there was meaningful competitive overlap and substitutability, further justifying the use of average prices here when making a price depression finding.

D. MOFCOM Appropriately Considered the Fact That the Market Share for the Domestic Like Product Increased In Interim 2009

41. The United States also claims that MOFCOM's price depression finding is contradicted by the fact that the market share of domestic like products increased from interim 2008 to interim 2009, at the same time that the market share of subject imports also increased. The United States seems to rely on the fact that third-country imports lost market share in interim 2009 from interim 2008 levels. However, over the entire period of investigation, the market share for imports from third countries was relatively stable, while the market share of subject imports increased by about 3.5 percent. Moreover, over the entire period of investigation, the market share of the domestic industry decreased while the market share of subject imports increased significantly. The domestic producers were only able to increase market share in interim 2009 to the extent that they were forced by subject imports to decrease prices in order to try to gain back lost market share.

VII. MOFCOM Sufficiently Established a Causal Link Between Subject Imports and Material Injury To The Domestic Industry

42. To support its claim that MOFCOM's causation analysis was not consistent with Articles 3.1 and 3.5 of the AD Agreement, and Articles 15.1 and 15.5 of the SCM Agreement, the United States picks certain isolated factors, and argues that MOFCOM's failure to consider them renders its causation analysis invalid. Thus, the United States seems to argue that if it can show any other factor that might have contributed in some way to the material injury suffered by the domestic industry, MOFCOM's causation analysis must fail. However, it is clear under the applicable text that subject imports need only be a cause, not the sole cause, of material injury, in order to satisfy Articles 3.5 and 15.5. The Appellate Body has also stated that an investigating authority need only to show that subject imports contributed in some manner, even though other factors also contribute to the situation of the domestic industry.

43. Here, MOFCOM thoroughly reviewed the record and reached its causation determination on the basis of positive evidence. The Final Determination spends 25 pages discussing the causal link between subject imports and the material injury suffered by the domestic industry. MOFCOM found that the volume of subject imports increased dramatically and prices declined, resulting in depressed prices for the domestic like products. Also, prices for subject imports and the domestic like product exhibited similar trends, and were consistent from 2006 to 2008 in general, and both decreased in interim 2009 from interim 2008 levels. While it is true that apparent consumption in the domestic market declined in interim 2009, the domestic industry's production and sales did not suffer proportionately. MOFCOM also carefully examined the role of other factors that might have contributed to injury. MOFCOM's thorough review of the causal link more than satisfies the standards under the relevant AD and SCM Agreement articles.

A. MOFCOM Appropriately Accounted For the Role of Third Country Imports

44. The United States argues that MOFCOM "failed to take into account" the fact that in a single isolated time period during the period of investigation – interim 2009 – the market share of the domestic like product increased at the same time that the market share of subject imports increased. The United States implies that subject imports took market share only at the expense of third country imports, and that MOFCOM "failed to address" the role of third country imports. The record shows, however, that MOFCOM fully examined and addressed this issue. MOFCOM examined data for imports from all sources and noted that the volume of third country imports decreased sharply by 32 percent in interim 2009, and that "imports from other countries (regions) do not affect the finding of the causal link in this case." Over the entire period of investigation, the record shows that the market share for third country imports was relatively stable, decreasing by less than one percent. In contrast, the market share of subject imports increased by about 3.5 percent.

B. MOFCOM Accounted For the Drop in Labor Productivity

45. The United States focuses on the fact that labor productivity declined to conclude that MOFCOM failed to account for the drop in labor productivity, despite the fact that MOFCOM examine 16 different indicia of the financial industry's health and performance over the period of investigation. An investigating authority is not required to examine in depth every possible issue. The U.S. argument ignores the fact that the Chinese industry has low labor costs, and therefore the decline in labor productivity in the Chinese industry is not a key indicia of the health of the industry or a significant factor in a causation analysis in these circumstances. Furthermore, the fact that no party raised this issue before MOFCOM during the course of investigation indicates that this is not a critical issue.

C. MOFCOM Reasonably Examined the Degree of Competitive Overlap Between Subject Imports and the Domestic Like Product

46. The United States argues that MOFCOM failed to recognize the alleged lack of competition between subject imports and the domestic like product. However, MOFCOM's Final Determination specifically examined the degree of competitive overlap, making it clear that the investigating authority conducted a comprehensive investigation of the product under review, considered various physical and market-related factors, and determined that the products were competitive.

47. The United States alleges that MOFCOM failed to address Table 6, which was submitted by Chrysler showing sales in four alleged categories of vehicles. The Final Determination, however, examines the contents of the chart and explains why the chart does not contradict MOFCOM's determination that products of the domestic industry and the product under investigation compete with each other.

48. In addition, the record shows that Chrysler's Table 6 is not reliable on its face. First, the four categories of vehicles it uses – "entry, mid, luxury, premium" – are nowhere defined. It is not clear if those categories relate to the size of the vehicle, their prices, consumer perceptions, or something else. Second, the data in Table 6 are incomplete. For example, the total volume of subject imports shown in Chrysler's Table 6 for each year is far less than the actual volume of subject imports shown in the Final Determination. Third, the record shows there are no dividing lines between these alleged categories. With respect to price, for example, the four categories identified in the Chrysler Table do not correspond strictly with discrete price segments.

49. In addition, even to the extent it can be relied upon, the Chrysler Table shows direct competition in 3 of the 4 product categories it identified, which on its face represents significant competitive overlap. There is no requirement that there be perfect, 100 percent overlap in light of MOFCOM's findings that subject imports are competitive with and substitutable for the domestic like product.

50. Moreover, the United States argues that the fact that subject imports oversold the domestic like product for part of the period of investigation undercuts MOFCOM's conclusion that subject imports and the domestic producers competed with each other. Again, the United States here seems to rely on the premise that a causation finding cannot be made in the absence of price undercutting. The fact that subject imports may have oversold the domestic like product for parts of the period of investigation does not mean that there was no competition between them. If that were true, then a causal link could not be found in any case where price undertaking was not present. Rapidly falling prices for subject imports can still depress or suppress prices for domestic

like products, and support an adverse price effects finding, even if those subject imports do not, over any given period of time, undersell the domestic like products.

51. Furthermore, the United States ignores the fact that in 2007, subject imports were priced lower than the domestic like product, which further supports MOFCOM's conclusion of competition between subject imports and the domestic like product.

D. MOFCOM Properly Accounted for the Decline in Apparent Consumption in Interim 2009

52. Again attempting to focus solely on isolated data point rather than examine the totality of MOFCOM's causation finding, the United States argues that MOFCOM "failed to take into account" the decline in apparent consumption in interim 2009. The U.S. claim is simply not correct, because MOFCOM in fact examined the role of the decline in consumption in interim 2009. The Final Determination beginning at page 138 addresses the decline in apparent consumption in interim 2009, and notes that "the domestic industry still kept increasing production and sales, as well as market share by improving production and operation levels and product competitiveness." Because the domestic industry was able to increase sales and production in interim 2009, it was insulated somewhat from the fall in apparent consumption over that period. The U.S. argument that MOFCOM "without explanation" rejected the fall in apparent consumption as a causal factor is therefore contradicted by the record.

E. MOFCOM Reasonably Addressed Other Possible Causes of Injury

53. Finally, the United States claims that MOFCOM failed to address other factors that "may" have caused injury, specifically, an increase in sales taxes on larger engine vehicles, and the impact of effective increases in average wages and employment, coupled with decreases in productivity. Both U.S. arguments should be dismissed. Concerning the sales tax issue, MOFCOM's Final Determination specifically explains that the respondent's argument raised in the underlying investigation was based on incorrect facts, because the domestic industry's production and sales in fact increased in interim 2009 from interim 2008. Regarding the impact of average wages and productivity, we noted above that labor costs are not a critical causal factor when examining the financial health of the domestic Chinese auto industry, and could not have been a likely cause of the decline in the domestic industry's pretax profits.

ANNEX C-3

CLOSING STATEMENT OF CHINA AT THE FIRST PANEL MEETING

1. Mr. Chairman and Members of the Panel, China would like to begin by thanking you and the Secretariat for the time and effort you are devoting to this proceeding. We hope that the discussion held during this hearing has assisted the Panel in enhancing its understanding of the claims raised by the United States, and China's response to those claims.

2. At this time, we would simply like to offer four brief observations regarding how the U.S. case has evolved during this proceeding so far.

3. First, we note with particular interest that the United States has shifted some of its arguments before the Panel. For example, in its First Written Submission, the United States focused on MOFCOM's supposed exclusion of joint ventures. Now, during the hearing, the United States appears to concede that MOFCOM did not exclude them. In addition, the United States previously argued that the petition failed to include any meaningful public summaries, but the United States now seems to argue that public summaries have been provided, but allegedly are insufficient. All of this shifting of arguments suggests that the United States may in fact be overreaching in its claims against China.

4. Second, the United States appears to rely heavily on the overly simplistic argument that the present case is the same as *China – GOES*. However, as the Panel now can see, that case differs in many fundamental respects from the present case. Concerning the adequacy of non-confidential summaries, for instance, the summaries at issue in this case are far more detailed than those in the *GOES* case. The non-confidential summaries in this case include text, trend lines, percentage changes, and related information, all of which provide more details than in *GOES*.

5. Also, this case presents different facts than *GOES* on the issue of facts available as the basis for all others rates. For example, in this case there is no question about the origin or derivation of the AD and CVD all others rates; the public notices of MOFCOM make perfectly clear how MOFCOM derived these rates. Further, as we discussed yesterday, the *GOES* panel did not expressly consider MOFCOM's logic and analysis in finding that the unknown U.S. exporters had determined not to participate in MOFCOM's investigations.

6. Moreover, the *GOES* panel found that adjustments were needed to ensure price comparability, but *only* in the context of a price undercutting analysis where prices are being compared. But in the present case, MOFCOM did not compare prices and did *not* make a price undercutting finding.

7. China's third observation concerns the U.S. claim under Article 6.9 of the AD Agreement. In its First Written Submission, the United States simply asserts that China violated this provision. Yet at the same time, the United States has not presented supporting documents to the Panel. As such, the United States has not met its initial burden of proof. The United States, as the complainant, must first make out a *prima facie* case by not just making the legal argument, but also by providing relevant evidence to support its arguments. Without doing so, the burden cannot shift to China.

8. China's final observation from this first hearing concerns the continuing U.S. argument that MOFCOM's notification of U.S. exporters and producers was inadequate. The record shows that MOFCOM engaged in a multi-pronged notification effort that included posting the registration notice on its website and requesting the U.S. government to provide the notice to all U.S. exporters and importers. The fact that four additional companies beyond those named in the petition registered for participation shows that the notification was effective. MOFCOM's notice also stated clearly that non-participation in the investigations could lead to the imposition of facts available, and thus, China satisfied its Article 6.8 notification obligation.

9. China would like to conclude by again thanking the Panel and the Secretariat for their attention and efforts during this hearing. We look forward to further clarifying the facts and issues for the Panel.

ANNEX C-4

EXECUTIVE SUMMARY OF THE SECOND WRITTEN SUBMISSION OF CHINA

I. INTRODUCTION

1. This dispute continues the overly broad attack by the United States on China's trade remedy procedures. Yet as China explained in its First Written Submission and during the First Substantive Meeting of the Parties, the aspects of MOFCOM's determinations before the Panel rest on a lawful and reasonable implementation of China's obligations under the AD and SCM Agreements.

II. ARGUMENTS

A. MOFCOM Appropriately Required Adequate Non-Confidential Summaries of Confidential Information

2. Article 31(1) of the Vienna Convention requires a provision to be interpreted "in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose." Therefore, when interpreting Article 6.5.1 of the AD Agreement and Article 12.4.1 of the SCM Agreement, the term "substance" in setting the public disclosure standard must be given due meaning. As the "substance" of the non-confidential summaries at issue concerns certain aspects of the petition's claims concerning injury, the substantive obligations concerning injury set out in Articles 3.4 of the AD Agreement and 15.4 of the SCM Agreement provides context. Article 3.4 requires an investigating authority to determine injury through an evaluation of all relevant economic factors and indexes that have a bearing on the industry, including actual or potential *declines* in certain specified injury factors, and actual or potential *negative effects* on certain other listed factors. Thus, the "substance" that must be ascertainable to the parties upon review of the non-confidential summaries in this case pertains to the *trends* of the specified injury factors and the relationship between subject imports and the domestic like product over time, rather than the absolute numbers themselves.

3. The United States argues that the trend lines provided in the petition do not provide an adequate summary because they are not to scale. The United States overlooks the fact, however, that for the vast bulk of the non-confidential summaries at issue, percentage changes are also provided, which give further detail and context for the non-confidential summaries at issue.

4. The United States also argues that the applicant could summarize absolute figures without disclosing confidential information by reporting the absolute figure as an average. The United States is in effect is arguing that the provision of "average" ranged figures is the only way to provide a non-confidential summary that would satisfy the requirements of Article 6.5.1. However, the text of the Article does not require any specific type or format for non-confidential summaries to be provided. Rather, Article 6.5.1 requires only that such summaries "be in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence." As discussed above, the "substance" of the confidential information at issue here relates to the trends in the relevant injury criteria discussed in the petition, in accordance with the context established by Article 3.4 of the AD Agreement. In such a trends-focused analysis, the percentage changes provided in the petition, coupled with trend lines over time, provide an adequate understanding of the substance of the information at issue. Additionally, each of the tables that the United States references relate to annual aggregate data concerning injury, the confidential treatment of which the United States has not challenged. Therefore, the United States is in effect arguing that the very information treated as confidential should have been disclosed, a circular argument that the *China – GOES* panel has previously found "not convincing."

5. Moreover, the U.S. argument that the petitioner in the present case never asserted that summarization was not possible or otherwise justified the absence of meaningful non-confidential summaries is beside the point. Petitioner never asserted that public summarization was not possible here for the simple fact that petitioner provided adequate non-confidential summaries.

B. The United States Has Failed to Establish a *Prima Facie* Case with Respect to its Claim that MOFCOM Did Not Disclose the Essential Facts Underlying its Dumping Margin Calculation

6. For reasons set forth in China's First Written Submission and its Opening Statement at the First Substantive Meeting of the Panel, the United States has failed to discharge its burden with respect to its claim under Article 6.9. The United States has provided no new evidence that would shift the burden to China as the respondent. Rather, in its response to the Panel's first set of questions, the United States argues that it can base its claim on just those documents "in its possession," implying that China, despite being the respondent, must supply the evidence for the United States to prove its case. The U.S. argument is without merit.

7. First, to make out a *prima facie* case, the complaining party must provide *both* adequate evidence and legal argument tying the alleged facts to a legal claim. As explained by the Appellate Body in *US – Gambling*, "{a} *prima facie* case must be based on 'evidence *and* legal argument' put forward by the complaining party in relation to *each* of the elements of the claim." The burden shifts to the responding party *only* if the complaining party adduces evidence sufficient to raise a presumption that what is claimed is true. Thus the burden cannot shift to the responding party where, as here, the United States has provided no evidence that would permit the Panel to adjudicate its claim of supposed deficiencies in MOFCOM's pre-final determination letters to the six U.S. exporters and producers for which it reached company-specific dumping determinations.

8. Second, the United States cannot establish a *prima facie* case by pointing to documents *other* than the pre-final determination disclosure letters to the six U.S. exporters and producers. As China explained, a legitimate *prima facie* case must tie alleged facts to the specific legal claim at issue. The U.S. references to unrelated documents that do not purport to be MOFCOM's pre-final determination disclosure letters are no substitute for evidence that is only contained in the disclosure letters to the U.S. exporters and producers.

9. Third, the U.S. comment that the disclosure letter provided by MOFCOM to the U.S. government did not provide the detail necessary for it to understand MOFCOM's dumping margin calculations misses the mark. The United States appears to imply that MOFCOM was required under Article 6.9 to provide to the U.S. government the same type of detailed disclosure of dumping margin calculations and analysis as provided to the individual company respondents, notwithstanding the inclusion of business confidential information ("BCI") in the disclosure letters to the individual respondents. Because MOFCOM calculated dumping margins based on company-specific BCI, the U.S. government could not reasonably expect that *it*, as a different interested party not authorized to receive this BCI, would receive the same level of disclosure.

C. MOFCOM Properly Resorted to Facts Available to Determine the AD and CVD All Others Rates, and Adequately Explained its Determinations

10. In its First Written Submission and in its arguments before the Panel during the First Substantive Meeting, the United States relied heavily on the panel report in *China – GOES*, claiming that this Panel should reach the "same" decision as that earlier panel. In *China – GOES*, however, the panel noted that it was unclear from the record how MOFCOM had determined the all others rate. No such question of clarity exists in this case; MOFCOM based the AD all others rate on the alleged rate of dumping provided in the petition, as explained in its Final Determination. The petitioner's basis for the all others rate is clearly laid out in the public version of the petition. The CVD all others rate was based on the highest calculated rate, i.e., the rate of subsidization determined for General Motors, as explained in detail in MOFCOM's pre-final determination disclosure letter to the U.S. government. Further, China submits that, in the absence of direct guidance in the AD and SCM Agreements, MOFCOM's administrative process – which first requires interested party registration and then proceeds with more detailed information requests – reasonably ensures an orderly investigation process that complies with the AD and SCM Agreements.

11. The United States has continued to insist that MOFCOM failed to provide adequate notice to those exporters and producers subject to the AD and CVD all others rates under Article 6.8 of the AD Agreement and Article 12.7 of the SCM Agreement. China reiterates that it took multiple steps to attempt to ensure that all exporters and producers of the subject merchandise were aware of

MOFCOM's AD/CVD investigations, as well as of the possibility that non-cooperation could result in the application of the facts available. Specifically, MOFCOM (i) posted its initiation notices on its website and placed them in its public reading room; (ii) requested the U.S. government to inform all U.S. producers and exporters of its investigations; and (iii) sent its questionnaires to all U.S. producers and exporters identified in the petition, as well as to a number of additional U.S. companies that voluntarily registered for participation in the investigations. These steps constituted a reasonable and comprehensive notification effort that made clear to potential exporters and producers that they faced the application of facts available should they choose not to cooperate with MOFCOM. China also rejects the reliance of the United States on the Appellate Body decision on *Mexico – Rice*, because in that case, there was no indication that the investigating authority warned interested parties that the investigating authority would apply facts available in the absence of participation in the investigation. In this case, MOFCOM provided the required notification to all potential exporters and producers of the consequences of non-cooperation with MOFCOM's investigations.

12. Furthermore, China respectfully suggests that, for purposes of the establishment of AD and CVD all others rates in circumstances like those presented by this case, it does not matter if the unknown exporters and producers do not exist or have chosen not to make themselves known. As a practical matter, an investigating authority may not be able to determine the basis for the non-responsiveness of unknown exporters and producers. China therefore does not believe that the Panel should adopt a new test in which investigating authorities are asked to do what may be impossible – i.e., determine whether unknown exporters do not exist or have simply chosen not to cooperate.

13. According to the United States, a purportedly WTO-consistent methodology for the calculation of AD and CVD all others rates may be to base such rates on simple or weighted averages of the rates determined for individually investigated companies. While the United States does not refer to any provision of the AD and SCM Agreements in making this suggestion, China understands that the United States is referring to Article 9.4 of the AD Agreement. However, the argument implied by the United States as to the applicability of Article 9.4 fails as a matter of law and policy.

14. Article 9.4 of the AD Agreement only applies when the investigating authority has limited the number of exporters and producers under investigation under the second sentence of Article 6.10. It does not apply to circumstances where, as here, the investigating authority investigated all exporters and producers of the subject merchandise that registered for participation in the AD/CVD investigations, under the preferred approach of Article 6.10. This corresponds with the objective of Article 9.4, which is to prevent prejudice against cooperative exporters not included by the investigating authority in its investigation. The method of calculating AD and CVD all others rates based on averages as suggested by the United States, on the other hand, would provide no inducement to non-cooperating exporters and producers to provide information to the investigating authority. In the event such a policy were to be applied, such exporters and producers would know that they would obtain rates as favorable as the average of the rates applied to those exporters and producers expending time and effort to cooperate with the investigating authority.

15. The United States further argues that MOFCOM did not explain why non-investigated exporters and producers should be subject to rates based on facts available; did not explain how non-exporting companies could refuse to provide necessary information; and did not explain why the facts available applied were appropriate under AD Agreement Articles 12.2 and 12.2.2 and SCM Agreement Articles 22.3 and 22.5. As an initial matter, China emphasizes that, in addressing this issue, any comparison with *China – GOES* is unwarranted. As noted above, a key question before the panel in *China – GOES* was how MOFCOM had derived an all others rate that differed from the rates determined for individual exporters and producers. In this case, there is no analogous question.

16. MOFCOM fully laid out its rationale for applying the all others rates to non-investigated U.S. exporters and producers based on facts available – i.e., having been notified of the investigations and given the opportunity to register for participation, MOFCOM determined that any U.S. exporters and producers that remained unknown had determined not to cooperate with MOFCOM's AD/CVD investigations. MOFCOM's logic in this respect was straightforward and reasonable, and there is no other analysis or rationale that MOFCOM could have further provided. The same

rationale applies with respect to the U.S. claim that MOFCOM did not explain how non-exporting companies could refuse to provide necessary information. Each step in MOFCOM's analysis is laid out in the Final Determination.

17. Concerning MOFCOM's selection of the all others rates, all findings and conclusions, as well as supporting relevant information, are readily apparent from the record. As MOFCOM first explained in the Preliminary Determination, it derived the AD all others rate directly from the rate alleged in the petition, and applied the all others rate from the highest calculated subsidy rate as the CVD all others rate. It affirmed both of these choices in the Final Determination.

18. China also emphasizes that the Articles 6.9 and 12.7 disclosure requirements apply only to certain *facts*, and do not extend to *reasoning*. These Articles thus do not obligate China to disclose its rationale for the selection of the all others rates, but only the essential facts underlying its choice of rates. The Articles 6.9 and 12.7 disclosure requirements similarly do not encompass *calculations*, which are a form of interpretation or assessment of facts.

D. MOFCOM's Definition of the Domestic Industry Is in Accordance with the AD and SCM Agreements

19. As an initial matter, the U.S. approach to its claim under Articles 3.1 and 4.1 of the AD Agreement and Articles 15.1 and 16.1 of the SCM Agreement has evolved considerably over the course of this proceeding. Most notably, the United States, having originally focused on MOFCOM's supposed exclusion of joint ventures from its definition of the domestic industry, now accepts (correctly) that MOFCOM did not exclude them. The United States has now shifted its focus to alleged distortion of MOFCOM's domestic industry definition pursuant to the Appellate Body's decision in *EC – Fasteners (China)*, and a new claim that the percentage of domestic production included in the domestic industry definition is, standing alone, too small to qualify as a "major proportion."

20. As China has explained, CAAM's membership is broad, encompassing all active domestic producers during the period of investigation, and thus including both joint ventures and domestically owned companies. MOFCOM included in its definition of the domestic industry and in its injury analysis all data provided by this group of eight domestic producers. Accordingly, MOFCOM's definition of the domestic industry is broadly representative of Chinese production of the domestic like product. Further, MOFCOM did not, as the United States alleges, limit its definition of the domestic industry to only those domestic producers that supported the petition. Rather, MOFCOM simply included data for all domestic producers that chose to participate, regardless of their position with respect to the petition. While China acknowledges that certain domestic producers did not register for participation in MOFCOM's injury investigation, MOFCOM did nothing to preclude that possibility.

21. The United States asserts that the Appellate Body's decision in *EC – Fasteners (China)* compels a finding of distortion in this case. However, the two cases differ in key respects, and no finding of distortion is warranted in this dispute. First, in *EC – Fasteners (China)*, the investigating authority affirmatively excluded from its definition of the domestic industry 25 out of 70 domestic producers that had supplied some initial information to the investigating authority. MOFCOM engaged in no such self-selection process, but rather incorporated into its injury analysis data from all those domestic producers that registered for participation in the investigation. Second, the Appellate Body in *EC – Fasteners (China)* found that the 25% domestic industry coverage benchmark applied by the investigating authority to determine a "major proportion" reduced the data coverage of the injury analysis and introduced a material risk of distortion. MOFCOM applied no such limiting benchmark in this case.

22. The United States argued for the first time at the First Substantive Meeting of the Panel that the percentage of domestic production included in MOFCOM's definition of the domestic industry is too low on its face. This new U.S. argument fails for several reasons. First, the AD and SCM Agreements nowhere define a specific quantitative threshold required to satisfy the "major proportion" test of Article 4.1 of the AD Agreement and Article 16.1 of the SCM Agreement. Second, MOFCOM's inclusion of data from all domestic producers that decided to participate in the injury investigation permits the Panel to conclude that MOFCOM's definition of the domestic industry constitutes a substantial reflection of total domestic production. Third, even though Article 4.1 of the AD Agreement and Article 16.1 of the SCM Agreement do not require an

investigating authority to identify specific "practical constraints" on its ability to obtain information from more domestic producers as the United States suggests, MOFCOM nonetheless *did* face the real constraint that it could not compel additional domestic producers to participate in the injury investigation, and took action to facilitate participation by additional domestic producers in the injury investigation. Finally, MOFCOM's registration process does not create a disincentive for domestic producers to participate in its injury investigation, as the United States contends. For one, MOFCOM's registration process is designed to ensure an orderly investigation process in which MOFCOM may quickly establish the pool of interested parties intending to supply information. Further, the injury registration notice that China supplied with its First Written Submission is a straightforward and relatively short questionnaire that cannot be described as burdensome.

E. MOFCOM's Price Effects Analysis Is Consistent with China's WTO Obligations

23. MOFCOM's finding of price depression in the present case was fully supported by record evidence and consistent with MOFCOM's obligations under Articles 3.1 and 3.2 of the AD Agreement, and Articles 15.1 and 15.2 of the SCM Agreement. MOFCOM's Final and Preliminary Determinations specifically linked the price depression it found to subject imports, under the section entitled "Price Effect of the Product Under Investigation on Prices of Chinese Like Product." The Final Determination found that the movement of price trends of the subject imports and domestic like product are consistent basically, and concluded that the increase in import volume and market share of the subject imports and the decrease of import price of subject imports in interim 2009 depressed the price of the domestic like product. The Final Determination also found that the price depression of domestic like products caused by increased import volume and market share of subject imports caused decreases in several indexes, including the sales price, the increase margin of the sales revenue, the pre-tax profit, and the return on investment of domestic like products. MOFCOM's Final Determination also discusses that MOFCOM found parallel trends between prices for subject imports and domestic like product, a dramatic increase in the volume of subject imports, and competitive overlap between the subject imports and the domestic like product, which further supported its price depression finding.

24. The fact that subject imports might have oversold the domestic like product at certain times during the POI does not undermine MOFCOM's finding of price depression. First, the U.S. claim that MOFCOM failed to address evidence that subject imports oversold the domestic like product is contradicted by the text of MOFCOM's Final Determination. The Final Determination specifically addresses this argument, and concludes that "{p}rice depression and price suppression do not require that the import price of the product under investigation be lower than the price of the domestic like product. The evidence indicates that since 2009, the decrease of the import price of the product under investigation depressed the price of the domestic like product." Second, price depression or suppression can occur without price undercutting being present. Competition with imports can depress or suppress prices for domestic like products, even if those imports are priced higher at any single point in time than prices for the domestic like product. Finally, the text of Articles 3.2 and 15.2 authorize Members to find adverse price effects upon the basis of price depression "or" price suppression "or" price undercutting, confirming that a Member can find price depression or suppression without price undercutting being present.

25. The existence of parallel price trends over the entire period of investigation supports MOFCOM's finding of price depression. While the United States focuses on price trends in 2007 to argue that MOFCOM's finding of parallel price trends "is belied by the relevant data," MOFCOM took into consideration price trends observed in the 2006-2007 time period in reaching its conclusion that "the movement of price trends of the product under investigation and domestic like product are *consistent basically*. Both of them increased *in general* from 2006 to 2008, and decreased in the first three quarters of 2009." The 2007 period is also when the volumes of subject imports skyrocketed, and when the domestic producers lost massive market share. The domestic industry was forced to fight back against the increase in market share of subject imports by decreasing prices at the expense of profits. As a result, the domestic industry's financial indicators were depressed, and hence injury was reflected in the financial indicators rather than in the production or market share of the domestic producers.

26. The massive increase in the volume of subject imports during the period of investigation, and especially in interim 2009, further supports MOFCOM's price depression finding. In the Final Determination, MOFCOM found that the significant increase in market share of the subject imports,

especially at the end of the POI, depressed the price of the domestic like product. While the United States focuses solely on interim 2009 to argue that the Final Determination failed to take into account an increase in market share of the domestic like product during a single period of the POI, the market share of domestic like products decreased from 18 percent at the start of the period of investigation to about 14 percent at the end. In contrast, the market share for subject imports increased substantially, from about 9.9 percent at the start of the period of investigation to about 13.4 percent at the end. The Final Determination also notes the important interaction between the volume effects and price effects of competition with subject imports, explaining that "{i}n interim 2009, the domestic industry was able to gain back some market share, but only at the price of further reductions to price as a result of competition from the massively rising volume of subject imports. And even so, the domestic producers still did not come close to gaining back the market share that they had held in 2006 at the start of the period of investigation."

27. In addition, it is not correct that subject imports only took market share from non-subject imports during the POI. The market share for imports from third countries remained relatively stable during the POI while the market share of subject imports increased by about 3.5 percent. Moreover, the United States is incorrect that subject imports took market share from Chinese producers not included in MOFCOM's definition of domestic industry, as the market share for Chinese producers not included in MOFCOM's definition of the domestic industry remained stable from interim 2008 to interim 2009, and in fact increased slightly over the entire period of investigation.

28. Similarly, the U.S. argument that the increases in the volume of subject imports in the 2006-2008 period "were commensurate with rising consumption of the subject merchandise in the Chinese market" also fails, because over the entire period of investigation, the massive increase in the volume of subject imports outstripped the rise in apparent consumption of the subject merchandise in the Chinese market. Further undercutting the U.S. argument that the volume of subject imports is linked to apparent consumption levels is the fact that in interim 2009 the volume of subject imports increased by 20 percent, even while apparent consumption declined significantly.

29. Furthermore, MOFCOM appropriately used average prices when examining price effects under Article 3.2 of the AD Agreement and 15.2 of the SCM Agreement. The U.S. argument that the panel and Appellate Body decisions in *China – GOES* requires MOFCOM to make adjustments to ensure comparability fails because the *China – GOES* decisions were expressly limited to instances when an investigating authority makes price comparisons in the context of a price undercutting analysis. In the present case, MOFCOM did not undertake a price undercutting analysis and did not compare prices. Rather, MOFCOM examined *relative* price movements of the domestic like product and subject imports over time in the course of conducting a price *depression* analysis. A comparison of absolute price levels is more central to the ultimate finding in a price undercutting analysis, because an investigating authority must determine and compare absolute price levels before making an undercutting finding. In contrast, a price depression finding relies instead on an analysis of *relative* price trends and movements over time rather than a comparison of *absolute* prices.

30. The United States argues that MOFCOM's use of average unit values was also inappropriate because MOFCOM should have made unspecified adjustments to ensure price comparability among the "varying grades of the automobiles MOFCOM was comparing." However, MOFCOM in its Final Determination thoroughly examined the issue of competitive overlap, including the arguments of the interested parties and the table supplied by Chrysler allegedly showing a lack of competition between subject imports and the domestic like product. MOFCOM concluded that the arguments by the exporters were not supported by the record and that "the product of the domestic industry and the product under investigation compete with each other." MOFCOM also investigated the extent of competitive overlap between the domestic like product by examining, *inter alia*, physical characteristics, use and sales channels, and prices and end users, and concluded that subject imports and the domestic like product compete with each other.

31. MOFCOM also addressed respondents' concern regarding competitive overlap in its Final Determination by adjusting the scope of the product under investigation and defining domestic like product based on the adjusted scope. The fact that some of the discussion of the significant similarity and competitive overlap between subject imports and the domestic like product took place in the context of MOFCOM's domestic like product determination does not undermine the

relevance of the information, as long as the discussion supports the factual conclusion that there was significant competitive overlap between subject imports and the domestic like product.

32. MOFCOM's Final Determination specifically took into account Chrysler's comments concerning the alleged lack of competition between subject imports and the domestic like product, including the table that Chrysler supplied, and found that Chrysler's arguments did not undermine its finding of competitive overlap between subject imports and the domestic like product. Moreover, the record evidence demonstrates that Chrysler's Table 6 is not reliable. For example, the four categories of vehicle it purports to use – "entry, mid, luxury, and premium" – are nowhere defined, and do not correspond strictly with discrete price segments. The data in Chrysler's Table 6 are also incomplete, as the total volume of subject imports shown in Chrysler's Table 6 for each year of the period of investigation is far less than the actual volume of subject imports shown in the Final Determination. Finally, even to the extent Chrysler's Table 6 can be relied upon, it still shows direct competition in three of the four product categories it identified, which represents significant competitive overlap.

F. MOFCOM Sufficiently Established A Causal Link Between Subject Imports and Material Injury To The Domestic Industry

33. MOFCOM's Final Determination thoroughly reviewed the record evidence and established a sufficient causal link between subject imports and the material injury suffered by the domestic industry, consistent with Articles 3.1, 3.4 and 3.5 of the AD Agreement, and 15.1, 15.4, and 15.5 of the SCM Agreement.

34. The United States argues that the significant increase in volume of subject imports over the POI is not relevant because, in interim 2009, subject imports took market share from Chinese products not included in MOFCOM's domestic industry definition and third-country imports. However, MOFCOM specifically examined statistical data for imports from all sources and concluded in the Final Determination that imports from other countries do not affect the finding of the causal link. MOFCOM's determination was based upon a review of the entire period of investigation, which showed that the market share of third country imports was relatively stable. In contrast, the market share of subject imports over the POI increased. In interim 2009, the volume of subject imports increased 20 percent at the same time prices declined significantly. In arguing that the market share of subject imports remained "relatively stable" in the 2006-2008 period, the United States fails to acknowledge that over that same time period, the domestic producers lost *massive* market share to the unfairly-priced flood of subject imports.

35. The argument advanced by the United States for the first time that MOFCOM failed to account for the role played by Chinese producers not included in its definition of the domestic industry is also without merit, as the record evidence shows that the market share held by Chinese producers not included in the definition of the domestic industry did not change significantly or in any meaningful way.

36. The United States also advances a speculative assertion concerning the role of the fall in apparent consumption in interim 2009, arguing that the domestic industry was forced to reduce prices when it found itself with excess production in interim 2009. However, the record contradicts the U.S. argument, which is apparently based on the premise that, in the Chinese domestic auto industry, production decisions are made independent of sales volumes. In fact, the Final Determination demonstrates that the "the sales model of Chinese like product is that the sales decides the production," demonstrating that production is a function of anticipated sales rather than the other way around, as the United States presumes.

37. Moreover, MOFCOM examined in detail the role of the decline in consumption in interim 2009, and found that in interim 2009, "although the apparent consumption of the domestic market decreased, the domestic industry still kept increasing production and sales, as well as the market share by improving production and operation levels and product competitiveness." Therefore, the Final Determination concluded that the change of the apparent consumption did not cause adverse impact on the domestic industry.

38. The United States continues to repeat its argument that a decline in the domestic labor productivity was a "likely culprit" that MOFCOM inappropriately ignored. However, labor costs are only a small portion of the total cost of producing a vehicle in China, and are not a meaningful

indicator when examining the causal link between subject imports and the material injury suffered by the domestic industry. In addition, the argument of the United States that the increase in labor costs eroded the profit of the domestic industry in interim 2009 by increasing overall costs is incorrect, because the increase in labor costs did not increase total per unit costs, which in fact *declined* in interim 2009 from interim 2008 levels. Also, while the United States argues that labor productivity is a "known factor" under Article 3.5 of the AD Agreement, prior panels have indicated that "known factors" include factors that are clearly raised before the investigating authority during the course of an AD investigation. No party raised the argument in the course of the underlying investigation in this case.

39. Finally, contrary to the U.S. argument that MOFCOM failed to address a respondent's allegation that a change in tax policy contributed to the material injury suffered by the domestic industry, MOFCOM reviewed the argument of the respondent and the response of the petitioner, and specifically concluded in the Final Determination that the respondent's argument was not consistent with the facts. The new assertion by the United States that MOFCOM should have responded to an argument that the respondents below did not even make—i.e., that tax increase may have contributed to the decline in domestic prices by making the vehicle less desirable to consumers—improperly imposes an obligation for the investigating authority to read the mind of respondents and to respond to arguments that are *different* than those that the respondent actually made.

III. CONCLUSION

40. For the reasons set forth in this submission, China respectfully requests that the Panel find that MOFCOM's determinations in the underlying investigations were fully consistent with China's WTO rights and obligations.

ANNEX C-5

EXECUTIVE SUMMARY OF THE OPENING STATEMENT OF CHINA
AT THE SECOND PANEL MEETING

I. Introduction

1. The United States notes that this is the third dispute settlement proceeding it has filed against AD/CVD measures imposed by China, as if that fact alone supports the validity of its claims before the Panel. However, the number of cases against China does not make the U.S. claims any more valid than the number of cases against the United States makes the claims against it any more persuasive. Rather, China submits that its AD/CVD procedures and findings in this case are lawful under the AD and SCM Agreements.

II. MOFCOM Appropriately Required Adequate Non-Confidential Summaries

2. Articles 6.5.1 of the AD Agreement and 12.4.1 of the SCM Agreement only require that a non-confidential summary be in "sufficient detail" to permit a "reasonable understanding" of the "substance" of the confidential information. The term "substance" is defined as "the essential nature or part of a thing." The "essential nature" can only be discerned by examining the purpose for which the confidential information is used in a particular case. Likewise, the terms "sufficient detail" and "reasonable understanding" cannot be determined in isolation pursuant to one independent, objective standard. Rather, they must be determined by looking at the *context* in which the confidential information at issue appears and the purpose for which that information is presented.

3. In this case, the petition focuses its injury allegations on the *trends* in the movement of various factors, rather than the absolute numbers themselves. Therefore, in the context of this case and the substantive obligations of Article 3, the "substance" at issue pertains to the movement, or trends, of certain factors, rather than the absolute numbers themselves. Because the current petition is based on a trends-focused injury analysis, the non-confidential summaries allow a reasonable understanding of the substance of those trends.

4. As for the discussion of sales to output ratio in Table 19, that table provides trend lines indicating the proportion of products sold by the domestic industry relative to production over time. This provides a reasonable understanding of the substance of the data, consistent with the petition's focus on a trends analysis. The trend line shows the ratio of sales to output increasing from 2006 to 2007, and decreasing generally from 2007 through the end of the period of investigation. Likewise, Table 27 provides a trend line showing movements in the return on investment over time, demonstrating that the return on investment dropped significantly after 2007. In addition, the vast bulk of the non-confidential summaries provide percentage changes, along with trend lines and additional text that give further detail and context for the non-confidential summaries at issue.

5. As such, the "substance" of the confidential information at issue in these tables relates to the trends in the relevant injury criteria, in accordance with Article 3.4 of the AD Agreement. While the United States complains of an absence of a scale for the trends provided in the public summaries, provision of a separate scale in addition to the percentage changes provided is not necessary where, as here, the focus of the underlying injury analysis is on the trends and the movement of the data rather than on the absolute values themselves.

6. The argument of the United States, that percentage changes are not sufficient because the petitioner could have instead provided an average of the aggregate figures themselves, is circular and should be rejected. Each of the tables at issue related to annual aggregate data concerning the domestic industry. Petitioner applied for, and MOFCOM granted, confidential treatment for that aggregate information. The United States has never challenged MOFCOM's decision to grant confidential treatment for the aggregate data. The United States cannot now challenge MOFCOM's provision of confidential treatment for that aggregate data by requiring petitioner to release it in the public version of the petition. The panel in *China - GOES* rejected this identical circular argument that the United States makes here.

7. Finally, no party objected to the adequacy of any of the non-confidential summaries during the underlying proceedings. China is not arguing, as the United States suggests, that an adequate public summary need only be provided if a party objects. Rather, China notes that it is relevant to the Panel's assessment that – as an evidentiary matter supporting China's conclusion – no party objected to the adequacy of the public summaries at issue.

III. The United States has Failed to Establish a Prima Facie Case with Respect to its Claim Under Article 6.9

8. The United States has not put forward any evidence in support of its claim that China failed to satisfy its obligation under Article 6.9 of the AD Agreement to disclose the "essential facts" underlying MOFCOM's dumping margin determinations. Thus, the United States has left the Panel with no basis to make any findings about the adequacy of MOFCOM's disclosures under Article 6.9.

9. The United States continues to argue that the Panel should rule in its favor because China failed to provide evidence showing that MOFCOM disclosed the essential facts of its dumping margin analysis. The United States bases its claim on the fact that none of the documents "before the Panel" demonstrate that MOFCOM disclosed the essential facts. However, the documents provided by the United States before the Panel do not include the confidential pre-final determination disclosure letters that MOFCOM provided to the respondents. As such, the U.S. theory of this issue seems to be that it is incumbent upon *China* to provide the evidence that counters the unsubstantiated U.S. claim. That is not how the burden of proof is allocated in WTO dispute settlement.

10. It is well-established that the complainant must first provide evidence in support of its claim. Indeed, a *prima facie* case must be based on *both* evidence and legal argument, not just the latter. Only when the complaining party "adduces evidence sufficient to raise a presumption that what is claimed is true…" does the burden shift to the respondent. When applying those rules here, the Panel must conclude that the United States has failed to make out a *prima facie* case under Article 6.9, and that the burden has not shifted to China. The United States has not explained, with reference to specific documents or facts, why MOFCOM's disclosure of essential facts to the company respondents was inadequate.

11. In addition, the United States is factually wrong in arguing that MOFCOM did not provide the required disclosure documents to interested parties. The Final Determination states clearly that MOFCOM issued a company-specific disclosure letter to each of the U.S. exporters and producers it investigated. The disclosure letters that MOFCOM provided to the U.S. exporters and producers contain business confidential information of those parties, and thus were not provided to the U.S. government. The disclosure letter that MOFCOM *did* provide to the U.S. government does not contain the business confidential information of the other parties, including the U.S. company respondents. Therefore, the U.S. government disclosure letter is irrelevant to the U.S. claim that the United States asserts here.

IV. MOFCOM's AD and CVD All Others Rates are Lawful

12. With regard to MOFCOM's determination of its AD and CVD all others rates, the U.S. claims rely extensively on the report of the panel in the *China - GOES* case. Since the last meeting before the Panel and the Parties' most recent written submissions, however, the decision of the *China - Broiler Products* panel has become available. While the *China - Broiler Products* and *China – GOES* panel both discussed at length the determination of MOFCOM's AD and CVD all others rates on similar facts, the *China - Broiler Products* panel came to different conclusions than the *China – GOES* panel.

13. The *China - GOES* panel based its decision on the all others rates in that case mainly on two factual findings. First, the *China – GOES* panel found that MOFCOM's notice of initiation did not specify all the information required for the AD and CVD investigations, and concluded that MOFCOM should have provided detailed notice of all required information before it could justify use of facts available.

14. The *China - Broiler Products* panel properly reached the opposite conclusion of the *China – GOES* panel on the same facts. The *China - Broiler Products* panel reasoned that the failure of an exporter to register and provide the initial information requested in MOFCOM's initiation notice, standing alone, meant that MOFCOM could not calculate a company-specific rate, and that

MOFCOM was justified in resorting to facts available to determine the applicable rate. The *China – GOES* panel's reasoning implies that an investigating authority must, before it can apply facts available, continue to request all information required for a full investigation from parties that have already signaled their intention not to cooperate with the authority. Such an approach is not supported by the AD and SCM Agreements and the jurisprudence, nor is it practically feasible or necessary for investigating authorities. It would be futile for an investigating authority to continue seeking information from a party that has decided not to cooperate with the first steps in the investigative process. Thus, China believes that this Panel should reach the same conclusion as the *China - Broiler Products* panel on this issue.

15. Second, the *China – GOES* panel relied on the fact that no other exporters existed beyond those identified by MOFCOM. On this basis, the panel rejected MOFCOM's resort to facts available for purposes of the all others rates, reasoning that non-existent exporters cannot refuse to cooperate with an investigating authority. Also, because the *China – GOES* panel found that no other exporters existed, it did not have to grapple with the practical problems that arise when an investigating authority does not or cannot know if other exporters exist. In this respect, the facts of the *China – GOES* case are different from those in the *China - Broiler Products* or the present cases. In the *China - Broiler Products* case, the United States never alleged that there were no other exporters beyond those known to MOFCOM. In this case, however the United States is again arguing that there were no exporters besides those known to MOFCOM. The United States, however, has pointed to no evidence from the investigation record before MOFCOM to support its argument. Indeed, in this case, MOFCOM never made any findings as to the existence or non-existence of other possible exporters and producers. Therefore, the second factual underpinning of the decision of the *China – GOES* panel was not present in the *China - Broiler Products* case, and is not present here.

16. The *China – GOES* and *China - Broiler Products* panels also differed sharply in their understanding of the panel and Appellate Body findings in the *Mexico – Rice* case. The *China - Broiler Products* panel identified a key factual difference between the actions of the investigating authority in *Mexico – Rice* and MOFCOM's method of notification, which it has consistently used in the recent cases we have been discussing. As the *China - Broiler Products* panel explained, there is no indication that the Mexican investigating authority warned interested parties that it would resort to facts available in case of failure to provide requested information. Here, as in the *China - Broiler Products* case, that message was perfectly clear in MOFCOM's notification. Similarly, the *China - Broiler Products* panel noted that MOFCOM made its initial request for information publicly available, such that interested parties unknown to the investigating authority could become aware of the request for information. There is no indication that the investigating authority in *Mexico – Rice* took this step. For these reasons, the U.S. reliance on the *China – GOES* panel's description of *Mexico – Rice* lacks merit.

17. The United States also complains that MOFCOM's multiple notification efforts in this case were inadequate to reach all possible U.S. exporters and producers. The United States appears to take the position that MOFCOM was required to individually notify each such company. Aside from being practically impossible, such an approach is not legally required. As the *China - Broiler Products* panel confirmed, international law recognizes that the accepted way to inform unknown interested parties in administrative proceedings is through public notices, including notices published in official gazettes or on the Internet. This recognition is embedded in the AD Agreement through the Article 12 requirement concerning the publication of preliminary and final determinations. The *China - Broiler Products* panel also agreed with China's position in this case that the Appellate Body in *Mexico – Rice* did *not* set forth a general rule requiring targeted requests for information to all individual exporters and producers. China further emphasizes the *China - Broiler Products* panel's conclusion that neither Article 6.8 of the AD Agreement nor Annex II specifies what form a request for information should take or how an authority is to communicate the request to interested parties.

18. An investigating authority determining individual AD/CVD rates for each exporter or producer cannot possibly know if it has identified all exporters and producers, regardless of what it tries to do. The *China - Broiler Products* panel recognized this inherent difficulty, finding that, in many investigations, an authority will be unable to satisfy itself that, even with best efforts, it has identified all exporters and producers. The United States maintains that MOFCOM should have undertaken some unspecified greater level of notification before resorting to facts available for the

determination of all others rates. China encourages the Panel to reject the U.S. argument on the same grounds as the *China - Broiler Products* panel.

19. The *China - Broiler Products* panel also explained that the U.S. position is problematic from a policy perspective, for two reasons. First, if an investigation authority were required to individually reach each unknown exporter or producer, it would be difficult, if not impossible, for the authority to determine appropriate AD/CVD rates for such entities. Second, the U.S. position could provide an incentive for unknown exporters and producers not to make themselves known, because they could avoid the application of AD/CVD measures through non-cooperation. The *China - Broiler Products* panel concluded that the Appellate Body report in *Mexico – Rice* did not require such results.

20. The United States also contends that MOFCOM's notification attempts were irrelevant because they could not have reached "unknown" U.S. exporters and producers. This U.S. argument fails on both legal and factual grounds. First, Article 6.8 of the AD Agreement and Article 12.7 of the SCM Agreement obligate investigating authorities to notify interested parties of the information required. Thus, the notification efforts of the investigating authority are indeed relevant. Second, MOFCOM's notification efforts were indeed relevant and effective because four U.S. exporters and producers not initially known to MOFCOM registered for participation in the investigation. This fact contradicts the U.S. claim that companies "unknown" to MOFCOM did not receive its notification.

21. The United States also argues that the application of the facts available all others AD rate to Ford is an example of why MOFCOM's approach produces unjustifiable results. However, the Ford situation provides no such example because MOFCOM did not apply facts available to Ford, as indicated in the Final Determination.

22. Furthermore, it should be noted that throughout this proceeding, the U.S. claims under Article 6.8 of the AD Agreement and Article 12.7 of the SCM Agreement have focused on whether MOFCOM satisfied the notification prerequisite to the application of facts available. The United States has not made any specific claim challenging MOFCOM's *choice* of facts available. In fact, the U.S. Request for the Establishment of a Panel is devoid of any claim based on paragraph 7 of Annex II, which provides guidance on the choice of facts available. MOFCOM's choice of facts available is therefore outside the terms of reference of this Panel.

23. Moreover, paragraph 6 of the Working Procedures for the Panel requires parties to submit a written submission presenting the facts of the case and its arguments prior to the first meeting with the Panel. The United States did not do so with respect to MOFCOM's choice of facts available in its First Written Submission, nor did it clearly articulate such a claim in its Second Written Submission. While the United States has referenced MOFCOM's choice of facts available in connection with certain procedural claims under other articles, those references do not substitute for a claim under AD Agreement Article 6.8 and Annex II, paragraph 7, and the equivalent provisions in the SCM Agreement.

24. China recognizes that the *China - Broiler Products* panel rejected China's argument that it should decline to rule on a U.S. claim concerning MOFCOM's choice of facts available because the United States articulated its claim too late in the proceeding. However, in *China - Broiler Products*, China did not make its argument concerning the absence of a U.S. claim regarding MOFCOM's choice of facts available until the interim review stage. In this case, China's argument that the United States did not make a proper claim regarding MOFCOM's choice of facts available is squarely before the Panel now. Further, China believes that it is even less clear in this case than it was in *China - Broiler Products* that the United States is specifically complaining about MOFCOM's choice of facts available. The U.S. written and oral submissions to the Panel nowhere clearly articulate such a claim. In China's view, this is not a proper claim on which the Panel can rule.

25. The United States also argues that MOFCOM did not live up to the disclosure obligations of Article 6.9 of the AD Agreement and Article 12.8 of the SCM Agreement. The U.S. argument is wrong for several reasons. First, the United States exaggerates the level and extent of disclosure required by these articles. These articles apply only to essential facts, and do not extend to the reasoning of the investigating authority. Second MOFCOM disclosed all pertinent facts leading to its selection and imposition of AD and CVD all others rates. There are no other salient facts that MOFCOM could have disclosed.

26. Moreover, the factual bases on which the *China – GOES* and *China - Broiler Products* panels ruled are not present in this case. In *China – GOES*, in the case of the AD investigation, the panel focused on the non-existence of other exporters and certain transactional data underlying the all others rate. For the CVD investigation, the *China – GOES* panel focused on the non-existence of other exporters. Similarly, the *China - Broiler Products* panel, in the case of the AD all others rate, found relevant certain facts related to the dumping calculation model used to generate the all others rate. In the case of the CVD all others rate, the *China - Broiler Products* panel based its findings on questions about the government programs included in the all others rate calculation.

27. The factual bases underlying the decisions of the *China – GOES* and *China - Broiler Products* panels are not present in this case. With respect to the AD all others rate, MOFCOM applied the rate in the petition with no further adjustments or calculations. For the CVD all others rate, MOFCOM applied the rate calculated for General Motors. Unlike the *China – GOES* and *China - Broiler Products* cases, the public record of the investigations in the present case leaves no questions whatsoever about the origin and application of the all others rates.

28. Finally, the United States continues to argue that MOFCOM did not provide an adequate explanation of its all others rate methodology for purposes of Articles 12.2 and 12.2.2 of the AD Agreement and Articles 22.3 and 22.5 of the SCM Agreement. While China has already addressed this argument in earlier submissions, the panel report in *China - Broiler Products* underscores an additional important point. The panel in *China - Broiler Products* based its findings on MOFCOM's calculations and analysis underlying the AD all others rate of 105.4%. Here, however, the AD rate of 21.5% is taken directly from the petition and the CVD rate of 12.9% is taken directly from the highest calculated rate. Thus, the bases for these rates are perfectly clear. The questions surrounding the derivation of the all others rates in the *China – GOES* and *China - Broiler Products* cases simply do not exist in this case.

V. MOFCOM Properly Defined the Domestic Industry

29. The U.S. claim regarding MOFCOM's definition of the domestic industry focuses on two main arguments. The first is that MOFCOM's definition must be distorted because, in the U.S. view, it included only domestic producers that supported the petition. The second is that the definition did not include enough domestic production to qualify as a "major proportion" of that production.

30. One of the options for defining the domestic industry provided by AD Agreement Article 4.1 and SCM Agreement Article 16.1 is the domestic producers whose combined production constitutes a major proportion of the total domestic production of the domestic like product. Nowhere do these articles specify a distortion test, mandate the collection of certain types of data, or otherwise limit the discretion of an investigating authority in defining the domestic industry. Prior WTO cases also make clear that these articles provide considerable flexibility for investigating authorities to adjust to the unique facts of each case.

31. The United States relies heavily on *EC – Fasteners* to argue that this case gives rise to the same type of distorted definition of the domestic industry previously rejected by the Appellate Body. The United States is wrong, however, for reasons laid out by the *China - Broiler Products* panel on materially identical facts. First, the *China - Broiler Products* panel carefully evaluated MOFCOM's process for providing public notice of its injury investigation – the same process followed here – and found that the United States did not demonstrate that MOFCOM's process excluded any domestic producers from participating in the investigation. Second, the *China - Broiler Products* panel found that MOFCOM did not apply a minimum threshold, as had been the case in *EC – Fasteners*. The same is true here. Third, the *China - Broiler Products* panel found that, unlike in *EC – Fasteners*, MOFCOM's process of defining the domestic industry did not involve sampling or any other type of limiting or self-selecting act, which is again true here. Fourth, the *China - Broiler Products* panel inquired if MOFCOM had affirmatively rejected information from domestic producers, as in *EC – Fasteners*, and concluded that it had not, as is the case before this Panel. Fifth, as in *China - Broiler Products*, the United States has not shown that MOFCOM or CAAM took any actions to limit or dictate the extent of domestic industry participation in MOFCOM's investigation.

32. In addition, the United States seems to imply that CAAM's role as the entity submitting domestic producer data to MOFCOM played an unspecified role in distorting the domestic industry definition. However, CAAM represents the entire domestic industry. The fact that CAAM was the single entity providing domestic producer data to MOFCOM did not limit, or artificially reduce,

domestic industry participation. Further, the eight participating domestic producers represent both joint ventures and domestically-owned producers. This broad domestic industry coverage belies alleged self-selection and confirms that MOFCOM obtained a representative and objective dataset for its injury analysis.

33. The United States makes much of the supposed obligation of an investigating authority to actively seek out information. In this regard, China stresses that its public notification process, which the *China - Broiler Products* panel just upheld, is designed to solicit information from any and all domestic producers willing to participate and to ensure an orderly investigative process. Further, the very jurisprudence on which the United States relies is linked to shortcomings in the evidence before the investigating authority. In this case, the United States has pointed to no concrete evidence of shortcomings in the data before MOFCOM; it has only offered speculation in claiming distortion.

34. MOFCOM included all data it received, covering eight producers, including domestically-owned producers and joint ventures. MOFCOM took no affirmative action that could have created a self-selection bias. Therefore, this Panel should reach the same conclusion on the U.S. claim as the *China - Broiler Products* panel reached on the identical claim.

35. Regarding its "major proportion" claim, the United States argues that the Panel should consider the percentage of domestic production covered by MOFCOM's definition of the domestic industry, in light of the process that MOFCOM employed to obtain the data. China does not believe that Article 4.1 of the AD Agreement or Article 16.1 of the SCM Agreement requires any such test. But even if they do, MOFCOM's process would pass such a test. This is because MOFCOM conducted an open and transparent registration process that permitted any domestic producer to participate in the injury investigation. MOFCOM excluded no company that provided data, and used all data provided by participating domestic producers. While the United States describes the participating group of domestic producers as "small," it is broadly representative of the Chinese domestic industry. As such, MOFCOM's process for defining the domestic industry did not impede satisfaction of the "major proportion" test.

36. The United States also contends that China did not satisfy the "major proportion" test because the domestic producer information in MOFCOM's possession was not "wide-ranging" or sufficiently "ample" to ensure an accurate injury assessment, and did not cover "a relatively high proportion" of domestic production. The United States does not, however, take the next step and explain how to apply these concepts to the facts of this case. The fact remains that MOFCOM opened its injury investigation to all domestic producers; it obtained data for eight domestic producers representing both domestic ownership and joint ventures; and it took no actions to limit participation in the investigation or to exclude any data. The result is coverage of adequate domestic production to satisfy the "major proportion" test.

37. In its Second Written Submission the United States appears to acknowledge that MOFCOM did not affirmatively exclude any domestic producers or segment of the industry from its injury dataset. However, it then faults MOFCOM for not counting more of the domestic industry than it did. By doing so, the United States is advocating for a standard that simply does not exist in the AD and SCM Agreements.

VI. MOFCOM's Price Effects Analysis is Consistent with Its WTO Obligations

38. MOFCOM's finding of price depression was fully supported by objective record evidence. MOFCOM's Final Determination addressed in detail the basis for its price depression finding and the causal relationship between the price depression it found and the subject imports. MOFCOM's Final Determination also explained that it had found parallel pricing and that the volume of subject imports increased dramatically over the period of investigation, especially in interim 2009, further contributing to the price depression.

39. The United States argues that there was no parallel pricing trend because prices moved in different directions from 2006 to 2007. However, MOFCOM based its finding of parallel price trends over the *entire* period of investigation. Prices for subject imports and the domestic like product increased from 2006 to 2008 by remarkably similar amounts. Also, prices for subject imports and the domestic like product both decreased by comparable amounts in interim 2009 from interim 2008 levels. In addition, a properly scaled chart of price movements over the entire period of

investigation, as provided in China's Second Written Submission, illustrates the parallel price trends over the entire period of investigation.

40. Contrary to U.S. arguments, MOFCOM did take into account the price trends observed in the 2006-2007 time period. MOFCOM's Final Determination states that the price trends are "consistent basically. Both of them increased in general from 2006 to 2008, and decreased in the first three quarters of 2009." The use of the qualifying terms "consistent basically" and "in general" demonstrate that MOFCOM took into account the price trends seen over 2006-2007. Perfect correlation is not required in a price trends analysis.

41. The United States alleges that MOFCOM's Final Determination failed to explain how the parallel price trends MOFCOM found supported its finding of price depression. MOFCOM's Final Determination, however, explains in sufficient detail both the basis for its finding of parallel price trends and the role of those trends in MOFCOM's price effects analysis. The fact that prices for subject imports and the domestic like product moved together, coupled with the finding that they competed with each other, support MOFCOM's finding that the drop in prices for subject imports in interim 2009 contributed to the parallel drop in prices for the domestic like product over the same period.

42. The United States also argues that the significant increase in the market share of subject imports at the end of the period of investigation that coincided with a decrease in prices should be discounted because it occurred at the same time as an increase in the domestic industry's market share. However, MOFCOM's analysis did not focus solely on interim 2009, but properly looked at trends over the entire period of investigation. The market share of the domestic like product *decreased* from the start of the period of investigation, whereas the market share for subject imports *increased* substantially.

43. Furthermore, when conducting its price effects analysis, MOFCOM appropriately used average unit prices. The United States argues that MOFCOM should have used some unidentified assortment of individual models or categories when conducting its price analysis. However, AD Agreement Article 3.2 and SCM Agreement Article 15.2 do not require investigating authorities to use any specific price methodology. Here, MOFCOM found significant evidence of competitive overlap that justified the use of average unit values. MOFCOM's Final Determination discussed the evidence of competitive overlap in detail, and based its conclusion on numerous pieces of evidence, such as similarity in physical characteristics, performance, product use, perceptions of consumers and producers, and price.

44. The United States relies heavily on a single chart submitted by a U.S. respondent showing sales in four alleged categories of vehicles. As China previously demonstrated, that table does not undercut MOFCOM's finding of competitive overlap, but rather demonstrates significant competitive overlap in most categories. The information in that table is also unreliable for many reasons. For instance, the alleged categories of vehicles are nowhere defined, and the data are incomplete and differ from the actual volume of subject imports.

45. Finally, the United States alleges that the *China – GOES* case prohibits MOFCOM's use of average unit values. However, the panel's analysis in *China – GOES* was based on the situation when an investigating authority conducts a price *undercutting* analysis. In this case, however, MOFCOM did *not* conduct a price undercutting analysis, but instead found price depression. The U.S. reference to the Appellate Body's Report in the *China – GOES* case, discussing "the depression or suppression of domestic prices," must be read in light of the fact that both the panel and Appellate Body in *China – GOES* found that MOFCOM used its price undercutting analysis to support its price depression and suppression analyses. The *China – X-Ray Equipment* panel also observed that both the panel and Appellate Body decisions in *China – GOES* arose "in circumstances where the investigating authority had conducted a price undercutting analysis without considering the need for adjustments to ensure price comparability." Thus, the continued reliance by the United States on the *China – GOES* case for the proposition that MOFCOM could not use average unit values when conducting a price depression analysis must be rejected.

46. In addition, on the facts of this case, the United States has not established that any possible differences in product mix would have distorted the use of average prices so as to render them insufficient for purposes of a price depression analysis. Moreover, there is no evidence that the product mix changed over the period of investigation, which might lead to a possible distortion in a trends analysis.

VII. MOFCOM Sufficiently Established a Casual Link between Subject Imports and Material Injury to the Domestic Industry

47. MOFCOM's Final Determination sets out in detail MOFCOM's thorough causation analysis. MOFCOM found that the volume of subject imports increased dramatically over the period of investigation, especially in interim 2009. MOFCOM also explained that prices for subject imports and the domestic like product exhibited similar trends over the period of investigation. And while apparent consumption declined in interim 2009, MOFCOM found that the domestic industry's production and sales did not suffer proportionately. MOFCOM also thoroughly examined the role of other factors that might have contributed to the material injury suffered by the domestic industry.

48. The United States alleges that declining demand in interim 2009, not subject imports, caused prices to decline. However, MOFCOM thoroughly examined the role of the decline in demand in interim 2009, and found that the change in market demand did not cause injury to the domestic industry because its production and sales continued to increase. The United States now claims that MOFCOM did not address the relationship between demand and price. On the contrary, the record demonstrates that the U.S. assumption that a decline in demand reduced the domestic industry's sales was factually incorrect, as sales actually increased. Thus, there is no evidence that the decline in demand caused prices to decline.

49. The United States also argues that the domestic industry's injury was caused by a decline in labor productivity. China previously demonstrated that labor costs are only a small portion of the total cost of producing a vehicle in China, and therefore played no meaningful role in explaining the domestic industry's declining financial performance. In addition, the United States assumes that total unit costs would have increased in interim 2009 from interim 2008 levels. However, total unit costs in fact *declined* in interim 2009 from interim 2008 levels. The record thus contradicts the U.S. claim.

50. The United States claims that MOFCOM failed to examine whether subject imports took market share from non-subject imports rather than from the domestic like product. However, MOFCOM's Final Determination noted that the volume of third country imports decreased sharply in interim 2009 and that imports from other countries did not affect the finding of the causal link. Moreover, the record shows that over the entire period of investigation, the market share for third country imports was relatively stable. In contrast, the market share of subject imports increased significantly. Thus, the U.S. allegation that MOFCOM failed to consider all relevant evidence is simply not correct.

51. The United States also alleges that MOFCOM failed to examine alleged "known factors" other than subject imports, and that MOFCOM was engaged in a "selective and non-objective analysis of the evidence" when it failed to discuss in detail the drop in labor productivity in its Final Determination. No party even raised this labor productivity issue during the underlying investigation, and it does not constitute a "known factor." Contrary to the U.S. claim, the fact that productivity is listed as a possible factor in Article 3.5 does not make it a "known factor" in this particular case. Article 3.5 only lists some examples of what *might* be a "known factor" in any given case. MOFCOM was not required to address issues that would have no bearing on its causation analysis.

52. Finally, the United States alleges that MOFCOM failed to examine the role played by an increase in the sales tax in China on certain vehicles. However, MOFCOM's Final Determination examined the impact of the change in tax treatment, and properly concluded that the respondent's argument was baseless, because the factual basis of the respondent's argument was incorrect – contrary to respondent's assertion, production and sales in fact *increased* between interim 2008 and interim 2009, despite the increased tax imposed on larger vehicles. The United States alleges that MOFCOM's analysis somehow "suggests a lack of objectivity," but in fact it is indicating that the respondent's factual assertions were on their face incorrect. This does not reflect a "lack of objectivity," but rather it reflects an administrating authority properly examining relevant evidence and reaching reasoned, objective conclusions on the basis of the record evidence before it.

ANNEX C-6

CLOSING STATEMENT OF CHINA AT THE SECOND PANEL MEETING

1. Mr. Chairman and Members of the Panel, China would like to offer several brief comments in closing.

2. First, China notes that the Panel has raised a number of questions about the disclosure letters that MOFCOM provided to the U.S. exporters pertaining to the calculation of their dumping margins. China reiterates that the burden is on the United States, as the complainant, to adduce the relevant evidence. The United States still has not done so. Accordingly, to the extent the Panel has any questions about the contents or substance of the disclosure letters, China would invite the Panel to request these documents from the United States. In *Broiler Products* and other recent cases, the United States recognized the need to discharge its burden as a complainant on identical claims under Article 6.9 of the AD Agreement, and it was able to do so. China therefore respectfully submits that the Panel should hold the United States to the same burden of proof in this case.

3. Turning to the AD and CVD all others rates, the United States has urged the Panel to follow the *GOES* precedent, while China believes *Broiler Products* is far more instructive on this issue. China will highlight two of the reasons why *Broiler Products* offers more compelling and relevant guidance in this case. First, the *Broiler Products* panel carefully assessed the same MOFCOM notification process as is before the Panel in this case, and found that MOFCOM could reasonably conclude that an exporter unwilling to respond to the registration notice will also not respond to the questionnaire. Second, the *Broiler Products* panel grappled with the very real practical problem that an investigating authority faces when it attempts to identify all exporters and producers. That panel found that the identical notification method before the Panel in this case was adequate to discharge China's notification responsibility under the AD and SCM Agreements.

4. Turning briefly to MOFCOM's definition of the domestic industry, the Panel has heard much speculation from the United States about supposed manipulation, distortion, or exclusion of the injury data before MOFCOM. The U.S. arguments in this respect are entirely unsubstantiated. The fact is that the record before the Panel contains no evidence showing or even implying that either MOFCOM or CAAM excluded or disregarded data from any of the domestic producers willing to participate in the investigation, or suggesting that either MOFCOM or CAAM determined which producers would participate. Again, MOFCOM issued a broad public notification of its investigation, and made it possible for any domestic producer to participate in its injury investigation.

5. We would also like to make a few comments on the other injury issues before the Panel. MOFCOM conducted a full and thorough injury investigation. It examined thoroughly the price effects issues. It found parallel pricing based on numerous pieces of record evidence. It properly examined the entire period of investigation rather than discrete fragments, as the United States does in its submissions. MOFCOM also linked the parallel pricing it found to the price depression that it also found. MOFCOM also conducted a full and through volume effects analysis. It found that subject imports flooded the market and that the petitioner lost significant market share. MOFCOM also found that third country imports did not lose market share over the period of investigation. MOFCOM's injury analysis also found that the domestic producers' prices declined in 2009 from competition with subject imports. MOFCOM also found significant competitive overlap between subject imports and the domestic like product, based on numerous pieces of evidence in the record.

6. MOFCOM answered issues that the parties raised, and it conducted a full and thorough non-attribution analysis. It examined the impact of the fall in demand in interim 2009, and concluded that the fall in demand did not cause the price depression MOFCOM found. MOFCOM also examined the impact of the change in tax policy, and also examined the impact and role of third country imports.

7. Finally, what MOFCOM did not do is answer and address issues that no party raised in the investigation below and which did not impact the injury analysis. There is no obligation on an

investigating authority to respond to and address issues that no party raised and which do not impact the injury analysis.

8. China would like to conclude by thanking the Panel and the Secretariat for the time and effort you are devoting to this proceeding. China treasures this opportunity to expand upon and clarify its positions in this case. China notes that its investigating authority is relatively young, with only about ten years of experience. We have worked diligently to implement the AD and SCM Agreements, and believe we have made good progress in this regard. We look forward to further clarifying the facts and issues of this case for the Panel in response to your questions.

ANNEX D

ARGUMENTS OF THIRD PARTIES

ANNEX D-1

EXECUTIVE SUMMARY OF THE THIRD PARTY WRITTEN SUBMISSION OF THE EUROPEAN UNION

1. The EU agrees with the US that the calculations employed by an authority to determine dumping margins, and the data underlying the calculations, constitute "essential facts under consideration which form the basis for the decision whether to apply definitive measures" within the meaning of Article 6.9 *ADA*. Those calculations are both material to the authority's decision and important for the determination. It is clear that without those calculations a decision on the definitive measure could not be taken. For these reasons, the EU agrees with the US that, by failing to disclose the actual data and calculations used to establish dumping margins, China acted inconsistently with Article 6.9 *ADA*.

2. With respect to the all others dumping determination, the EU anticipates that, absent cogent reasons for adopting a different approach, the Panel may be guided by prior DSB reports on this issue. This nevertheless leaves the question of what an authority is to do in order to ensure public notice of such investigations. As also indicated in recent cases, and below in the specific discussion of the *ASCM*, the EU is of the view that nothing precludes an investigating authority from requesting the authorities of the exporting WTO Member to identify any producing exporters that have not yet been identified.

3. Given the apparent absence of any meaningful disclosure, the EU agrees with the US with respect to this matter. The EU also agrees with the US that the single sentence in the Final Determination is not sufficient to meet that requirement, and that the failure to provide more detailed explanations constitutes a breach of Article 12.2.2 of the *ADA*.

4. With respect to the all others subsidy determination, the EU would point out that there are some differences in the wording of Article 6.1 *ADA* and Article 12.1 of the *ASCM*. These may reflect the fact that it is reasonable for a Member to know to which firms it has granted subsidies, and the Panel should take this into account.

5. In the injury determination, in its price effects analysis MOFCOM finds that the average sales prices of subject imports and of domestic products were increasing and decreasing in parallel during the period of investigation. Then, without expanding its reasoning any further, MOFCOM concludes that the decreasing prices of subject imports combined with a sharp increase of their market share in mid-2009 resulted in depressing the price of domestic like products. The US claims that the finding of continuous parallelism between domestic and import prices throughout this period is belied by the data on the record and that in any event it is not in itself sufficient to explain how subject imports depressed the prices of like domestic products. The EU agrees with the US on both points.

6. The US is correct in pointing out that the mere fact that the prices of subject imports and domestic products are moving in the same direction cannot itself establish the existence and the direction of a causal relationship. There could be several alternative explanations of price parallelism, of which price depression by subject imports is only one. As a matter of pure logic, it may not necessarily be the case that subject import prices were driving domestic product prices down. It could have been the other way round or, alternatively, both domestic and subject import prices could have been simultaneously driven in the same direction by exogenous third factors. It could also be that there was no causal link at all in the evolution of the two prices but a mere coincidence in their movement over the reference period. In any event, a simple concluding statement of the kind made by MOFCOM in its Final Determination is not enough to establish which one of these options actually holds true under the circumstances of the case at hand.

7. The need for an in-depth examination of the matter is all the more obvious in cases where at a certain point during the reference period the pattern of parallel pricing was broken and the prices of subject imports and domestic products were clearly moving in opposite directions to such an extent that for certain periods in 2007 subject imports were in fact priced lower than domestic products. Absent a reasonable explanation of this type of movement, the very existence of the trend of price parallelism can be called into question and the credibility of any conclusion drawn on that basis is further weakened.

8. Instead of providing a plausible explanation of the apparent inconsistency in the overall finding of price parallelism, MOFCOM's Final Determination attempts to conceal it by presenting an oversimplified end-point-to-end-point comparison of the prices of subject imports and domestic products in the beginning and at the end of the 2006-2008 period, only to conclude that over this period both sets of prices have increased "in general". An attempt to provide the missing explanation can probably be found in China's First Written Submission, where it is submitted that the diverging movements of subject import and domestic product prices in 2007 coincided with a period when "import volumes skyrocketed […] and domestic producers lost significant market share".

9. The EU submits that such explanation should have been provided earlier and spelled out in MOFCOM's Final Determination in order to satisfy the requirement of performing an objective assessment based on positive evidence at the time of the adoption of the contested measure. Putting this case into context, it is also worth mentioning that MOFCOM's failure to address in any detail the causal relationship between the pricing of subject imports and that of domestic products is not merely incidental but revealing of a systemic flaw in the way MOFCOM approaches injury analyses, that stems from an erroneous reading of Article 3.2 of the *ADA* and Article 15.2 of the *ASCM*.

10. In *China-GOES*, the AB confirmed that, pursuant to Article 3.2 of the *ADA* and Article 15.2 of the *ASCM*, an investing authority is required to consider, in the context of its price effects analysis, the explanatory force of subject imports for the occurrence of significant price depression. More specifically, the AB held that it is "not sufficient for an investigating authority to confine its consideration to what is happening to domestic prices for purposes of considering significant price depression or suppression," but, rather, "an investigating authority is required to examine domestic prices in conjunction with subject imports in order to understand whether subject imports have explanatory force for the occurrence of significant depression or suppression of domestic prices."

11. In reaching this conclusion the AB rejected China's argument that "the price effects considered under Articles 3.2 and 15.2 are not themselves the result of a causation determination. Rather, they serve as the basis for the causation determination required under Articles 3.5 and 15.5." Bearing in mind that the contested measures in this case were adopted more than a year prior to the moment when China brought the above argument up on appeal in *China-GOES*, it appears safe to assume that at the time when the price effects analysis in this case was carried out, MOFCOM was still acting on the erroneous understanding that it was under no obligation to consider the relevant causal link. That is why there is little credibility in China's arguments.

12. Turning to the different market segments, MOFCOM defined the products subject to its findings as "Saloon cars and Cross-country cars of cylinder capacity > 2500cc" and used average unit prices for these products in its price effects analysis. The US makes the point that cars (covered by the above definition) can be classified into four different segments: entry level, mid-level, premium and luxury. It further notes that during the reference period "the Chinese domestic industry sold primarily “entry” level vehicles, and a very small number of “premium” or “luxury” vehicles, while U.S. producers primarily sold “premium” and “luxury” vehicles, and a very small number of “mid” level vehicles; no sales of “entry” level vehicles by U.S. producers are reported."

13. Turning to the price effects analysis, applying a methodology that involves the comparison of average unit values for different products may be appropriate, for the purposes of a price effects analysis, only where the products are relatively homogeneous and sufficiently comparable. Otherwise, differences in average unit values may reflect changes or variations in product mix rather than genuine differences in pricing. If the comparisons applied fail to take into account the existence of considerable differences in product mix, they can yield results that are unreliable and skewed against the target exporters. In such cases the findings of price undercutting and price depression, and the ensuing determination of injury are not based on an "objective examination" of "positive evidence", contrary to the obligation imposed upon the investigating authorities by Articles 3.1 and 3.2 of the *ADA* and Articles 15.1 and 15.2 of the *ASCM*. The relevant question to answer in this case is therefore if, indeed, as a result of their focus on different car segments, domestic products and subject imports can be said to involve a different product mix affecting price comparability.

14. The EU observes that a differentiated approach to the car market might well be justified, given the broad variation in the levels of technology, the quality of the materials used, the after sales service and the goodwill of the brands of cars falling under the different segments. All of these factors provide an objective justification for the existing differences in pricing across the four

segments. In a related vein, one might also consider the likelihood that due to their varying requirements some (especially corporate and public entity) consumers might strongly focus in their demand on certain segments and completely exclude others from their consideration. To reach a definitive conclusion on this point however, it is necessary to collect empirical evidence that the factors just mentioned are actually relevant and perform as described in the context of the particular geographic market concerned.

15. On the other hand, factors that militate against a finding of differences in product mix affecting price comparability include (i) the difficulty to draw a clear cut-off line between the different car segments, and (ii) the evidence in this case that at a certain point in 2007 the average unit prices of subject imports (supposedly a high-end product mix) have temporarily fallen below the average unit prices of domestic products (supposedly a low-end product mix). All of this being said, it is worth mentioning that, regardless of whether the use of average unit values is deemed to be legally justified, in this case it is possible that it may operate in favour, rather than to the detriment, of US importers. As a matter of fact, in its First Written Submission the US itself puts considerable weight on the argument that US subject imports were actually priced higher that the domestic like products. It should be noted then, that the use of average unit values may tend to highlight the price gap between the high-end (subject imports) and low-end (domestic products) segments, thus providing support for the US' overselling argument. Adjusting the average unit values, on the other hand, would close up the gap and downplay the overselling argument, which presumably is not what the US is trying to achieve. That is why the Panel may wish to consider to what extent contesting the use of non-adjusted average unit values is actually instrumental in this case for refuting MOFCOM's finding of price depression.

16. In any event, the impact of using such values is stronger in cases of price undercutting, where a direct comparison is necessarily made between the prices of subject imports and those of domestic products. In this case, however, MOFCOM is focusing on the proposition of price depression, in which the prices of subject imports and domestic products are juxtaposed only for the purposes of explaining their mutual relationship and a direct mathematical comparison of their absolute values is not strictly necessary and certainly not decisive.

17. Turning to the issue of causation, the US claims that MOFCOM's statement that "[t]he quality and the client base between the domestic like products and that of the subject products is [...] roughly the same" and its overall finding that subject imports and domestic products have a competitive relationship, are contradicted by the evidence. The evidence invoked for that purpose includes (i) a table submitted by one of the respondents, indicating that domestic and import sales were largely focusing on different market segments in opposite ends of the spectrum, and (ii) the average unit values used by MOFCOM, indicating that the average prices of subject imports were 30.4% higher than those of domestic products in 2009, when the injury to the domestic industry was found to have occurred.

18. The EU submits that it is relevant and the argument in support of which it was presented is plausible, so that MOFCOM was under an obligation to analyse it in order to satisfy the "objective examination" standard imposed by Article 3.1 of the *ADA* and Article 15.1 of the *ASCM*. The EU considers, however, that the analysis presented in MOFCOM's Final Determination falls short of meeting this standard. As a matter of fact this analysis is reduced to broad and abstract statements, outlining MOFCOM's final conclusions without any reference to supporting empirical evidence.

19. The EU has two observations. First, the basic identity of production processes, quality and customer base across all segments of the market for "Saloon cars and Cross-country cars of cylinder capacity > 2500cc" is a doubtful line of reasoning, to say the least. MOFCOM has provided no evidence in respect of any of these three elements. Second, customer overlapping, or in other words the fact that some consumers choose to buy and simultaneously own two or more cars of different segments, does not necessarily prove that there is competition between these segments, just like buying bread and caviar from a supermarket does not prove that there is competition between these two products. Car rentals, for example, buy large numbers of cars of different segments and rent them out at a different price to customers with different needs and preferences.

20. The EU further observes that price difference is not in itself sufficient to negate competition between two products but it may at least be indicative of the lack of such competition. Once presented with an assertion and corresponding evidence in this sense, it is MOFCOM's task to examine the issue further and confirm or reject that assertion on the basis of positive evidence. For that purpose it would, for example, be appropriate to examine the cross-elasticity of demand

for different car segments by verifying if a small but significant and non-transient change in the pricing of one segment could attract customers from or drive customers towards another segment. There is no evidence, however, that MOFCOM has done anything of the kind. For all of the above reasons, the EU is of the opinion that MOFCOM's analysis of this matter falls short of the requirement to perform an objective examination based on positive evidence.

21. Turning to the question of market share, the US claims that subject imports took market share from non-subject imports and not from domestic products, whose market share was actually growing. It relies on this claim to challenge both MOFCOM's causation analysis and its price effects analysis. With regard to the price effects analysis it presents the simultaneous growth of market shares as a non-attribution argument, and with regard to the causation analysis it relies on it to demonstrate a contradiction between MOFCOM's finding of the domestic industry's decreased profitability and the evidence on record.

22. The EU has doubts about the relevance of this claim in either context. In its **price effects analysis** MOFCOM does not argue that either the alleged price depression or the diminished profitability of the domestic industry were in any way caused by a loss of market share, or indeed that a loss of market share even occurred to the domestic industry. On the other hand a finding of diminished profitability (by MOFCOM) is not necessarily in contradiction with a simultaneous increase of the market share of domestic products (invoked by the US). Profitability is a function of the ratio between the revenue gained and the costs incurred from selling a product, and not of the volume of sales or of the market share achieved. So far as the **causation analysis** is concerned, the EU agrees with China that MOFCOM's causation finding is, on its face, premised more on price declines than on changes in market share. For these reasons, the US' assertion (not contested by China) that subject imports took market share from non-subject imports and not from domestic products, seems of limited relevance. With respect to the decline in domestic productivity, the US claims that MOFCOM failed to explore the role, in causing injury to the domestic industry, of the 33.24% drop in the industry's productivity, combined with a 68.71 % expansion of its labour force in the first three quarters of 2009. Without contesting this factual point, China questions its potential significance as a causation factor, bearing in mind that MOFCOM's causation finding is based on sixteen other indicia, and that the low labour costs in China represented only 9 % of the domestic industry's total costs in 2009. China also notes that no party has ever raised this issue before MOFCOM.

23. The EU agrees with the US that domestic productivity is a relevant factor that should have been addressed in MOFCOM's determination and the question of its actual significance under the particular circumstances of the Chinese automobile industry should have been answered in the course of this discussion. The fact, that issue was never raised by any party during the investigation, does not imply that it was not "known" to MOFCOM and that dealing with it was therefore not required pursuant to Article 3.5 of the *ADA* and Article 15.5 of the *ASCM*. The relevant data about domestic productivity was obviously available to MOFCOM (and it is mentioned elsewhere in the text of the Final Determination) and its relevance to the causation analysis is expressly foreseen in Article 3.5 of the *ADA* and Article 15.5 of the *ASCM*. Failing to address this issue raises doubts about the objectiveness of MOFCOM's examination of the causation of injury, and therefore of its compliance with Articles 3.1 and 3.5 of the *ADA* and Articles 15.1 and 15.5 of the *ASCM*.

24. Finally, turning to the issue of the drop in demand, the US notes that the only part of the investigation period in which injury was found to have occurred (interim 2009) coincides with the only instance of contraction of demand during that period. It therefore objects to MOFCOM's dismissal of demand contraction as a non-attribution factor without further explanation. As it becomes clear from China's response in its First Written Submission, the explanation was to be found elsewhere in the text of the Final Determination, and in essence it was that the drop in apparent consumption was not the cause of injury to the domestic industry, because despite that drop "the domestic industry still kept increasing production and sales, as well as market share by improving production and operation levels and product competitiveness."

25. The EU finds this explanation unsatisfactory because, as a matter of fact, the injury suffered by the domestic industry was found to have taken the shape of decreasing prices and profitability and not of lost sales. The mere fact that the number of domestic product sales increased, does nothing to exclude the possibility that the shrinking demand may have driven sales prices down and diminished profitability of the domestic industry, or in other words, that it may have caused the injury identified by MOFCOM, despite the domestic industry's growing production and sales volumes.

ANNEX D-2

EXECUTIVE SUMMARY OF THE THIRD PARTY
WRITTEN SUBMISSION OF JAPAN

A. Preparation of Non-Confidential Summaries under Article 6.5.1 of the *AD Agreement*

1. In the *First Written Submission of the United States* (the "US FWS"), the United States argues that MOFCOM "accepted confidential information without requiring adequate non-confidential summaries of that information" and that consequential "lack of transparency significantly prejudiced the ability of [interested parties and the interested Member] to defend their interests."[1] The United States alleges that the application simply redacted the information from the part in which the information was provided. The United States further asserts that there was only a "simple assertion that the information was confidential"[2] and that the "application contain[ed] no explanation of why such information could not be summarized."[3] The United States thus claims that the redaction of information without non-confidential summary is inconsistent with Article 6.5.1 of the *AD Agreement*.

2. Article 6.5.1 requires the party submitting confidential information to provide non-confidential summaries except where exceptional circumstances have been demonstrated. Article 6.5.1 also requires that the non-confidential summary should provide a reasonable understanding of the substance of the confidential information. This requirement clarifies that the non-confidential summary must be sufficiently in detail to protect and observe the due process right of interested parties for the defense of their interests under Article 6.2. In case that interested parties did not submit sufficiently detailed non-confidential summaries of confidential information, accordingly, Article 6.5.1 requires the authorities to scrutinize the stated reasons establishing the existence of exceptional circumstances. The authority may permit the interested party not to submit non-confidential summaries only when they decide that the reason outweighs the due process right of the interested parties for their defense. At minimum, as the panel in *Mexico – Olive Oil* stated, "general statements ['it is not possible to prepare public summaries of the information and documents that we classified as confidential because of the nature of such information and documents'] are not sufficient as they constitute an unsupported assertion rather than a statement of reasons".[4]

B. Disclosure of Essential Facts before the Final Determination Under Article 6.9 of the *AD Agreement*

3. The United States argues that MOFCOM failed to disclose the "data it used and calculations it performed to determine the existence and margin of dumping, including the calculation of the normal value and export price for the respondents"[5] and thus acted inconsistently with Article 6.9 of the *AD Agreement*.

4. The first sentence of Article 6.9 of the *AD Agreement* provides that the authorities must disclose the "essential facts under consideration which form the basis for the decision whether to apply definitive measure." The second sentence states that "such disclosure take place … for the parties to defend their interests." Thus, these provisions of Article 6.9 set forth the level of detail of each essential fact that the authority must disclose. As the panel in *EC – Salmon (Norway)* stated, the disclosure must "provide the interested parties with the necessary information to enable them to comment on the completeness and correctness of the facts being considered by the investigating authority, provide additional information or correct perceived errors, and comment on or make arguments as to the proper interpretation of those facts."[6]

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[1] US FWS, para. 35.
[2] *Id.*, para. 42.
[3] *Id.*, para. 45.
[4] Panel Report, *Mexico – Olive Oil,* para. 7.101.
[5] US FWS, para. 47.
[6] Panel Report, *EC – Salmon (Norway)*, para. 7.805.

5. With respect to dumping determinations, the panel in *Argentina - Poultry Anti-Dumping Duties* found that "the normal value and export price data ultimately used in the final determination are essential facts which form the basis for the decision whether to apply definitive measures."[7] Indeed, the normal value and the export price data are facts found by the authorities based on individual items of evidence such as actual invoice prices and various cost and expenses data.

6. The panel in *China – X-Ray Equipment* further clarified that the facts related to the existence of the dumping margin must be disclosed to interested parties for their effective defense of interests. It held that:

> …we consider that **the transaction-specific price and adjustment data that are developed and used by the investigating authority for the purpose of establishing a margin of dumping constitute "essential facts"** within the meaning of Article 6.9. Such data are salient to the establishment of the margin of dumping. Furthermore, the margin established cannot be understood without such data.[8]

7. As this panel clarified, an authority is obliged to disclose specific transaction prices, which the authority found as the fact to establish normal value and export prices and to determine the margins of dumping in the final determination. Mere disclosure of the finally-calculated normal value and export prices would not be sufficient for interested parties to present their defense. For example, the interested party would not be able to argue whether the authority correctly identified the transaction prices without knowing the actual invoice prices that the authorities decided to use. Moreover, the interested party would also not be able to present the defense for the correct amount of adjustments to make fair comparison under Article 2.4 of the *AD Agreement* without knowing the amount of the individual expenses that the authorities verified to be deducted from the invoice price. All these facts that the authorities found in the process to reach the determination of dumping margin are required for the interested parties to present an effective defense. Therefore, the authorities must disclose these facts to meet the requirements under Article 6.9 of the *AD* Agreement.

C. Consistency of the Determination of the All Others Rates Based on Facts Available with Article 6.8 and Annex II of the *AD Agreement*

8. The United States alleges that MOFCOM's application of facts available to determine the anti-dumping duty rate for unexamined exporters/producers was inconsistent with Article 6.8 and Paragraph I of Annex II of the *AD Agreement*.[9]

9. According to the United States, MOFCOM applied an all others dumping rate of 21.5 percent to unexamined U.S. producers/exporters, "despite the fact that the dumping margin for the respondents ranged from 2 percent to 8.9 percent".[10] The United States alleges that MOFCOM "had no evidence that any interested party 'refused access to' or otherwise 'did not provide' information that was 'necessary' to the antidumping investigation or otherwise 'significantly impeded' the investigation."[11]

10. The United States argues that because "no other U.S. exporters existed at the time of the investigation,"[12] it was not proper to apply facts available "as it is logically impossible for a non-existent exporter to cooperate."[13] In order to apply the facts available to an interested party, "Articles 6. 8 and Annex II, paragraph 1 together ensure that an exporter or producer has an opportunity to provide information required by an investigating authority before the latter resorts to the use of facts available."[14]

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[7] Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.223 (emphasis in original).
[8] Panel Report, *China – X-Ray Equipment*, para. 7.417 (emphasis added, a footnote omitted).
[9] US FWS, para. 59.
[10] *Id*., para. 58 and fn. 81.
[11] *Id*., para. 64.
[12] *Id*.
[13] *Id*., para. 65.
[14] *Id*., para. 62.

11. The *AD Agreement* sets forth the procedural rules to investigate the margin of dumping of individual exporter/producers. Article 6.1 of the *AD Agreement* provides that "[a]ll interested parties shall be given notice of the information which the authorities require". Paragraph 1 of Annex II further provides, "[a]s soon as possible after the initiation of the investigation, the investigating authorities should specify in detail the information required from any interested party". Accordingly, the *AD Agreement* requires that authorities give notice of specific information to an interested party from which the specific information is needed. Article 6.8 of the *AD Agreement* then sets forth that facts available may be applied to an interested party only when the interested party "refuses access to, or otherwise does to provide, necessary information … or significantly impedes the investigation". Paragraph 1 of Annex II further provides that the authorities should inform the interested party that the authorities will apply facts available if the interested party does not supply the requested information. Therefore, facts available cannot be applied to an interested party with respect to specific information, which the authorities had not asked the interested party to submit such information and had not informed that its failure to submit would result in application of facts available.

12. As explained by the Appellate Body,[15] the *AD Agreement* makes clear that the importing Member may not use facts available to determine the margin of dumping of exporters/producers for which the Member's authorities had not given any notice of necessary information.

13. The panel in *China – GOES* further clarified that the authorities' notice as required under paragraph 1 of Annex II must be such that "the party is aware" of the consequences of not supplying necessary information.[16] In this connection, "posting a notice in a public place or on the internet will not necessarily ensure this awareness in each interested party." [17] It also clarified that while "the notice of initiation requested interested parties to provide some general information", investigating authorities could not "replace[…] more information than this with 'facts available'".[18] This is all the more true for exporters that did not exist during the period of investigation. As noted by the panel in *China – GOES*, "It is not clear how non-existent exporters could possibly refuse to provide information or impede an investigation."[19]

D. The Price Effect Analysis under Articles 3.1 and 3.2 of the *AD Agreement*

14. The United States argues that MOFCOM's price effects analysis "is not based on 'positive evidence' and . . . did not 'involve an objective assessment."[20] Specifically, the United States submits that the subject automobiles imported from the United States primarily fell into a different grade from those primarily sold by the Chinese domestic producers and, in light of these varying grades of the automobiles, MOFCOM should have made necessary adjustments to ensure price comparability in its price comparison, or, at the very least, explained why such adjustments were not necessary in this case[21].

15. Japan understands that the United States intends to submit that there was no or, if any, very limited competition between the subject imports and the domestic like products in this case. From Japan's point of view, this argument is in line with the recent precedents, that is, the Appellate Body report in *China – GOES* and the panel report in *China – X-Ray Equipment*. In particular, in the latter case, it was made clear that the investigating authority must examine whether there is a competition between the subject imports and the domestic like products.

16. In the first place, in *China – GOES* the Appellate Body has clarified the investigating authority's obligations in its price effect analysis pursuant to Article 3.2 of the *AD Agreement*, explaining that the authorities must consider "whether certain price effects are the consequences of subject imports."[22] The Appellate Body further explained the rigor of this analysis:

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[15] Appellate Body Report, *Mexico –Anti-Dumping Measure on Rice*, para. 259 (emphasis in original, footnote omitted). *See also* Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 459.

[16] Panel Report, *China – GOES*, para. 7.386.

[17] *Id*.

[18] *Id*.

[19] *Id*., para. 7.387.

[20] US FWS, para. 126.

[21] *Id*., paras. 141, 144.

[22] Appellate Body Report, *China – GOES*, para. 136.

> Moreover, the syntactic relation expressed by the terms "*to* depress prices" and "[*to*] prevent price increases" is of a subject (dumped or subsidized imports) doing something to an object (domestic prices). The language of Articles 3.2 and 15.2 thus expressly links significant price depression and suppression with subject imports, and contemplates an inquiry into the relationship between two variables, namely, subject imports and domestic prices. More specifically, an investigating authority is required to consider whether a first variable—that is, subject imports—has explanatory force for the occurrence of significant depression or suppression of a second variable—that is, domestic prices.[23]

17. In this analysis, the Appellate Body has further clarified that the objective examination of positive evidence under Article 3.1 requires that the authorities must ensure price comparability when comparing the domestic price and the import price in its price effect analysis. It has stated:

> [W]e do not see how a failure to ensure price comparability could be consistent with the requirement under Article 3.1 … Indeed, if subject import and domestic prices were not comparable, this would defeat the explanatory force that subject import prices might have for the depression or suppression of domestic prices. We therefore see no reason to disagree with the Panel when it stated that "[a]s soon as price comparisons are made, price comparability necessarily arises as an issue".[24]

18. Following the Appellate Body's analysis, the panel in *China – X-Ray Equipment* applied this legal requirement to facts in that underlying investigation. In that case, having confirmed that "the fact that where a broad basket of goods under consideration and a broad basket of domestic goods have been found by an investigating authority to be "like", this does not mean that each of the goods included in the basket of domestic goods is "like" each of the goods included within the scope of the product under consideration"[25], the panel found that "the dumped imports consisted only of 'low-energy scanners', while there was no such limit on the energy levels of the domestic like product."[26] In such factual situation, the panel found that the authorities must consider differences between the two before making their comparison, stating:

> [T]here was evidence on the record to indicate that there were significant differences between the dumped imports and some of Nuctech's scanners, in terms of uses, physical characteristics and prices, for example. Further, MOFCOM's own findings indicated that "high-energy" and "low-energy" scanners have different uses and are perceived differently by consumers. In the light of this evidence, the Panel is of the view that MOFCOM clearly failed to conduct an objective examination of positive evidence by proceeding with its price effects analysis without even considering, let alone taking into account, these differences in the products being compared.[27]

19. As the Appellate Body in *China – GOES* and the panel in *China – X-Ray Equipment* have clarified, the fact that the domestic product is the "like product" as defined in Article 2.6 of the *AD Agreement* is not sufficient to compare with subject imports. The authorities must further review whether these products are comparable. Indeed, "[i]f two products being analyzed in an undercutting analysis are not comparable, for example in the sense that they do not **compete with each other**, it is difficult to conceive how the outcome of such an analysis could be relevant to the causation question."[28] Thus, this requirement means that the investigating authorities must examine whether the subject imports and the domestic like products are in competition with each other, by inquiring, for example, whether these products have substantially the same physical

[23] *Id*. (internal citations omitted).
[24] *Id*., para. 200 (internal citations omitted).
[25] Panel Report, *China – X-Ray Equipment*, para. 7.65.
[26] *Id*., para. 7.68.
[27] *Id*., para. 7.68.
[28] *Id.*, para. 7.50.

characteristics and are used by customers as interchangeable, etc.[29] In this connection, it is to be noted that a simple observation of parallel price trends would not be sufficient.[30]

E. The Causation Analysis under Articles 3.1 and 3.5 of the *AD Agreement*

20. The United States argues that "MOFCOM's causation analysis includes and relies upon a number of findings that are contradicted by the evidence . . ., contrary to the requirements of Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement."[31] The United States alleges further that "MOFCOM failed to meet its obligations under Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement to base its determination on an examination of all relevant evidence before it and to examine any known factors other than dumped and subsidized imports that were injuring the domestic industry."[32]

21. Article 3.5 of the *AD Agreement* provides that the causation must be demonstrated through the effects of dumping as set forth in Article 3.2. As the panel in *China – X-Ray Equipment* found, where the authority "relied upon the price effects of subject imports in its causation analysis, the flaws in the price effects analysis also undermine [the authority's] conclusion on the causal link between the subject imports and the injury suffered by the industry."[33]

22. Article 3.5 of the *AD Agreement* also requires investigating authorities to "examine all known factors other than the [subject] imports which at the same time are injuring the domestic industry." Injury caused by such other factors "must not be attributed to the [subject] imports" in the causation analysis. As explained by the Appellate Body,[34] the authorities must separate and distinguish the causes of injurious effects of the other factors from the injurious effects of dumped imports when analyzing causation of injury. Although the analysis might not be "easy," the Appellate Body has cautioned that it is necessary to properly conduct the non-attribution analysis to assess injury.[35]

[29] E.g. *Id*., para. 7.92.
[30] *See* Appellate Body Report, *China – GOES*, para. 210.
[31] US FWS, para. 154.
[32] *Id*., para. 154.
[33] Panel Report, *China – X-Ray Equipment*, para. 7.239.
[34] Appellate Body Report, *US – Hot-Rolled Steel*, para. 223.
[35] *Id*., para. 228.

ANNEX D-3

EXECUTIVE SUMMARY OF THE THIRD PARTY
ORAL STATEMENT OF JAPAN

I. INTRODUCTION

1. Mr. Chairman, and distinguished Members of the Panel, Japan thanks this opportunity to appear before you today. This dispute involves important systemic issues on the disciplines of the *AD Agreement* that matter to Japan. In its third party submission, Japan discussed both substantive and procedural issues, such as the price effect analysis and causation analysis for the injury determination, the determination of the all others rate, the preparation of non-confidential summaries, and disclosures of essential facts. All of these issues are important to clarify disciplines on anti-dumping regimes of the WTO Members, but Japan would like to focus today on the price effect analysis that the authority is required to conduct under Articles 3.1 and 3.2 of the *AD Agreement*.

II. DISCUSSION

2. Japan clarified in its third party submission that Article 3.2 of the *AD Agreement* requires the authority to examine whether subject imports compete with such domestic like products in its price effects analysis.[1] As the Appellate Body in *China – GOES* has explained, Article 3.2 requires the authority to consider "whether certain price effects are the consequences of subject imports".[2] Therefore, the authority must examine "the relationship between two variables, namely, subject imports and domestic prices."[3] The panel in *China – X-Ray Equipment* further explained, "where a broad basket of goods under consideration and a broad basket of domestic goods have been found by an investigating authority to be "like", this does not mean that each of the goods included in the basket of domestic goods is "like" each of the goods included within the scope of the product under consideration."[4] "To be comparing the prices of [subject imports of] low energy scanners with the prices of a much broader mix of [domestic] "like" products, including products **with different uses** and which were **not perceived by customers to be substitutable**, does not constitute an objective examination of positive evidence for the purposes of the price undercutting."[5]

3. These findings clarify that Article 3.2 requires the authority to ascertain that for the purpose of price effects analysis, a type of subject imports is in competition with a type of the domestic like products. When examining the state of competition of the products at issue, the investigating authority must take into account various factors, for example physical characteristics, usage and customers' perceptions to make an objective examination in price comparisons. Indeed, if the authority does not address such factors, the price comparability between subject imports and the domestic like products is not ensured. The price comparison , if it ignores differences in physical characteristics, usage and customers' perceptions, would not provide any meaningful analysis on "whether certain price effects are the consequences of subject imports".

4. Japan also notes that the price effects analysis under Article 3.2 "form[s] the basis for the overall causation analysis contemplated in Article 3.5."[6] The panel in *China – X-Ray Equipment* explained,

> the causation question is not resolved by such a general finding of coincidence. Rather, we consider that MOFCOM was required to conduct a more detailed analysis.[7]

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[1] Third Party Submission of Japan, 30 April 2013, paras. 23-30.
[2] Appellate Body Report, *China – GOES*, para. 136.
[3] Appellate Body Report, *China – GOES*, para. 136.
[4] Panel Report, *China – X-Ray Equipment*, para. 7.65.
[5] Panel Report, *China – X-Ray Equipment*, para. 7.88 (emphasis added).
[6] Appellate Body Report, *China – GOES*, para. 128.
[7] Panel Report, *China – X-Ray Equipment*, para. 7.247.

Thus the mere finding of parallel price trends between subject imports and the domestic like product is not sufficient to conclude that the price effects to the domestic like product are the consequence of subject imports.

5. In its First Written Submission, China acknowledged that MOFCOM used averages of all types of the subject imports and the domestic like product, including passenger sedans and off-road vehicles.[8] China explained that "the product under investigation is generally the same with the product manufactured by the domestic industry in terms of size of automobile bodies, wheel base and performance indicators", and "the domestic product and the product under investigation overlap partially in terms of prices and consumers, and thus are competing and substituting for each other".[9] China then argues, "MOFCOM found substitutability and mutual competition between subject imports and the domestic like product, further justifying the use of averages in this case."[10] According to China, MOFOM's preliminary and final determinations briefly discuss their physical characteristics, production process, use, sales channels, price, consumer, competitiveness or substitution.[11] However, the determinations only contain the conclusions that the two products are the same in terms of these factors, without pointing to any concrete facts or evidence supporting these conclusions, for example, evidence that would suggest the Chinese market does not distinguish passenger vehicles from off-road vehicles.

6. Although Japan does not take any particular position in the factual issues in this case, it is doubtful, as a matter of general observation of automobile sector that the off-road vehicles do not differ from passenger sedans in terms of physical characteristics, usage, customers' perceptions, etc.. As the panel in *EC – X-Ray Equipment* correctly found, a type of vehicles in a basket of subject imports would not be necessarily "like" the other type of vehicles combined together in a basket of domestically produced vehicles. It is likely that the average price of different types of vehicles would ignore the price difference and fluctuation stemming from, for example, differences in physical characteristics, usage, and perception in the market. The comparison of annual average prices of all imports and domestically produced vehicles would compound such differences, and accordingly likely to provide no meaningful results for the price effects analysis under Article 3.2.

7. Japan respectfully requests that the Panel carefully analyse whether MOFCOM based its price effects analysis on an objective examination of positive evidence consistently with the requirements under Articles 3.1 and 3.2 of the *AD Agreement*, as discussed above.

III. CONCLUSION

8. In conclusion, Japan respectfully requests the Panel to examine carefully the facts presented by the parties in this dispute in light of the arguments presented in Japan's submission and this oral statement. Japan is happy to answer questions that the Panel may have.

[8] First Written Submission of the People's Republic of China ("China FWS"), 22 April 2013, paras. 204-205.

[9] China FWS, para. 204, quoting the MOFCOM's preliminary determination, pp. 29-30 (CHN-05).

[10] China FWS, para. 210.

[11] MOFCOM's preliminary determination, pp. 29-34 (CHN-05), and final determination, p. 158 (CH0-07).

ANNEX D-4

EXECUTIVE SUMMARY OF THE THIRD PARTY
ORAL STATEMENT OF KOREA

Mr. Chairman and Members of the Panel,

1. Korea appreciates this opportunity to present our views to the Panel as a third party participant to this dispute. In this dispute, the United States challenges the anti-dumping and countervailing duties imposed by China on imported automobiles from the United States. Korea would like to share what we think of as the key issues in this case and our opinion on such issues with regard to the *Agreement on Implementation of Article VI of General Agreement on Tariffs and Trade 1994* ("AD Agreement") and the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement").

2. Among various issues, Korea would like to present its views on the "calculation of dumping margins applicable to non-investigated entities" and the "definition of Domestic Industry."

Dumping margins for non-investigated entities

3. Article 6.10 of the AD Agreement allows the relevant investigative authorities, the MOFCOM in this dispute, to limit their examination to a reasonable number of interested parties, in cases where the number of exporters, producers, importers or types of products involved is so large as to make the determination impracticable. However, the AD Agreement is silent on determining dumping margins for non-investigated entities, and the issue in this dispute is whether the dumping margin calculated based on facts available could be applied to non-investigated entities.

4. Non-investigated entities can be divided into three categories. The first category consists of non-investigated entities that were willing to participate but discouraged due to the impracticability of conducting an anti-dumping investigation; the second category consists of non-investigated entities unwilling or having no interest in participating in the investigation; and the third category consists of non-investigated entities unaware of the ongoing investigation or nonexistent at the time of the investigation.

5. With regard to those entities in the first category, Korea believes such entities should be subject to paragraph 4 of Article 9 of the AD Agreement and facts available not applicable to such entities. Non-investigated entities in the second category are blameworthy for their behavior and there is no doubt that they are subject to the dumping margins calculated based on facts available under Article 6.8 of the AD Agreement. With regard to entities in the third category, Korea views that dumping margins calculated based on facts available are applicable, if the investigating authority had used its best efforts to notify the interested parties of the initiation of the anti-dumping investigation and give an appropriate public notice under Article 12 of the AD Agreement. In case of an entity that did not exist at the time of the anti-dumping investigation, it may resort to Article 9.5 of the AD Agreement and request a review on an accelerated basis during which the imposition of anti-dumping duties will be suspended.

Definition of Domestic Industry

6. Both the AD Agreement, in Article 4, and the SCM Agreement, in Article 16, contains a definition of "domestic industry." In principle, domestic industry means "the domestic producers as a whole of the like products or those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products." In this dispute, MOFCOM chose to define China's domestic industry in terms of "domestic producers whose collective output of the products constitutes a major proportion of the total domestic production of those products." The issue here is what level of collective output of the products could be taken as a major proportion of the total domestic production of those products (major proportion test).

7. Considering the fact that the AD Agreement and the SCM Agreement both stipulate "domestic producers as a whole of the like products" and "domestic producers whose collective output of the products constitutes a major proportion of the total domestic production of those products" in parallel with each other in defining domestic industry, Korea views that a major proportion of domestic production of like products should encompass a relatively high portion of the output of the domestic production of like products so that it could be considered equivalent to the domestic producers as a whole of like products. The Appellate Body in *EC-Fasteners* case also stated that a proper interpretation of the term "a major proportion" under Article 4.1 of the AD Agreement requires that the domestic industry defined on this basis encompass producers whose collective output represents "a relatively high proportion that substantially reflects the total domestic production."

8. Keeping in mind that domestic producers representing 46 percent of total domestic production had been accepted as a "major proportion" of the "domestic industry" under Article 4.1 of the AD Agreement in *Argentina - Poultry AD Duties(Panel)* case, Korea notes that the Appellate Body in *EC-Fasteners* case stated that "in the special case of a fragmented industry with numerous producers, the practical constraints on an authority's ability to obtain information may mean that what constitutes 'a major proportion' may be lower than what is ordinarily permissible in a less fragmented industry." Korea agrees to the decision made in *EC-Fasteners* in relation to the meaning of major proportion and thus views that, in general, in order to be acknowledged as a major proportion, the defined domestic industry must encompass producers whose collective output represents a relatively high proportion that substantially reflects the total domestic production, except, in fragmented industries, what constitutes a major proportion may be lower.

9. That having been said, the automobile industry is not a fragmented industry with numerous producers that may limit an authority's ability to obtain information, and therefore the major proportion of the auto industry requires that it encompass producers whose collective output represents "a relatively high proportion that substantially reflects the total domestic production."

10. Also, it is not a mere provision of an opportunity for a major proportion of domestic producers of like products to participate, but actual reflection of a major proportion of domestic producers of like products in the injury investigation that suffices to be recognized as the definition of domestic industry under Article 4.1 of the AD Agreement.

Thank you for your attention. We would be happy to take any question you might have.

ANNEX D-5

EXECUTIVE SUMMARY OF THE THIRD PARTY
WRITTEN SUBMISSION OF SAUDI ARABIA

I. INTRODUCTION

1. The Kingdom of Saudi Arabia's participation in this dispute addresses systemic issues relating to the interpretation of the Agreement on Subsidies and Countervailing Measures (the SCM Agreement) and the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the Anti-Dumping Agreement). The Kingdom takes no position on the merits of the claims that are based on the particular facts of this case.

II. AN INVESTIGATING AUTHORITY MAY RESORT TO "FACTS AVAILABLE" IN LIMITED CIRCUMSTANCES

2. WTO rules impose explicit limitations on an investigating authority's application of facts available. First, an investigating authority may only use "facts available" in the event of non-cooperation. Under Article 6.8 of the Anti-Dumping Agreement and Article 12.7 of the SCM Agreement, an investigating authority may resort to "facts available" in three limited circumstances: when an interested party (i) refuses access to, or (ii) otherwise does not provide, necessary information within a reasonable period; or (iii) significantly impedes the investigation.

3. Second, an investigating authority may only resort to "facts available" where it has provided proper notice. Annex II of the Anti-Dumping Agreement stipulates that an authority may only resort to "facts available" where it has (i) given proper notice of the information required, and (ii) informed interested parties of the possibility that "facts available" will be applied in the event of non-cooperation. Thus, an investigating authority must ensure that interested parties have been contacted and adequately informed before resorting to "facts available".

4. Third, "facts available" may be used "solely for the purpose of replacing information that may be missing", as the purpose of these provisions is to ensure that the investigation is not frustrated by non-cooperation on the part of interested parties. Correspondingly, an investigating authority must employ "the *best* information available", and any determination must have a factual foundation and must not be based on conjecture, or speculative inferences.

III. INVESTIGATING AUTHORITIES MUST DISCLOSE ESSENTIAL FACTS IN A MANNER WHICH ALLOWS PARTIES TO DEFEND THEIR INTERESTS

5. Article 6.9 of the Anti-Dumping Agreement and Article 12.8 of the SCM Agreement require an investigating authority: (i) to disclose all "essential facts" which form the basis for its determinations; and (ii) to ensure that an interested party has adequate time to review those facts and correct them in a manner that permits parties to defend their interests.

6. The Kingdom is of the view that where an investigating authority resorts to the use of "facts available", the disclosure of "essential facts" must include those facts which led the investigating authority to that conclusion, as well as the actual facts subsequently relied upon in reaching the subsidy or dumping determination. In the interest of due process, the "essential facts" must be identified as such so that the interested parties have an opportunity to review the facts used to replace the necessary information and to comment on the choice of "facts available" on which the investigating authority has relied. An investigating authority also must explain why these facts constitute the "best" information available.

IV. INVESTIGATING AUTHORITIES MUST ENSURE THAT PUBLIC NOTICES MEET SEVERAL TRANSPARENCY REQUIREMENTS

7. Both the Anti-Dumping and the SCM Agreements stipulate that investigating authorities must include in public notices "sufficient detail" on all "material issues" and, where measures are

imposed, "all relevant information on the matters of fact and law" and the "reasons which have led to the imposition of final measures".

8. An issue is "material" under Article 12.2 of the Anti-Dumping Agreement and Article 22.3 of the SCM Agreement where it has arisen in the course of the investigation and must be resolved in order for the investigating authority to be able to reach its determination. The obligation on investigating authorities to set forth findings and conclusions in "sufficient detail" requires that explanations are provided for *all* material elements of the determination. Possible alternative explanations must also be addressed in the public notice in the same level of detail. Where there is an affirmative determination for the imposition of a duty, Article 12.2.2 of the Anti-Dumping Agreement and Article 22.5 of the SCM Agreement require the investigating authority to issue a public notice or report which contains (i) "all relevant information on the matters of fact and law", and (ii) the "reasons which have led to the imposition of final measures".

9. Thus, a public notice should include any facts relating to the decision to resort to "facts available" because that is "one step in the process leading to the imposition of a final measure". It also should include the "facts available" actually selected and relied upon to calculate the dumping and subsidy rates.

V. ALL ASPECTS OF THE DETERMINATION OF INJURY MUST BE BASED ON AN OBJECTIVE EXAMINATION OF POSITIVE EVIDENCE

10. Every aspect of an injury determination is subject to the "overarching" obligation in Article 3.1 of the Anti-Dumping Agreement and Article 15.1 of the SCM Agreement that Members' investigating authorities must conduct an "objective examination" based on "positive evidence". The requirement to conduct an "objective examination" means that the examination must accord with the basic principles of good faith and fundamental fairness, and be both unbiased and even-handed. While "positive evidence" must be assessed on a case-by-case basis, evidence which is "positive" is that which is "affirmative, objective, verifiable, and credible".

11. The definition of "domestic industry" under Article 4.1 of the Anti-Dumping Agreement and Article 16.1 of the SCM Agreement is fundamental to an accurate injury and causation analysis that is based on an "objective examination" of "positive evidence". The Kingdom is of the view that the Panel should take this opportunity to confirm that legally permissible injury and causation determinations cannot follow from a definition of domestic industry that does not meet the same standards of "objective examination" and "positive evidence". This conclusion flows directly from the text of each Agreement, which repeatedly links the definition of "domestic industry" to the injury determination.

12. The Appellate Body recognized this linkage to mean that "the purpose of defining the domestic industry… [is] to provide the basis for the injury determination". The Appellate Body explained that the requirements of an "objective examination" based on "positive evidence" inform the substantive obligations for defining the domestic industry, and the "domestic industry" definition must "ensure that the subsequent injury analysis is based on positive evidence and involves an objective examination". Given that this is the case, the definition of "domestic industry" must itself also be based on an "objective examination" of positive evidence.

13. A price effects analysis under Article 3.2 of the Anti-Dumping Agreement and Article 15.2 of the SCM Agreement must meet several substantive and procedural requirements. First, the investigating authority must assess whether domestic prices are depressed or suppressed *by subject imports*, and the Appellate Body has confirmed that it will not be sufficient for an authority to confine its consideration to what is happening to domestic prices. Second, price effects determinations must be based on "positive evidence" and involve an "objective examination". Although an investigating authority is only required to "consider" price effects and need not make a definitive determination in this respect, this "does not diminish the rigour that is required of the inquiry" nor "the scope of *what* the investigating authority is required to consider". Finally, an investigating authority's consideration of price effects must be reflected in relevant documentation, such as an authority's final determination.

14. An investigating authority must also "demonstrate" causation, including specific injury findings and a proper "non-attribution" analysis, in accordance with Article 3.5 of the Anti-

Dumping Agreement and Article 15.5 of the SCM Agreement. The requirement to "demonstrate" causation is rigorous, and requires the investigating authority to "do more than simply list other known factors, and then dismiss their role with bare qualitative assertions". The authority must explain the causal analysis that has been conducted and thereby establish the requisite causal link for each factor in the analysis. The causation analysis under Articles 3.5 and 15.5 is informed by other parts of Articles 3 and 15, and an investigating authority's analysis of price effects, volume effects, and the domestic industry must tie into its final causation analysis.

15. In order to "demonstrate" causation, an investigating authority must conduct a "non-attribution" analysis, which demands a cogent explanation of the injurious effects of factors other than the dumped or subsidized imports. "Known factors" include those clearly raised by interested parties as well as those that the investigating authorities become aware of as a result of their own investigations. The injurious effects of those other factors must be separated and distinguished from the injurious effects of the subject imports, because this approach is the only way that an investigating authority can make a reasoned judgment as to the degree of injury caused by other factors.

16. Separating and distinguishing the injurious effects of dumped or subsidized imports from the injurious effects of each other known factor requires a *satisfactory or meaningful explanation* of the *nature and extent* of the other factors' injurious effects, as distinguished from those of the subject imports. The investigating authority is obligated to determine the *nature* and *extent* of the injurious effects of the factors under consideration, and to establish a genuine and substantial causal relationship between the dumped or subsidized imports and the injury found to exist. Conclusions as to attribution should be accompanied by "quantitative or thorough qualitative support", and the analysis "must go deeper than a simple comparative statement".

VI. CONCLUSION

17. The Kingdom respectfully requests the Panel to consider its positions on the interpretive issues set out above.

ANNEX D-6

EXECUTIVE SUMMARY OF THE THIRD PARTY
ORAL STATEMENT OF SAUDI ARABIA

I. INTRODUCTION

1. Thank you, Mr. Chairman. The Kingdom of Saudi Arabia would like to take this opportunity to affirm all of the positions set out in its Third Party submission. Today, the Kingdom will summarize its views on two of the systemic issues relating to the interpretation of the Anti-Dumping Agreement and the Agreement on Subsidies and Countervailing Measures: the use of "facts available" and the analysis of injury and causation.

II. FACTS AVAILABLE

2. The first issue concerns the circumstances under which an investigating authority may resort to "facts available". Article 6.8 of the Anti-Dumping Agreement and Article 12.7 of the SCM Agreement establish that "facts available" may only be used by an investigating authority in limited circumstances: where a party refuses access to, or otherwise does not provide, necessary information within a reasonable period; or where the party significantly impedes the investigation.

3. Moreover, an investigating authority may only resort to "facts available" where it has provided proper notice. Annex II of the Anti-Dumping Agreement stipulates that an authority may resort to "facts available" only where it has, first, given proper notice of the information required, and, second, informed interested parties of the possibility that "facts available" will be applied in the event of non-cooperation. Thus, an investigating authority must ensure that interested parties have been contacted and adequately informed before resorting to "facts available".

4. Finally, it is important to emphasize that when an investigating authority does resort to "facts available", it may only do so in order to fill in any gaps in the necessary information that was requested from, but not provided by, interested parties. The actual facts that may be relied upon to fill in any gaps are also limited. Specifically, investigating authorities are expected to employ "the *best* information available", which means that only those facts that are the most fitting or most appropriate to the case at hand should be used. Furthermore, even in cases of non-cooperation, investigating authorities must ensure that their determinations of the "facts available" have a factual foundation and are not based on conjecture or speculative inferences designed to increase the dumping or subsidy margin.

5. The Kingdom emphasizes that the function of the "facts available" provisions is to ensure that the work of an investigating authority is not frustrated by non-cooperation on the part of interested parties. As such, an investigating authority should not be permitted to resort to "facts available" where the absence of information before it is directly attributable to the authority's own failure to request it, or where better record evidence is available.

III. INJURY AND CAUSATION

6. The second issue relates to the requirements of a proper injury analysis. Every aspect of an injury determination is subject to the "overarching" obligation in Article 3.1 of the Anti-Dumping Agreement and Article 15.1 of the SCM Agreement that Members' investigating authorities must conduct an "objective examination" based on "positive evidence". The requirement to conduct an "objective examination" means that the examination must agree with the basic principles of good faith and fundamental fairness, and must be both unbiased and even-handed. "Positive evidence" is that which is "affirmative, objective, verifiable, and credible".

7. It is the Kingdom's view that the obligation to conduct an "objective examination" of "positive evidence" also must apply to an investigating authority's definition of the "domestic industry" under Article 4.1 of the Anti-Dumping Agreement and Article 16.1 of the SCM Agreement. Because the industry definition will provide the basis for the injury and causation analyses, the definition is fundamental to an "objective examination" of "positive evidence".

8. That these procedural and evidentiary obligations apply to the definition of "domestic industry" follows directly from the text of each Agreement, which repeatedly links the definition of "domestic industry" to the injury determination. The Appellate Body confirmed this linkage when it stated that "the domestic industry forms the basis on which an investigating authority makes the determination of whether the dumped imports cause or threaten to cause material injury to the domestic producers". With this in mind, the Appellate Body in *EC – Fasteners (China)* specifically instructed that, "to ensure the accuracy of an injury determination, an investigating authority must not act so as to give rise to a material risk of distortion in defining the domestic industry, for example, by excluding a whole category of producers of the like product". The definition chosen must not "introduce a material risk of skewing the economic data and, consequently, distorting [the] analysis of the state of the industry".

9. Given that the definition of "domestic industry" provides the basis for the injury determination, and that every aspect of the injury determination requires an "objective examination" based on "positive evidence", it logically follows that the definition of "domestic industry" under Article 4.1 of the Anti-Dumping Agreement and Article 16.1 of the SCM Agreement must meet the same standard. The Kingdom respectfully requests that this Panel reaffirm that legally permissible injury and causation determinations can only follow from a definition of "domestic industry" that meets the same standards of "objective examination" and "positive evidence".

10. The Kingdom would also like to take this opportunity to highlight an investigating authority's price effects analysis under Article 3.2 of the Anti-Dumping Agreement and Article 15.2 of the SCM Agreement. Any such analysis must meet several substantive and procedural requirements. First, the investigating authority must assess whether domestic prices are depressed or suppressed *by subject imports*, and the Appellate Body has confirmed that it will not be sufficient for an authority to only conduct a general analysis of domestic prices.

11. Second, a price effects analysis must be based on "positive evidence" and involve an "objective examination". Although an investigating authority is only required to "consider" price effects and need not make a definitive determination in this respect, this "does not diminish the rigour that is required of the inquiry" nor "the scope of *what* the investigating authority is required to consider".

12. Third, an investigating authority's consideration of price effects must be reflected in relevant documentation, such as the authority's final determination.

13. Finally, the Kingdom wishes to elaborate on how an investigating authority must "demonstrate" causation, including specific injury findings and a proper "non-attribution" analysis, in accordance with Article 3.5 of the Anti-Dumping Agreement and Article 15.5 of the SCM Agreement. The requirement to "demonstrate" causation is rigorous, and requires the investigating authority to "do more than simply list other known factors, and then dismiss their role with bare qualitative assertions". The authority must explain the causal analysis that has been conducted and thereby establish the requisite causal link for each factor in the analysis. The causation analysis under Articles 3.5 and 15.5 is informed by other parts of Articles 3 and 15, and an investigating authority's analysis of price effects, volume effects, and the domestic industry must tie into its final causation analysis.

14. In order to "demonstrate" causation, an investigating authority must conduct a "non-attribution" analysis, which demands a cogent explanation of the injurious effects of factors other than the dumped or subsidized imports. "Known factors" include those clearly raised by interested parties as well as those that the investigating authorities become aware of as a result of their own investigations. The injurious effects of those other factors must be separated and distinguished from the injurious effects of the subject imports, because this approach is the only way that an investigating authority can make a reasoned judgment as to the degree of injury caused by other factors.

15. Separating and distinguishing the injurious effects of dumped or subsidized imports from the injurious effects of each other known factor requires a *satisfactory or meaningful explanation* of the *nature and extent* of the other factors' injurious effects, as distinguished from those of the subject imports. The investigating authority is obligated to determine the *nature* and *extent* of the

injurious effects of the factors under consideration, and to establish a genuine and substantial causal relationship between the dumped or subsidized imports and the injury found to exist. Conclusions as to attribution should be accompanied by "quantitative or thorough qualitative support", and the analysis "must go deeper than a simple comparative statement".

IV. CONCLUSION

16. Mr. Chairman, the Kingdom urges the Panel, when considering the systemic issues raised in this dispute, to preserve the Anti-Dumping and SCM Agreements' carefully negotiated balance of interests between WTO Members. This balance requires the consistent application of the Agreements' multilateral disciplines.

17. This concludes the Kingdom's statement. Thank you for your attention.

ANNEX D-7

EXECUTIVE SUMMARY OF THE THIRD PARTY
WRITTEN SUBMISSION OF TURKEY

I. INTRODUCTION

1. The Republic of Turkey (hereinafter referred to as "Turkey") makes this third party submission due to its interest in the correct and coherent legal interpretation of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (hereinafter referred to as the "AD Agreement") and Agreement on Subsidies and Countervailing Measures (hereinafter referred to as the "SCM Agreement").

2. Turkey understands that the outcomes of this panel will have significant ramifications on the application of both agreements. Turkey, at this stage, would like to confine its submission to two important issues, namely the use of "facts available" based dumping margin /subsidy amount calculations vis-a-vis unknown exporters and disclosure standards regarding calculation of dumping margin/subsidy amount imposed to interested parties.

II. THE USE OF "FACTS AVAILABLE" METHODOLOGY IN CALCULATIONS AS REGARDS UNKNOWN EXPORTERS IN ANTI-DUMPING AND SUBSIDY INVESTIGATION

A. Summary of Arguments of Parties

4. In its first written submission, United States of America (hereinafter referred to as "United States") argues that, pursuant to Articles 6.1, Article 6.8 and Annex II of the AD Agreement as well as Article 12.1 and Article 12.7 of the SCM Agreement, during a dumping or countervailing duty investigation the authority is not entitled to use "facts available" based calculations and conclusions as regards foreign producers/exporters which are unknown to the investigating authority.

5. The United States further underscores that the investigating authority cannot resort to *"facts available"* based calculations since the "unknown producer/exporter" was not notified on the requested information and, as a matter of fact, these producer/exporters had not the opportunity to respond to the required information communicated to "known producer/exporters" in line with paragraph 1 of Annex II to AD Agreement.[1]

6. In response, the People's Republic of China (hereinafter referred to as "China") discusses that the AD Agreement and SCM Agreement are both silent on the methodology concerning the calculations regarding unknown producer/exporters. In this context, China argues that the absence of clear cut rules leave the investigating authority with a considerable discretion to adopt a reasonable method as regards the conclusions on foreign producers/exporters unknown to authority[2]. China equally admits that the predicate for the application of facts available under Article 6.8 of the AD Agreement is notification to all interested parties. China, however, asserts that the weight of legal responsibility upon the investigating authority, in terms of notification, would differ considering the structure of the industry in the country under investigation. It underlines that every case should be evaluated considering its own facts[3]. Finally, it claims that China has fulfilled the notification requirements enshrined both in AD Agreement and SCM Agreement and the "unknown exporters" in this case were US companies that deliberately opted in to stay unknown which was a choice to non-cooperate within the framework of Article 6.8 of AD Agreement and Article 12.7 of SCM Agreement.[4]

[1] United States' first submission, paras. 60,61.
[2] China's first submission, para. 100.
[3] China's first submission, para. 110.
[4] China's first submission, para. 114.

B. Summary of Leading Panel/Appellate Body Reports

7. The United States identifies the Appellate Body report of *Mexico-Rice (AB)* and the panel report of *China-GOES (panel)* as the leading cases to be considered in this dispute.

8. In the adjudication of *Mexico-Rice (AB)* the Appellate Body upheld the findings of the panel by concluding that an investigating authority infringes the provisions of Article 6.8 of and paragraph 1 of Annex II to AD Agreement in the event that it resorts to facts available, based on information in the application for initiation, to exporters that were not given notice of the information required by the authority.[5] The Appellate Body, however, underlines in following paragraphs[6] that the *information submitted by the petitioning domestic industry* cannot be used as a basis of fact available which leaves the question open whether information other than those present in the application of initiation can be used for the findings vis-à-vis unknown exporters.

9. In the report of China-*GOES (panel)* the panel concludes that the legal discipline of Article 6.8 of the AD Agreement should be considered together with provision of Article 6.1. In this line, the panel holds that a producer/exporter cannot be held liable of refusing to provide information which was not notified to this producer/exporter in first place. The panel concentrates on the point that such producers/exporters, which were unaware of the investigation and did not receive any communication, had not the opportunity to respond to information demanded by the authority. Consequently, they cannot be accused of any act (refusal/not providing required information, impediment of investigation) under Article 6.8 of AD Agreement (or Article 12.7 of the SCM Agreement) which leads to use facts available.[7] Finally, even though the panel admits that there is a lacuna in the AD Agreement on how the "unknown exporters" issue will be addressed it underlines that such a legal gap does not vindicate any decision violating the discipline enshrined in Article 6.8 of and Annex II to AD Agreement[8].

C. Observations of Turkey

10. Turkey considers that this legal discussion bears outcomes that have the potential to profoundly influence the practice of member countries enforcing anti-dumping/countervailing duties on prospective basis. Turkey observes that these ramifications will influence a wide spectrum of issue extending from the effectiveness of duties to the position of "unknown exporters" in final determinations and reviews.

11. Turkey understands that before analyzing whether the AD Agreement and SCM Agreement justifies the use of "*fact available*" to unknown producers/exporters it is important to address first the phases that lead to use of the "facts available". In that sense, without understanding the margin of the obligations to identify producers/exporters incumbent upon the investigating authority the analysis will be incomplete.

12. Pursuant to Article 5.2 (ii) of the ADA and Article 11.2(ii) of the SCM the domestic producers that claim to act as the domestic industry have to show in their application the identity of *known* exporters or producers operating in the investigated country/countries. Under Article 5.3 of ADA and Article 11.3 of the SCM, after an examination, if the investigating authority is satisfied with the accuracy and adequacy of the information and concludes that there is sufficient evidence to justify the initiation of an investigation it can take the necessary steps to commence an investigation.

13. The crucial question to be asked is whether, at this stage, the investigating authority is obliged to identify further potential producers/exporters that were not shown in the application. The Appellate Body report on *Mexico-Rice (AB)* discussed this issue and concluded that there is no provision in the AD Agreement or in the SCM Agreement that envisages the extension of obligation of identifying potential producers/exporters other than those *known* by the investigation authority at the time of submission of relevant questionnaires.

14. The Appellate Body supports this conclusion by stressing that there is no legal basis in Article 6.1 (Article 12.1 of the SCM Agreement) and Article 6.1.3 (Article 12.1.3 of SCM

[5] Appellate Body Report, Mexico-Rice, para. 259.
[6] Appellate Body Report, Mexico-Rice, paras. 261, 264.
[7] Panel Report, China-Goes (panel), paras. 7.386-7.393.
[8] Panel Report, China-Goes (panel), para. 7.390.

Agreement) of the AD Agreement requiring the investigating authority to notify not only the known producers/exporters but also those producers/exports which could have been identified if the authority had deepen its pre-initiation examination.[9] Accordingly, the word *"known exporters"*, as used in Article 6.1.3 of the ADA (12.1.3 of the SCM) encompasses the companies that were identified in the application by the domestic industry and those that were pinpointed by the investigating authority before initiation of the investigation.

15. The concept of *"known exporter"* in Article 6.10 of Anti-Dumping Agreement, however, should be considered differently from the same term used in Article 6.1.3 of the ADA. Article 6.10 reads as follows:

> *The authorities shall, as a rule, determine an individual margin of dumping for* ***each known*** *exporter or producer concerned of the product under investigation. In cases where the number of exporters, producers, importers or types of product involved is so large as to make such a determination impracticable, the authorities may limit their examination either to a reasonable number of interested parties or products by using samples which are statistically valid on the basis of information available to the authorities at the time of selection, or to the largest percentage of volume of the exports from the country in question which can be reasonably be investigated (emphasis added)*

16. The concept of *"known"* in this provision includes those producers/exporters that the investigating authority got aware of during investigation. This conclusion was also confirmed by the Appellate Body Report of *Mexico-Rice (AB)*.[10] In light of our explanations, *"known producers/exporters"* within the meaning of Article 6.10 of the ADA will be comprised of the following:

a. The producer/exporters which received a questionnaire at the beginning of the investigation and cooperated in full manner without being subject to "facts available" procedure.

b. Under the condition that Article 6.14 of AD Agreement and Article 12.12 of the SCM Agreement is maintained, the producer/exporters which made themselves known after the initiation of investigation who got informed about the process from sources other than the investigating authority and cooperated in full sense.

17. In cases where sampling is warranted under Article 9.4 of the ADA, dumping margins for producers/exporters outside the scope of examination will be calculated in line with the methodology stipulated in Article 9.4. In such a case the calculation will not be company-specific.

18. Another group of producers/exporters which will not be recipients of company specific dumping margins will be those who did not comply with the rules of Articles 6.8 and Annex II of the ADA (Article 12.7 of the SCM). Consequently, the dumping margin/subsidy amount calculated for this group will be based on "facts available".

19. The case law confirms that under the legal discipline of Article 6.10 of the ADA the investigating authority is not under any obligation to calculate an individual margin for producers/exporters which the authority was not aware of.[11] Accordingly, the position of this third group of producers/exporters, namely those which;

- were not in the list of producers or exporters shown in the domestic industry's application and consequently never received relevant questionnaires.
- could not be identified even tough best effort has been displayed by the investigating authority.
- were not notified by their own government agencies,
- were genuinely uninformed concerning the ongoing process,

constitute the central element of the discussion.

[9] Appellate Body Report, Mexico-Rice, paras. 247, 251.
[10] Appellate Body Report, Mexico-Rice, para. 255.
[11] Appellate Body Report, Mexico-Rice, para. 255.

20. Turkey considers that the focus of the jurisprudence concerning the interpretation of Article 6.8 of and paragraph 1 of Annex II to the AD Agreement (Article 12.7 of the SCM Agreement) is on the principle that *due process* should be observed during the investigation.

21. The reports of leading cases emphasize that the use of facts available should be an outcome of a *"process"* which, by definition, necessitates the active participation of the investigating authority and the interested party under investigation. It is underlined that the Article 6.8 of the AD Agreement (Article 12.7 of SCM Agreement) envisages that the interested party may become subject to fact available methodology if it refuses access to, or otherwise does not provide necessary information within a reasonable period or significantly impedes the investigation through various means. Under all scenarios the adverse response/action of the party is considered to be needed. Under such consideration, the jurisprudence holds that the authority cannot be entitled to impose a less favorable duty, calculated with facts available methodology, on a foreign producer/exporter which was not notified on the responsibilities within legal framework of Article 6.8 of the AD Agreement (Article 12.7 of the SCM Agreement).

22. Turkey understands the legal reasoning of the Appellate Body and Panel report. Yet the outcome of the case law is disputable under a number of points.

23. During the *China-GOES* adjudication China rightly voiced its concern that the Appellate Body report of *Mexico- Rice* did not consider the policy implications and that there were no guiding principles or rules in Articles 9.4 and 6.10 of the ADA on how to act vis-à-vis unknown producers or exports in anti-dumping investigations. This point has correctly been raised again in this panel. Turkey argues that the silence of both AD and SCM Agreement on how the calculations/findings will be based for unknown producers/exporters creates a lacuna in the legal structure of both agreements. Such a legal grey zone is not a question on procedure but relates to the very substance of the investigation affecting the imposition of its outcome. Even though this issue was partially addressed in the panel report of *China-GOES* (panel) the question still necessitates further clarification.[12]

24. Turkey agrees with the argument that the legal margins of the obligation under Article 6.1, 6.1.3 and 6.10 of AD Agreement to determine all known producers/exporters should be considered under the peculiarities of the industry in which the foreign producers/exporters are operating. In this respect Turkey would like reiterate that both the conceptual reading of the relevant articles and case law affirms that the investigating authority is not under an obligation to determine potential producer/exporters which could have been found if the examination had been extended outside the borders of the application of petitioning domestic industry.

25. Turkey considers that the United States` approach and jurisprudence stays silent concerning the producers/exporters which get informed on the investigation through sources other than the investigating authority yet preferred to stay *unknown* being aware that even "facts available" based calculation is not possible to be applied. Although, it is understood that the case law aims to protect the *bona fide* exporter/producer, it still leaves a gap as regards those companies that deliberately prefer to stay out of scrutiny to avoid any measure.

26. Turkey opines that the case law based interpretation of the facts available methodology would encourage non-cooperation for unknown producers/exporters which are not identified by the applicant(s) and/or by the investigating authority. Accordingly, the non-applicability of "facts available" for unknown producers/exporters and the absence of instrument or clear rules to determine dumping margin and subsidy amount by the investigating authority can undermine the effectiveness of the anti-dumping and countervailing measures.

27. In the light of these arguments the Panel may want to clarify how the lacuna in AD and SCM Agreements will be addressed without harming the due process requirements in investigations but observing the ultimate objective of trade remedies discipline namely the protection of domestic industry from unfair trade practices.

[12] Panel Report, China-Goes (panel), para. 7.390.

III. DISCLOSURE OF CALCULATIONS AND DATA USED TO DETERMINE THE EXISTENCE OF DUMPING TO THE INTERESTED PARTIES

A. Observations of Turkey

28. In its first written submission, the United States claims that China breached Article 6.9 of the AD Agreement by failing to disclose to interested parties the "essential facts" forming the basis of MOFCOM's decision to apply anti-dumping duties.

29. Article 6.9 of the AD Agreement requires the investigating authority to disclose to interested parties the "essential facts" forming the basis of the investigating authority's decision to apply anti-dumping duties:

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

30. It is clear that Article 6.9 requires the investigating authority to make a one-time disclosure before a final determination is made as to whether a definitive measure will be applied.

31. Disclosure of "essential facts" is a crucial procedural obligation for the investigating authorities and a procedural right for the interested parties in order to defend their interests and present counter arguments before imposition of final measures. In this regard, fulfilling of this obligation by the investigating authority and giving a meaningful opportunity to the interested parties to defend their interests depends mainly on the facts to be disclosed.

32. Turkey is of the view that the facts related with the existence of dumping and injury on the domestic industry and the causal link between dumped imports and injury on the domestic industry are "essential facts". Because, no measure is possible to be imposed if one these elements is absent.

33. This consideration of Turkey seems to be supported by the Panel in *Argentina – Poultry Anti-Dumping Duties* which further considered the term of "essential facts". The Panel stated that "We do not believe that the ordinary meaning of the word "fact" would support a conclusion that Article 6.9, when using the term "fact" refers not only to "facts" in the sense of "things which are known to have occurred, to exist or to be true" but also to "motives, causes or justifications"[13].

34. The calculations relied on by the investigating authority to determine the normal value and export price –as well as data underlying those calculations- and the methodology followed by the investigating authority cited in Article 2.4.2 in the AD Agreement constitute "essential facts" forming the basis of the investigating authority's imposition of final measures within the meaning of Article 6.9. Thus, disclosure of calculations gives interested parties to check correctness of these calculations. If there is a clerical or mathematical error in these calculations which could seriously distort the actual dumping margin might be raised to be reviewed by the investigating authority.

35. In addition to this, Turkey would like to clarify that these company specific calculations, which in most cases include confidential information, should be disclosed only to the related interested party and not to all interested parties. Thus the disclosure should be limited only to the relevant interested party.

IV. CONCLUSION

36. In the light of our explanations Turkey would like to underscore the following conclusions:

a. The legal interpretation of the United States concerning the non-application of Article 6.8 and Annex II of the Anti-Dumping Agreement as well as the Article 12.7 of the Subsidies Agreement for unknown producers/exporters bears negative policy implications in terms of the effectiveness of duties and the level of protection of the domestic industry.

[13] Panel Report, Argentina – Poultry, para.7.225.

b. The lacuna in the legal structure of the AD and SCM Agreements concerning rules and procedures will be followed in calculations/conclusions as regards unknown producers/exporters is an issue that need to be addressed carefully. As underlined before such a legal grey zone has the potential to create many downsides for practitioners which can extended from the problems created by producers and exporters that deliberately preferred to remain unknown to the circumvention of the measure through company-shifting. Turkey has serious concerns whether this interpretation serves the objective of the trade remedies discipline which aims to protect of the domestic industry from unfair trade practices.

c. The calculations and data used to determine the existence of dumping are "essential facts" within the interpretation of "essential facts" in Article 6.9 of the Anti-Dumping Agreement. This is clear procedural obligation of the investigating authority to disclose these facts to give an opportunity to interested parties to examine the correctness of the calculations and the data used.

37. Turkey appreciates this opportunity to present its views to the Panel. Turkey requests this Panel to review the comments stated in this submission, in interpreting AD and SCM Agreements.

ANNEX D-8

EXECUTIVE SUMMARY OF THE THIRD PARTY ORAL STATEMENT OF TURKEY

I. Introduction

Mr. Chairman, Members of the Panel,

1. Turkey welcomes this opportunity to present its views in the present dispute. Turkey has systemic interest in the issues raised by the US in this dispute and intervenes to provide its views for the proper interpretation and application of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (hereinafter referred to as the "AD Agreement") and Agreement on Subsidies and Countervailing Duties (hereinafter referred to as the "SCM Agreement").

2. In this statement, Turkey will focus on "the use of "facts available" in calculations concerning unknown producers/exporters" and "disclosure of data used to determine the existence of dumping".

II. The Use of "Facts Available" In Calculations Concerning Unknown Producers/Exporters

Mr. Chairman,

3. Let me start with expressing Turkey's view on "using facts available in calculations concerning unknown producers/exporters".

4. There is no rule, principle or guidance in the AD or SCM Agreement regarding determination of anti-dumping margin or subsidy amount for the producers/exporters which are not identified by the complainant and the investigating authority and not cooperated during the investigation process.

5. Having no rule, principle or guidance in the agreements induces investigating authorities to find solutions in order to impose duty for these producers/exporters due to the fact that imposition of anti-dumping duty or countervailing duty for these unknown producers/exporters is essential for the effectiveness of the trade remedies.

6. According to the Appellate Body decision in Mexico-Rice (AB)[1] and textual reading of Article 5.2 (ii) of the AD Agreement and Article 11.2(ii) of the SCM Agreement, Turkey opines that the investigating authority is not under the obligation to identify the potential producers/exporters which did not appear on the petition of the domestic industry at the initial phase of the investigation. In addition to this, the notice of initiation provided to the diplomatic authorities of the investigated country does not generate any obligation for the investigated country to make their producers/exporters aware of the investigation[2].

7. Thus, taking into account that neither the investigating authority nor the government of the investigated country is obliged to identify all producers/exporters it would be fair to conclude that there will always be a group of producers/exporters falling outside the individual examination of the investigating authority in AD or CVD investigations. The number of unknown producers/exporters will be higher when the investigated industry is fragmented.

8. As a result, it is clear that there will be residual producers/exporters in nearly all AD or CVD investigations which are not known by the complainant and not identified by the investigating authority despite its best effort and not informed by the government of the investigated country.

9. Having said that, the crucial question that should be addressed and responded by the panel that arises in this dispute is whether "facts available" can be used for determination and imposition of an AD/CVD for residual exporters/producers. In relation to this question, Turkey believes that

[1] Appellate Body Report, Mexico Rice, paras. 247,251.
[2] Appellate Body Report, Mexico Rice, para. 263.

the question whether it is necessary to determine anti-dumping margin or subsidy amount for these unknown producers/exporters and impose duty for these producers/exporters is out of the scope of the examination of the Panel.

10. However, taking into account the importance of the response to that question, let me start with expressing Turkey's view whether it is necessary to determine anti-dumping margin or subsidy amount for these unknown producers/exporters and impose duty for these producers/exporters?

11. Turkey considers that it is essential and necessary to calculate anti-dumping margin or subsidy amount and impose duty for unknown producers/exporters. Firstly, if no measure is imposed for these exporters/producers this will undermine the credibility and effectiveness of the measure, makes the measure inutile and may lead to circumvention.

12. Secondly, these exporters/producers which are unknown and not identified by the complainant in the petition and by the investigating authority at the initiation stage of the investigation despite its best efforts will be out of the scope of the measure. So these producers/exporters will continue to sell their products with/without dumped prices – no clarity whether their products are dumped because no determination has been made - by taking advantage of extra costs for cooperated exporters/producers brought by AD/CVD measures.

13. It is clear that such an approach will encourage non-cooperation for unknown producers/exporters. In fact, while the legal rationale of panel and Appellate Body reports[3], understandably, aims to protect the "*bone fide*" producer/exporter through "*due process*" requirement they still leave unanswered questions on how to treat those producer/exporters which were fully aware of the initiation of the ongoing investigation but deliberately stayed unknown to avoid a possible trade measure.

14. Fourthly, non-imposition of a measure for "unknown" producers/exporters makes newcomer investigation process inutile for producers/exporters due to the fact that these producers/exporters will not be subject to the measure. As it is clear that newcomer process stipulated in Article 9.5 of the AD agreement and Article 19.3 of the SCM Agreement protect producers/exporters right which have no export sales during the investigation period or which come out after the imposition of the measures and subject to the measure. It should be highlighted at this point that if no measure is imposed to the producers/exporters which have no export sales during the investigation period there is no need to have a newcomer mechanism in AD and SCM Agreement. In this respect, having a newcomer mechanism in AD and SCM Agreements should be interpreted as a measure shall be imposed to exporters/producers which do not have export sales during the investigation period.

15. In relation to this issue, I would like to recall at this stage that Article 3.2 of the Dispute Settlement Understanding envisages that the recommendations and rulings of the Dispute Settlement Body can not add to or diminish the rights and obligations provided in the covered agreements.

16. In addition to this, I would like to highlight that there is also a need to impose a measure in cases where there is no producer/exporter except cooperated companies. This practice will prevent circumvention of a measure through many ways like changing company names or establishment of a new company and protect rights of the producers/exporters that may come out after the measure is imposed by resorting newcomer review process.

17. Let me move back to the question that should be addressed and responded by the panel whether "facts available" can be used for determination of anti-dumping margin and subsidy amount for imposition of a measure on residual exporters/producers.

18. As underlined at the beginning of our statement there is no rule, principle or guidance in the AD or SCM Agreement displaying the methodology on how the dumping margin/subsidy amount should be calculated for producers/exporters unknown to the investigating authority. Turkey considers such an absence as a significant lacuna in the fabric of both agreements. Notwithstanding, Turkey has no clear response concerning the basics of the calculations. Even

[3] Appellate Body Report, Mexico -Rice, paras.259; Panel Report, China-GOES (Panel), paras. 7.386-7.393.

though the jurisprudence holds that "facts available" based calculations are not applicable to unknown producers/exporters and underlines such a legal lacuna cannot be remedied through the expansion of discretional powers[4] of the investigating authority the basis of these calculations still remains unanswered.

19. As a last point, it has been argued in third party submissions that the case of "unknown producers/exporters" would appear differently in countervailing duty investigations. It is highlighted that, for practical reasons, the member state, granting the subsidy, would possess knowledge on the names and addresses of the recipients.[5] Thus, as a rebuttable presumption, the companies included to the subsidy program cannot be considered to be a part of the "unknown producer/exporter" group since they will be informed by their own government authorities. Even though the reasoning of such an approach appears to be sound the position of the companies that are not a part of a long lasting subsidy program is still ambiguous. Furthermore, it is not clear what will happen if the member state under investigations refuses to cooperate or partially cooperate. Lastly, the questions why a member would refrain from conveying the notice of investigation to the relating firm or why this firm would deliberately keep itself unknown[6] need to be addressed.

III. Disclosure of Data Used To Determine the Existence of Dumping

Mr. Chairman,

20. Let me move to clarify Turkey's position regarding "disclosure of data used to determine the existence of dumping".

21. Taking this opportunity, I would like to reiterate that disclosure of "essential facts" is a crucial procedural obligation for the investigating authorities and a procedural right for the interested parties in order to defend their interests and present counter arguments before imposition of final measures. In this regard, fulfilling of this obligation by the investigating authority and giving a meaningful opportunity to the interested parties to defend their interests depends mainly on the facts to be disclosed.

22. Having said that, the calculations relied on by the investigating authority to determine the normal value and export price –as well as data underlying those calculations- and the methodology followed by the investigating authority cited in Article 2.4.2 in the AD Agreement constitute "essential facts" forming the basis of the investigating authority's imposition of final measures within the meaning of Article 6.9. Thus, disclosure of calculations gives interested parties to check correctness of these calculations. If there is a clerical or mathematical error in these calculations which could seriously distort the actual dumping margin might be raised to be revised by the investigating authority.

23. In addition to this, Turkey would like to clarify that these company specific calculations, which in most cases include confidential information, should be disclosed only to the related interested party and not to all interested parties. Thus the disclosure should be limited only to the relevant interested party.

Turkey appreciates this opportunity to present its view and would be happy to take questions you might have.

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[4] Panel Report, China-GOES, para. 7.390.
[5] Third Party Written Submission of the European Union, p. 9.
[6] Third Party Written Submission of the European Union, p. 11.