WORLD TRADE ORGANIZATION

WT/DS414/R/Add.1
15 June 2012

(12-3104)

Original: English

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

Report of the Panel

Addendum

This *addendum* contains Annexes A to H to the Report of the Panel to be found in document WT/DS414/R.

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ANNEX A-1

EXECUTIVE SUMMARY OF THE FIRST WRITTEN
SUBMISSION OF THE UNITED STATES

I. INTRODUCTION

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

2. Transparency and due process commitments are important elements of the AD and SCM Agreements. From the very outset, China's conduct of the GOES investigation raised serious transparency and due process concerns. Following China's wide-ranging investigation, in which it requested detailed information on companies' entire production lines including products unrelated to GOES, data on sales stretching back fifteen years, and on laws and regulations that had no relation to the companies or product at issue, and after both the United States and U.S. companies provided over a dozen questionnaire responses, the serious due process and transparency problems evident from the beginning of the proceeding became even more apparent as China began issuing its determinations. These due process and transparency problems impaired the ability of the United States and interested parties to understand the basis for China's determinations or to defend their interests.

II. FACTUAL BACKGROUND

A. THE IMPOSITION OF DUTIES ON U.S. IMPORTS

1. The Petition

3. On 27 April 2009, two Chinese steel producers, Wuhan Iron and Steel (Group) Corporation and Baosteel Group Corporation, filed a petition with China's Ministry of Commerce ("MOFCOM") requesting relief under China's AD and CVD laws on behalf of China's domestic GOES industry. The petitioners alleged that U.S. producers of GOES, in particular AK Steel Corporation ("AK Steel") and ATI Allegheny Ludlum Corporation ("ATI"), had engaged in injurious dumping and benefitted from various countervailable subsidies.[1]

4. Regarding subsidies, the petitioners alleged that 27 federal and state laws provided countervailable subsidies to the U.S. companies. Among the laws challenged were several federal procurement statutes. Regarding the dumping allegations, petitioners estimated a dumping margin for GOES imports from the United States of 25 per cent. The petition alleged that imports of GOES from the United States and Russia caused and threatened injury to the Chinese industry. Citing China's AD regulations, the petitioners argued that a cumulative assessment of injury should be performed, which would collectively take into consideration GOES imports from the United States and Russia. The petition then alleged price undercutting, price depression, and price suppression caused by the imports.

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

5. To support virtually their allegations, the petitioners purportedly relied on a wide variety of data and information. Virtually none of this information was disclosed, however, because the petitioners sought and obtained from MOFCOM confidential treatment for nine broad categories of data and information that it claimed was confidential.

6. On 1 June 2009, MOFCOM initiated the anti-dumping, countervailing duty, and injury investigations. For the anti-dumping and countervailing duty proceedings, MOFCOM set a period of investigation from 1 March 2008 to 28 February 2009, and for injury, MOFCOM set the period of investigation from 1 January 2006 to 31 March 2009.

2. Subsidy Questionnaires and New Allegations

7. On 26 June 2009, MOFCOM issued initial subsidy questionnaires to AK Steel and ATI, as well as to the United States. MOFCOM asked the United States for purchase data relating to GOES during the period of investigation. The results of a search of the federal procurement database showed that GOES was not purchased by the U.S. government.

8. In the subsidy questionnaires issued to AK Steel and ATI, MOFCOM demanded volumes of information unrelated to the subject merchandise. For example, MOFCOM demanded that AK Steel provide detailed transaction data for billions of dollars in transactions involving non-subject merchandise – products that are neither inputs for GOES nor substitutable for GOES. Because of the volumes of information requested, neither AK Steel nor ATI could fulfil all of the requests made in the CVD proceeding. In addition, and in connection with demands for all sales data for all products, AK Steel referenced the fact that it had already submitted detailed sales data for GOES in the parallel anti-dumping proceeding, and asked MOFCOM to review that data for purposes of the CVD, since China's anti-dumping laws and regulations do not provide for separate investigative records.

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

10. On 20 July 2009, the petitioners filed new subsidy allegations regarding various federal and state laws. Despite serious deficiencies pertaining to these allegations, on 19 August 2009, MOFCOM initiated an investigation covering five programmes.

11. After filing its initial questionnaire response on 10 August 2009, in a span of just eight weeks, AK Steel received and responded to five lengthy supplemental questionnaires issued by MOFCOM in the CVD investigation. On 9 September 2009, AK Steel noted the considerable burden resulting from MOFCOM's investigation, and stressed its willingness to cooperate. AK Steel responded to all of MOFCOM's requests.

3. Preliminary Determination

12. On 20 December 2009, MOFCOM published the preliminary determination. Regarding the government procurement statutes, MOFCOM applied what it termed facts available and calculated a subsidy rate of 11.7 per cent for AK Steel and 12 per cent for ATI. MOFCOM asserted that it applied facts available to the U.S. companies because it determined that the U.S. companies did not cooperate in its investigation. MOFCOM specifically cited U.S. companies' failure to provide data on all sales of all steel products.

13. Regarding its benefit determination for the federal procurement statutes, MOFCOM concluded that competitive bidding under the procurement statutes does not result in a valid market

price. While conceding that competitive bidding exists, MOFCOM nonetheless concluded, without explaining it conclusion, that the qualification criteria for bid participants prevented the price from reflecting true market conditions.

14. MOFCOM calculated preliminary dumping margins of 10.7 per cent for AK Steel, 19.9 per cent for ATI, and 25 per cent for all others. The only explanation MOFCOM provided regarding how it calculated the all others rate was a single sentence in its report. MOFCOM provided no further explanation of its calculation of the all others dumping rate, and it did not disclose the information forming the basis for the calculation of this rate. The all others subsidy rate in the preliminary determination was 12 per cent.

4. On-Site Verification

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

5. Disclosure Documents

(a) Factual Disclosure on Dumping Margin and Subsidy Rate

16. Prior to issuing the Final Determination for the anti-dumping and countervailing duty investigations, MOFCOM released its Final Disclosure, in which it revealed that it had nearly quadrupled the all others subsidy rate to 44.6 per cent. As with the Preliminary Determination, the Final Disclosure provided only one sentence referring to its CVD regulations to explain the source of the all others subsidy rate. MOFCOM did not disclose the facts that led it to conclude that the use of facts available was justified for all other U.S. companies. It also did not disclose the facts that led it to conclude that 44.6 per cent was a justifiable rate or the calculations performed to determine this rate. Also in the Final Disclosure, MOFCOM revealed that it was increasing the all others dumping rate to 64.8 per cent. Again, MOFCOM simply provided a vague reference to China's anti-dumping law, and beyond that offered not a single piece of information regarding how the rate was calculated.

(b) Injury Disclosure

17. On 5 March 2010, the Industry Injury Investigation Bureau of MOFCOM issued a document titled "Basic Facts Based on Which the Industry Injury Determination of the Anti-dumping Investigation into GOES Imports from the United States and Russia and the CVD Investigation into GOES Imports from the United States was Made" ("Injury Disclosure Document").

18. The Injury Disclosure Document provided some basic information about the volume of the imports under investigation, as well as trend information concerning the condition of the domestic industry. Nevertheless, with respect to an issue that was critical to the subsequent injury determination – pricing – MOFCOM disclosed strikingly few facts**.**

19. What MOFCOM characterized as "pricing" data in a section entitled "Price of the Subject Merchandise" were in fact average unit value data for transactions derived from Customs statistics. MOFCOM combined average unit value data for products imported from the United States and Russia, notwithstanding the fact that separate data for each country could be derived from the Customs statistics. MOFCOM also decided to use only one annual observation for calendar years 2006, 2007, and 2008. Consequently, in a three and one-quarter year period of investigation concerning products from two countries, MOFCOM reported – and apparently relied upon – only four observations of average unit values for the imports under investigation. In short, MOFCOM's disclosure included *no information* concerning actual prices charged for *any product* in any commercial transaction.

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

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

22. On causation, MOFCOM disclosed that the Chinese industry's capacity increased by over 50 per cent in 2008, and was 80 per cent higher in the first quarter of 2009 than during the first quarter of 2008. The large capacity increases facilitated substantial increases in production. These increases in production outstripped even robust increases in demand – particularly so in the first quarter of 2009.

6. Final Determination

(a) Subsidy and Dumping Findings

23. On 10 April 2010, MOFCOM issued the final determination for the anti-dumping and countervailing duty investigations. MOFCOM applied a dumping margin of 7.8 per cent to AK Steel, and 19.9 per cent to ATI.

24. For the subsidy rate, MOFCOM continued to use what it termed facts available to calculate subsidy rates for the federal procurement statutes because the respondents did not provide 15 years of detailed sales data for non-subject merchandise. To calculate the amount of the subsidy purportedly benefitting GOES products, MOFCOM, relying on facts available, assumed that AK Steel and ATI sold only carbon steel, and sold *all* of their output to the government, despite the fact that the record demonstrated there were no sales of GOES to the government, AK Steel did not sell any product to any government entity during the POI, and only a limited amount of non-GOES AK Steel and ATI products could even as a theoretical matter have been purchased in connection with alleged government procurement. Without any analysis, MOFCOM determined that U.S. carbon steel prices were 25 per cent above prices for foreign products**.** MOFCOM calculated subsidy rates for the federal procurement statutes indicating that GOES from AK Steel benefitted from subsidies at the rate of 11.918 per cent and GOES from ATI benefitted at the rate of 11.65 per cent.

25. Regarding the procurement statutes, MOFCOM also concluded that the prices obtained through the competitive bidding process provided for under U.S. law do not reflect real market prices. In doing so, MOFCOM dismissed the position of the United States that procurement in the United States occurs under competitive bidding conditions and that foreign companies may compete

for bids. Repeating its position in the preliminary determination, MOFCOM simply stated that the prices generated by competitive bidding do not reflect market prices.

26. Ignoring U.S. comments explaining the flaws in the all others subsidy rate calculation, filed in response to the disclosure document, MOFCOM, in the final determination, imposed a final all others subsidy rate of 44.6 per cent. Again, at no time prior to the final determination did MOFCOM disclose to the United States or other interested parties the essential facts under consideration that formed the basis for the near quadrupling of the all others subsidy rate, other than stating that the rate was based on information from the petitioners pursuant to China's CVD regulations. MOFCOM's explanation did not change from the preliminary determination and disclosure document to the final determination.

27. In the final determination, MOFCOM calculated an all others dumping rate of 64.8 per cent, 332 per cent higher than that in its preliminary determination. It did so despite the fact that the dumping rates it calculated for the two respondents, AK Steel and ATI, were substantially lower that 64.8 per cent – that is, 7.8 per cent and 19.9 per cent, respectively. Again, MOFCOM's only explanation was that it relied upon its Anti-Dumping Regulation. The Final Determination contains no other explanation of how MOFCOM calculated the rate, the data it relied on, or why an increase from 25 per cent was warranted for other U.S. producers/exporters that it did not examine.

(b) Injury Findings

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

29. MOFCOM repeatedly stated that the importers had a "strategy" of charging "low prices." One critical finding at the beginning of the section is that "[t]he contracts and original records from the price formulation process provided by petitioners showed that the subject merchandise adopted a pricing strategy of selling at a price lower than Chinese like products in the Chinese domestic market. Because subject merchandise was kept at a low price, and the import volume of subject merchandise increased greatly since 2008, domestic producers had to lower their prices to keep market share." MOFCOM failed to specify the nature of these contracts or records, or summarize their content in the Final Determination. As previously discussed, the Injury Disclosure Document contained no information concerning actual prices charged for any product in any commercial transaction. It also provided no information about these contracts or records. Both the Russian and U.S. parties argued to MOFCOM that their prices were not in fact lower than the prices charged by the domestic producers. MOFCOM rejected these arguments at the end of its pricing discussion, in language almost identical to its "low price strategy" finding quoted above, providing no greater detail as to the nature or application of the policy.

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

31. As previously stated, notwithstanding the foregoing, MOFCOM found that the imports under investigation had price-depressing effects. In particular, it found that domestic producers had to

"lower their prices to keep market share" in response to the "pricing strategy" of the imports under investigation.

32. MOFCOM also found that the imports under investigation had price-suppressing effects. It found that, because of the imports under investigation, domestic producers were not able to recover rising costs in the first quarter of 2009. MOFCOM first found that, during 2008 and the first quarter of 2009, imports increased more quickly than domestic demand. MOFCOM then found that the increased market penetration of the imports under investigation caused declines in the domestic industry's capacity utilization and increases in its inventories in 2008 and the first quarter of 2009.

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

34. MOFCOM further purportedly examined whether other factors caused injury to the domestic industry. In every instance, it found that the other factors caused no injury. Thus it found that GOES imports from countries other than Russia and the United States were not a cause of injury. This discussion, which was the sole discussion in the Final Determination concerning imports from sources other than the United States and Russia, provided no empirical data concerning imports from nonsubject countries. Nor did MOFCOM include any information about imports from nonsubject countries in its Injury Disclosure Document.

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

III. LEGAL ARGUMENT

A. THE INITIATION OF THE COUNTERVAILING DUTY INVESTIGATION FOR SEVERAL PROGRAMMES BREACHED ARTICLE 11 OF THE SCM AGREEMENT

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

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

B. MOFCOM FAILED TO REQUIRE ADEQUATE NON-CONFIDENTIAL SUMMARIES, BREACHING ARTICLE 12.4.1 OF THE SCM AGREEMENT AND ARTICLE 6.5.1 OF THE AD AGREEMENT

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

C. CHINA BREACHED ARTICLE 12.7 OF THE SCM AGREEMENT BECAUSE ITS USE OF FACTS AVAILABLE WAS IMPROPER

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

D. MOFCOM FAILED TO MAKE AVAILABLE THE CALCULATIONS IT PERFORMED TO ARRIVE AT THE DUMPING MARGINS, INCONSISTENT WITH ARTICLE 12.2.2 OF THE AD AGREEMENT

40. China breached Article 12.2.2 of the AD Agreement because it failed to make available to AK Steel and ATI the calculations used to determine these companies' final dumping margins. The dumping calculations are "relevant information on the matters of fact" that led to the imposition of definitive measures. Accordingly, MOFCOM was required to make them available, but it did not do so.

E. MOFCOM'S FAILURE TO PROVIDE SUFFICIENT INFORMATION ON THE FINDINGS AND CONCLUSIONS OF LAW IT CONSIDERED MATERIAL CONSTITUTES A BREACH OF ARTICLE 22.3 OF THE SCM AGREEMENT

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

F. MOFCOM'S DETERMINATION OF THE "ALL OTHERS" CVD RATE WAS INCONSISTENT WITH ARTICLES 12.7, 12.8, 22.3, AND 22.5 OF THE SCM AGREEMENT

42. MOFCOM, without explanation, applied countervailing duties based on facts available to other U.S. exporters/producers of GOES that were not named in the petition and were never sent a questionnaire. MOFCOM never notified a single producer other than those identified in the petition of the existence of the investigation, the information that would be required of them, or the consequences of not fully complying with MOFCOM's requests. MOFCOM compounded the impact of its application of facts available by providing no detail in its Final Determination and final disclosure documents with regard to the findings that led to its application of facts available. As a

result of this lack of disclosure, the United States and other U.S. companies were deprived of any opportunity to defend their interests with respect to this issue. Thus, China acted inconsistently with Articles 12.7, 12.8, 22.3, and 22.5 of the SCM Agreement.

G. MOFCOM'S DETERMINATION OF THE ALL OTHERS RATE IN THE FINAL ANTI-DUMPING DUTY DETERMINATION IS INCONSISTENT WITH ARTICLE 6.8, 6.9, 12.2, AND 12.2.2 OF THE ANTI-DUMPING AGREEMENT

43. As with the application of countervailing duties to other U.S. exporters/producers of GOES that were not named in the petition and were never sent a questionnaire, MOFCOM appears to have applied a facts available dumping margin to other U.S. producers/exporters of GOES despite never notifying a single producer other than those identified in the petition of the existence of the investigation, the information that would be required of them, or the consequences of not fully complying with MOFCOM's requests. In so doing, MOFCOM did not disclose the essential facts and conclusions of law that led it to this result. MOFCOM provided no detail in its Final Determination and final disclosure documents with regard to the findings that led to its application of facts available. As a result of this lack of disclosure, the United States and other U.S. companies were deprived of any opportunity to defend their interests with respect to this issue. Consequently, China acted inconsistently with Articles 6.8, 6.9, 12.2, and 12.2.2 of the AD Agreement.

H. CHINA'S CONDUCT OF THE GOES INVESTIGATION BREACHED ARTICLE 1 OF THE AD AGREEMENT

44. Because China's conduct of the GOES investigation breached numerous other provisions of the AD Agreement, China also breached Article 1.

I. CHINA BREACHED ARTICLE VI:2 OF GATT 1994 BY LEVYING AN ANTI-DUMPING DUTY GREATER THAN THE MARGIN OF DUMPING

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

J. THE PRICE EFFECTS ANALYSIS IN MOFCOM'S FINAL DETERMINATION WAS INCONSISTENT WITH CHINA'S WTO OBLIGATIONS

46. MOFCOM's price effects analysis in its injury determination was fundamentally flawed in many respects. MOFCOM failed to disclose essential facts supporting is price effects analysis. MOFCOM's price effects analysis was also not based on positive evidence. In conducting its price effects analysis, MOFCOM did not engage in an objective examination of the evidence, nor did MOFCOM offer an adequate explanation for its price effects findings. China therefore acted inconsistently with Articles 3.1, 3.2 , 6.9, and 12.2.2 of the AD Agreement, and Articles 12.8, 15.1, 15.2, and 22.5 of the SCM Agreement

K. THE CAUSATION ANALYSIS IN MOFCOM'S FINAL DETERMINATION IS INCONSISTENT WITH CHINA'S WTO OBLIGATIONS

47. MOFCOM's causation analysis in its injury determination was similarly deficient. MOFCOM failed to disclose facts supporting its causation analysis. The causation analysis was not supported by

positive evidence and was not based on an objective examination of the evidence. MOFCOM also failed to communicate an adequate explanation for its causation findings. Therefore, China acted inconsistently with Articles 3.1, 3.5, 6.9, and 12.2.2 of the AD Agreement, and Articles 12.8, 15.1, 15.5, and 22.5 of the SCM Agreement.

L. CHINA'S CONDUCT OF THE GOES INVESTIGATION BREACHED ARTICLE 10 OF THE SCM AGREEMENT

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

ANNEX A-2

EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION OF CHINA

A. THE PETITION AND INITIATION THEREOF WERE CONSISTENT WITH ARTICLES 11.2 AND 11.3 OF THE SCM AGREEMENT

1. In the underlying anti-subsidy proceeding, the applicants presented hundreds of pages of factual information relating to financial contribution, benefit, and specificity in support of their subsidy allegations. The information provided was that information reasonably available to the applicants. MOFCOM examined the allegations and accompanying factual information, and determined that although certain allegations did not warrant initiation of an investigation, there was a sufficient evidentiary basis to initiate on several other allegations. MOFCOM conducted an investigation of the allegations at issue. (Ultimately, none of the allegations at issue under this U.S. claim were determined to have provided countervailable benefits to the respondents.)

2. The U.S. claims merely reflect disapproval of the allegations found in the applications rather than a critique of the factual information supporting the allegations. Indeed, the United States is far too quick to assert without any evaluation that "the petition did not contain any evidence" of one or more elements of an actionable subsidy, when in fact such evidence existed, leaving in doubt whether the United States has advanced a *prima facie* case under Article 11

3. What the United States seeks is a different standard for applications than that found in Article 11 of the SCM Agreement, requiring a level of information, analysis, and disclosure simply not required by that provision. The consistent theme of prior panels in addressing this requirement is that applicants need only submit enough evidence to justify an investigation, and need not analyse that evidence or justify the ultimate conclusion. First, WTO dispute settlement panels have found that the initiation standard presents a relatively low threshold for applicants. Second, an application is sufficient if limited to providing relevant information; analysis is not a prerequisite. Third, an applicant is not required to provide within its application an exhaustive compendium of all relevant information reasonably available to it. The real question is whether the application contained sufficient information on the matters specified in Article 11, and by that standard whether initiation of the allegations at issue was proper. The evidence on the record of the proceeding, largely unaddressed by the United States in its claim, demonstrates that both the contents of the petition and initiation were proper.

4. China submits that the United States has failed to engage in a serious evaluation of the evidence that accompanied the application at issue. Because of that failure, the United States has failed to establish a *prima facie* case that the application was inconsistent with Article 11.2. Its entire case with respect to 11 separate allegations is confined to 11 perfunctory paragraphs that, to one extent or another, simply assert that "the petition did not contain any evidence" of one or more elements of an actionable subsidy. The United States made absolutely no reference to the information that accompanied the application with respect to many of the challenged allegations, when in fact each allegation was accompanied by specific documentary information beyond the assertions contained in the allegation itself. For the programmes where the United States actually mentioned accompanying evidence, it was only in passing with no serious critique of the information.

B. 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

5. Article 6.5.1 and Article 12.4.1 do not require complete or perfect disclosure. They require only that a non-confidential summary – the public version of a document – be in "sufficient detail" to permit a "reasonable understanding" of the "substance" of the information. These provisions seek to strike a balance between the interests of the interested parties submitting confidential information and the interests of the other interested parties to be reasonably informed. Nonetheless, the text of the provisions recognizes that the balance must favour the submitter of confidential information, where summaries cannot adequately protect confidential information. The non-confidential summaries in the public version of the petition more than met this standard.

6. The U.S. argument focuses entirely on the statements made in part II of the petition, but completely ignores the non-confidential summaries provided in part I of the petition. Given the United States failure even to address the non-confidential summaries actually provided, China believes the United States has not made out a *prima facie* case of its claim. The fact that the Appendices do not repeat non-confidential summaries provided in the narrative of the public version of the petition does not create a violation of Article 6.5.1 or Article 12.4.1. One can have a "reasonable understanding" of the key issues and facts by reading the entire public version of the petition and there is no obligation on the authorities to require interested parties to repeat a non-confidential summary that has already been provided.

7. To the extent the Panel finds that adequate non-confidential summaries on any particular issues were not provided in the underlying proceeding, China believes that the central issue shifts to whether or not China dealt with the exceptional circumstances of this investigation properly in view of Article 6.5 and 6.5.1 and the so-called "due process" rights of the interested parties. The exceptional circumstance of having only two respondent companies in China permitted the authorities to invoke the "exceptional circumstance" provision of Articles 6.5.1 and 12.4.1 of the AD and SCM Agreements respectively in order to protect the confidentiality of the information submitted. Because the information was limited to two companies, the information provided was not susceptible to a more traditional confidential summary which aggregates the information from multiple companies, thereby protecting the confidentiality of individual company information.

C. MOFCOM'S APPLICATION OF FACTS AVAILABLE IN DETERMINING THE SUBSIDY MARGIN FOR THE GOVERNMENT PURCHASE OF GOODS PROGRAM WAS CONSISTENT WITH ARTICLE 12.7

8. In the underlying investigation MOFCOM made direct requests to the company respondents regarding information on all steel sales in the context of the government purchase of goods program. The respondents refused to respond to MOFCOM's requests in their initial questionnaire responses. After consulting and providing written guidance to both AK Steel and ATI on the matter, MOFCOM gave both companies ample opportunity to correct their responses. The companies again refused. In response, China declined to verify the deficient, untimely and unusable information provided, and instead applied "facts available" to both companies, finding that 100 per cent of sales took place under the programme. On the basis of these facts, the United States now argues that China improperly applied "facts available" in consideration of the government purchase of goods program. Looking to the language of Article 12.7 and guidance derived from parallel language under Article 6 of the AD Agreement, the United States claims that MOFCOM impermissibly ignored "necessary information" provided by the company respondents in the case.

9. China notes that the U.S. "facts available" claims appear rooted in a substantive disagreement over China's analysis of subsidy issues, but any substantive disagreement the United States has over

China's theory of subsidization and methodological choices with respect to the government purchase of goods program is not before this Panel. The Panel must evaluate the U.S. claim in light of China's approach to what it deemed to be necessary information, not in light of U.S. arguments about what should have been sufficient information. Properly framed, it is evident that MOFCOM's application of "facts available" was consistent with Article 12.7. The companies did not provide timely responses, did not cooperate to the best of their ability, and seriously impeded the investigation even when they knew as of the preliminary determination that MOFCOM was considering a 100 per cent utilization option.

10. MOFCOM knew the correct utilization of the programme was more than zero. MOFCOM also had a reasonable basis to believe the correct utilization was more than the 29 per cent alternative offered by AK Steel, since AK Steel had refused to provide requested information. Indeed, this alternative was filed on the same day – 30 December 2010 as the final AK Steel effort belatedly to respond to the MOFCOM request for information. Yet even at this late date, AK Steel still did not respond properly, and provided transaction data only for a subset of the customers that had been previously identified. Indeed, AK Steel did no more than submit data that it had readily available for months. So instead of making a good faith effort finally to respond to the request, AK Steel yet again decided it could pick and choose how and whether to respond. On the other hand, MOFCOM had no information with which it could determine some alternative more than the AK alternative but less than 100 per cent utilization, again in large part due to the refusal of ATI and AK Steel to provide complete information. MOFCOM's effort to elicit more complete cooperation had failed, and the facts to determine the actual level of utilization had still been withheld by the U.S. respondents. Thus, MOFCOM reasonably relied on the 100 per cent figure, consistent with Article 12.7 of the SCM Agreement.

11. Respondents who wilfully and strategically create a factual void during the course of an investigation should not be allowed to benefit from that non-cooperation under Article 12.7 of the SCM Agreement. To allow such an outcome would undermine the entire purpose of the investigation and allow respondents to manipulate the process by withholding unfavourable information in a calculated manner.

D. MOFCOM'S DISCLOSURE OF ITS DETERMINATION OF THE MARGINS OF DUMPING WAS CONSISTENT WITH THE REQUIREMENTS OF ARTICLE 12.2.2

12. There is no language in Article 12.2.2 that supports the U.S. contention that this provision requires authorities to provide respondents with the actual calculation of the margins of dumping. Article 12 is focused on providing an "explanation" of determinations; sufficient detail in this context would indicate that the disclosure be sufficient to constitute an adequate explanation of the authority's findings and conclusions, and what facts and law were relied upon in reaching such conclusions and findings. This is not a mandate to require full disclosure of all facts used to calculate the margins of dumping, but rather a more limited requirement to ensure an understanding of the methodology, facts used, and the results obtained with respect to the margins of dumping. All that is necessary is to provide interested parties to an investigation or review notice of determinations made by the authorities and an explanation of the determinations.

13. It is questionable whether the United States complaint regarding the disclosure of the actual numbers used and the actual calculations performed in the determination of the margins of dumping properly even lies under Article 12.2.2, which addresses final determinations, or Article 6.9 which addresses the disclosure of the essential facts forming the basis of the decision to apply definitive measures. Nevertheless, even if the United States were basing its complaint on Article 6.9, the language of the Article makes clear that its object and purposes is to provide the "essential facts" to enable interested parties "to defend their interests," not to provide the detailed facts demonstrating the

calculation of the margin of dumping. Moreover, even if Article 6.9 were properly before the Panel, the disclosure provided in Article 6.9 does not add to that required under Article 12.

14. Notwithstanding the absence of any requirement that the details of the calculation of the margins of dumping be disclosed, the disclosure by China in the instant investigation was sufficient to allow respondents to replicate the authority's calculation. China provides in Exhibits CHN-25 and CHN-26 tables listing each element of the calculation of normal value and export price or constructed export price used to calculate the margins of dumping for each of the two U.S. respondents, drawn from the source documents of the proceeding. Each respondent could go to the source information and reconstruct the exact calculation performed by MOFCOM to determine the margins of dumping. Thus, the respondents were in a position to check the accuracy of the MOFCOM calculation, and it is evident from comments filed by ATI during the proceeding that it clearly understood what information MOFCOM was using. Thus, the U.S. claim is without merit.

E. MOFCOM PROVIDED SUFFICIENT DETAIL ON ITS FINDINGS OF THE LACK OF A COMPETITIVE BIDDING PROCESS UNDER THE GOVERNMENT PURCHASE OF GOODS PROGRAM

15. Using record facts, MOFCOM's preliminary and final determinations plainly set forth why participation restrictions on foreign steel and price preferences afforded to U.S. steel resulted in prices that did not reflect competitive, market conditions under the government purchase of goods program.

16. Article 22.3 of the SCM Agreement establishes notification requirements at the preliminary and final stages of investigation with respect to those issues of fact and law considered material by the investigating authorities. Notifications, in "sufficient detail," should be provided in the preliminary and final determinations, or through a separate report. The object and purpose of the provision is to provide transparency and afford affected parties a reasonable understanding of the facts and analysis underlying an authority's determinations. Both the preliminary and final determinations issued by MOFCOM accomplished exactly this objective, contrary to U.S. claims.

17. In the preliminary determination, MOFCOM explained all the elements that led to its conclusion that bidding under the government purchases of goods program did not reflect market pricing. Contrary to U.S. claims, it also directly addressed arguments made by the United States that no benefits were conferred on any manufacturers of goods. Specifically, the preliminary determination noted: (1) bids by U.S. producers are afforded a 25 per cent price cushion over competing foreign prices, thus "competitive bidding" is really closed bidding among U.S. producers at artificial start prices; (2) to the extent foreign suppliers are exempted from the 25 per cent price preference for U.S. products under the Government Procurement Agreements, others remain subject to that restriction, with certain states prohibiting any foreign participation and expressly limiting competition to U.S.-made steel; and (3) because of these features, the price obtained through this so-called "competitive bidding does not reflect true market conditions."

18. In the final determination, MOFCOM's explanation expanded upon that offered in the preliminary determination. MOFCOM not only quantified the amount of foreign steel excluded from Buy American projects as part of U.S. consumption, but also quantified the price difference between North American prices and non-North American prices based on the submissions of AK Steel. As discussed in the final determination, what that factual information showed is that the prices of excluded products were lower than the North American price. Finally, MOFCOM presented evidence from verification noting the extremely limited use of foreign products within Buy American projects. Combined with what was already explained about price preferences and general exclusions, this information confirmed the lack of a competitive market, and a market that was otherwise weighted toward higher priced U.S. steel.

F. MOFCOM'S DETERMINATION OF THE "ALL OTHERS" CVD RATE WAS CONSISTENT WITH ARTICLES 12.7 AND 12.8 OF THE SCM AGREEMENT

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

20. In terms of the facts selected by MOFCOM in calculating the "all others" CVD rate, as indicated in the final determination, MOFCOM relied upon information provided by the petitioner. Notice and thereby disclosure was given to all known producers/exporters. With respect to disclosure of the facts upon which the all others rate was based, the final determination disclosed that it was based upon information provided by the petitioners. Specifically, the final determination stated: "{f}or other U.S. companies who did not register nor submit the questionnaire responses, the Investigating Authority made a determination on ad valorem subsidy rate based on the information submitted by the petitioner pursuant to Article 21 of the Regulations on Countervailing Measures." There was little mystery to which information this statement referred, and the United States appears to have readily identified the source from the record based on that statement. The information provided the facts and calculations upon which the all others rate based.

G. MOFCOM'S DETERMINATION OF THE "ALL OTHERS" AD RATE

21. In the underlying GOES investigation, MOFCOM followed the general rule set forth in Article 6.10 of the AD Agreement which establishes that authorities "shall, as a rule, determine an individual margin of dumping for each known exporter or producer concerned of the product under investigation." Since MOFCOM conducted an individual examination of the margins of dumping of each known exporter/producer, the rule for determining the margin of dumping for non-individually examined exporters/producers in Article 9.4 of the AD Agreement does not apply in determining an "all others" rate. Neither Article 6.10 nor any other provision of the AD Agreement addresses the issue of the treatment of exporters/producers that are not "known" to the authority and cannot, therefore, be individually examined.

22. Pursuant to MOFCOM's notification to all producers/exporters consistent with Article 6.1 of the AD Agreement, China determined that the most relevant provision of the AD Agreement to address the issue of the antidumping rate for unknown and unresponsive exporters/producers was Article 6.8 of the AD Agreement which addresses the treatment of interested parties who do not provide the "necessary information" required by the authority. In applying Article 6.8, the authority based its margin of dumping on paragraph 7 of Annex II. This was done since an "all others" rate based on the rate applied to one or both of the cooperating respondents, would provide no incentive for unknown companies to make themselves known and participate in the investigation. Thus, the application of Article 6.8 and the last sentence of paragraph 7 of Annex II were intended to encourage realization of the objectives of Article 6.10, namely to enable China to follow the general rule of determining margins of dumping for each individual producer/exporter.

23. In the preliminary determination, the margins of dumping used for the "all others" rate was based on the margins alleged and contained in the petition. However, because the information on which the final determination of the "all others" rate was based was confidential information of one of the responding companies, the actual information used to determine this rate could not be disclosed without breaching the confidentiality of the information used. Thus, the explanation was necessarily general in nature. The failure to disclose the details of the calculation of the "all others" rate had no effect on the ability of parties to defend their interests. So long as the "all others" rate is based on

record evidence, it is not clear that in the situation where parties do not cooperate that the authority's discretion is limited.

H. MOFCOM'S INVESTIGATION DID NOT BREACH ARTICLE 1 OF THE AD AGREEMENT

24. In the sections above, China has addressed in full each of the United States' substantive claims concerning China's alleged breaches of the AD Agreement. To the extent China has addressed all of the substantive claims raised by the United States and acted consistently with its obligations under the AD Agreement, the United States' Article 1 claim lacks merit and should be set aside.

I. CHINA'S AD MEASURE DID NOT BREACH ARTICLE VI:2 OF GATT 1994

25. The United States claims that the circumstances surrounding China's assignment of the "all others" rate in the underlying proceeding breached Article VI:2 of GATT 1994. China has addressed the United States substantive arguments with respect to the "all others" AD margin. We refer the Panel to the discussion above in Section G.

J. MOFCOM PROPERLY ANALYSED THE ADVERSE PRICE EFFECTS FROM THE SUBJECT IMPORTS

26. At the outset, it is important to note the MOFCOM findings not being challenged by the United States. The United States has made no challenge to the MOFCOM findings of adverse volume effects. The United States has also made no challenge to the MOFCOM findings regarding cumulation, which means that subject imports from both the United States and Russia must be considered together and the behaviour of the U.S. producers themselves (individually or together) is not legally relevant to the analysis. Finally, the United States has made no challenge to the MOFCOM findings of material injury. The U.S. challenges are limited to the price effects, and the causal link.

27. The U.S. arguments focus heavily on price undercutting findings that MOFCOM did not make, and largely misstate and mischaracterize the price suppression and price depression analysis that MOFCOM did make. MOFCOM properly found that in the face of an increasing volume of subject imports that gained significant market share, domestic prices began to show the effects of price suppression and depression during 2008, and those effects continued and worsened in early 2009. The record provides strong positive evidence for the MOFCOM findings of price suppression and depression during 2008 and 2009, evidence that was not challenged at all during the administrative proceedings before MOFCOM and evidence that the United States has not effectively challenged in its submission to this Panel.

28. MOFCOM did not make specific price undercutting findings, nor was it under any legal obligation to do so, contrary to U.S. arguments. The texts of Article 3.2 and Article 15.2 -- through the key term "or" -- make clear that price undercutting is simply one alternative methodology that the authorities may consider as part of evaluating price effects. This interpretation is reinforced by the term "otherwise" that the United States left out of its quote from these texts – "whether the effect of such imports is otherwise to depress prices to a significant degree or prevent price increases." (emphasis added) Both the use of "or" and the use of "otherwise" confirm that price undercutting is optional, not mandatory. This interpretation has been adopted by other panels.

29. MOFCOM also disclosed all of the "essential facts" as required by Article 6.9 and Article 12.8. This disclosure occurred in two key documents. First, MOFCOM presented a Preliminary Determination on 10 December 2009, which included extensive discussion of injury issues in general, and pricing issues in particular. Second, MOFCOM also presented a Final Injury

Disclosures on 7 March 2010, which presented the essential facts and provided initial responses to those arguments that had been made so far during the administrative proceedings. These two documents contained all of the "essential facts" on which China ultimately relied in its Final Determination.

30. In making its disclosure argument, the United States has completely ignored the authority's obligation to protect the confidentiality of information. The United States cites to the procedural requirement to disclose, but conveniently overlooks the fact that this obligation occurs in the context of the parallel requirement to protect the confidentiality of proprietary information. This requirement can be seen in Article 6.5 and Article 12.4, which discuss the obligation to protect confidentiality. This requirement can also been seen in Article 12.2.2 and Article 22.5, which discuss the obligation of disclosure, but with "… due regard being paid to the requirements for protection of confidential information." On balance, the United States has not identified any specific piece of information that was both an "essential fact" and could be disclosed while maintaining confidentiality. Such a failure has often been the basis for dismissing such claims as not stating a *prima facie* case.

31. Beyond complaining about the disclosure of "essential facts," the United States also complains about the "reasons" provided by MOFCOM. Contrary to the U.S. argument, MOFCOM has provided the "relevant information" and "reasons" required by Article 12.2.2 and Article 22.5. The authority's obligation is not to address every detail of every argument raised by the parties, in the specific terms provided by those parties. MOFCOM developed its response that the growing volume of subject imports in 2008 and early 2009 caused price suppression and price depression in those years. That complete explanation of its "reasons" satisfies the obligations of Article 12.2.2 and Article 22.5.

32. Overall, China believes that its analysis of adverse price effects fully complied with the substantive and procedural requirements of the relevant Agreements. If the Panel were to disagree, China asks the Panel to confirm MOFCOM's overall finding of causation was still proper. Since MOFCOM based its analysis of causation on both volume effects and price effects, those price effects can support an overall finding of causation, even if they might not have been sufficient to justify finding a causal link on their own. U.S. arguments to the contrary are without merit, resting on an incorrect assumption that the WTO agreements "require an authority to undertake a price effects analysis." Article 3.1 and Article 15.1 require only two findings: an initial finding about volume/price effects, and then a finding about the "consequent impact" of those effects. An authority can thus "examine" both the volume and price effects, but ultimately decide to base its decision on whatever balance of volume effects and price effects appropriate in a specific case, and the "consequent impact" of those subject imports. The United States has not challenged the MOFCOM findings of volume effects, nor has the United States challenged the MOFCOM findings of material injury. If the Panel agrees that MOFCOM has properly established a causal link between that subject imports and the condition of the domestic industry, that should be sufficient even if the price effects analysis alone would not have supported a finding of causal link.

K. MOFCOM PROPERLY ANALYSED THE WAYS IN WHICH SUBJECT IMPORTS CAUSED THE MATERIAL INJURY SUFFERED BY THE DOMESTIC INDUSTRY

33. On causal link, the United States presents only a single paragraph discussing causal link more generally, and that paragraph simply refers back to the U.S. arguments about price effects. The United States seems to believe that the absence of price effects automatically established the lack of a WTO consistent causal link. Legally, the United States is wrong. Adverse price effects alone are not a "necessary element" of the causal link. The U.S. argument also conveniently ignores the extent to which MOFCOM based its analysis on <u>both</u> the volume effects and the price effects. MOFCOM never considered the price effects in isolation; they were part of any overall analysis that the increasing volumes of low priced subject imports were causing material injury to the Chinese

industry. The United States has thus failed to demonstrate any inconsistency between MOFCOM's analysis and the requirements of Article 3.1 and Article 15.1 to find a causal relationship between subject imports and the condition of the domestic industry.

34. With respect to non-attribution, the primary U.S. argument is a challenge based on a single "other cause" of injury -- the expansion of Chinese capacity -- that the United States believes was not adequately addressed, and somehow severed by itself the causal link that MOFCOM had found. In making its argument, China notes that the United States ignores the degree of discretion authorities have to address alternative causes. Article 3.5 and Article 15.5 do not specify any particular methodology, and thus leave authorities with discretion as to how best to ensure a genuine causal link, even given the effects of other causes. The United States also mischaracterizes the nature of the legal obligation. The issue is not whether increases in capacity "could not have contributed" to the injury. MOFCOM need not disprove any possible effect of any other known factor that might also be affecting the domestic industry. Rather, the issue is whether subject imports contributed sufficiently to the adverse condition of the domestic industry, and whether the effect of the other factor was so dramatic as to nullify that contribution by subject imports, and thus sever the causal link.

35. The burden is on the United States as the complaining party to establish a *prima facie* case that the effects of increased domestic capacity were so dramatic that they severed any possible causal link between the subject imports and the condition of the domestic industry. The United States has failed to meet that burden. It reduces to a single other factor and a series of failed efforts to attack the reasons given by MOFCOM for finding that capacity expansion did not sever the causal link. But the respondents below provided no evidence for the U.S. theory, and the logic presented ultimately failed. The record before MOFCOM demonstrated that:

- Production capacity increased, but never exceeded total Chinese consumption.

- Even though the domestic industry added capacity, it did not actually use all of that new capacity and instead capacity utilization rates fell.

- Subject imports increased sharply in 2008 (up 61 per cent) and early 2009 (up 24 per cent), were growing faster than the overall market, and were gaining market share.

- The large and increasing volume of subject imports suppressed domestic shipments, and this subject import volume (which also happened to be at low prices) prevented the domestic industry from taking advantage of its new capacity.

Based on these facts, MOFCOM properly dismissed the possibility that the expansion of domestic capacity severed the causal link that MOFCOM had found.

36. Finally with respect to the issue of non-subject imports, China disclosed the "essential facts" of the case. The Preliminary Determination identified "products imported from other countries" as an "other factor" being analysed, and noted that subject imports were capturing a larger share of the total imports. This provided both notice that China was addressing non-subject imports, and that subject imports were gaining share of total imports. Other parts of the notice also addressed non-subject imports.

37. Having made this basic point in the Preliminary Determination, the interested parties made no further arguments on this issue. They could have developed information publicly – as the United States concedes in fn. 295 of its submission – but did not do so. Having provided the "essential facts," and having received no arguments on this point, China did not need to develop this issue further in the absence of arguments from the parties.

38. Finally, the U.S. argument that MOFCOM did not provide any "factual substantiation" for its conclusions, is just wrong. The demonstration that non-subject imports gained only 0.09 percentage points of market share is factual substantiation. Moreover, MOFCOM provided more than adequate discussion of this issue in light of the failure by the parties to use the publicly available information to develop any arguments on this point.

L. CHINA'S OBLIGATIONS UNDER ARTICLE 10 OF THE SCM AGREEMENT

39. The United States claims that China breached its obligations under Article 10 of the SCM Agreement based on its substantive arguments under various other provisions of the Agreement and GATT 1994. To the extent China's has demonstrated that its actions are consistent with the provisions of Article VI of GATT 1994 and the terms of the SCM Agreement as raised by the United States, this U.S. Article 10 claim should be rejected.

ANNEX B

WRITTEN SUBMISSIONS, OR EXECUTIVE SUMMARIES THEREOF,
OF THE THIRD PARTIES

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ANNEX B-1

EXECUTIVE SUMMARY OF THE THIRD PARTY
WRITTEN SUBMISSION OF ARGENTINA*

I. INTRODUCTION

1. In this third-party submission, Argentina is setting out its views on some of the issues that form part of this dispute, in accordance with the written submissions to this Panel by the United States and China.

II. UNDER ARTICLE 6.5 OF THE AGREEMENT ON IMPLEMENTATION OF ARTICLE VI OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE 1994 ("AD AGREEMENT") AND ARTICLE 12.4 OF THE AGREEMENT ON SUBSIDIES AND COUNTERVAILING MEASURES ("SCM AGREEMENT"), GOOD CAUSE MUST BE SHOWN FOR THE CONFIDENTIALITY OF INFORMATION AND A NON-CONFIDENTIAL SUMMARY MUST BE FURNISHED TO THE INTERESTED PARTIES

2. Articles 6.5 and 6.5.1 of the AD Agreement and Article 12.4.1 of the SCM Agreement require the submission of non-confidential summaries, so as to enable the interested parties or Members to gain "a reasonable understanding of the substance of the information submitted in confidence". The aim, ultimately, is to guarantee the right of defence to the interested parties, who otherwise would lack sufficient information to understand the grounds of the accusation that they face.

3. The WTO has had the opportunity to give its opinion on this subject in "*United States - Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*" (WT/DS268/RW). The Panel in that case held that "*[a]s we noted above, Article 6.5.1 protects the right of the interested parties generally to be reasonably informed about the substance of the confidential information that may be submitted by any other interested party. What matters for purposes of Article 6.5.1 is whether the interested parties themselves receive non-confidential summaries of the confidential information submitted to the investigating authorities*".[1]

4. Argentina therefore agrees with the view expressed by the United States in point B of its written submission to the effect that the Chinese Ministry of Commerce (MOFCOM), in accordance with the above-mentioned Articles 6.5.1 of the AD Agreement and 12.4.1 of the SCM Agreement, should have required the interested parties submitting confidential information in the investigation to furnish non-confidential summaries thereof, especially in cases where the submitting parties had shown no cause for the impossibility of summarization.

III. NON-ATTRIBUTION ANALYSIS WITH RESPECT TO OTHER FACTORS IN THE DETERMINATION OF INJURY

5. Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement show that, prior to its determination as to whether imports at dumped or subsidized prices are the cause of the difficulties experienced by the domestic industry, an investigating authority should carry out the so-called non-attribution analysis, whereby consideration has to be given to factors other than known factors

* This written statement was originally made in Spanish.

[1] *United States - Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina* (WT/DS/268/RW), paragraph 7.137.

and a determination made as to whether they contribute to the injury suffered by the domestic industry.

6. In this connection, Argentina is of the opinion that it is also clear from the above-mentioned rules that the Agreements under interpretation require no evidence that imports from other countries considered as "known factors" within the meaning of Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement are dumped or subsidized imports. In our view, therefore, even in the absence of dumping or subsidization or where the prices and/or quantity of those commercial operations are such as to cause injury to the domestic industry, it might be necessary for the investigating authority to examine whether, in the light of their volume and/or prices, imports from sources other than the one under investigation are substantial enough to break the causal link between the dumped imports and the injury determined. In that examination, it might also be necessary to consider qualitative issues relating to the forms of competition in each of the markets.

IV. CONCLUSION

7. In the light of the analysis contained in this submission, Argentina considers that:

- The "confidential" classification of information submitted by any party in the dumping or subsidy investigation must be justified by good cause; in that event, it is of the utmost importance that, except in duly attested exceptional circumstances, non-confidential summaries are to be furnished, so as to guarantee the right of defence to the interested parties.

- In the determination of injury, the investigating authority shall effect a non-attribution analysis relating to "other known factors" which may be a contributing cause of the difficulties faced by the domestic industry.

ANNEX B-2

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

I. INTRODUCTION

1. The European Union (EU) intervenes in this dispute because of its interest in the correct interpretation of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994"), the *Agreement on Subsidies and Countervailing Measures* ("*SCM*") and the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade* ("Anti-Dumping Agreement" or "ADA").

II. CONCERNING THE ALLEGATION THAT MOFCOM FAILED TO REQUIRE ADEQUATE NON-CONFIDENTIAL SUMMARIES CONTRARY TO ARTICLE 12.4.1 SCM AND ARTICLE 6.5.1 ADA

2. In its First Written Submission the U.S. submits that China breached Article 12.4.1 SCM and Article 6.5.1 ADA because it failed to require non-confidential summaries of allegedly confidential information.

3. Prior WTO panels clarified the importance and the outer boundaries of the obligation imposed by Article 6.5.1 ADA and its parallel provision in the SCM Article 12.4.1. The EU is of the view that not even the minimum transparency requirements of Article 6.5.1 ADA or Article 12.4.1 SCM can be considered to have been met in cases where non-confidential summaries were not provided to nor requested by the investigating authority and no statement of reasons stating the exceptional circumstances that render the confidential information unsusceptible to summarisation in non-confidential format has been provided to the investigating authorities.

III. CONCERNING THE ALLEGATION THAT MOFCOM FAILED TO MAKE AVAILABLE THE CALCULATIONS IT PERFOMED TO ARRIVE AT THE DUMPING MARGINS CONTRARY TO ARTICLE 12.2.2 ADA

4. In its First Written Submission the U.S. argues that China breached Article 12.2.2 ADA because it failed to make available to AK Steel and ATI the calculations and data used to determine these companies' final dumping margins. Whilst not taking a position on the facts of this case, the EU agrees with the U.S. that under Article 12.2.2 ADA, the investigating authority is required to include, or make available through a separate report, all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures in the public notice of conclusion of an investigation in the case of an affirmative determination providing for the imposition of a definitive duty.

5. The EU further notes that in order to provide interested parties with the opportunity to review the essential facts and provide meaningful comments, the ADA requires the investigating authority to disclose essential facts already under consideration before the final determination is made. According to the U.S., MOFCOM did not make the calculations, and the data underlying those calculations, available in its Final Disclosure. In general terms, even where calculations, and the data underlying those calculations, have already been made available at the stage of disclosure, any revision or modification of the calculations, and the data underlying those calculations, after the final disclosure would, in accordance with Article 12.2.2 ADA, have to be set out and explained in the public notice or through a separate report.

IV. CONCERNING THE ALLEGATION THAT MOFCOM APPEARS TO HAVE APPLIED A RATE THAT INCORPORATES PROGRAMS SPECIFICALLY FOUND NOT TO BE COUNTERVAILABLE

6. In its First Written Submission the U.S. alleges that China based the All Others' Rate on rates from the petition, which included rates for subsidies which were subsequently found to be non-countervailable.

7. The inclusion in the calculation of the All Others' Rate of programmes alleged in the petition, which were during the investigation found not to be countervailable by the investigating authority itself, would in the view of the EU amount to abusive use of facts available incompatible with Article 12.7 SCM interpreted with its relevant context.

V. CONCERNING THE ALLEGATION THAT CHINA ACTED INCONSISTENTLY WITH ARTICLE 12.8 OF THE SCM BY FAILING TO DISCLOSE THE ESSENTIAL FACTS UNDER CONSIDERATION REGARDING ITS CALCULATION OF THE "ALL OTHERS" SUBSIDY RATE

8. In its First Written Submission the U.S. alleges that China breached Article 12.8 SCM by failing to disclose the essential facts under consideration forming the basis of the All Others Subsidy Rate.

9. The EU agrees with the U.S. that: (i) facts that led the investigating authority to conclude that resorting to the use of the facts available was appropriate; (ii) facts that led the investigating authority to conclude that the subsidy rate as determined was an appropriate rate applicable to all other companies; (iii) facts underpinning the calculation of the subsidy rate as determined, and the details of the calculation itself; in general terms constitute essential facts forming the basis of the All Others Subsidy Rate within the meaning of Article 12.8 SCM and should as such be disclosed before a final determination is made.

VI. CONCERNING THE ALLEGATION THAT CHINA ACTED INCONSISTENTLY WITH ARTICLE 6.9 ADA BY FAILING TO DISCLOSE THE ESSENTIAL FACTS UNDER CONSIDERATION REGARDING ITS CALCULATION OF THE "ALL OTHERS" DUMPING RATE

10. The U.S. alleges that MOFCOM did not identify the essential facts that formed the basis for its imposition of a 64.8 per cent All Others Dumping Rate contrary to China's obligation under Article 6.9 ADA.

11. The EU agrees with the U.S. that: (i) facts that led the investigating authority to conclude that the All Others Dumping Rate as determined was an appropriate rate applicable to all other companies, especially considering that the dumping rates for the two companies identified in the notice of investigation were substantially lower than the determined all others dumping rate; (ii) particular "transaction information" from the two respondents that formed the basis for the All Others Dumping Rate as determined; (iii) facts underpinning the calculation of the All Others Dumping Rate, and the details of the calculation itself; in general terms constitute essential facts forming the basis of the All Others Dumping Rate within the meaning of Article 6.9 ADA and should as such be disclosed before a final determination is made.

VII. CONCERNING THE ALLEGATION THAT THE PRICE EFFECTS ANALYSIS IN MOFCOM'S FINAL DETERMINATION WAS INCONSISTENT WITH CHINA'S WTO OBLIGATIONS

12. The United States alleges[1] that MOFCOM did not (1) disclose several pieces of information critical to its price effects analysis, which is contrary to Article 6.9 ADA and Article 12.8 SCM; (2) in either the Final Determination or the injury disclosure document, provide any factual information or indeed reasoning to support its conclusion that import prices were lower than domestic producers' prices, thus infringing Article 12.2.2 ADA and Article 22.5 SCM; and (3) disclose evidence of significant price effects, which is in breach of Articles 3.1 and 3.2 ADA and Articles 15.1 and 15.2 SCM.

13. Concerning the alleged breach of Article 6.9 ADA and Article 12.8 SCM on the basis of the information available to the European Union it seems that disclosure[2] did not include any information about price levels for the domestically produced products. The information provided on page 8 of Exhibit US-27 indicates only the relative increase of the price of the products without indicating any price levels. Therefore, should the United States' allegations be confirmed, the European Union agrees with the United States' submission that MOFCOM's failure to disclose numerous facts central to its price effects analysis is inconsistent with Article 6.9 ADA and Article 12.8 SCM.

14. Concerning the alleged breach of Article 12.2.2 ADA and Article 22.5 SCM, if the United States' allegations are confirmed, the European Union agrees with the United States' submission that MOFCOM's failure to provide (1) a meaningful description of numerous facts critical to the price effects analysis; and (2) a substantiated response to the parties' arguments, breach Article 12.2.2 ADA and Article 22.5 SCM.

15. Concerning the alleged breach of Articles 3.1 and 3.2 ADA; and Articles 15.1 and 15.2 SCM were the Panel to establish that MOFCOM's response in the Final Measure to exporters' arguments submitted during the administrative procedure is insufficient and/or not based on sufficient evidence, the European Union agrees with the United States' submission that MOFCOM's failure to provide (1) a meaningful description of numerous facts critical to the price effects analysis; and (2) a substantiated response to the parties' arguments breach of Article 12.2.2 ADA and Article 22.5 SCM.

VIII. CONCERNING THE ALLEGATION THAT THE CAUSATION ANALYSIS IN MOFCOM'S FINAL DETERMINATION WAS INCONSISTENT WITH CHINA'S WTO OBLIGATIONS

16. Given the flawed price effects analysis MOFCOM could not possibly accomplish a correct causal link analysis. Indeed, unless imports have proven significant price effects, the investigating authorities cannot find such imports to be causing injury within the meaning of Article 3.1 ADA, first sentence; and Article 15.1 SCM.

17. Therefore, on the basis of the information presently before it, the European Union agrees with the United States' submission that MOFCOM has not complied with Article 6.9 ADA and Article 12.8 SCM in that it has provided no information whatsoever on imports from sources other than Russia and the United States.

[1] Ibid, paras. 186 et seq.
[2] See Exhibit US-27.

IX. CONCLUSIONS

18. The EU considers that this case raises important questions on the interpretation of Articles 15.1, 15.2, 12.4.1, 12.7 and 22.5 of the Agreement on Subsidies and Countervailing Measures and Articles 3.1, 3.2, 6.5.1, 6.8, 6.9 and 12.2.2 of the Anti-Dumping Agreement. While not taking a final position on the merits of the case, the EU requests this Panel to carefully review the scope of the claims in light of the observations made in this submission.

19. The EU reserves its right to make further comments at the third party session of the first substantive meeting with the Panel.

ANNEX B-3

THIRD PARTY WRITTEN SUBMISSION
OF HONDURAS[*]

I. INTRODUCTION

1. Honduras is participating in this dispute for reasons of systemic interest and because it considers that there is a need for proper interpretation of specific provisions of the WTO Agreements at issue.

2. In this third-party submission, therefore, Honduras is setting out its views on the legal interpretation of two of the issues that are the subject of this dispute, namely: (i) the requirements for initiation of an investigation on countervailing measures, pursuant to Articles 11.2 and 11.3 of the Agreement on Subsidies and Countervailing Measures (the "SCM Agreement"); and (ii) the requirements for the submission of confidential information, pursuant to Article 12.4.1 of the SCM Agreement and Article 6.5.1 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the "AD Agreement").

3. Honduras wishes to state that it reserves the right subsequently to submit its views on other issues or to elaborate on the comments concerning the two matters addressed in this submission, either at the oral statements stage or when the members of the Panel deem appropriate.

II. INITIATION OF INVESTIGATION BASED ON SUFFICIENT AND RELEVANT EVIDENCE UNDER ARTICLES 11.2 AND 11.3 OF THE SCM AGREEMENT

4. Article 11.2 of the SCM Agreement states that an application for initiation of an investigation in a proceeding on countervailing measures must contain:

> sufficient evidence of the existence of (a) a subsidy and, if possible, its amount; (b) injury within the meaning of Article VI of GATT 1994 as interpreted by this Agreement; and (c) a causal link between the subsidized imports and the alleged injury.

5. In addition, Article 11.2 of the SCM Agreement specifies that "simple assertion, unsubstantiated by relevant evidence", is not sufficient to meet the requirements of "sufficient evidence".

6. Furthermore, Article 11.3 of the SCM Agreement provides that:

> the authorities shall review the accuracy and adequacy of the evidence provided in the application to determine whether the evidence is sufficient to justify the initiation of an investigation.

7. The above-mentioned provisions lay down two obligations for the initiation of the investigation, both designed to obtain sufficient evidence. The first obligation pertains to the application and, in particular, the nature of the attached evidence. The second obligation falls on the investigating authority. The requirement that the evidence should be sufficient means, in part, that it should be relevant, adequate or appropriate - otherwise the investigating authority would have to

[*] This written statement was originally made in Spanish.

request the applicant to complete the application so that it complies with this provision. Without verifying such compliance, the investigating authority would not even be able to initiate the investigation procedure by reason of the *a fortiori* interpretation of Article 5.8 of the AD Agreement and Article 11.9 of the SCM Agreement.

8. The Panel in *US - Hot-Rolled Steel* stated that the expression "sufficient evidence" under Article 5.3 requires an examination as to "whether the evidence before the authority at the time it made its determination was such that an unbiased and objective investigating authority evaluating that evidence could properly have made the determination".[1] Therefore, the assessment criterion must pertain to the accuracy and relevance of the respective evidence in the light of the mandate to carry out an impartial and objective examination.

9. In the report of the Panel on *US - Softwood Lumber*, it was stated that the term "sufficient evidence" could not be taken to mean just "any evidence", since there has to be a factual basis to the decision of the investigating authority which is susceptible to review.[2]

10. It is clear from the foregoing that the evidence must contain a factual basis. In other words, the evidence submitted must be concrete evidence relating to the required elements of subsidization, injury and a causal link between subsidized imports and the alleged injury.

III. NON-CONFIDENTIAL SUMMARIES UNDER ARTICLE 12.4.1 OF THE SCM AGREEMENT AND ARTICLE 6.5.1 OF THE AD AGREEMENT

11. Article 12.4.1 of the SCM Agreement stipulates that the authorities shall require "interested parties providing confidential information to furnish non-confidential summaries thereof". It adds that:

> "[t]hese summaries shall be in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence. In exceptional circumstances, such Members or parties may indicate that such information is not susceptible of summary. In such exceptional circumstances, a statement of the reasons why summarization is not possible must be provided".

12. Article 6.5.1 of the AD Agreement sets out the same obligations with respect to the handling of non-confidential summaries in the context of anti-dumping investigation proceedings.

13. The above-mentioned provisions are unequivocal. In both cases they require that the investigating authorities should in turn require the interested parties to furnish non-confidential summaries when submitting information which they consider to be confidential. If a non-confidential summary of such information is not provided, it is not possible to gain an understanding of the substance of the information that has been removed or deleted from the document or documents containing confidential information. Failure to fulfil this obligation adversely affects compliance with the principle of defence and due process in an investigation procedure, and may affect the impartiality and neutrality of the investigating authority.

IV. CONCLUSION

14. In the light of the foregoing, we consider that the Panel should assess whether the investigating authority verified that sufficient evidence was provided on the elements required for the initiation of the investigation and whether the same authority satisfied itself that the evidence in

[1] Panel Report, *US - Hot-Rolled Steel*, paragraph 7.153.
[2] Panel Report, *US - Softwood Lumber*, paragraph 7.55.

question met the requirement of adequacy and accuracy as justification for the initiation of the investigation.

15. We likewise consider that the Panel should confirm the compulsory nature of the requirement that non-confidential summaries must be provided when an interested party submits confidential information, with a view to guaranteeing respect for due process and the impartiality and neutrality of the investigation.

ANNEX B-4

EXECUTIVE SUMMARY OF THE THIRD PARTY
WRITTEN SUBMISSION OF JAPAN

I. INTRODUCTION

1. In this third party submission, Japan would like to present its views on systemic aspects of the following issues: (a) disclosure of essential facts before the final determination under Article 6.9 of the *AD Agreement* and Article 12.8 of the *SCM Agreement*; (b) final determinations under Article 12.2.2 of the *AD Agreement* and Articles 22.3 and 22.5 of the *SCM Agreement*; and (c) the determination of the all others rates based on facts available under Article 6.8 of the *AD Agreement* and Article 12.7 of the *SCM Agreement*.

II. DISCUSSION

A. DISCLOSURE OF ESSENTIAL FACTS BEFORE THE FINAL DETERMINATION UNDER ARTICLE 6.9 OF THE *AD AGREEMENT* AND ARTICLE 12.8 OF THE *SCM AGREEMENT*

1. The Investigating Authority's Obligation to Disclose the Essential Facts before the Final Determination

2. The respective first sentences of Article 6.9 of the *AD Agreement* and Article 12.8 of the *SCM Agreement* provide that the authorities must disclose the "essential facts under consideration which form the basis for the decision whether to apply definitive measure." This obligation must be distinguished from providing interested parties the opportunity to see all information under Article 6.4 of the *AD Agreement* and Article 12.3 of the *SCM Agreement*. The authorities must identify the particular "essential facts" among all relevant information in the anti-dumping or countervailing investigation.

3. Japan recalls that essential facts "form the basis for the decision whether to apply definitive measure." In this respect, Japan agrees with the panel in *Mexico – Olive Oil*, which correctly described them to be "the specific facts that underlie the investigating authority's final findings and conclusions in respect of the three essential elements – subsidization, injury and causation".[1] The same rationale should apply to the essential facts for the decision whether to apply definitive anti-dumping measures because the provision of Article 6.9 of the *AD Agreement* is substantively identical to the provision of Article 12.8 of the *SCM Agreement*. Further, Article VI:1 of GATT 1994 provides that, in the case of an anti-dumping investigation, essential elements would be the existence of dumping, injury to the domestic industry, and causation.

2. Disclosure of Information on Price Effects in Connection with the Finding on Causation

4. The United States argues that MOFCOM disclosed "no data on levels of prices for the domestically produced product" and did not "disclose the results of any pricing comparisons between the domestically produced product and the imports"[2] and that non-disclosure of these facts is inconsistent with Article 6.9 of the *AD Agreement* and Article 12.8 of the *SCM Agreement*.

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[1] Panel Report, *Mexico – Olive Oil*, para. 7.110. (WT/DS341/R)
[2] US FWS, para. 195.

5. Article 3.5 of the *AD Agreement* and Article 15.5 of the *SCM Agreement* provide that the causation must be demonstrated through the effects of dumping and subsidies as set forth in paragraphs 2 and 4 of these Articles. The factual finding by the investigating authorities of the price effects is "the specific facts that underlie the investigating authority's final findings conclusions in respect of … causation".[3]

6. In the final determination, MOFCOM appears to make certain price comparisons.[4] Such price comparisons appear to have resulted in the fact finding by the MOFCOM on the effects of the price of imports to the price of the domestically-produced product.

7. The authorities' choice of prices among raw price data, and its choice of the method to compare these prices would be a part of the process of the fact finding of the price effects. For exporters/producers and the exporting Member, the disclosure of such comparisons would be indispensable to argue effectively whether and how the authorities accurately and correctly found the effects of the price of imports to the price of the domestically-produced product. The results of pricing comparisons, therefore, are the type of "facts" that Article 6.9 of the *AD Agreement* and Article 12.8 of the *SCM Agreement* envisage to require disclosure to the interested parties. Japan notes that raw price data, however, is different from the price comparisons between the domestically-produced product and the imports. Such data would have to be made available under Article 6.4 of the *AD Agreement* and Article 12.3 of the *SCM Agreement.* Finally, it should be noted that certain price information might not be disclosed to interested parties because of its confidentiality.

3. Information Concerning Non-Subject Imports

8. The United States argues "MOFCOM disclosed no information concerning the volume or prices of imports from sources other than Russia and the United States"[5] in making the determination that there is no evidence suggesting that GOES imported from other countries or regions caused material injury to China's domestic industry[6] in both the preliminary determination and the final determination.

9. Article 3.5 of the *AD Agreement* and Article 15.5 of the *SCM Agreement* provide that authorities must examine any known factors and may not attribute the effect of the other factor to the dumped or subsidized imports. The non-attribution analysis is an essential part of the authority's final finding and conclusion on causation. As discussed above, however, raw data as such do not fall within the scope of the term "facts" that must be disclosed to interested parties under Article 6.9 of the *AD Agreement* and Article 12.8 of the *SCM Agreement*. The results of the analysis of raw data would be a part of the non-attribution finding that "the proportion of the volume of GOES imported from other countries and regions in total imports continued to drop". Such analytical information would be a "specific fact that underlie[s] MOFCOM's final finding of the causation."

[3] Panel Report, *Mexico – Olive Oil*, para. 7.110. (WT/DS341/R)

[4] *First Written Submission of the People's Republic of China* ("China FWS"), para. 282, citing Final Determination (English version) at 58; *See also* Preliminary Determination, (English version), (10 December 2009, at 56, Exhibit CHN-16). *See also* China FWS, para. 312.

[5] US FWS, para. 260.

[6] US FWS, para. 58. *See also* US FWS footnote 116 to para. 58 and footnote 294 to para. 260.

4. Information to Determine the Anti-Dumping Duty Rate Applicable to Unexamined Exporters

10. The United States argues that MOFCOM failed to disclose the information of the transactions that led MOFCOM to calculate an all others rate of 64.8 per cent rate in the anti-dumping duty investigation and the calculation of the all others rate.[7]

11. The Appellate Body has clarified that the existence of dumping must be determined on an exporter/producer-specific basis in accordance with the margin of dumping calculated on that basis.[8] The calculated individual margin is, therefore, one of the "facts" found by the authority to determine the existence of dumping, and accordingly, must be disclosed to all interested parties in accordance with Article 6.9 of the *AD* Agreement. Further Japan recalls the panel's finding 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."[9] Therefore it is clear that investigating authorities must disclose facts, including the normal value, the export price, and the calculation of dumping margins. A failure to disclose these facts would be inconsistent with Article 6.9 of the *AD* Agreement.

5. Information to Determine the Countervailing Duty Rate Applicable to Unexamined Exporters

12. The United States argues that MOFCOM failed to disclose the information that led MOFCOM to use the facts available to unexamined exporters in determining countervailing duty rate applicable to them, the information that led MOFCOM calculated 44.6 per cent of subsidy with respect to thereto, and calculation of the amount of subsidy applicable to these exporters or per-unit subsidy rate in the countervailing duty investigation.[10]

13. Article 19.4 of the *SCM Agreement* provides that the amount of subsidy must be calculated "in terms of subsidization per unit of the subsidized and exported product". The *SCM Agreement* requires "immediate termination in cases where the amount of a subsidy in *de minimis*".[11] As such, the amount of subsidy as indicated in the *ad valorem* rate constitutes a fact on which the authority makes the determination of the subsidization. Authorities therefore must disclose the government actions, which the authorities find as the subsidy, and also calculation of per-unit *ad valorem* subsidy rate. A failure to disclose these facts is inconsistent with Article 12.8 of the *SCM Agreement*.

B. FINAL DETERMINATIONS UNDER ARTICLE 12.2.2 OF THE *AD AGREEMENT* AND ARTICLES 22.3 AND 22.5 OF THE *SCM AGREEMENT*

1. The Investigating Authority's Obligation to Provide a Sufficiently Detailed Explanation in Its Public Notice of the Final Determination

14. Article 12.2 of the *AD Agreement* and Articles 22.3 of the *SCM Agreement* require the issuance of a public notice or separate report of the final determination, setting forth "in ***sufficient***

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[7] US FWS, para. 173.

[8] *See* Appellate Body Report, *US - Zeroing (Japan)*, para. 111. WT/DS322/AB/R ("the *Anti-Dumping Agreement* prescribes that dumping determinations be made in respect of each exporter or foreign producer examined. … Margins of dumping are established accordingly for each exporter or foreign producer on the basis of a comparison between normal value and export prices.").

[9] Panel Report, *Argentina - Poultry Anti-Dumping Duties*, para. 7.223 (emphasis in original).

[10] US FWS, para. 148.

[11] In case of developing countries, the *de minimis* level is 2 per cent. *See* Article 27.10(a) of the *SCM Agreement*.

detail the findings and conclusion reached on ***all issues*** of fact and law considered material by the investigating authorities."[12] Further, Article 12.2.2 of the *AD Agreement and A*rticle 22.5 of the *SCM Agreement* require that the public notice of such final determination must contain *"**all relevant information*** on the matters of fact and law and ***reasons***"[13] as well as "the reasons for the acceptance or rejection of relevant arguments" made by exporters or by interested Members. Therefore, in case of an affirmative determination, the authorities are required to provide explanation "in sufficient detail" and the reasons on all factual and legal issues related to the authorities' final determination or to arguments by interested parties and it must be published.

2. MOFCOM's Alleged Failure to Make Available the Calculations of the Dumping Margins and Data Used to Calculate the Margins

15. The United States alleges that MOFCOM's failure to make available the calculations and data it used to calculate the margins for two U.S. GOES producers was inconsistent with Article 12.2.2 of the *AD Agreement*.[14]

16. With respect to the determination of dumping, Article 12.2.2 requires that the public notice contain "all relevant information on the matters of fact"[15] The authorities, therefore, are obliged to provide a sufficiently detailed explanation on how they established the margin of dumping on an exporter/producer-specific basis, including the matters of facts. It must include the factual findings of the export price and the normal value, their comparison, and calculation of dumping and must be discernable in the public notice or separate report of the final determination. It should be noted that the actual data need not be stated in the public notice beca*use of the r*equirement for the protection of confidential information under Article 12.2.2 of the *AD Agreement.* Article 12.2.2 does not oblige the authorities to prepare a report of confidential version separately from the public notice.

3. MOFCOM's Alleged Failure to Provide Any Rationale on Its Rejection of a Price Derived from the Competitive Bidding Process

17. The United States *argues that "*Article 22.3 [of the *SCM Agreement*] requires MOFCOM to explain how the evidence supported its conclusion, and why MOFCOM chose to disregard arguments from the United States"[16] and that MOFCOM's explanation "does not qualify as adequate, and therefore China breached its obligation under Article 22.3."[17]

18. Article 12.2 of the *SCM Agreement* sets forth that any decision of the authorities must be "based on … the written record". Article 22.3 of the *SCM Agreement* then requires that the public notice or report of the preliminary or final determination "set forth … in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities."

19. According to the allegation by the United States, MOFCOM rejected the competitive bidding price in the U.S. government procurements as the market price. The adoption or rejection of the market price information in the country of purchase is an issue that must necessarily be resolved by the investigating authorities to reach the final determination. MOFCOM, thus, would be required to provide explanation in sufficient detail on how MOFCOM found that the competitive bidding price

[12] Emphasis added.
[13] Emphasis added.
[14] US FWS, para. 110.
[15] Article 12.2.1(iii) of the *AD Agreement* (incorporated by reference into Article 12.2.2).
[16] US FWS, para. 121.
[17] US FWS, para. 121.

was unable to accept as the market price and was higher than the market price based on the evidence on the record.

4. MOFCOM's Alleged Failure to Provide Factual Information of the Price Effects and of Imports from Sources Other than Russia and the United States and Alleged Insufficient Responses to Parties' Argument on the Price Effects

20. The United States argues that MOFCOM's non-attribution analysis in its final determination contained no empirical information concerning the volume and value of imports from sources other than Russia and the United States.[18] It further argues that the final determination "does not contain any facts that would support a finding that prices for the merchandise under investigation were at any time lower than prices for the domestically produced product."[19] Therefore China acted inconsistently with Article 12.2.2 of the *AD Agreement* and Article 22.5 of the *SCM Agreement*.[20]

21. Article 3.1 of the *AD Agreement* and Article 15.1 of the *SCM Agreement* require the authority to make determination "based on positive evidence". Articles 3.2 and 15.2 provide that the authority "***shall consider***" whether there has been a significant price-undercutting or otherwise a depression or suppression of the price of the domestically produced products. Articles 3.5 and 15.5 require that "the authorities ***shall examine*** all other factors … and the injuries caused by these other factors must not be attributed to the dumped [subsidized] imports." Article 12.2.2 of the *AD Agreement* and Article 22.5 of the *SCM Agreement* require that the notice contain information explaining "consideration relevant to the injury determination as set out in Article 3 of the *AD Agreement* or Article 15 of the *SCM Agreement*".[21]

22. The authorities must provide explanation in sufficient detail as to how the authorities considered positive evidence to make fact findings relevant to the injury determination as set forth in of Articles 3 and 15 because the analyses on both price effects and non-attribution are "consideration relevant to the injury determination"

C. THE DETERMINATION OF THE ALL OTHERS RATES BASED ON FACTS AVAILABLE

1. Consistency of the Determination of the All Others Rates Based on Facts Available with Article 6.8 of the *AD Agreement*

23. The United States alleges that "[b]y applying facts available to the unexamined firms when it never sent them copies of the anti-dumping questionnaire or took any other steps to ensure that they had received the notice that the AD Agreement requires, China breached Article 6.8 of the AD Agreement and paragraph 1 of Annex II."[22]

24. 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". Article 6.8 of the *AD Agreement* then sets forth that facts available may be applied to an interested party which "refuses access to, or otherwise does to provide, necessary information … or significantly impedes the investigation". Paragraph 1 of

[18] US FWS, para. 262.
[19] US FWS, para. 201
[20] US FWS, paras. 204 and 265.
[21] Article 12.2.1(iv) of the *AD Agreement* and Article 22.4(iv) of the *SCM Agreement* (incorporated by reference into Article 12.2.2 and 22.5 respectively).
[22] US FWS, para. 166.

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 a dumping determination based on facts available with respect to exporters/producers that were not given any notice or unknown is inconsistent with Articles 6.1 and 6.8 and Paragraph 1 of Annex II of the *AD Agreement*.

2. Consistency of the Determination of the All Others Rates Based on Facts Available with Article 12.7 of the *SCM Agreement*

25. The United States argues that "China's application of facts available to calculate an adverse subsidy rate with respect to unexamined exporters/producers of GOES failed to satisfy the requirements of Article 12.7 of the SCM Agreement."[23]

26. The *SCM Agreement* envisages that certain exporters would be left unexamined during the original investigation, by providing in Article 19.3 that such exporters are "entitled to an expedited review in order that the investigating authorities promptly establish an individual countervailing duty rate for that exporter." The *SCM Agreement*, however, does not set forth any rules on whether or not to determine the existence of subsidization on an individual exporter basis. The authorities thus have the substantial discretion to make such determinations.

27. The authorities' discretion, however, is not unlimited. Article 12.1 of the *SCM Agreement* set forth the due process requirement that "all interested parties in a countervailing duty investigation shall be given notice of the information which the authorities require." This provision is substantially identical to Article 6.1 of the *AD Agreement.* Also as is the case of Article 6.8 of the *AD Agreement*, Article 12.7 permits authorities to rely on facts available only when an interested party does not provide "necessary" information.

28. The authorities must first notify an interested party of the information that they require, i.e. necessary information; the authorities may apply application of facts available with respect to "necessary" information, which the interested party did not provide; accordingly, the authorities may not apply facts available with respect to information that the authorities have not requested the interested party to submit. Therefore, a mere request in the public notice of the initiation to make themselves known to the authorities within 20 days from the date of initiation cannot be the basis to apply facts available to determine the amount of subsidy conferred upon such interested party.

III. CONCLUSION

29. As a third party, Japan does not comment on factual aspects on the issues above, and thus, does not take any specific position whether the measures at issue are inconsistent with the *AD Agreement* and the *SCM Agreement*. Japan respectfully requests the Panel to examine carefully the facts presented by the parties to this dispute in light of Japan's arguments above to ensure the fair and objective application of the provisions of the *AD Agreement* and the *SCM Agreement*.

[23] US FWS, para. 141.

ANNEX B-5

EXECUTIVE SUMMARY OF THE THIRD PARTY
WRITTEN SUBMISSION OF THE KINGDOM
OF SAUDI ARABIA

I. INTRODUCTION

1. Saudi Arabia's participation in this dispute relates to the interpretive issues discussed below, which are of strong systemic importance to all WTO Members. Saudi Arabia takes no position on the merits of the claims that are based on the particular facts of this case.

II. THE SCM AGREEMENT IMPOSES STRICT DISCIPLINES ON THE INITIATION OF A COUNTERVAILING DUTY INVESTIGATION

2. The negotiating history of the SCM Agreement demonstrates the intent of the drafters to strengthen the disciplines on initiation. Article 2.1 of the Tokyo Round Subsidies Code – the predecessor provision to Article 11.2 of the SCM Agreement – was incorporated essentially unchanged into the SCM Agreement, though with three important additions. First, the Uruguay Round negotiators added a new sentence to establish that "[s]imple assertion, unsubstantiated by relevant evidence, cannot be considered sufficient to meet the requirements of this paragraph". Second, they specified that the application must contain the detailed information set out in paragraphs (i) through (iv) of Article 11.2, provided such information is reasonably available to the applicant. Third, and most importantly, they added Article 11.3, imposing a new, affirmative obligation on the investigating authority to "review the accuracy and adequacy of the evidence provided in the application to determine whether the evidence is sufficient to justify the initiation of an investigation." The additions incorporated into the SCM Agreement demonstrate the intent of the drafters to "impose more disciplines on the application of countervailing measures".

3. There must be "sufficient evidence" before an investigating authority of subsidization, injury and causation to justify initiation. It is important to distinguish between the information requirements relevant to the *applicant* under Article 11.2 and the obligations of the *investigating authority* to review the accuracy and adequacy of that evidence under Article 11.3. The "reasonably available" language does not condone acceptance by the investigating authority of a complaint that is inaccurate or inadequate. Article 11.3 imposes a positive obligation on investigating authorities which goes beyond a determination that the requirements of Article 11.2 have been satisfied; authorities "must verify that the evidence presented constitutes 'reasonable indications'" of all subsidy and injury elements.[1]

III. AUTHORITIES MAY ONLY RESORT TO FACTS AVAILABLE IN LIMITED CIRCUMSTANCES AND CANNOT APPLY THEM IN A PUNITIVE MANNER

4. Under Article 12.7 of the SCM Agreement and Article 6.8 of the AD Agreement, an investigating authority may resort to facts available only in limited circumstances: when an interested party (i) refuses access to, or (ii) otherwise does not provide, necessary information[2] within a reasonable period, or (iii) significantly impedes the investigation. Information received from a respondent must be used if the respondent acted to the best of its ability, even if the information

[1] Panel Report, *Mexico – Steel Pipes and Tubes*, para. 7.22.
[2] *See* Panel Report, *US – Steel Plate*, para. 7.53; Panel Report, *EC – Salmon (Norway)*, para. 7.343.

provided is in a form different from that which was requested.[3] Paragraph 3 of Annex II "obliges an investigating authority to 'take[] into account' the information supplied by a respondent, even if *other* information requested has not been provided by the respondent and will need to be supplemented by facts available."[4] This is the case even if that information is submitted after a deadline, but within a reasonable period of time.[5]

5. Furthermore, the application of facts available must be non-punitive. The use of facts available "permits the use of facts on record *solely for the purpose of replacing information that may be missing*",[6] and authorities "should not arrive at a 'less favourable' outcome simply because an interested party fails to furnish requested information if, in fact, the interested party has 'cooperated'".[7] Thus, where an exporter fails to provide *some* information, or if the information provided does not fit perfectly the request to which it responds, authorities are not permitted to reject *all* information. Facts available may be employed only "to fill in gaps in the information [as] necessary to arrive at a [final] conclusion".[8]

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

6. Under Article 12.8 of the SCM Agreement and Article 6.9 of the AD Agreement, an authority must (i) disclose all "essential facts" which form the basis for its determinations; and (ii) ensure that an interested party has adequate time to review those facts and correct them, where necessary, in a manner that permits interested parties to defend their interests. "Essential facts" encompasses "not only those [facts] that *support* the decision ultimately reached" but also the "body of facts" necessary to "the *process of analysis and decision-making* by the investigating authority" in reaching that ultimate decision.[9] This includes "new" essential facts which bring about a change in the authority's findings after the issuance of the preliminary determination. Where the factual basis of the definitive measure is "significantly different" from that of the provisional measure, the "essential facts" disclosure must include the specific facts that brought about this change.[10]

7. "Essential facts" must be explicitly identified and disclosed as such,[11] so that parties can then "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."[12] Authorities must take into account the information or arguments an interested party submits.[13]

V. THE DETERMINATION OF INJURY REQUIRES A CAUSAL ANALYSIS BASED ON AN OBJECTIVE EXAMINATION OF POSITIVE EVIDENCE

8. Article 15 of the SCM Agreement and Article 3 of the Anti-Dumping Agreement impose an affirmative obligation on an authority to demonstrate that it has determined, through an "objective

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[3] Appellate Body Report, *Mexico – AD Measures on Rice*, para. 288; Panel Report, *US – Steel Plate*, para. 7.72.

[4] Appellate Body Report, *Mexico – AD Measures on Rice*, para. 287 (emphasis original).

[5] *See* Appellate Body Report, *US – Hot-Rolled Steel*, paras. 83-86.

[6] Appellate Body Report, *Mexico – AD Measures on Rice*, para. 293 (emphasis added).

[7] Appellate Body Report, *US – Hot-Rolled Steel*, para. 99-100.

[8] Appellate Body Report, *Mexico – AD Measures on Rice*, para. 291.

[9] Panel Report, *EC – Salmon (Norway)*, paras. 7.807, 7.796 (emphasis added).

[10] Panel Report, *Mexico – Olive Oil*, para. 7.110; Panel Report, *Guatemala – Cement II*, para. 8.228.

[11] Panel Report, *Guatemala – Cement II*, paras. 8.229-8.230.

[12] Panel Report, *EC – Salmon (Norway)*, para. 7.805. *See also* Panel Report, *Argentina – Ceramic Tiles*, para. 6.125.

[13] Panel Report, *EC – Salmon (Norway)*, para. 7.799.

examination" based on "positive evidence", (i) the subject imports' volume effects and price effects; (ii) injury to the domestic industry; and (iii) a causal link between the imports and that injury. The analytical and evidentiary standards of SCM Article 15.1 and AD Article 3.1 apply to all elements of an authority's injury determination.

9. The Appellate Body has found that the term "positive evidence" relates to "the *quality* of the evidence that authorities may rely upon in making a determination" and "focuses on the facts underpinning and justifying the injury determination".[14] Positive evidence must be distinguished from and preferred over unverified statements made by interested parties.[15]

10. Each element of the authority's injury analysis must involve an objective examination of the positive evidence collected. The Appellate Body has clarified that the word "objective" means that the examination "must conform to the dictates of the basic principles of good faith and fundamental fairness".[16] In keeping with this aim, the investigating authority is obligated to conduct its examination of the factors relating to injury in an unbiased, even-handed manner without favouring the interests of any interested party to make a finding of injury more likely.[17]

11. In accordance with SCM Article 15.5 and AD Article 3.5, an affirmative injury determination may only be made where the authority has *demonstrated* that the subsidized/dumped imports have caused injury to the domestic industry.[18] The Agreements impose a rigorous requirement to "demonstrate" causation. An investigating authority must ensure that injury caused by other "known factors" is not wrongly attributed to the subsidized/dumped imports in the causation analysis.[19] Only by separating and distinguishing the injurious effects can an authority make a reasoned judgment as to the degree of injury suffered which should be attributed (or not) to such other factors.

VI. SUFFICIENT DETAIL AND RELEVANT INFORMATION MUST BE PROVIDED IN THE PUBLIC NOTICE ON ALL MATERIAL ISSUES

12. Investigating authorities must provide "sufficient detail" on "material issues" in both preliminary and final determinations. An issue will be considered "material" where it has arisen in the course of the investigation and must necessarily be resolved in order for the investigating authority to be able to reach its determination.[20] The discipline imposed on an investigating authority to set forth its findings and conclusions in "sufficient detail" requires it to provide explanations for all material elements of the determination.[21]

13. Interested parties must be able to understand fully the reasons for the imposition of measures. As the Appellate Body has stressed, the investigating authority must provide a "reasoned and adequate explanation as to: (i) how the evidence on the record supported its factual findings; and (ii) how those factual findings supported the overall…determination", and this should be directly "discernible from the published determination itself."[22] The degree of detail required in the public

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[14] Appellate Body Report, *US – Hot-Rolled Steel*, paras. 192-193 (emphasis added).
[15] Panel Report, *EC – Countervailing Measures on DRAM Chips*, para. 7.368.
[16] Appellate Body Report, *US – Hot-Rolled Steel*, para. 193.
[17] Appellate Body Report, *US – Hot-Rolled Steel*, paras. 193, 196; Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 180.
[18] *See* Appellate Body Report, *Japan – DRAMs (Korea)*, paras. 262-263, 268; Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 175.
[19] Appellate Body Report, *US – Hot-Rolled Steel*, paras. 226-228; Appellate Body Report, *EC – Tube or Pipe Fittings*, paras. 175, 188.
[20] Panel Report, *EC – Tube or Pipe Fittings*, para. 7.424.
[21] Panel Report, *Mexico – Corn Syrup*, para. 7.103.
[22] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 186; Panel Report, *EC – Tube or Pipe Fittings*, para. 7.435.

notice is therefore one that permits interested parties to discern directly either the significance or lack of significance of factors the investigating authority was obligated to address.[23]

14. "All relevant information" includes all information connected to the decision to impose duties. Article 22.5 of the SCM Agreement and Article 12.2.2 of the Anti-Dumping 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". The use of the words "have led to" means that authorities have a duty to identify in the notice "those matters on which a factual or legal determination must necessarily be made in connection with the decision" to impose measures.[24] The significance or lack of significance of factors the investigating authority was obligated to address must be directly discernable from the notice.[25] It would necessarily include information on the facts underlying the price effects analysis, upon which a legal determination of injury must necessarily be made in order to impose measures.

VII. CONCLUSION

15. Saudi Arabia respectfully urges the Panel to consider the Kingdom's positions on the interpretive issues set out above.

[23] Panel Report, *EC – Tube or Pipe Fittings*, paras. 7.432, 7.435.
[24] Panel Report, *EC – Tube or Pipe Fittings*, para. 7.424.
[25] Panel Report, *EC – Tube or Pipe Fittings*, paras. 7.432, 7.735.

ANNEX B-6

EXECUTIVE SUMMARY OF THE THIRD PARTY
WRITTEN SUBMISSION OF KOREA

I. INTRODUCTION

1. Korea appreciates this opportunity to present its views to the Panel. Korea fully shares the view that the issues presented in this dispute appear to have "wider, perhaps systemic, implications" for all the WTO Members since the claims presented in this dispute touch upon some of the core procedural elements of AD and CVD investigations of investigating authorities.

2. Korea is of the view that clarification of key factual situations would be critical for the Panel's proper analyses of the claims and the final disposition of the present dispute. In evaluating conflicting factual information, Korea respectfully requests the Panel to discharge its obligation under Article 11 of the DSU.

II. LEGAL ARGUMENTS

A. INITIATION OF A COUNTERVAILING DUTY INVESTIGATION SHOULD BE BASED ON ADEQUATE AND SUFFICIENT EVIDENCE

3. A CVD investigation entails mobilization of a great deal of resources on the part of a responding government and companies. A CVD investigation is also a serious undertaking laden with political sensitivities in that one Member investigates another Member's governmental programs on a bilateral basis. In Korea's view, these unique aspects of a CVD investigation explain the inclusion of bilateral consultations requirement in Article 13 of the SCM Agreement which do not appear in the AD Agreement.

4. In this spirit, the SCM Agreement clearly guards against initiation of a CVD investigation without adequate and sufficient evidence that cannot justify a lengthy investigation of another government. Although the information to be presented at the initiation stage is not the type of evidence that establishes the existence of subsidization or material injury, which can only be confirmed as a result of the full investigation[1], the investigating authority should nonetheless examine and confirm that at least a minimal amount of information reasonably indicating subsidization and injury has been submitted by a domestic applicant.

5. In fact, Article 11.2 of the SCM Agreement sets forth a detailed threshold for the initiation of a CVD investigation: in order for there to be initiation, "evidence that substantiates" the existence of a subsidy and injury that is reasonably available to the applicant must be presented in the application.

[1] *See* Panel Report, *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States*, WT/DS132/R, Adopted 24 February 2000, and Corr.1, DSR 2000:III, 1345, at paras. 7.74, 7.76; Panel Report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, WT/DS122/R, 5 Adopted April 2001, DSR 2001:VII, 2741, at para. 7.77; Panel Report, *United States – Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/R, Adopted 31 August 2004, DSR 2004:V, 1875, at para. 7.56.

As the panel in U.S. - Byrd Amendment opined, this provision is to "ensure that investigations are not initiated on the basis of frivolous or unfounded suits."[2]

6. Article 11.3 of the SCM Agreement in turn requires the investigating authority to confirm the accuracy and adequacy of the evidence itself. Thus, an investigating authority assumes an affirmative obligation to examine all the relevant information and materials contained in the application and to confirm their veracity before making a decision to initiate a CVD investigation. It cannot passively accept the allegations in the petition as true or appearing to be true and initiate the investigation hoping to confirm the veracity down the road. Article 11.9 of the SCM Agreement clearly stipulates that the application should be rejected in such an instance.

7. In short, under the current SCM Agreement, initiation of a CVD investigation is not supposed to be an automatic rubber-stamp process once a petition is filed by a domestic industry. Rather, it is designed and envisioned to be a meaningful step where the investigating authorities carefully look into substantive information contained in the petition and determine whether the petition is really worth the time and resources to be inflicted from the lengthy investigations. Unless this filtering process operates in a way envisioned in Article 11 of the SCM Agreement, foreign exporters and governments would be in a severely dire situation regardless of the final outcome of a CVD investigation.[3]

B. THE "FACTS AVAILABLE" STANDARD HAS ITS OWN LEGAL PARAMETERS AND SHOULD NOT BE ABUSED TO PENALIZE FOREIGN RESPONDENTS SIMPLY BECAUSE A REQUEST FROM THE INVESTIGATING AUTHOROTY WAS NOT FULLY RESPECTED

8. The SCM Agreement does not provide an unlimited discretion to an investigating authority conducting a CVD investigation whenever it encounters a less than optimal information from a foreign respondent. Instead, these provisions unequivocally provide conditions that need to be satisfied before the investigating authority applies the facts available standard. Article 12.7 of the SCM Agreement, Article 6.8 of the AD Agreement, and Annex II of the AD Agreement provide detailed guidelines in this respect. Likewise, the Appellate Body in *Mexico-Beef and Rice* also stated that even if the request by an investigating authority for certain information is not completely adhered to by a foreign respondent (for instance, when the respondent submits only some information, not all the information requested), the investigating authority is nonetheless required to consider information actually provided by the respondent.[4]

9. In Korea's view, Article 12.7 of the SCM Agreement along with other provisions in Article 12 collectively stands for the proposition that fundamental due process rights must be ensured at all times

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[2] Panel Report, *United States – Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217/R, WT/DS234/R, adopted 27 January 2003, as modified by the Appellate Body Report, WT/DS217/AB/R, WT/DS234, at para. 7.61

[3] For example, due to the so-called "chilling effect" flowing from an AD or CVD investigation, a foreign exporter defending an AD or CVD investigation "feels the direct hit" even in the initiation stage of the investigation, which is well before any preliminary or final AD/CVD determination. In other words, importers of the foreign exporters named in an AD or CVD petition usually consider reducing or avoiding transactions with the foreign exporters due to the "uncertainty" in the market – the importers are not sure about the ultimate AD or CVD margin as a result of a lengthy investigation, or the extra duty imposition's implication for and impact on the market. So, even if there is no actual duty imposition yet – whether preliminary or final – it may be the case that from the initiation itself, the market already feels the effect of an AD or CVD investigation. Therefore, initiation needs to be limited only to the good-faith allegations with sufficient information within the meaning of Article 5 of the AD Agreement or Article 11 of the SCM Agreement.

[4] Appellate Body Report, *Mexico – Definitive Anti-Dumping Measures on Beef and Rice; Complaint with Respect to Rice*, WT/DS295/AB/R, adopted 20 December 2005, at para. 294.

in a CVD investigation.[5] The Panel should carefully review whether this due process right has been adequately respected. The Panel would have to look into the specific situation of the investigation at hand and then determine whether facts available would be warranted in the situation.

C. AN INVESTIGATING AUTHORIGY OF A MEMBER DOES NOT ENJOY UNBRIDLED DISCRETION REGARDING AN "ALL OTHERS RATE" IN ANTI-DUMPING AND COUNTERVAILING DUTY INVESTIGATIONS

10. One of the contentious claims in this dispute is about all others rates in AD and CVD investigations by MOFCOM. In the underlying AD and CVD investigations, the complainant claims, the all others rates were set at unreasonably high margins without sufficient explanations or rationale other than some cursory statements of policy reasons.[6] The respective all others rates indeed seem extraordinarily high when compared to the margins assigned to the respondent companies, AK and ATI.[7] Unreasonably high "all others rates" disassociated with calculated margins of the respondents participating in the investigations does raise a concern of possible inconsistency with the relevant provision of the SCM Agreement and the AD Agreement.

11. In Korea's view, to the extent the application of "all others rates" constitutes the virtual application of "facts available," as the United States argues, Article 12.7 of the SCM Agreement and 6.8 of the AD Agreement could be implicated in this context as well. If the facts available standard was imposed on non-participating exporters without satisfying the detailed requirements stipulated by Article 12.7 of the SCM Agreement and Article 6.8 of the AD Agreement, a violation similar to the one discussed in the previous section could be found.

III. CONCLUSION

12. Korea respectfully submits that in reaching its decision in this important dispute, the Panel should ensure that the relevant provisions of the GATT 1994, the AD Agreement and the SCM Agreement are construed in their proper context, which will give effect to the ordinary meaning of the terms consistently with the context, object and purpose of these legal instruments as a whole. Korea appreciates the opportunity to participate in this proceeding, and to present its views to the Panel.

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[5] See, e.g. Appellate Body Report, *United States - Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268/AB/R, 29 November 2004, at para. 241; *Guatemala – Cement II*, at para. 8.119; *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/R, adopted 9 January 2004, at para. 7.255.

[6] *See* U.S. First Written Submission, at paras. 134-136, 156, 173-175.

[7] *See id.* (With respect to the CVD investigation, the all others rate was set at 44.6 per cent compared to 11.918 per cent and 11.65 per cent assigned to the two participating respondents. In the AD investigation, the all others rate was set at 64.8 per cent compared to 7.8 per cent and 19.9 per cent assigned to the two participating respondents.).

ANNEX C

ORAL STATEMENTS OR EXECUTIVE SUMMARIES THEREOF OF THE PARTIES AT THE FIRST SUBSTANTIVE MEETING

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ANNEX C-1

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

China's GOES investigation was conducted in a manner inconsistent with the AD and SCM Agreements. As a result, the ability of the United States and interested parties to understand the basis for China's determinations or to defend their interests was seriously impaired. Beyond the serious problems in how China conducted its investigation, the resulting determinations contain several fundamental flaws of reasoning that render them inconsistent with other obligations in the AD and SCM Agreements. This is particularly so with respect to China's injury determination, which is based on the most cursory of analysis and scant evidentiary support. In examining China's justifications for its measures in this case, it is useful to focus on what MOFCOM actually found as reflected in its determinations and disclosures, not on the *post-hoc* rationalizations contained in China's first written submission. As we discuss below, China's first written submission often ignores MOFCOM's actual findings or tries to rewrite them.

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

Several of the petitioners' subsidy allegations did not offer sufficient, or in some cases any, evidence of the existence, amount, and nature of the subsidy, but rather consisted of simple assertion, unsubstantiated by relevant evidence. With respect to these programs, MOFCOM failed to sufficiently review the accuracy and adequacy of the evidence in the application to determine whether there was sufficient evidence for the initiation of an investigation, and thus acted inconsistently with Article 11.3 of the SCM Agreement. In response to the U.S. claims, China has offered pure speculation and citations to irrelevant evidence, and has claimed repeatedly that generalized allegations of the existence of subsidies for steel cured the defects in the various allegations.

MOFCOM did not meet its obligation under Article 11.3 to review the accuracy and adequacy of the evidence in the petitioners' application for sufficiency. For example, it is not sufficient, as China suggests, for the "broader context" provided in an application to support a specific subsidy allegation that is deficient with respect to one of the three subsidy elements. Rather, the Article 11 standard is met when there is accurate and adequate evidence as to *each* of the three subsidy elements sufficient to justify initiation. With respect to each of the subsidy programs described in the U.S. first written submission, the evidence was insufficient to initiate.

The obligations in Article 11 exist for a reason: so that investigations, involving a significant potential burden to both companies and WTO Members, will not be initiated unless certain evidentiary requirements are met.[1] An improperly initiated investigation can cause burden regardless of the ultimate finding. China cannot dodge the requirements of Article 11 by suggesting that initiating an investigation of flawed subsidy allegations is harmless because it did not result in the imposition of countervailing duties. China's arguments should not obscure the fact that MOFCOM acted inconsistently with these requirements in initiating investigations of several subsidy allegations in this case.

[1] *US – Carbon Steel (AB)*, para. 115.

B. China Failed to Require Adequate Non-confidential Summaries of Confidential Information

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 its investigating authority 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.

China contends that the section of the petition entitled "non-confidential summaries," which was quoted in full by the United States and discussed in the U.S. first written submission, does *not* contain the "non-confidential summaries," and that in fact Part I of the petition contains a non-confidential summary of confidential information in the petition. Second, in the alternative, it asserts that "exceptional circumstances" were present that justified the absence of non-confidential summaries. With regard to China's first theory, in suggesting that the Panel rely on Part I in assessing whether China complied with its obligations, China ignores the clear structure of the petition. Even setting this fact aside, Part I of the petition does not contain adequate non-confidential summaries.

As an alternative, China asserts that "exceptional circumstances" exist such that summarization was not possible. Notably, 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. China's argument in this regard is nothing more than a *post hoc* rationalization to justify its failure to comply with SCM Agreement Article 12.4.1 and AD Agreement Article 6.5.1. However, such a a *post hoc* rationalization cannot satisfy the requirement in Articles 12.4.1 and 6.5.1 that "a statement of the reasons why summarization is not possible must be provided."

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

MOFCOM's use of facts available was unjustified and punitive, and MOFCOM ignored necessary information provided by the U.S. companies. While China claims that the U.S. description of the facts is in error, a review of the evidence demonstrates the opposite: China's response relies on factual errors and mis-characterizations of the record.

While China repeatedly asserts that the respondents "refused" to respond to MOFCOM's questions and "seriously impeded" the investigation, a closer examination of the evidence demonstrates otherwise. First, in Part 3 of its initial questionnaire, MOFCOM asked for tables reflecting all government procurement "signed" within the POI and those "not performed within the POI." MOFCOM also asked for sales prices for the "involved" products in transactions with "private" purchasers. In Part 4, MOFCOM asked for tables showing the "[t]he quantity and {value} of each product sold to each client … ."

In response, ATI indicated that it made no direct sales to the government. AK Steel pointed out that it did not sign any government procurement within the POI, pointed MOFCOM to the sales data submitted in the parallel AD proceeding, and offered a customer list showing that the government did not purchase GOES. Because AK Steel did not participate in any procurement activity during the POI, there were no "involved" products and thus no sales to private purchasers of the same products to report. In response to Part 4, which only relates to the POI, and which does not contain a proviso of "not limited to the subject merchandise," AK Steel referred MOFCOM to the sales data for subject merchandise provided in the parallel AD proceeding.

While China now describes this as a "refusal" to cooperate, in fact, MOFCOM invited such a response in its own questionnaire. Specifically, in Section II Item 3 of the questionnaire, MOFCOM states: "if the question does not apply to you, please write down explicitly 'this question does not apply to my company' and state the reasons."

China further alleges that after issuing its deficiency letter, the companies still refused to respond "in an acceptable form," and continued to argue that MOFCOM's questions were irrelevant. Yet, AK Steel did respond. In the deficiency letter, MOFCOM gave the respondents the opportunity to show inapplicability: "If your company was of the view that, regarding the product concerned and your company's other products, there was no purchase from the government or public body, or there was no transaction bound by the Buy America Act, it was your company who shall bear the burden of proof." In response, AK Steel attached a customer list to its revised questionnaire response showing that the government did not purchase any AK Steel products during the POI – including products unrelated to subject merchandise. ATI provided a customer list for subject merchandise. In its deficiency letter response, AK Steel explained that it was impossible to know what its customers did with its products.

In its preliminary determination, MOFCOM rejected the customer list because the list does not contain transaction data. However, the preliminary determination, issued on December 10, 2009, is the first instance where MOFCOM indicated that it was requiring transaction data independent of whether government procurement was involved. In response to MOFCOM's approach in the preliminary determination, AK Steel submitted the sales data for subject merchandise as an exhibit to its comments on the preliminary determination.

The companies cooperated, responded to MOFCOM's questionnaires, and to the extent they did not provide information it was because MOFCOM's own questionnaires did not require it. When MOFCOM finally decided to require such information at the preliminary determination stage, it did not give the companies an opportunity to submit it. AK Steel provided the data after the preliminary determination, but MOFCOM chose not to verify it.

China nonetheless complains that the companies' failure to provide transaction data prior to the verification denied MOFCOM "the ability to plan efficiently" for verification. To the extent that MOFCOM may have suffered any prejudice, however, this was simply the result of its own decision to allow respondents to opt not to provide the data if not relevant.

Perhaps in recognition of the plainly burdensome nature of MOFCOM's request, China now appears to be attempting to distance itself from MOFCOM's request for 15 years of sales data for all products, asserting that MOFCOM did not apply facts available because of the failure to provide 15 years of sales data. But China's assertions are belied by the facts: when it applied facts available, MOFCOM simply explained that the U.S. companies had failed to provide the requested sales data.

MOFCOM could have verified that AK Steel or ATI did not sell to any government entity at verification. When the course MOFCOM was taking became clear in the preliminary determination, AK Steel re-submitted the sales data, which was already in MOFCOM's possession.

Finally, there are no facts available on the record to support MOFCOM's conclusion that the respondents sold all of their output to the government. As explained in our first written submission, the only facts available on the record suggest that, at most, AK Steel could have sold 29% of its output to the government, as part of infrastructure and manufacturing sales.

The respondents responded to MOFCOM's requests to the best of their ability. The information actually submitted was verifiable, timely submitted, and usable without undue difficulty. MOFCOM appears to have concluded that because a company does not provide some information, or if the

information provided does not perfectly fit the request to which it responds, MOFCOM can reject all information provided by the company.

D. China Acted Inconsistently With Article 12.2.2 of the AD Agreement by Failing to Make Available the Final Dumping Calculations

Article 12.2.2 requires an investigating authority to "make available" "*all relevant information* on the matters of fact" that led to the imposition of final measures. If information is relevant, it must be made available – as evidenced by the use of the term "all" (of course, with due regard for the protection of confidential information). Few things are more relevant to the imposition of final duties than the calculations themselves, which are the means by which an investigating authority arrives at the final finding of dumping. Without calculations that indicate dumping, there would be no affirmative finding. "Information" is "[c]ommunication of the knowledge of some fact or occurrence" or "[k]nowledge or facts communicated about a particular subject, event, etc." Dumping calculations certainly are "facts" that should be "communicated" about the imposition of final measures. In short, the language of Article 12.2.2 requires an investigating authority to release its final calculations to the affected interested parties.

China completely ignores the fact that, in addition to a "public notice," Article 12.2.2 also mentions a "separate report" as the vehicle for making available all relevant information on matters of fact and law. The "separate report" *need not* be public. These calculations can still be released to the relevant interested party. China should have fulfilled its obligation under Article 12.2.2 by releasing its calculations of AK Steel's dumping margin to AK Steel, and its calculations of ATI's dumping margin to ATI.

Release of the final dumping calculations to the interested parties is vital to those parties' ability to protect their interests. Parties should not be forced to guess at or approximate the methodology and data used by an investigating authority in its calculations, or piece the calculations together from different places in the record.

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

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

Under Article 14(d) of the SCM Agreement, the authorities are to use market prices in the country of purchase unless they establish that those prices are so distorted that the market price is unusable. Article 22.3 thus requires the investigating authority to provide explanation on how it found that market prices resulting from the competitive bidding process were distorted. Nothing in MOFCOM's determination however explains why the admittedly competitive bidding process distorted the market.

F. MOFCOM's Determination of the "All Others" AD and CVD Rates were Inconsistent with its Obligations under the SCM Agreement

The petition identified two U.S. exporters/producers of GOES: AK Steel and ATI. Notwithstanding the fact that neither the petitioner nor MOFCOM identified any other U.S. producers or exporters of GOES, China not only established an "all others" subsidy rate for the unidentified producers, but China established a rate more than two times higher than the highest rate for an investigated company

based on the purported lack of cooperation of the unknown, unidentified companies. The "all others" antidumping rate was more than three times higher than the highest rate calculated for an investigated company.

As the Appellate Body has made clear in *Mexico – Rice*, an exporter must be given the opportunity to provide information required by an investigating authority before the latter resorts to facts available that can be adverse to the exporter's interests. An exporter that is unknown to the investigating authority is not notified of the information required, and thus is denied an opportunity to provide it.

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 exporter cannot be said to have failed to cooperate by not having located the petition and/or the notice of initiation in this case.

G. China Failed to Disclose the Essential Facts Regarding the Calculation of the "All Others" AD and CVD Rates

During the investigation, MOFCOM increased the all others subsidy rate from a preliminary rate of 12 percent to a final rate of 44.6 percent, justifying this increase by claiming it relied upon the "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.

MOFCOM increased the "all others" dumping rate from a preliminary rate of 25 percent to a final rate of 64.8 percent. MOFCOM's lone statement in the Final Disclosure regarding tis action was that the "all others" dumping rate was "based on transaction information of the respondents pursuant to Article 21 of the Antidumping Regulations." This disclosure is insufficient. Totally absent are any facts relating to the U.S. companies' refusing access to necessary information or significantly impeding the investigation, any facts relating to the actual calculation of the 64.8 percent rate or why that rate was appropriate given the much lower rates of the respondents, and any facts regarding the particular transaction information chosen.

China argues that it could not disclose the particular transaction information used without compromising the confidentiality of information supplied by the two respondent companies, but provides no explanation for why MOFCOM could not have publicly summarized the information used or at least identified the calculation methodology it employed. Disclosure of the essential facts is particularly important here, because it is difficult to understand how MOFCOM used the information of the two respondent companies and arrived at an all others dumping margin that is more than three times as high as the margin for one such company and eight times as high as the margin for the other company.

H. China's Injury Determination is Inconsistent with China's WTO Obligations

Cumulated imports from Russia and the United States increased throughout the POI. But during most of this period, the Chinese GOES industry was prospering. The Chinese industry's output, sales quantities, sales revenues, employment, wages, prices and pre-tax profits all increased during both 2007 and 2008.

It was only during the first quarter of 2009 that the Chinese industry began to experience some difficulties. In particular, the industry's profitability declined. The decline in profits, however, was not volume-related. The Chinese GOES industry showed double digit increases in sales quantities and revenues from the first quarter of 2008 to the first quarter of 2009. The market share of the Chinese industry actually increased during this period – by nearly the same amount as that of the

subject imports. Instead, the decline in profits occurred because the increased quantity of sales during the first quarter of 2009 was being sold at lower prices.

Consequently, MOFCOM's affirmative determination could not have been, and was not, based solely or even principally on volume considerations, as China's first written submission suggests. MOFCOM's conclusion that the imports had significant price effects was essential to its affirmative determination.

In examining MOFCOM's injury determination, it is useful to focus on what MOFCOM actually found, notwithstanding the fact that in its first written submission China variously ignores MOFCOM's findings or tries to rewrite them. To start, it is useful to explore why MOFCOM found price depression. It was not solely because imports were increasing. Instead, the final determination states that price depression occurred "[b]ecause the sales of the product concerned were kept at a low price." In an attempt to support this finding, MOFCOM cited the petitioners' assertion that "a pricing policy aiming at setting the price down to a level lower than the price of the domestic like product was adopted by the producers of the product concerned." Thus, whether or not MOFCOM expressly found significant underselling, underselling was critical to its price depression finding.

This finding is pervasively flawed. First, it relies on facts MOFCOM never disclosed. China now asserts that MOFCOM "was considering" an argument that price depression began in "late" 2008, although it made no express finding to this effect. The only 2008 pricing information provided in the final determination is that domestic prices increased by 14.53 percent in 2008 – hardly evidence of price depression.

Additionally, MOFCOM admitted that during 2009, the imports under investigation were actually priced *higher* than the domestically produced product. Thus there is no positive evidence supporting the price depression finding for 2009. Moreover, the fact that the imports oversold the domestically produced product in 2009 indicates that the unspecified, unexplained "pricing strategies" materials on which MOFCOM relied for its finding of low import prices could not constitute positive evidence of actual price levels.

It is true that MOFCOM did not rely solely on price depression. It also asserted declines in 2008 and the first quarter of 2009 in "profits per unit." Here again MOFCOM failed to disclose essential facts in violation of Articles 6.9 and 12.8. China claims that costs rose faster than revenues. But MOFCOM disclosed no information with respect to the industry's costs. MOFCOM additionally could have disclosed nonconfidential information about the types of costs that were rising, but instead disclosed nothing pertaining to the industry's cost levels.

MOFCOM also failed to address the pertinent substantive question under the Agreements: whether the dumped and subsidized imports served to prevent price increases, which otherwise would have occurred, to a significant degree. MOFCOM did not address this inquiry at all for the 2008 data. To fulfill its obligations under the Agreements, MOFCOM had to show that, because of the imports, prices for the domestic product would have increased even more in 2008 than they already did. Instead, MOFCOM assumed that, if imports were increasing, they must have caused the negative trends in per unit profits. An assumption is not positive evidence.

MOFCOM's findings of price suppression during the first quarter of 2009 must also fail. The price suppression findings for 2009 failed to reflect an objective examination, because MOFCOM evaluated the 2009 data in isolation from the earlier data. By contrast, an objective examination taking into account the entire POI would have revealed that there was not necessarily a correlation between rising import quantities and significant price suppression.

In its first written submission, China counters that the 2009 price suppression findings are justified because they reflect a continuation of 2008 trends. China's argument appears to follow from a passage in the final determination contending that "the price-cost differential declined continually." MOFCOM states that this was a result of the import underselling "strategy" that we have previously explained is contrary to the disclosed evidence. Thus, this finding is not supported by positive evidence. Moreover, because the 2008 price suppression findings are also unsupported by positive evidence, they cannot serve as the basis for the 2009 findings.

Because, as we explained, MOFCOM's price effects findings do not meet the requirements of the Agreements, the causal link required under Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement is absent.

Furthermore, the Agreements required MOFCOM not to attribute to dumped and subsidized imports injury caused by other known factors. There was at least one known factor other than imports under investigation that contributed to the domestic industry's decline in performance during the first quarter of 2009. This was the industry's huge increase in capacity. According to the preliminary determination, capacity was 80.13 percent higher in the first quarter of 2009 than in the first quarter of 2008. As a result, production skyrocketed during the first quarter of 2009, increasing far faster than demand. In fact, the increase in production was over 42 percentage points higher than the increase in demand. Inventories soared by 978.81 percent as a result. We explained in our first written submission why this inventory increase put pressure on the domestic industry's prices during the first quarter of 2009, why this contributed to the domestic industry's financial declines during that period, and why MOFCOM's analysis of the effects of the inventory increase falls short of the requirements of the Agreements.

China's response to this claim is defective legally. China argues that an authority need only show that the subject imports made a substantial contribution to the domestic industry's material injury and that the effect of other factors was not "so dramatic that they severed any possible causal link between the subject imports and the condition of the domestic industry." China further suggests that the party opposing the imposition of measures has the obligation to provide evidence demonstrating that the effects of other causes was "dramatic."

The text of the Agreements does not support China's arguments. Articles 3.5 of the AD Agreement and 15.5 of the SCM Agreement place on the authority the responsibility to examine all relevant evidence concerning causes of injury other than the subject imports. The only obligation the text places on the parties is to identify "known" causes of injury. It is undisputed that a U.S. exporter brought to MOFCOM's attention that overproduction and inventory overhang contributed to the difficulties of the Chinese GOES industry.

Similarly, neither Article 3.5 nor 15.5 states that an authority is relieved from the responsibility of conducting a non-attribution analysis if other known factors have effects, but such effects are not "dramatic." Nor does China point to any Appellate Body or panel report supporting this interpretation. By contrast, under the principles articulated in the Appellate Body report in *US – Hot-Rolled Steel*, once overproduction and the consequent inventory overhang was identified as a known cause of injury, MOFCOM had the obligation either to demonstrate that this factor was not contributing to the domestic industry's injury, or to conduct a non-attribution analysis. MOFCOM did not purport to conduct a non-attribution analysis.

Instead, MOFCOM took the position that production growing far more rapidly than demand had no appreciable effect on the domestic industry. This finding defies common sense, and our first written submission extensively discusses the lack of positive evidence supporting MOFCOM's analysis. For the most part, China has not responded to our arguments, nor has it meaningfully disputed that an inventory overhang caused by excessive growth in capacity and production would likely put

downward pressure on domestic prices. Instead, China asserts that the expanded capacity of the industry was less than domestic consumption. The accuracy of this assertion cannot be verified from any information MOFCOM disclosed. It is also unresponsive to the U.S. argument. Instead, it merely reflects an assumption that an industry that increases its capacity should be able to displace all imports in the market. The nature of this assumption is not intuitive, not explained by China, and not supported by any evidence disclosed. It cannot support MOFCOM's patently inadequate analysis of the increases in production and inventories.

China also argues in its first written submission that Chinese producers "did not produce more than the market could bear." Not even MOFCOM made such a finding, which is directly contradicted by the disclosed evidence. Far from showing restraint in production, Chinese producers used their additional capacity to increase production far beyond what the market demanded, resulting in the large inventory overhang. Again, China's argument does not justify MOFCOM's failure to perform a nonattribution analysis.

We also note that Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement specifically require authorities to examine the volume and price of imports that are not dumped or subsidized in their analysis of causal link. MOFCOM's superficial analysis of imports from sources other than Russia and the United States, which is devoid of any meaningful data, does not satisfy these requirements.

Consequently MOFCOM did not satisfy its obligations under the Agreements to establish a causal link between the subject imports and any injury sustained by the domestic industry.

In its consideration of imports from countries other than Russia and the United States, MOFCOM also breached its obligations to disclose essential facts. China attempts to defend MOFCOM's failure to provide facts or analysis by asserting that no interested party made an argument concerning nonsubject imports. China's argument overlooks that the purpose of the obligation is to permit parties to defend their interests. Parties cannot be expected to raise arguments about information an authority never disclosed. And MOFCOM entirely failed to disclose nonsubject import quantity and value information.

Finally, in our first written submission we pointed out several instances where MOFCOM's findings concerning price effects, causal link, and nonsubject imports failed to satisfy Article 12.2.2 of the AD Agreement and Article 22.5 of the SCM Agreement. Rather than attempt to defend MOFCOM's inadequate findings and conclusions, China asserts that authorities need only provide whatever information that they deem material. China provides no support for this assertion. It cannot be reconciled with the language of these provisions, which require disclosure of "all relevant information on the matters of fact and law which have led to the imposition of final measures." Premising disclosure not on an objective basis of relevance, but on the authority's own concept of what is "material," would reduce this provision to a nullity.

ANNEX C-2

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

1. The U.S. challenge in this case is limited in nature. There is no substantive challenge to China's findings with respect to the existence of dumping and subsidization. Rather, the U.S. challenge to the results of the antidumping and countervailing duty investigations is confined to a series of procedural complaints and complaints about the magnitude of the margins of dumping and subsidization based on facts available. The sole substantive complaint relates to China's determination of a single element of causation and is apparently grounded on a very limited analysis of the facts.

CVD Initiation

2. The record reflects that the information provided in the application was that information reasonably available to the applicants. BOFT examined the allegations and accompanying factual information, and determined that although certain allegations did not warrant initiation of an investigation, there was a sufficient evidentiary basis to initiate on several other allegations. This included the 11 challenged allegations.

3. The U.S. first submission failed to critique the factual information supporting the allegations. By failing to even address the evidence, China believes the United States has not established a *prima facie* case. What the United States really seeks is a different standard for applications than that found in Article 11 of the SCM Agreement. The United States wants a level of information, analysis, and disclosure simply not required by that provision. The consistent theme of prior panels in addressing Article 11 is that applicants need only submit enough evidence to justify an investigation, and need not analyze that evidence or justify the ultimate conclusion.

Treatment Of Confidential Information

4. The U.S. argument focuses entirely on the statements made in Part II of the application from the underlying record, but completely ignores the non-confidential summaries provided in Part I of the application. Given the failure of the United States even to address the specific non-confidential summaries provided, to discuss why each of the summaries is inadequate, or to demonstrate why such summaries did not provide respondents sufficient understanding of the confidential information to protect its interests, China does not believe that the United States has even established a *prima facie* case in support of its claim.

5. China also submits that the fact that the Appendices to the application do not repeat non-confidential summaries provided in the narrative of the public version of the application does not create a violation of Article 6.5.1 or Article 12.4.1. One can have a "reasonable understanding" of the key issues and facts by reading the entire public version of the petition and there is no obligation on the authorities to require interested parties to repeat a non-confidential summary that has already been provided.

6. To the extent the Panel finds that adequate non-confidential summaries on any particular issues were not provided in the underlying proceeding, China believes that the central issue shifts to whether or not China dealt with the exceptional circumstances of this investigation properly in view of Article 6.5 and 6.5.1 and the so-called "due process" rights of the interested parties. The exceptional circumstance of having only two respondent companies in China permitted the authorities

to invoke the "exceptional circumstance" provision of Articles 6.5.1 and 12.4.1 of the AD and SCM Agreements respectively in order to protect the confidentiality of the information submitted.

The Government Purchase of Goods Program

7. In the underlying investigation MOFCOM made direct requests to the company respondents regarding information on all steel sales in the context of the government purchase of goods program. The respondents refused to respond. After consulting and providing written guidance on the matter, MOFCOM gave both companies ample opportunity to correct their responses and provide the information necessary for MOFCOM to investigate the program. The companies again refused. In response, China declined to verify the deficient, untimely and unusable information provided, and instead applied "facts available" to both companies, finding that 100% of sales took place under the program.

8. The Panel must evaluate the U.S. Article 12.7 claim in light of China's approach to what it deemed to be necessary information, not in light of U.S. arguments about what should have been sufficient information under its own theory of subsidization. Properly framed, it is evident that MOFCOM's application of "facts available" was consistent with Article 12.7. The companies did not provide timely responses, did not cooperate to the best of their ability, and seriously impeded the investigation.

9. The United States has on this issue limited its arguments to AK Steel. All examples and arguments raised by the United States pertain only to AK Steel, and do not address ATI at all. The U.S. argument also concedes the point that China may infer some sales by AK Steel fell under the government purchase of goods program; the only issue is the extent to which sales by AK Steel fell under the program.

10. MOFCOM knew the correct utilization of the program was more than zero. MOFCOM also had a reasonable basis to believe the correct utilization was more than the 29% alternative offered by AK Steel, since AK Steel had refused to provide requested information. But MOFCOM also had no information with which it could determine some alternative that was more than the AK alternative but less than 100% utilization due to the refusal of ATI and AK Steel to provide complete information. Thus, MOFCOM reasonably relied on the 100% figure, consistent with Article 12.7 of the SCM Agreement. Finding MOFCOM obligated to utilize AK Steel's ratio would have been an invitation for respondents to create the same types of factual voids in order to obtain a favorable result.

MOFCOM's Disclosure of Its Determination of the Margins of Dumping

11. The United States is attempting to impose a requirement on Article 12.2.2 that authorities disclose the full calculations of all margins of dumping. But the U.S. claim does not refer to any WTO jurisprudence or reference any standard to be applied in interpreting the requirements of Article 12.2.2. The U.S. position is not supported by either the plain meaning of Article 12.2.2 of the AD Agreement or the facts.

12. Article 12 is focused on providing an "explanation" of determinations; sufficient detail in this context would indicate that the disclosure be sufficient to constitute an adequate explanation of the authority's findings and conclusions, and what facts and law were relied upon in reaching such conclusions and findings. All that is necessary is to provide interested parties to an investigation or review notice of determinations made by the authorities and an explanation of the determinations.

13. Notwithstanding the absence of any requirement that the details of the calculation of the margins of dumping be disclosed, as addressed in China's first submission the disclosure by China in the instant investigation was sufficient to allow respondents to replicate the

authority's calculation. Respondents were clearly in a position to check the accuracy of the MOFCOM calculation. Thus, the U.S. claim is simply without merit.

"Competitive" Bidding Process Under the Government Purchase of Goods Program

14. The U.S. Article 22.3 claim is focused on two issues: (1) MOFCOM's basic explanation; and (2) MOFCOM's reaction to U.S. arguments. China addressed both within its first written submission. Using record facts, MOFCOM's preliminary and final determinations plainly set forth why participation restrictions on foreign steel and price preferences afforded to U.S. steel resulted in prices that did not reflect competitive, market conditions under the government purchase of goods program. They also addressed U.S. arguments in the process. The U.S. claim is simply without merit.

"All Others" CVD Rate

15. In the underlying investigation MOFCOM provided direct notice to the participating respondents of its investigation, including the U.S. Government, AK Steel, and ATI. It also placed a copy of the received petition in its public reading room and published public notices of initiation. To MOFCOM's knowledge, notice was thereby given to each known interested party as defined by Article 12.9 of the SCM Agreement. In terms of the facts selected by MOFCOM in calculating the "all others" CVD rate, as indicated in the final determination, MOFCOM relied upon information provided by the petitioner. With respect to disclosure of the facts upon which the all others rate was based, the final determination disclosed that it was based upon information provided by the petitioners. The United States appears to have readily identified the source from the record based on that statement.

"All Others" AD Rate

16. On U.S. claims regarding the all others rate in the AD investigation, MOFCOM followed the general rule set forth in Article 6.10 of the AD Agreement. Neither Article 6.10 nor any other provision of the AD Agreement addresses the issue of the treatment of exporters/producers that are not "known" to the authority and cannot, therefore, be individually examined.

17. China also determined that the most relevant provision of the AD Agreement to address the issue of the antidumping rate for unknown and unresponsive exporters/producers was Article 6.8 of the AD Agreement which addresses the treatment of interested parties who do not provide the "necessary information" required by the authority. The application of Article 6.8 and the last sentence of paragraph 7 of Annex II were intended to encourage realization of the objectives of Article 6.10, namely to enable China to follow the general rule of determining margins of dumping for each individual producer/exporter.

18. Because the information on which the final determination of the "all others" rate was based was confidential information of one of the responding companies, the actual information used to determine this rate could not be disclosed without breaching the confidentiality of the information used. Thus, the explanation was necessarily general in nature. The failure to disclose the details of the calculation of the "all others" rate had no effect on the ability of parties to defend their interests. So long as the "all others" rate is based on record evidence, it is not clear that in the situation where parties do not cooperate that the authority's discretion is limited.

Injury Investigation

19. The United States has made no challenge to the MOFCOM findings of adverse volume effects. The United States has also made no challenge to the MOFCOM findings regarding

cumulation. Finally, the United States has made no challenge to the MOFCOM findings of material injury. The U.S. challenges are limited to the price effects, and the causal link.

20. On price effects, the U.S. arguments focus heavily on price undercutting findings that MOFCOM did not make, and largely misstate and mischaracterize the price suppression and price depression analysis that MOFCOM did make. The record provides strong positive evidence for the MOFCOM findings of price suppression and depression during 2008 and 2009, evidence that was not challenged at all during the administrative proceedings before MOFCOM and evidence that the United States has not effectively challenged.

21. MOFCOM did not make specific price undercutting findings, nor was it under any legal obligation to do so, contrary to U.S. arguments. The texts of Article 3.2 and Article 15.2 -- through the key term "or" -- make clear that price undercutting is simply one alternative methodology that the authorities may consider as part of evaluating price effects.

22. MOFCOM also disclosed all of the "essential facts" as required by Article 6.9 and Article 12.8. This disclosure occurred in two key documents. First, MOFCOM presented a Preliminary Determination on 10 December 2009, which included extensive discussion of injury issues in general, and pricing issues in particular. Second, MOFCOM also presented a Final Injury Disclosures on 7 March 2010, which presented the essential facts and provided initial responses to those arguments that had been made so far during the administrative proceedings. These two documents contained all of the "essential facts" on which China ultimately relied in its Final Determination.

23. MOFCOM also provided the "relevant information" and "reasons" required by Article 12.2.2 and Article 22.5. MOFCOM developed its response that the growing volume of subject imports in 2008 and early 2009 caused price suppression and price depression in those years. That complete explanation of its "reasons" satisfies the obligations of Article 12.2.2 and Article 22.5.

24. China further believes that its analysis of adverse price effects fully complied with the substantive and procedural requirements of the relevant Agreements. If the Panel were to disagree, China asks the Panel to confirm MOFCOM's overall finding of causation was still proper. Since MOFCOM based its analysis of causation on both volume effects and price effects, those price effects can support an overall finding of causation, even if they might not have been sufficient to justify finding a causal link on their own.

25. On causal link, the U.S. first submission presented only a single paragraph discussing causal link more generally, and that paragraph simply refers back to the U.S. arguments about price effects. But MOFCOM never considered the price effects in isolation; they were part of any overall analysis that the increasing volumes of low priced subject imports were causing material injury to the Chinese industry. The United States has thus failed to demonstrate any inconsistency between MOFCOM's analysis and the requirements of Article 3.1 and Article 15.1.

26. With respect to non-attribution, Article 3.5 and Article 15.5 do not specify any particular methodology, and thus leave authorities with discretion as to how best to ensure a genuine causal link, even given the effects of other causes. MOFCOM need not disprove any possible effect of any other known factor that might also be affecting the domestic industry. The burden is on the United States as the complaining party to establish a *prima facie* case that the effects of increased domestic capacity were so dramatic that they severed any possible causal link between the subject imports and the condition of the domestic industry. The United States has failed to meet that burden.

27. With respect to the issue of non-subject imports, China disclosed the "essential facts" of the case. The Preliminary Determination identified "products imported from other countries" as an "other factor" being analyzed, and noted that subject imports were capturing a larger share of the total

imports. Other parts of the notice also addressed non-subject imports. Having provided the "essential facts," and having received no arguments on this point, China did not need to develop this issue further in the absence of arguments.

28. Finally, the U.S. argument that MOFCOM did not provide any "factual substantiation" for its conclusions is wrong. The demonstration that non-subject imports gained only 0.09 percentage points of market share is factual substantiation. Moreover, MOFCOM provided more than adequate discussion of this issue in light of the failure by the parties to use the publicly available information to develop any arguments on this point.

U.S. Claims Under Article 1 of the AD Agreement, Article VI:2 of GATT 1994, and Article 10 of the SCM Agreement

29. U.S. claims under Article 1 of the AD Agreement, Article VI:2 of GATT 1994, and Article 10 of the SCM Agreement are subsidiary claims related to the substance of the claims previously addressed. To the extent the Panel finds the U.S. claims to lack merit with respect to these prior claims, so to should it dismiss this U.S. claims under Article 1 of the AD Agreement, Article VI:2 of GATT 1994, and Article 10 of the SCM Agreement.

ANNEX C-3

CLOSING STATEMENT OF THE UNITED STATES
AT THE FIRST MEETING OF THE PANEL

Mr. Chairman, Members of the Panel. The United States would like to begin by thanking you and the Secretariat for your efforts in the preparation for and conduct of this hearing.

We hope that the discussion held here yesterday and today has assisted the Panel in enhancing its understanding of the issues before it in this case.

If an observer had been listening solely to China's interventions yesterday, he or she might have come away with the impression that the practices of the U.S. Department of Commerce and International Trade Commission were the subject of this dispute. In that context, we would again note that China's description left out a number of important aspects of U.S. practice that are quite different from what MOFCOM did in this investigation.

To the extent that the Panel found the examination of such matters helpful to the task before it, we welcome further discussions along these lines. Nevertheless, we find it telling that China has chosen not to focus its attention on the actual Chinese measures at issue in this dispute, the actual record in the underlying investigation, and the application of WTO principles to that record.

China also at one point seemed to suggest that it is the responsibility of an interested party to piece together information that the investigating authority chose not to disclose or adequately summarize. First, this would be a highly speculative exercise. More fundamentally, the skill of a party in making educated guesses has no bearing on whether a breach of an investigating authority's WTO obligations exists.

We discussed a number of substantive issues on Thursday and will address them more fully in our future submissions. We also note that many of the third parties addressed the issues of initiation and the provision of non-confidential summaries, which we found helpful; particularly, the oral statements of Argentina, Honduras, and the European Union. We also found Japan's comments on the obligations of Article 12.2.2 of the AD agreement with regard to the dumping margin calculations particularly informative.

Before these hearings formally close, the United States would like to make a few brief comments relating to one of the substantive matters discussed yesterday. In particular, the United States would like to address the discussion before the Panel on Thursday concerning MOFCOM's finding of significant price effects, as this discussion revealed fundamental flaws in China's arguments.

First, China variously suggested that the factual support for the price effects findings may be found in the public documents prepared by MOFCOM or in other public documents submitted by the parties that MOFCOM neither referenced in its essential facts disclosure nor expressly or implicitly adopted in any determination. In some instances, both the Panel and the United States are left to guess where MOFCOM has stated its factual findings and what these findings are. Such lack of transparency cannot be reconciled with the requirements of Article 12.2.2 of the AD Agreement and Article 22.5 of the SCM Agreement. Moreover, China cannot simultaneously posit that it satisfied its obligations under Article 6.9 of the AD Agreement and Article 12.8 of the SCM Agreement through the preliminary determination and essential facts disclosure, but that the disclosures made in these documents were not intended to be complete.

Second, while China argues that a price undercutting analysis was unnecessary, it simultaneously repeated MOFCOM's findings of "low" import prices as grounds for finding significant price depression and price suppression. A predicate of a finding of "low" prices is that an authority has undertaken an analysis of comparative prices. But China has thus far failed even to explain how it undertook any such price comparison analysis, much less to respond to the United States' detailed arguments about how any such analysis did not reflect an objective examination and was unsupported by positive evidence. As Japan stated today, "[t]he mere statement ... that 'the sale of the product concerned was kept at a low price' – would not be sufficient to explain the relevant information."

The United States would like to conclude by again thanking the Panel and Secretariat for their efforts. We look forward to receiving your written questions and continuing this discussion in future submissions and at the December substantive hearing.

ANNEX C-4

CLOSING STATEMENT OF CHINA AT
THE FIRST MEETING OF THE PANEL

1. We would like initially to take the opportunity of this closing statement to again thank the panelists and the secretariat for their dedication to this proceeding. We have made every effort to make the first meeting with the Panel as productive as possible and we hope the panel shares our view that the meeting has been productive in better defining the issues and clarifying the positions of the parties on their positions. We look forward to working with the Panel and the secretariat as the panel proceeding moves forward.

2. We would like in this closing statement to briefly summarize China's position on the principal issues in this proceeding, beginning with the U.S. claims under Article 11.2 and 11.3 of the SCM Agreement and issues related to initiation. China believes some initial progress has been made. In particular, the United States confirms that the focus of any inquiry is on the evidence that accompanies an application, not the elegance of the allegation.

3. In parting, we would ask the Panel to consider two points. First, the initiation standard that appears to be offered by the United States is one of definitive evidence. For example, the United States wants definitive evidence of a financial contribution. According to the United States, anything less is mere speculation. But what purpose does an investigation serve if the initiation standard is based on definitive evidence? There is a well settled principle on this very point – the quantity and quality of the evidence required for initiation is less than that required for a preliminary or final determination. Second, it is the United States' burden to present both argument *and evidence* to the panel to make its *prima facie* case. The United States did not move beyond paragraph 78 of its First Written Submission, which is limited to assertions of "no evidence." China is left to defend on the basis of these simple assertions. We believe this situation should further reflect on the U.S. argument and whether it has met its burden as complainant in this case.

4. In terms of the adequacy of the non-confidential summaries provided in the petition and related to the determination of injury and causation. The fact that China in the context of this proceeding has been able to present to the Panel full argumentation and explanation of the basis of its determinations relying solely on the public information provided would seem to render this issue moot. To the extent that the United States provides specific examples of information which did not permit an adequate explanation of a particular aspect of the authority's determination, we would welcome the opportunity to respond by pointing them to the information on the public record which renders their concern moot. China provided such examples during the course of the Q&A yesterday to the extent that the United States provided specific examples and China is prepared to do this with respect to additional examples. China also reiterates that the adequacy of these summaries should be viewed in the context of the difficulty of protecting confidential information when only two petitioners are involved in an investigation. This problem is not unique to China.

5. In summary, the question before the panel is whether the non-confidential summaries provided by petitioners with respect to the determinations of injury and causation provide "sufficient detail" to allow a "reasonable understanding" of the substance of the information being provided in confidence and the reasoning of the authority in reaching its determination. China believes that the record in the underlying proceeding satisfies this standard.

6. In terms of the disclosures provided to the respondents on the method of calculation of the dumping margins, there are two very simple points to be made. First, while not disclosing the specific

numbers used in calculating the margins of dumping, the Chinese authority did disclose the source of the specific numbers used in calculating the margins of dumping and the methodology used. Although in China's view, nothing more is required because this meets the standards of both Article 12.2 and 6.5 of the Antidumping Agreement, the level of disclosure was such that the actual margins of dumping could be calculated by the respondents to ensure the accuracy of the calculations by the authority, the apparent overriding concern of the United States. This is evident from the detail of the disclosure itself.

7. We will not dwell on the issue of the all others rate, except to say that there is no provision governing the all others rate and that there are policy reasons supporting the use of facts available to encourage unknown exporters/producers to come forth and cooperate in an investigation in which the authority is investigating all exporters or producers individually.

8. On the application of facts available with respect to the Government Purchase of Goods Program, the issue remains whether the respondents cooperated to the best of their ability in providing necessary information. The United States wishes to distract by focusing on irrelevant issues and avoiding the question of whether AK Steel or ATI could have done more. Yesterday the United States appeared to advance a new theory not articulated in its first written submission – that AK Steel and ATI fully responded to the questions as posed by MOFCOM on this issue and were taken by complete and utter surprise in December 2009 when they first learned this was not MOFCOM's interpretation. The record simply does not support this new theory, as we will discuss in greater detail in subsequent submissions to the Panel. But suffice it to say that the U.S. theory has trouble at the start. It seems highly unlikely that answers to questions that were so clear to AK Steel in terms of the their narrow focus, at least according to the United States, were qualified in advance by healthy argument from AK Steel about why it believed it was impermissible for China to inquire on a broader scale. I could go on from here, but China will reserve further discussion to any written responses to questions and its second submission.

9. With regard to the claims involving injury, we would like to note a few key points. As we made clear in our first written statement and in our comments yesterday, we are happy to answer any Panel questions regarding proprietary information. We repeat that offer, with regard to both the U.S. claim regarding price effects that we discussed yesterday and the U.S. claim regarding causation that we assume will come up in the written questions.

10. Yesterday, the United States said in its oral statement that "it is useful to focus on what MOFCOM actually found." We agree. MOFCOM found that subject imports increased absolutely, captured more than 5 percentage points of market share in 2008, and continued to gain market share in early 2009. MOFCOM also found that the increasing volume of subject imports caused material injury. These findings of adverse volume effects have not been challenged by the United States. For all the back forth the parties have had and will continue to have about price effects, these volume effects alone establish a legally sufficient causal link to justify these measures. The United States claims the declining profitability in 2008 and 2009 was "not volume-related," but this is just not true. The domestic industry invested in a growing market, but found itself shipping less than it might otherwise have shipped and thus losing market share because of these surging volumes of unfairly traded imports. The price levels of the imports do not change the fact that increasing volumes of unfairly traded imports caused material injury.

Thank you.

ANNEX D

ORAL STATEMENTS OR EXECUTIVE SUMMARIES THEREOF OF THE THIRD PARTIES AT THE FIRST SUBSTANTIVE MEETING

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ANNEX D-1

THIRD PARTY ORAL STATEMENT OF ARGENTINA*

I. INTRODUCTION

Mr Chairman, distinguished members of the Panel

1. The Republic of Argentina would like to thank the Panel for the opportunity to present its arguments and considerations relating to this case, in view of its "systemic" interest in ensuring the correct interpretation of the provisions at issue in this dispute.

2. As third party, Argentina maintains an interest in the correct interpretation of the agreements cited in these proceedings, and accordingly, in this submission, our government wishes to express its views on the interpretation of certain provisions of 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") inasmuch as this Panel's interpretations of those provisions will have systemic implications.

3. To make the best of the short time available, this submission will focus on certain matters relating to this case. The first concerns the interpretation of the confidentiality of the documents submitted in an investigation under the AD Agreement and the SCM Agreement, and the need for non-confidential summaries so as to ensure that the parties under investigation have the proper right of defence. The second relates to the determination of injury, in particular, in connection with the need to consider factors other than imports as causal agents of injury.

II. UNDER ARTICLE 6.5 OF THE AGREEMENT ON IMPLEMENTATION OF ARTICLE VI OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE 1994 ("AD AGREEMENT") AND ARTICLE 12.4 OF THE AGREEMENT ON SUBSIDIES AND COUNTERVAILING MEASURES ("SCM AGREEMENT"), GOOD CAUSE MUST BE SHOWN FOR THE CONFIDENTIALITY OF INFORMATION AND A NON-CONFIDENTIAL SUMMARY MUST BE FURNISHED TO THE INTERESTED PARTIES

4. We note that Articles 6.5 and 6.5.1 of the AD Agreement and 12.4.1 of the SCM Agreement require the submission of non-confidential summaries, so that interested parties or Members are able to gain "a reasonable understanding of the substance of the information submitted in confidence". The aim is to guarantee the right of defence to the interested parties, who otherwise would lack sufficient information to understand the grounds of the accusation that they face.

5. We recall that in *United States - Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina* (WT/DS268/RW), the Panel held that "*Article 6.5.1 protects the right of the interested parties generally to be reasonably informed about the substance of the confidential information that may be submitted by any other interested party. What matters for purposes of Article 6.5.1 is whether the interested parties themselves receive non-confidential summaries of the confidential information submitted to the investigating authorities*".[1]

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* This oral statement was originally made in Spanish.

[1] *United States - Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina* (WT/DS268/RW), paragraph 7.137.

6. In other words, where the existence of a non-confidential summary is not accredited in the file, or where there is no explanation in the file that would justify the inability to summarize the confidential information, the right of the interested parties to be reasonably informed about the substance of the confidential information will not have been respected.

7. This is why Argentina agrees with the arguments set forth by the United States in point B of its written submission to the effect that in accordance with Article 6.5.1 of the AD Agreement and 12.4.1 of the SCM Agreement, the Chinese Ministry of Commerce (MOFCOM) should have required the interested parties submitting confidential information in the investigation to furnish non-confidential summaries thereof, especially in cases where the submitting parties had provided no reasons why summarization was not possible.

III. NON-ATTRIBUTION ANALYSIS WITH RESPECT TO OTHER FACTORS IN THE DETERMINATION OF INJURY

8. Argentina notes that according to Articles 3.5 of the AD Agreement and 15.5 of the SCM Agreement, prior to its determination as to whether imports at dumped or subsidized prices are the cause of the difficulties experienced by the domestic industry, an investigating authority should carry out the so-called *non-attribution analysis*, whereby consideration has to be given to factors other than known factors and a determination made as to whether they contribute to the injuries suffered by the domestic industry.

9. In this connection, we take the view that it is also clear from the above-mentioned rules that the Agreements under interpretation require no evidence that imports from other countries considered as one of the other "known factors" are dumped or subsidized imports.

10. In our view, even in the absence of dumping or subsidization, the prices and/or quantity of those commercial operations could be such as to cause injury to the domestic industry. In that case, the investigating authority would have to examine whether, in the light of their volume and/or prices, imports from sources other than the one under investigation are substantial enough to break the causal link between the dumped imports and the injury determined. In that examination, it might also be necessary to consider qualitative issues relating to the forms of competition in each of the markets.

IV. CONCLUSION

11. In the light of the analysis contained in this oral submission, Argentina considers that:

- The "confidential" classification of information submitted by any party in the dumping or subsidy investigation must be justified by good cause; in that event, it is of the utmost importance that, except in duly attested exceptional circumstances, sufficiently detailed non-confidential summaries are furnished, so as to guarantee the information necessary for the interested parties to be able to exercise their legitimate right of defence.

- In the determination of injury, the investigating authority shall effect a non-attribution analysis relating to "other known factors" which may be a contributing cause of the difficulties faced by the domestic industry. In particular, it shall analyse whether imports from origins other than those investigated are causing injury to the domestic industry.

12. We thank you for your attention and hope that the above comments prove to be useful in the Panel's deliberations and help arrive at an interpretation that is harmonious and in accordance with the aims and objectives of the AD Agreement and the SCM Agreement.

ANNEX D-2

EXECUTIVE SUMMARY OF THE THIRD PARTY ORAL
STATEMENT OF THE EUROPEAN UNION

I. TREATMENT OF CONFIDENTIAL INFORMATION UNDER ARTICLES 6.5.1 ADA AND 12.4.1 SCM

1. The European Union (EU) is of the view that the reading of Article 6.5 and 6.5.1 ADA (and the corresponding provisions in the SCM) advanced by China in Its First Written Submission cannot be reconciled with the text of the Agreement and is not supported by the jurisprudence of prior panels and the Appellate Body.

2. Article 6.5 ADA lays down the principle that, **upon good cause shown**, confidential information submitted by interested parties in the course of an anti-dumping investigation is to be kept confidential by the authorities. The requirement to show good cause falls on the **interested party submitting the information at issue, not the investigating authority**, and it applies both to information that is confidential "by nature" as to the information that is "provided on a confidential basis".

3. The Appellate Body in its recently confirmed that "[i]f information is treated as confidential by an authority without such a 'good cause' showing having been made, the authority would be acting inconsistently with its obligations under Article 6.5 to grant such treatment only 'upon good cause shown'" (Appellate Body Report in *EC – Fasteners*, para. 539). The Appellate Body also clarified that the type of evidence and the extent of substantiation an authority must require will depend on the nature of the information at issue and the particular "good cause" alleged.

4. Provided good cause has been shown, Article 6.5.1 ADA further **obliges the investigating authority to require** that parties submitting confidential information also furnish a **non-confidential summary** thereof. The summary must be **in sufficient detail** to permit the parties to the investigation a reasonable understanding of the substance of the information submitted in confidence and thereby allow them the opportunity to defend their interests.

5. The ADA and SCM allow the possibility for authorities to waive the obligation to provide a non-confidential summary of confidential information, but limit it to **"exceptional circumstances" where summarization is not possible**. In such exceptional circumstances **the party seeking confidential treatment** of the information submitted **is required to provide a "statement of reasons why summarization is not possible"**.

6. The EU also notes that prior panels - and recently the Appellate Body - left no doubt as to the fact that Article 6.5.1 ADA (as well as its parallel provision in the SCM) should be understood as imposing an **obligation on the investigating authority to scrutinise the statements** provided by parties seeking confidential treatment for information submitted. The aim is to determine whether exceptional circumstances have been established, and whether the reasons provided adequately explain why under the circumstances a summarization is not possible.

7. China refers to jurisprudence on Article 6.5 and 6.5.1 ADA in noting that these provisions aim to **strike a balance between the interests** of parties submitting information (i.e. confidentiality) and the interests of all other concerned parties (i.e. due process, transparency). In the view of the EU, this very balance would be completely upset if authorities were to be allowed to protect as

confidential virtually any piece of information based on a mere presumption that such protection is warranted.

8. The party submitting information is best placed to asses the effects that its disclosure could have. All an investigating authority could do, in the absence of a motivated request, is speculate as to the potential risks. It is therefore only logical and appropriate that the ADA put the burden of proof of good cause for confidential treatment and the obligation to demonstrate insusceptibility of summarization in non-confidential format on the party submitting the information. The authorities are charged with the obligation to demand and objectively scrutinise such requests. Anything else would create a risk that any "inconvenient facts" would become shielded from scrutiny and rebuttal by interested parties through an *ex officio* designation of confidentiality.

9. China furthermore argues that the very fact that there were only two producers amounts to "exceptional circumstances" within the meaning of Article 6.5.1 ADA. While it is undisputable that Article 6.5.1 provides for the possibility that there may be justified cases in which it is not possible to provide a non-confidential summary of confidential information, the EU is not persuaded by China's arguments that this is always the case where there are only two producers involved. The EU is of the view that in cases when there are only two producers it is still possible to prepare non-confidential summaries (e.g. in the form of indexes).

II. THE ALLEGATION THAT THE PRICE EFFECTS ANALYSIS IN MOFCOM'S FINAL DETERMINATION WAS INCONSISTENT WITH CHINA'S WTO OBLIGATIONS

10. The United States (US) alleges that MOFCOM's price effect analysis is inconsistent with Articles 3.1 and 3.2 ADA and with Articles 15.1 and 15.2 SCM. In particular the US alleges that MOFCOM made no finding at all regarding **price undercutting**, while references to "low price" policies and strategies are not based on positive evidence. According to the US, MOFCOM did not, either in the Injury Disclosure Document or in the Final Determination, rely on any information about actual pricing levels, neither in the price suppression nor in the price depression analysis. China argues, that it did not make specific findings about price undercutting, since on the basis of ADA it is not required to do so. China acknowledges that it based its overall finding about adverse price effects on the price suppression and price depression analysis and that these two "did not depend on precise pricing information".

11. The EU does not agree with China's position that price suppression and price depression analysis do not have to "depend on precise pricing information". In the EU's view, prices analysis necessarily requires information on prices, also concerning the analysis of price suppression and price depression. Otherwise the reliability of the findings cannot be guaranteed.

12. As elaborated in our Written Submission, an investigating authority is obliged under Article 3.1. ADA to base the injury examination on "**positive evidence**" and to conduct an "**objective examination**". The term "positive", indicates that the evidence must be of an affirmative, objective and verifiable character, and that it must be credible.

13. Price depression can be determined by considering the trend in prices of the domestic product over the period of investigation (POI). It could also be assessed by evaluating whether domestic price declines and prices of imports remain consistently below domestic prices over the POI. Failure to take into account concrete pricing data does not allow - in neither of the above methods - for an affirmative, objective and verifiable, and thus credible result of such an analysis.

14. Price suppression analysis, which relies on a counter-factual conclusion that, absent the dumped imports, prices of the domestic products would have increased, is even more difficult to

undertake in an objective manner. It requires a conclusion that domestic prices should have increased. Any such conclusion may rest on elements as e.g. increased costs, which would be normally passed on as price increases.

15. Therefore, any analysis which allows for the assessment of adverse price effects - be it in the form of price undercutting, price suppression or price depression - and of their significance must rest on precise pricing information to satisfy the requirements set out in Article 3.1 ADA.

16. The EU agrees that, in accordance with Article 3.2 ADA, a determination of injury does not require a finding of price undercutting, but may also be based on a finding of price depression and/or of price suppression. The EU also agrees that the ADA does not prescribe any precise methodology for assessing the level of price undercutting. But this does not mean, contrary to what appears to be China's position, that a comparison of the prices of domestic and imported products is never required by the ADA, so that the investigative authorities enjoy complete discretion to decide whether or not to make such a comparison. In particular, it may be noted that some form of comparison between the prices for domestic and imported products will usually be required in order to establish the requisite causal link between the imports and the injurious effects. For example, it is obvious that where the prices for the imported products have been much higher than the prices for the domestic products during the relevant period of reference, price depression or price suppression cannot, absent very exceptional circumstances, be attributed to the imported products. For this reason, a failure to make any kind of comparison between the prices for domestic and imported products may well constitute a breach of the obligation to make an "objective examination" within the meaning Article of 3.1 ADA.

III. ESTABLISHMENT OF THE REQUIRED CAUSAL LINK

17. In view of the Chinese arguments concerning the alleged failures in establishment of casual link, the EU would like to underline that both the significant adverse price effects and increasing volumes of low priced imports are necessary elements of the analysis of the casual link as provided for in Article 3.1 ADA and Article 15.1 SCM. Therefore, any inadequacies in the establishment of the adverse price effects will necessarily have repercussions on the finding concerning the casual link.

ANNEX D-3

THIRD PARTY ORAL STATEMENT OF HONDURAS[*]

Mr Chairman and distinguished members of the Panel,

1. Honduras would like to thank the Panel and the parties for this opportunity to present its views on some of the matters at issue in this dispute, and because we have a systemic interest in the matter, we would like to discuss the interpretation of some of the provisions of the WTO Agreements that are in dispute.

2. In this statement, and without prejudice to what was already stated in the third party submission to the Panel, Honduras will focus on certain matters relating to the standards of proof for the initiation of a countervailing measures investigation.

3. There does not appear to Honduras to be any divergence between China and the United States on the fact that Article 11.2 of the SCM Agreement requires that sufficient evidence be provided of the existence of the three elements of an actionable subsidy, namely financial contribution, benefit, and specificity of the subsidy.[1]

4. However, Honduras does see a divergence on whether sufficient evidence was provided regarding the elements of a subsidy in the context of various programmes that were under investigation during the domestic procedure. The United States claims that the application did not include that evidence[2], while China claims the contrary.[3]

5. In evaluating the arguments of the two parties, the Panel should bear in mind the following points:

6. Article 11.2 of the SCM Agreement requires the inclusion of sufficient "evidence" of the "existence" of a subsidy, among other elements. The term "evidence" is defined as an instrument intended to ascertain the truth or falsity of a matter, or an indication, sign or testimony that is given in relation to something.[4] In that respect, it must give *clear indications* of what it is seeking to establish. These clear indications must be *objectively* verifiable, and not simply left to a *subjective* appreciation. For Honduras, complying with Article 11.2 of the SCM Agreement requires more than simply asserting that there is "implicit" evidence. Evidence cannot consist of mere conjecture, speculation or abstract inferences without any positive and objective substantiation.

7. At the same time, Honduras notes that there is a certain divergence regarding compliance with the requirement to provide sufficient evidence of the benefit conferred by a subsidy when that subsidy ended prior to the beginning of the investigation period. In particular, there appears to be the suggestion that in the absence of any guidelines in the SCM Agreement as to the distribution of the benefit of a subsidy over time, an application for the initiation of an investigation would not necessarily have to contain evidence of the existence of the benefit during the period of investigation.[5]

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[*] This oral statement was originally made in Spanish.

[1] First Submission of the United States, paragraphs 72-74, and First Submission of China, paragraphs 14-18.

[2] For example, First Submission of the United States, paragraph 78.

[3] For example, First Submission of China, paragraphs 34-58.

[4] Real Academia Española, *Diccionario de la Lengua Española*, 22nd edition, 2011, p.1853.

[5] First Submission of China, paragraph 38.

8. In our view, Article 11.2 does not contain any repealing clause or provide for any exception with respect to the inclusion of *sufficient* evidence of the existence and the various elements of a subsidy. Consequently, we do not think that the lack of guidelines concerning the distribution of a subsidy over time should be considered as an exception to the *sufficiency* requirements laid down in Article 11.2.

9. Finally, Honduras notes that there is a divergence as to whether sufficient evidence was included, showing that a State entity provided a financial contribution.[6] It appears to Honduras that the sufficient evidence should be of the "existence" of a subsidy and its constituent elements. In its ordinary meaning, the term "existence" refers to a thing that is *real and genuine*.[7] Compliance with the Article 11.2 mandate requires the inclusion of evidence showing that the subsidy is real or genuine, in other words that it exists and has been granted. The mere creation of an entity whose apparent function is to conduct studies or analyses should not, in Honduras's view, be considered sufficient evidence of the *existence* of a subsidy, and in particular a financial contribution. Honduras is concerned at the idea that State information-gathering activities on behalf of a domestic industry should be considered to be an actionable subsidy.

Thank you.

[6] First Submission of the United States, paragraph 78, and First Submission of China, paragraph 43.
[7] Real Academia Española, *Diccionario de la Lengua Española*, 22nd edition, 2001, p. 1019.

ANNEX D-4

EXECUTIVE SUMMARY OF THE THIRD PARTY
ORAL STATEMENT OF INDIA

Mr. Chairman and distinguished members of the Panel. India thanks the Panel Members for the opportunity provided to it to submit its statement before this Panel.

Introduction

1.1. This dispute raises several procedural issues related to initiation of countervailing duty investigations, determination of subsidy rates, treatment of confidential information, injury determination etc. The issues raised are of systemic importance for all the WTO Members and therefore India attaches importance to the examination of these issues by the Panel. Most of the claims and counterclaims in this dispute are factual. With very limited factual information available, India would not wish to support the claims of any particular party and would rather urge the Panel to objectively look at the facts of this dispute and draw conclusions which would provide guidance to Members in implementation of the relevant provisions of ASCM and AD Agreement.

2. On whether China's initiation of an Anti-subsidy investigation was consistent with Articles 11.2 and 11.3 of the SCM Agreement

China asserts that the US has claimed that China's initiation was inconsistent with Articles 11.2 and 11.3 of ASCM :

(i) the application for investigation failed to contain information reasonably available to the applicant regarding the existence of a financial contribution, a benefit, and/or specificity with respect to certain of the investigated subsidy programs; and

(ii) by initiating an investigation of the same set of programs the investigating authority failed to objectively assess the adequacy and accuracy of the evidence contained in the application.

2.1. It is submitted that while examining the US claim under Article 11.2, it may be inherent to examine whether the specific programmes included in the allegation of subsidies fulfilled the criteria of definition of a 'subsidy' within the meaning of Article 1.1 of ASCM in order to prove that a subsidy existed.

2.2. It is submitted that whether or not the application contained the requirements as mandated under Art. 11.2, ASCM is a question of fact. India would urge the Panel to evaluate this question of fact keeping in view an objective interpretation of the requirements enunciated under Article 11.2, ASCM.

2.3. On the purported challenge of the US that by initiating an investigation of the same set of programs, India would wish to submit that this is a question of fact.

2.4. In the *Request for Consultations*, the US alleges that China's Countervailing and Antidumping measures on GOES from the US appear to be inconsistent, *inter alia*, with Article 10 and 19 of the ASCM because China improperly determined that government purchases under the US Buy American Laws

conferred a "benefit"[1]. At para 12[2], the US states that MOFCOM initiated an investigation with respect to the American Recovery and Reinvestment Act (ARRA), 2009. In the *Request for the Establishment of the Panel*[3], the US acknowledges that China has applied CVD as countervailing action on several alleged subsidy programs[4].The US states that the petitioner challenged the US State and Federal laws that they claimed provided countervailable subsidies to GOES producers[5]. The US does not categorically rebut the factum of the existence of the subsidy element in several and specific US programmes. The US in its First Written submissions[6] refers to the specific US measures/ sectors alleged to be providing subsidies to the US industry such as:

-*Buy America provisions.*

-*Medicare Prescription Drug, Improvement and Modernization Act of 2003, Economic Recovery Tax Act of 1981, Tax Reform Act of 1986, Steel Import Stabilization Act of 1984, State of Indiana Steel Industry Advisory Service, Grace periods for compliance with the Clean Air Act,*The American Clean Energy Security Act of 2009,*2003 Economic Stimulus Plan of Pennsylvannia.3,-Pennsylvania's Alternative Energy Funding Program.*

Sectors: *Electricity, Natural Gas, Coal*

2.5. It is submitted that an underlying issue in this dispute would be the existence of subsidies or otherwise in the US State and Federal Programmes and whether these subsidies could be subjected to countervailing duty action as per the ASCM.

2.6. At para 229[7], China submitted while addressing U.S. arguments in the underlying proceeding (that competitive bidding existed under Buy American provisions), the MOFCOM stated in full as follows:

> *The Investigating Authority found that, according to provisions in the Buy American Act and other regulations, although there is competitive bidding process, using steel and finished products produced in the U.S. is required unless there is a waiver. The Investigating Authority holds that this fact shows that the scope of products allowed for bidding under Buy American Act has actually been limited to some extent, and thus the bidding is not market competition in the usual sense…..when purchases of U.S. iron and steel products do not cost 25% more than foreign products, the foregoing so-called competitive bidding is only competition among U.S. products. …..…Therefore, the Investigating Authority considered that the competitive bidding restricted the scope of*

[1] WT/DS414/1
G/L/927
G/SCM/D85/1
G/ADP/D85/1
Dated 20 September, 2010; *Request for Consultations by the US.*
[2] *US First Written Submissions* (USFWS)dated June 8,2011.
[3] WT/DS414/2 dated 14 February,2011, *Request For The Establishment Of A Panel By the US.*
[4] At para 1.(a) and (b), *Ibid*.
[5] USFWS para 13.Details of the said laws are provided elsewhere in the USFWS and China's FWS.
[6] At page 25, para 78
[7] *Ibid.*

> *participating products, and thus could not reflect the full market competition. Even if there is competition, it is competition only among the U.S. domestic steel products (may include part of the foreign products at the federal level and in some regions). Hence the price obtained through competitive bidding does not reflect the true market conditions.*

2.7. Further, China states that the United States acknowledged in its questionnaire response in the underlying investigation The Buy American Act (the Act), 41 U.S.C. 10a-10d, is the major domestic preference statute governing procurement by the federal government and the program at issue is governed by "Buy American" provisions that prefer U.S. prices and U.S. goods, distorting the competitive playing field.

2.8. As a third party, India submits that questions of facts and evidence would be for the parties to prove or to rebut and the Panel should examine carefully the facts presented by the parties for fair and objective application of the provisions of the *AD Agreement* and the *SCM Agreement.*

3. On whether 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

3.1. United States has claimed that MOFCOM breached these disciplines as the non-confidential summaries provided to MOFCOM were inadequate and no reasons were provided for the inadequacy of the non-confidential summaries, China has rebutted this allegation. This is a question of fact to be established by evidence led by the two main Parties in this dispute.

3.2. As stated hereinbefore, India would urge the Panel to interpret the provisions of the WTO Agreements strictly in accordance with the language adopted in the said provisions. The Panel in *Mexico- Steel Pipes and Tubes* at para 7.380 held that it considered that the conditions set out in Article 6.5, chapeau, and 6.5.1 are of critical importance in preserving the balance between the interests of confidentiality and the ability of another interested party to defend its rights throughout an anti-dumping investigation.

3.3. India as a third party would like to assist the Panel in the determination of the issues raised in the present dispute for the Panel's balanced consideration.

3.4. China has contended that the US has claimed that the non-confidential summaries provided to MOFCOM were inadequate and that no reasons were provided for the inadequacy of the non confidential summaries. China believes that the US claim ignores important facts related to the confidential information: (1) the petitioning parties provided non-confidential summaries for the information for which confidential treatment was requested; and (2) most of the information for which confidential treatment was requested was information which fits within the "exceptional circumstances" waiver of confidential summaries provided in Article 6.5.1 and 12.4.4. Thus, China claims that the US does not challenge under Article 6.5 or Article 12.4 the right of this information to be classified as confidential rather it challenges only the sufficiency of the non confidential summaries under Art. 6.5.1 and Art. 12.4.1.

3.5. India submits that Art. 6.5.1, ADA lays down the standard of acceptability of a non confidential summary in as much as it states that "These [non confidential] summaries *shall be in sufficient detail to permit a reasonable understanding* of the substance of the information submitted in confidence."

3.6. At para 87, China states that in compliance with Art. 6.5.1, the information provided in non-confidential summaries was more than sufficient to allow responding parties to have a "reasonable understanding of the substance of the information". In *EC - Fasteners (Panel)* it was held that "the investigating authority must ensure that an appropriate non-confidential summary is provided, or in exceptional circumstances, if that is not possible, that an appropriate statement of reasons why summarization is not possible is given". China also takes the support of the exceptional circumstances provision under Article 6.5.1.

3.7 China's statement that in the case a party indicates that the confidential information is not susceptible to the aforementioned [non confidential] summary, then the provision does not provide a significant guidance on the level of analysis and explanation required (other than a statement of the reasons why summarization is not possible) appears to be, *prima facie*, supported by a bare reading of Art.6.5.1.

3.8. At para 134, China provides explanation that the confidential information at issue is primarily the confidential information on which the authority based its injury determinations. China claims that most of this information related to non-public information generally recognized and treated as business proprietary by companies throughout the world, namely information on individual company operations including sales revenue, sales volume etc. It is submitted that the Panel would evaluate the nature of the information submitted and the reasons for treating the information as confidential. In India's views, the practices of Investigating Authorities for treating certain information of the domestic industry as confidential may differ. The claims regarding certain information to be treated as confidential can also be evaluated with reference to the norms of public disclosure of financial statements of companies. The conclusions of the Panel on this matter would provide important guidance to Members.

4. On whether MOFCOM's application of Facts Available in determining the subsidy margin for the Government Purchase of Goods Program was consistent with Article 12.7

4.1. China has contended that due to the continuing failure of the companies to provide necessary information related to government purchase of goods programme, in its final determination MOFCOM continued to apply facts available in the manner imposed in the preliminary determination. It stated that what occurred was nothing short of a conscious decision to withhold information.

4.2. China relies on the observations of the Panel in *EC –DRAMs* to state that uncooperative behaviour may be taken into account by the authority when weighing the evidence and the facts before it and the fact that certain information was withheld from the authority may be the element that tilts the balance in a certain direction. Further, China also relies upon the interpretation given in *Egypt- Steel Rebar* to 'necessary information' under Art.6.8, ADA. India submits that this issue is a question of fact to be evaluated by the panel.

5. On whether MOFCOM's disclosure of its determination of the margins of dumping was consistent with its requirements of Art. 12.2.2

5.1. The US alleges that the failure of the MOFCOM to release the actual calculations while determining the margin of dumping violated Art. 12.2.2, ADA. China, in turn, states that the US does not refer to any WTO jurisprudence or reference any standard to be applied in interpreting Art. 12.2.2.

5.2. It is stated that the Panel would interpret Art. 12 as per the language used in the provision and would take into account that in the case of a determination, the authorities are required to provide explanations that are sufficiently detailed and shall refer to all matters of facts and law which have led to arguments being accepted or rejected.

5.3. Thus though the authorities have to provide a sufficiently detailed explanation on how they established the margin of dumping on an exporter/producer-specific basis, it may be considered that perhaps the actual data need not be stated in the public notice under the exception under Article 12.2.2 keeping in view the need for protection of confidential information under Article 12.2.2 of the AD Agreement.

6. On the determination of the All Others Rates based on Facts Available

6.1. The US alleged that MOFCOM's application of facts available to determine the anti-dumping duty rate and the countervailing duty rate for unexamined exporters/producers was inconsistent with Article 6.8 of the *AD Agreement* and Article 12.7 of the *SCM Agreement.*

6.2. The United States states that the unexamined firms were never sent copies of the antidumping questionnaire and that China breached Article 6.8 of the AD Agreement and paragraph 1 of Annex II by applying facts available to them. The said issue is a question of fact that the panel would examine.

6.3. Article 6.8 of the *AD Agreement* states that facts available may be applied to an interested party which refuses access to, or otherwise does not provide, necessary information or significantly impedes the investigation. Paragraph 1 of Annex II states 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. Interpreting the above, it appears that facts available may not be applied to an interested party who had not been asked to submit information in the first place.

6.4. Further, Art. 12.7, ASCM also states that in cases in which any interested Member or interested party refuses access to, or otherwise does not provide, necessary information or significantly impedes the investigation, the determinations, affirmative or negative, may be made on the basis of the facts available. Again, it would appear that a natural corollary of the said Article is that facts available may not be applied in the case that the interested party who has not been asked to submit information in the first place.

7. On MOFCOM's alleged failure to provide any rationale on its rejection of a price derived from the competitive bidding process

7.1. The US has alleged that MOFCOM rejected the competitive bidding price in the U.S. government procurements as the market price. It is a question of fact.

Conclusion

India thanks the panel for giving this opportunity to present its views as third party in this dispute. India would be happy to provide answers to any questions which the Panel may have.

Thank you.

ANNEX D-5

THIRD PARTY ORAL STATEMENT OF JAPAN

I. INTRODUCTION

1. Mr. Chairman, and the distinguished Members of the Panel, on behalf of the Government of Japan, I thank you for the opportunity you provide us to present our views with respect to this dispute, which involves important systemic issues on the disciplines of *AD Agreement* and the *SCM Agreement*. Because time is limited, Japan would like to focus only on three issues today.

II. DISCUSSION

A. Disclosure of Dumping Margin Calculation and Data Used

2. The first issue is the disclosure of the dumping margin calculation and the data used in the calculation. The United States claims that MOFCOM acted inconsistently with Article 12.2.2 of the *AD Agreement* because it failed to disclose or otherwise make available the calculation and data used during the investigation. According to the United States, MOFCOM's disclosure was limited to the weighted averages of export prices, normal values, and the product-specific margin of dumping and did not provide sufficient information for interested parties to understand how MOFCOM calculated the margin or which data MOFCOM used.

3. In general, the disclosure of the entire actual calculations for an exporter's dumping margin is critical for the exporter to present an effective defense because even a tiny mistake could result in a grave distortion of the margin calculation. For example, an authority might mistakenly treat the unit of measurement of data in pounds in the margin calculation, although the data actually were reported in kilograms. Such a mistake would be just a very small part of the entire calculation formulae but could result in the calculated margin being doubled. This type of mistake cannot be identified from the disclosure of the intermediate stage in the calculation process. As such, Japan considers that the authorities are required to disclose the entire dumping margin calculation under Article 12 of the *AD Agreement*; including the data of sales, expense and cost, which the authorities chose to use for the margin calculation, demonstrating every calculation step to reach the margin of dumping.

4. Article 12.2 of the *AD Agreement* sets forth the overarching rule applicable to a public notice or separate report of any preliminary and final determinations, providing that the notice or report must set forth "in ***sufficient detail*** the findings and conclusion reached on ***all issues of fact and law*** considered material by the investigating authorities."[1] The panel in *EC - Tube or Pipe Fittings* explained this provision, stating "a 'material' issue [is] an issue that has arisen in the course of the investigation that must necessarily be resolved in order for the investigating authorities to be able to reach their determination."[2] It is not within the authorities' discretion to decide whether a specific issue may be classified as "material," thereby requiring inclusion in the public notice or a separate report.

5. Article 12.2.2 of the *AD Agreement* then sets forth special provisions applicable only to affirmative final determinations. This provision expands the depth and width of the content of a public notice or a separate report to include "all relevant information on the matters of fact … and reasons" of "the margins of dumping established and a full explanation of the reasons for the

[1] Emphasis added.
[2] Panel Report, *EC - Tube or Pipe Fittings*, para. 7.424.

methodology used in the establishment and comparison of the export price and the normal value under Article."[3] The content of a public notice or a separate report of the affirmative final determination must include not only "material" issues but also "all relevant information." With respect to the dumping margins, all individual decisions of the authorities, including its decision to choose the data, to assess the comparability of the export price with a specific normal value, and to set forth a specific calculation formula, are relevant information to the establishment of the margin of dumping, as discussed earlier. Therefore, the authorities must set forth such information in the document of the final determination.

B. Disclosure of Factual Findings Related to Injury Determinations

6. The second issue that Japan would like to address is the disclosure of factual findings related to injury determinations in the disclosure of essential facts before the final determination and the public notice or a separate report of the final determination. In particular, Japan focuses upon the disclosure of the price effects to the domestic like products, and injurious effects of factors other than dumped or subsidized imports to the domestic industry.

7. Article 6.9 of the *AD Agreement* and Article 12.8 of the *SCM Agreement* require the investigating authorities to disclose "the essential facts under consideration which form the basis for the decision whether to apply definitive measures" before the final determination. The panel in *EC – Salmon (Norway)* explained that such 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".[4]

8. According to China, MOFCOM found "the sale of the product concerned was kept at a low price" in the final determination.[5] The MOFCOM's finding of "at a low price" would indicate that MOFCOM reached this fact finding based on certain data comparisons. In such case, as explained by the panel in *EC – Salmon (Norway)*, the authorities would have been obliged to disclose information on the comparison as a part of "essential facts" to enable interested parties to comment on the sufficiency of such facts finding before the final determination.

9. With respect to final determinations, Article 12.2.2 of the *AD Agreement* and Article 22.5 of the *SCM Agreement* require that the authorities set forth "all relevant information" on the matter of the facts, "which have led to the imposition of final measures", as discussed earlier. The information on the comparison would have led the authorities to make a finding of the fact of the price effects to the domestic like products, and then to the injury determination. Accordingly, such information must be set forth in the public notice or a separate report of the final determination. The mere statement of the fact found—that "the sale of the product concerned was kept at a low price"—would not be sufficient to explain the relevant information.

10. In addition, the United States argues that MOFCOM's disclosure and explanation on the volume and prices of imports from non-subject merchandise was insufficient. China states that MOFCOM analyzed those facts in the preliminary determination. China argues that the public notice of the preliminary determination was a part of the disclosure of the essential facts as required under Article 6.9 of the *AD Agreement* and Article 12.8 of the *SCM Agreement*.[6]

11. It should be noted, however, that the preliminary determination would not always be sufficient disclosure of the "essential facts" before the final determination. For example, when the

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[3] Article 12.2.1(iii) of the *AD Agreement* (incorporated by reference into Article 12.2.2).
[4] Panel Report, *EC – Salmon (Norway)*, para. 7.805.
[5] China FWS, para. 282.
[6] *See* China FWS para. 373.

investigating authorities conduct on-the-spot investigations after the preliminary determination, the essential facts may be changed after on-the-spot investigations. In such case, the exporter should be informed of any changes in the "essential facts" found by the authorities from the time of the preliminary determination to allow them to present an effective defense.

C. The Determination of the All Others Rates Based on Facts Available

12. The last issue that Japan would like to address is the determination of the all others rates based on facts available. Article 6.1 and paragraph 1 of Annex II of the *AD Agreement* require that authorities give notice of information to an interested party from which the information is required, specifying the necessary information in detail.

13. The Appellate Body explained in *Mexico – Anti-Dumping Measures on Rice* that "an investigating authority that uses the facts available in the application for the initiation of the investigation against an exporter that was not given notice of the information the investigating authority requires, acts in a manner inconsistent with paragraph 1 of Annex II to the *AD Agreement* and, therefore, with Article 6.8 of that Agreement."[7] As explained by the Appellate Body, facts available cannot be applied to an interested party which had not been asked to submit information. Japan is of the view that investigating authorities are not allowed to treat the notice posted on the website as being properly given to exporters. Therefore, such notice is insufficient to satisfy the requirement under Article 6.8 of the *AD Agreement*.

14. In addition, the initiation notice of MOFCOM in this case did not request exporters and producers to submit the specific information but requested them only to register with MOFCOM. MOFCOM, nevertheless, declared that it made determination based on the facts available to the exporters that failed to register. Paragraph 1 of Annex II to the *AD Agreement* makes it clear that the authorities may apply facts available to an exporter only when the authorities gave a notice after the initiation to the exporter of the specific information which the authorities would like it to submit but it did not. In that sense, a mere request in the public notice of the initiation to make themselves known to the authorities within 20 days from the date of initiation cannot be the basis to apply facts available to determine dumping determination.

15. The all others rate, which China determined in the final determination of the antidumping investigation in question, *a*ppears to be based on the facts available, and to apply it to exporters and producers that MOFCOM did not ask to submit any information during the investigation. If it is the case, the application of such all others rate to such exporters and producers is also inconsistent with Articles 6.1 and 6.8 and paragraph 1 of Annex II of the *AD Agreement*.

16. Finally, Japan recalls that the Appellate Body found in *Mexico – Anti-Dumping Measures on Rice* that "it would be anomalous if Article 12.7 of the *SCM Agreement* were to permit the use of "facts available" in countervailing duty investigations in a manner markedly different from that in anti-dumping investigations".[8] Therefore, Japan considers that an investigating authority that uses the facts available in the application for the initiation of the investigation against an exporter that was not given notice of the information the investigating authority requires, acts in a manner inconsistent with Article 12.7 of the *SCM Agreement.*

[7] Appellate Body Report, *Mexico –Anti-Dumping Measures on Rice*, para. 259
[8] Appellate Body Report, *Mexico –Anti-Dumping Measures on Rice*, para. 295

III. CONCLUSION

17. In conclusion, Japan respectfully requests the Panel to review carefully the arguments presented by the parties in this dispute in light of the comments presented in Japan's submission and this oral statement. Japan would be pleased to respond any questions that the Panel may have.

ANNEX D-6

THIRD PARTY ORAL STATEMENT OF THE
KINGDOM OF SAUDI ARABIA

Mr. Chairman, Members of the Panel,

1. The Kingdom of Saudi Arabia affirms all of the positions set out in its Third Party submission, and we need not repeat them today. Instead, we will highlight two key issues of systemic importance. The first issue concerns the evidentiary standards that apply to the initiation of subsidy investigations. The second issue relates to the use of facts available.

I. INITIATION

2. I turn first to the issue of initiation.

3. Article 11 of the SCM Agreement imposes significant evidentiary disciplines on the initiation of subsidy investigations. In recognition of the obligation imposed on all Members not to initiate investigations based on unwarranted claims, Article 11 requires that the complaint contain *sufficient* evidence on each of the required elements of subsidization. Applications must contain a "degree of actual evidence"[1] as well as evidence of the relevant *type*.[2] The Kingdom explained in its submission that there must be sufficient evidence demonstrating the requisite elements of a countervailable subsidy.

4. This interpretation of "sufficient evidence" is consistent with the jurisprudence on initiation, which has established that authorities have an obligation to ensure that the evidence in an application constitutes a "reasonable indication" of the actual existence of subsidization and injury.[3] This is a positive obligation that must be faithfully discharged by the investigating authority.

5. The obligation on the investigating authority is set forth in Article 11.3, which requires the investigating authority to examine both the accuracy and adequacy of the evidence provided *in the application* itself. This imposes a binding obligation on Members not to initiate on the basis of deficient claims.

6. The time to verify the accuracy and adequacy of the complaint is prior to initiation. Verification after initiation falls far short of the duty entrusted to investigating authorities to identify and reject inadequate claims.

7. There are strong policy reasons for the initiation standard advocated here. The initiation of a subsidy investigation imposes a heavy burden on all parties, including the government of the exporting Member. Initiation has an immediate adverse effect on trade, and the chilling effect can remain even when initiation results in a negative finding. Investigations launched on the basis of insufficient evidence undermine the credibility of the entire investigatory process, as well as the justification for final measures.

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[1] Panel Report, *Mexico – Steel Pipes and Tubes*, para. 7.24.

[2] Panel Report, *Guatemala – Cement I*, para. 7.67; Panel Report, *Mexico – Steel Pipes and Tubes*, paras. 7.56, 7.59.

[3] Panel Report, *Guatemala – Cement I*, para. 7.49; Panel Report, *Mexico – Steel Pipes and Tubes*, para. 7.21; Appellate Body Report, *US – Carbon Steel*, para. 115.

8. The Kingdom urges the panel to take this opportunity to reinforce the agreed strong evidentiary standards under Article 11 to provide meaningful disciplines on the initiation of subsidy investigations.

II. FACTS AVAILABLE

9. I now turn to the issue of the use of facts available.

10. The Kingdom wishes to highlight that the SCM and Anti-Dumping Agreements limit both the opportunities to resort to facts available and the manner in which they are used. The use of facts available is disciplined in order to ensure that investigating authorities adopt the best information in their determinations. As the Appellate Body has stated, the use of facts available "permits the use of facts on record *solely for the purpose of replacing information that may be missing*".[4]

11. Accordingly, investigating authorities must accept information provided by the respondent where the respondent acted to the best of its ability. This is required under the Agreements even if other information requested has not been provided by the respondent,[5] and even if that information is submitted after a deadline, but within a reasonable period of time.[6] These standards are intended to ensure that determinations are based on objective evidence, and that "facts available" is not used in a punitive manner.

12. The Kingdom notes the European Union's acknowledgement that the right of an authority to use facts available depends on whether the authority *itself* has "acted in a reasonable, objective and impartial manner".[7] The Kingdom agrees with this statement and would add that at least three elements are relevant to the Panel's examination of the investigating authority's actions: the nature of the requests made by the authority, the efforts made by investigated parties to meet those requests, and the degree of any alleged impediment caused by the investigated party's failure to cooperate.[8]

13. The EU also emphasizes that resort to facts available is precluded in situations where the parties in question were not properly notified and the information not properly requested.[9] The Kingdom agrees and considers that the use of facts available is permissible only when the parties have been given proper notice both of the information required by the investigating authority, and of the possibility of the application of facts available in the case of non-cooperation with the authority.[10]

III. CONCLUSION

14. Mr. Chairman, the Kingdom urges the Panel, when considering the systemic issues raised in this dispute, to preserve the SCM Agreement's carefully negotiated balance of interests between exporting and importing Members. That balance can best be preserved through the strict enforcement of a rules-based system for trade remedies investigations.

15. This concludes the Kingdom's statement. I do thank you.

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[4] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 293 (emphasis added).
[5] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 287 (emphasis original).
[6] *See* Appellate Body Report, *US – Hot-Rolled Steel*, paras. 83-86.
[7] Third Party Submission of the European Union, para. 12, citing Panel Report, *Guatemala – Cement II*, para. 8.251.
[8] *See, for example,* Panel Report, *Guatemala – Cement II*, paras. 8.249-8.251.
[9] Third Party Submission of the European Union, para. 11.
[10] *See generally* Article 6.8 and Paragraph 1 of Annex II to the Anti-Dumping Agreement.

ANNEX D-7

THIRD PARTY ORAL STATEMENT OF KOREA

1. Korea appreciates this opportunity to present its views to the Panel as a third party.

2. The issues presented in this dispute appear to have systemic implications for the Members since the claims presented in this dispute touch upon some of the core procedural elements of AD and CVD investigations. However, with only a limited amount of factual information available, Korea does not attempt to support any particular party in this dispute. Instead, Korea offers its view concerning certain critical issues that may help the Panel reach a proper conclusion in the current proceeding.

I. INITIATION OF A COUNTERVAILING DUTY INVESTIGATION SHOULD BE BASED ON ADEQUATE AND SUFFICIENT EVIDENCE

3. A CVD investigation entails mobilization of a great deal of resources on the part of a responding government and companies. A CVD investigation is also a serious undertaking laden with political sensitivities in that one Member investigates another Member's governmental programs. In Korea's view, these unique aspects of a CVD investigation explain the inclusion of bilateral consultations requirement in Article 13 of the SCM Agreement which do not appear in the AD Agreement.

4. In this spirit, the SCM Agreement clearly guards against initiation of a CVD investigation without adequate and sufficient evidence that cannot justify a lengthy investigation of another government. Although the information to be presented at the initiation stage is not the type of evidence that establishes the existence of subsidization or material injury, the investigating authority should nonetheless examine and confirm that at least a minimal amount of information reasonably indicating subsidization and injury has been submitted by a domestic applicant.

5. In fact, Article 11.2 of the SCM Agreement sets forth a detailed threshold for the initiation of a CVD investigation: in order for there to be initiation, "evidence that substantiates" the existence of a subsidy and injury that is reasonably available to the applicant must be presented in the application. As the panel in *U.S.-Byrd Amendment* opined, this provision is to "ensure that investigations are not initiated on the basis of frivolous or unfounded suits."

6. Article 11.3 of the SCM Agreement in turn requires the investigating authority to confirm the accuracy and adequacy of the evidence itself. Thus, an investigating authority assumes an affirmative obligation to examine all the relevant information and materials contained in the application and to confirm their veracity before making a decision to initiate a CVD investigation. It cannot passively accept the allegations in the petition as true or appearing to be true and initiate the investigation hoping to confirm the veracity down the road. Article 11.9 of the SCM Agreement clearly stipulates that the application should be rejected in such an instance.

7. In short, under the current SCM Agreement, initiation of a CVD investigation is not supposed to be an automatic rubber-stamp process once a petition is filed by a domestic industry. Rather, it is designed and envisioned to be a meaningful step where the investigating authorities carefully look into substantive information contained in the petition and determine whether the petition is really worth the time and resources to be inflicted from the lengthy investigations. Unless this filtering

process operates in a way envisioned in Article 11 of the SCM Agreement, foreign exporters and governments would be in a severely dire situation regardless of the final outcome of a CVD investigation.

II. THE "FACTS AVAILABLE" STANDARD SHOULD NOT BE ABUSED TO PENALIZE FOREIGN RESPONDENTS SIMPLY BECAUSE A REQUEST FROM THE INVESTIGATING AUTHORITY WAS NOT FULLY RESPECTED

8. The SCM Agreement does not provide an unlimited discretion to an investigating authority conducting a CVD investigation whenever it encounters a less than optimal information from a foreign respondent. Instead, these provisions unequivocally provide conditions that need to be satisfied before the investigating authority applies the facts available standard.

9. Article 12.7 of the SCM Agreement, Article 6.8 of the AD Agreement, and Annex II of the AD Agreement provide detailed guidelines in this respect. Likewise, the Appellate Body in *Mexico-Beef and Rice* also stated that even if the request by an investigating authority for certain information is not completely adhered to by a foreign respondent, the investigating authority is nonetheless required to consider information actually provided by the respondent.

10. In Korea's view, Article 12.7 of the SCM Agreement along with other provisions in Article 12 collectively stands for the proposition that fundamental due process rights must be ensured at all times in a CVD investigation. The Panel should carefully review whether this due process right has been adequately respected. The Panel would have to look into the specific situation of the investigation at hand and then determine whether facts available would be warranted in the situation.

III. INVESTIGATING AUTHORITY DOES NOT ENJOY UNBRIDLED DISCRETION REGARDING AN "ALL OTHERS RATE" IN ANTI-DUMPING AND COUNTERVAILING DUTY INVESTIGATIONS

11. One of the contentious claims in this dispute is about all others rates in AD and CVD investigations by MOFCOM. In the underlying investigations, the complainant claims, the all others rates were set at unreasonably high margins without sufficient explanations or rationale other than some cursory statements of policy reasons. The respective all others rates indeed seem extraordinarily high when compared to the margins assigned to the respondent companies, AK and ATI. Unreasonably high "all others rates" disassociated with calculated margins of the respondents participating in the investigations does raise a concern of possible inconsistency with the relevant provision of the SCM Agreement and the AD Agreement.

12. In Korea's view, to the extent the application of "all others rates" constitutes the virtual application of "facts available," as the complainant argues, Article 12.7 of the SCM Agreement and 6.8 of the AD Agreement could be implicated in this context as well. If the facts available standard was imposed on non-participating exporters without satisfying the detailed requirements stipulated by Article 12.7 of the SCM Agreement and Article 6.8 of the AD Agreement, a violation similar to the one discussed previously could be found.

13. Korea appreciates this opportunity to participate in this proceeding, and to present its views to the Panel. /END/

ANNEX E

EXECUTIVE SUMMARIES OF THE SECOND WRITTEN SUBMISSIONS OF THE PARTIES

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ANNEX E-1

EXECUTIVE SUMMARY OF THE SECOND WRITTEN SUBMISSION OF THE UNITED STATES

I. Introduction

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

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

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

2. While there are parallels between SCM Agreement Article 11 and AD Agreement Article 5, it is important to note the textual differences between Article 5.2 of the AD Agreement and Article 11.2 of the SCM Agreement. Thus, China's reliance in its first written submission on panel reports interpreting the AD Agreement for its propositions that all that is needed is "the inclusion of raw information," and that information need not be linked with allegations, is misplaced in the context of the SCM Agreement. In contrast to the low standard advocated by China, the text of the SCM Agreement makes clear that what is required is *sufficient evidence*.

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

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

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

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

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

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

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

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

7. China appears to suggest in its submissions that it need only require "adequate" non-confidential summaries if an interested party objects to the manner in which confidential information is summarized. Yet, whether an interested party objects during the proceeding to the adequacy of a summary is irrelevant to the question of whether the summaries were in fact adequate. The obligation to require adequate non-confidential summaries applies regardless of whether an interested party objects to their adequacy during the proceeding. The obligations contained in SCM Article 12.4.1 and AD Agreement Article 6.5.1 rest with China, not interested parties.

8. China's response reflects the mistaken view that its obligation to ensure that the interested parties furnish adequate non-confidential summaries during the course of the investigation may be excused if it is able to point to some subsequent "non-confidential analysis" contained in its own determinations that provides some indication of the confidential information submitted by the interested party. To adequately defend their interests, parties must have access to adequate non-confidential summaries *during* the course of the investigation, not after the investigating authority has drawn conclusions based on the submitted information. *Ex post facto* "non-confidential analysis" is beside the point. Once the determination is made, the parties' ability to defend their interests has been compromised.

9. China's assertion that the agreements do not provide sufficiently detailed guidance on the requirement to furnish adequate non-confidential summaries is belied by the text of the provisions themselves, as well as how the provisions have been applied. In *Mexico – Olive Oil*, for instance, the panel emphasized that a public version of a document where confidential information has simply been redacted is unlikely to qualify as an adequate non-confidential summary. What is required by Article 12.4.1 are adequate non-confidential *summaries*.

10. Regarding China's claims of exceptional circumstances, as noted in our oral statement, neither the petition nor the documents prepared by MOFCOM during the course of the investigation ever asserted that summarization was not possible or otherwise justified the absence of meaningful

non-confidential summaries. China's *post-hoc* rationalizations that exceptional circumstances existed justifying the inadequate non-confidential summaries should therefore be rejected.

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

11. The application itself demonstrates that the applicants intended the purported non-confidential summaries contained in Part II of the application to be linked with the information redacted. Yet the purported non-confidential summaries were inadequate. Setting aside the fact that Part II in fact contains the purported non-confidential summaries, for each category of confidential information, the application was inadequate as it contained no summary at all, or contained unlabelled trend lines, or year-over-year percentage changes without the necessary context of absolute values and without any justification from the applicants why there were exceptional circumstances that precluded more detailed summarization.

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

A. China's Portrayal of the Facts Is Misleading and Contradicted by the Record

12. While China repeatedly asserts that the respondents "refused" to respond to MOFCOM's questions and "seriously impeded" the investigation, a closer examination of the evidence demonstrates otherwise. At no point did the U.S. companies refuse to cooperate with the investigation. The companies cooperated, responded to MOFCOM's questionnaires, and to the extent they did not provide information it was because MOFCOM's own questionnaires did not require it. When AK Steel provided the data after the preliminary determination (data that were already in the hands of the investigators), MOFCOM chose not to either verify it or use the information to develop a verification plan.

13. Similarly, China's assertion that MOFCOM did not request 15 years of sales data for federal-level procurement is misleading. In its original questionnaire, MOFCOM requested sales information for government procurement "not performed within the POI," or according to China's third re-translation of MOFCOM's questions on this topic, procurement "signed within the POI as well as those for which performance has started but remained unfulfilled by the end of the POI." On page 17 of the new subsidy allegation questionnaire response, MOFCOM asks for sales data for all products during the POI and the prior 14 years, for both state- and federal-level procurement laws: "Please provide, during the POI and the 14 years before the POI, the sales situation of all the products under the influence of Pennsylvania Steel Products Procurement Act *and purchasing American goods clause of other Acts* ." The only other procurement Acts alleged in the questionnaires issued at that time are federal procurement laws.

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

15. In addition, there are no facts available on the record to support MOFCOM's conclusion that the respondents sold all of their output to the government. As explained in our first written submission, the only facts available on the record suggest that, at most, AK Steel could have sold 29 percent of its output to the government, as part of infrastructure and manufacturing sales. The 29

percent sales figure for infrastructure and manufacturing sales comes from AK Steel's audited financial statements and annual report.

16. Notwithstanding MOFCOM's apparent concern that this percentage may not have held true for the entire POI, which did not correspond to a calendar year, the annual report shows that 26 percent of the company's U.S. sales fell under the infrastructure and manufacturing segment in 2007. These figures demonstrate stability in the sales figures to this particular market segment over 24 months. It defies reason to suggest that the first two months of 2009 would be so drastically different from the preceding 24 months that MOFCOM would reject the figures entirely, and a review of AK Steel's later financial reporting would demonstrate that they were not. Regarding China's assertion that the proposal to use the 29 percent figure was untimely filed, AK Steel's annual report was actually contained in the Application. AK Steel proposed the use of the 29 percent figure from that report after seeing MOFCOM's unreasonable course in the preliminary determination.

17. Furthermore, MOFCOM could have verified that AK Steel or ATI did not sell to any government entity at verification. The 29 percent figure rejected by MOFCOM as the maximum possible percentage of AK Steel sales that could have been relevant to the alleged procurement programs, which focused on research and development funds and construction contracts for infrastructure, was provided in the Application before MOFCOM required AK Steel to translate into Chinese and re-submit the same document in the deficiency letter issued to AK Steel on August 26, 2009. Thus, this information was before MOFCOM well before verification began.

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

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

19. Given the various additional means that MOFCOM had at its disposal to evaluate the U.S. companies' claims with respect to utilization of the government procurement programs and MOFCOM's failure to make use of any of them, China's claim of that the U.S. companies seriously impeded the investigation simply are not credible. Moreover, China's argument that MOFOCOM could review such summary data to uncover "anomalous transactions" makes no sense. As outlined above, MOFCOM's questionnaire did not request transaction-specific data in the absence of any procurement-related sales; it had only requested a "tabulation of all domestic sales by product … including quantity, value, and customer." Such data would not provide the information necessary to perform the analysis China purports it intended to perform.

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

20. China does not deny that MOFCOM failed to provide to each U.S. company the actual, final dumping calculations that it performed for that company. Rather, it claims that there is no obligation to do so under Article 12.2.2, and that the U.S. exporters in this investigation were able to replicate MOFCOM's calculations. China's arguments are without merit.

21. Article 12.2.2 requires that if information on matters of fact that led to the imposition of final measures is relevant, then it must be made available, with due regard paid to the protection of confidential information. China argues that the language of Article 12.2.2 does not mandate the release of the final dumping calculations, but China's argument is contradicted by the text. Article 12.2.2 provides that the investigating authority's final determination must contain "or otherwise make available through a separate report, all relevant information on the matters of fact ... which have led to the imposition of final measures ...." As the United States has demonstrated, the calculations employed by an investigating authority to determine dumping margins, and the data underlying the authority's calculations, constitute "relevant information on the matters of fact ... which have led to the imposition of final measures" within the meaning of Article 12.2.2.

22. The theme running through China's arguments is that Article 12.2 pertains only to "public notice" and to "explanation," but China disregards the fact that Article 12.2.2 mentions the possibility of a "separate report" in addition to a "public notice," and the fact that Article 12.2.2 itself does not even use the word "explanation." China delves into the particular provisions of Article 12.2; if anything, however, these other provisions support the U.S. position, not China's. China's assertion that the two exporters were able to replicate the dumping calculations on their own is unavailing. Even if the exporters were in fact able to replicate the calculations, this would not relieve China of its obligation under Article 12.2.2 to make available the actual dumping calculations that its investigating authority performed.

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

23. Under Article 14(d) of the SCM Agreement, the authorities are to use market prices in the country of purchase unless they establish that those prices are so distorted that the market price is unusable. MOFCOM's flawed logic appears to be based on the assumption that any government involvement in a market leads to a distorted market with prices that are unusable as a benchmark price. Prior reports of the Appellate Body interpreting Article 14(d) directly contradict MOFCOM in this regard. Regarding MOFCOM's benefit determination, Article 22.3 thus requires the investigating authority to provide explanation on how it found that market prices resulting from the competitive bidding process were distorted.

VII. MOFCOM's Determination of the "All Others" CVD Rate was Inconsistent with Articles 12.7 and 12.8

24. The fact that MOFCOM provided notice to the U.S. Government, AK Steel, and ATI is irrelevant to the question of the WTO-consistency of China's application of facts available to companies subject to the 44.6% "all others" subsidy rate. Likewise, placing a copy of the petition in a reading room and publishing notices of initiation is not sufficient to justify the application of facts available. China now acknowledges that "there are no other U.S. producers" of GOES. This begs the question of what basis China had to apply adverse facts available to nonexistent entities for failure to cooperate.

25. Without notice of the investigation and the information required of interested parties subject to the investigation, the unidentified, unknown (indeed non-existent) other U.S. producers/exporters cannot be said to have refused access to the required information, or otherwise failed to provide access to the information within a reasonable period as required under Article 12.7 when read in the context of Article 12.1 before resort to facts available. Neither can such producers/exporters be said to have significantly impeded an investigation of which they were unaware.

26. China acknowledges that many of the programs were "found by MOFCOM not to confer countervailable subsidies on the two known respondents." Nonetheless, China's "all others" calculation appears to include non-countervailable programs representing over one-half the 44.6 percent "all others" rate. China argues that it discharged its obligations under Article 12.8 to inform the interested parties "of the essential facts under consideration" which formed the basis of the "all others" calculation in time for the parties to defend themselves through a single sentence in final determination. However, absent from this sentence are any facts that led MOFCOM to conclude that resorting to facts available was appropriate or any facts that led MOFCOM to determine that a 44.6 percent CVD rate was appropriate to apply to the unknown, unidentified companies.

27. That the United States may have been able to divine some of the essential facts through guesswork from the information provided is of no consequence here. The burden is on China to disclose the essential facts, not on the United States to guess at them. Moreover, putting that aside, the facts that led China to determine that nonexistent companies that were not subject to the investigation nevertheless could be deemed non-cooperative for not having registered to participate in this investigation remains a mystery to the United States. China does not even attempt to demonstrate that MOFCOM disclosed the essential facts under consideration regarding its calculation of the "all others" subsidy rate.

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

28. As with the U.S. claim regarding the CVD "all others" rate, the issue before the Panel is whether a single sentence is sufficient disclosure under Article 6.9. It plainly is not. China's defense appears to be that MOFCOM could not disclose the essential facts under consideration because doing so would have revealed the business confidential information of the responding companies. However, China does not explain why MOFCOM failed to disclose the facts forming the basis for its decision to apply the facts available in the first place. These facts would not be confidential to the two responding companies, and would include the actions by all other U.S. companies that indicated to MOFCOM that these companies refused access to, or otherwise did not provide, necessary information within a reasonable period, or that they significantly impeded the investigation. Further, China provides no explanation for why MOFCOM could not have publicly summarized the information used or at least identified the calculation methodology it employed.

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

A. Price Effects and Underselling Findings were Critical to MOFCOM's Analysis

29. For the most part China has failed to respond to the arguments of the United States in its first written submission describing how MOFCOM's price effects analysis fails to satisfy WTO requirements. China variously ignores the U.S. arguments, mistakenly claims that they are irrelevant, or attempts to defend the MOFCOM analysis by recasting it.

30. China improperly mischaracterizes MOFCOM's price effects analysis (i) by suggesting, without citing anything from the final determination, that MOFCOM's price effects findings were unnecessary to support its injury determination and by arguing that MOFCOM did not need to make findings on underselling, and did not do so, and (ii) by arguing that it was not obliged to undertake *any* analysis comparing domestic prices with those of the subject imports.

31. The United States explained at length why the conclusions that MOFCOM reached concerning price comparisons were not supported by positive evidence, did not reflect an objective

examination, and consequently were inconsistent with Articles 3.1 and 3.2 of the AD Agreement and Articles 15.1 and 15.2 of the SCM Agreement. China does not challenge or even respond to this U.S. argument, other than mistakenly to contend that it is irrelevant because MOFCOM made no findings whatsoever on comparative prices. In so doing, China has essentially conceded that there is no positive evidence to support a finding that prices for the imports under investigation were lower than prices for the domestically produced product at any time during the period of investigation.

B. MOFCOM's Findings of Price Depression are Inconsistent with AD Agreement Articles 3.1 and 3.2 and SCM Agreement Articles 15.1 and 15.2

32. Contrary to China's current argument, MOFCOM did not rely exclusively on import volume to explain the domestic industry's price declines. Instead, it stated that the imports caused price depression because of their low prices, notwithstanding China's repeated statements that MOFCOM did not conduct a "price undercutting" analysis. We have previously demonstrated that there is no positive evidence supporting any finding that the imports were priced below the levels of the domestic product, and that any such findings could not have resulted from an objective examination. China has not attempted to rebut these claims.

33. China criticizes the United States for overlooking price depression that supposedly occurred in "late" 2008. MOFCOM, however, never made a finding that price depression occurred in 2008. Even accepting *arguendo* China's contention, any finding of price depression during "late" 2008 would not reflect an objective examination. China now argues that MOFCOM conducted a quarterly analysis for domestic price levels during 2008. MOFCOM's use of quarterly data for 2008 only for the purpose of examining domestic price levels "was selective and provided only a part the picture" of what might have caused any pricing declines in the fourth quarter. It was not consistent with of an objective examination of the data.

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

34. China's arguments defending MOFCOM's findings of price suppression in 2008 fail to address the defects in the analysis MOFCOM conducted. Materials China introduced to the Panel in connection with the first written submission raise serious questions about whether MOFCOM's analysis of changes in the "price-cost differential" was objective.

35. MOFCOM's stated reason for finding that the increasing ratio of costs to sales revenues in the first quarter of 2009 was the effect of the subject imports was the purported "low price" strategy adopted by the importers under investigation. As we have explained, there is no positive evidence that the imports followed a "low price" policy and China does not even attempt to defend this finding.

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

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

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

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

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

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

38. China's argument that the price effects analysis was unnecessary to MOFCOM's conclusion of causal link cannot withstand even casual scrutiny. As we explained, the price effects findings were an essential element of MOFCOM's causal link analysis. Because MOFCOM's analysis of price effects does not satisfy the requirements of the AD and SCM Agreements, China has failed to demonstrate that dumped or subsidized imports are causing injury, as required by Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement.

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

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

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

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

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

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

ANNEX E-2

EXECUTIVE SUMMARY OF THE SECOND
WRITTEN SUBMISSION OF CHINA

I. INTRODUCTION

1. This submission focuses on clarifying the issues, legal arguments, and facts before the Panel at this stage in the proceeding. In addition, the submission identifies omissions, mischaracterizations, and concessions by the United States in its various submissions of the facts and analysis in the underlying investigations. It remains China's position that the determinations of dumping, subsidization, and injury made by the authorities in the underlying investigation were consistent with the relevant obligations of the *SCM Agreement* and *AD Agreement*. The United States has not provided any support for the Panel to find these determinations to be inconsistent with China's obligations.

II. ARGUMENT

A. The United States Has Struggled To Reconcile Its Claims About Initiation Under Article 11 Of The *SCM Agreement* With The Applicable Standard, Its Burden Of Proof, And The Facts Of This Case

1. U.S. efforts to distinguish the standards under Article 5.2 of the *AD Agreement* from Article 11.2 of the *SCM Agreement* are unpersuasive

2. The United States seeks to discredit China's reliance on panel reports interpreting Article 5.2 of the *AD Agreement* in describing the applicable standard under Article 11.2 of the *SCM Agreement*. The U.S. position appears to be that the standard under Article 11.2 of the *SCM Agreement* is somehow more stringent than the standard under Article 5.2 of the *AD Agreement*. China disagrees with this interpretation and finds the textual distinctions upon which the U.S. posits this argument to amount to little practical difference between the two provisions. Indeed, if there is any difference, it is in the particularity of the evidence that must be presented under Article 5.2 of the *AD Agreement*, which provides a much more precise description of the type of evidence that is required to accompany an application.

3. China submits that reliance on panel interpretations of Article 5.2 of the *AD Agreement* in discussing the appropriate standard under Article 11.2 of the *SCM Agreement* is both valid and directly on point. Although the United States wishes to read more into Article 11.2 of the *SCM Agreement*, both the text and context of that provision confirm that the only requirement is that the application contain "sufficient evidence" as opposed to any analysis of that evidence. The application in the underlying proceeding met this standard.

2. The United States has largely failed to advance its initiation arguments beyond simple assertions of "no evidence"

4. It is the United States' burden to present its case. Applying well-accepted principles, the Appellate Body has confirmed that a complaining party must make out a *prima facie* case by presenting sufficient evidence to raise a presumption in favor of its claim. The 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. It seems axiomatic that if a complaining party "may not simply submit

evidence and expect a panel to divine from it a claim of WTO-inconsistency," or "simply allege facts without relating them to its legal arguments," it should not be able to simply assert facts without relating them to the evidence presented. The United States, however, has largely failed to move beyond simple assertions of "no evidence" contained at paragraph 78 of its First Written Submission for each of the 11 challenged subsidy allegations. In most instances, it has not even addressed the evidence and documentation directly cited in the petition.

3. The initiation of investigations into the 11 challenged allegations was consistent with Articles 11.2 and 11.3 of the *SCM Agreement*

5. China reiterates that initiation of investigations into the 11 challenged allegations was consistent with Articles 11.2 and 11.3 of the *SCM Agreement*. For purposes of Article 11.2 they adequately met the obligations of that provision in terms of providing information reasonably available to the applicant that addressed the subject matter of Article 11.2(iii), and namely information related to financial contribution, benefit, and specificity. The evidence provided by the applicants further comports with the Article 11.3 standard. The objective at initiation is not to resolve all issues of fact and law. "An . . . investigation is a process where certainty on the existence of all the elements necessary in order to adopt a measure is reached gradually as the investigation moves forward." Consistent with that understanding "the quantity and quality of the information provided by the applicant need not be such as would be required in order to make a preliminary or final determination . . . ." China contends that the application met this standard, and that an unbiased and objective investigating authority would have found that the application contained sufficient information to justify initiation.

B. 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*

1. The basis of the United States claims about the non-confidential summaries remains unclear

6. It remains unclear from the U.S. argument what provisions of Article 6.5 and 6.5.1 of the *AD Agreement* and 12.4 and 12.4.1 of the *SCM Agreement* China has supposedly violated. The United States appears to have changed its focus from the adequacy of the non-confidential information in allowing parties "a reasonable understanding" of the confidential information to whether or not there was "a link" between the non-confidential information and the redacted confidential information. In addition, the United States claims that even if the methodology used by petitioners to provide an adequate non-confidential summary were acceptable under the Agreements, "interested parties" should not be required "to piece together information" in order to understand the "substance of the confidential information." But the United States has not explained why the non-confidential information actually provided did not allow a reasonable understanding of the confidential information in the petition.

2. Articles 12.4.1 of the *SCM Agreement* and 6.5.1 of the *AD Agreement* are focused on whether the non-confidential summaries allow parties a reasonable understanding of the confidential information submitted and not on the form or placement of such summaries

7. Article 12.4 of the *SCM Agreement* and Article 6.5 of the *AD Agreement* set forth the standards to be applied when confidential information is submitted as evidence in an investigation. The Articles are concerned with ensuring that: (1) confidential information can be used in investigations without risk of disclosure adverse to the submitting party; (2) there is a legitimate reason for authorities to classify information as confidential; and (3) parties other than those

submitting the confidential information have a reasonable understanding of the confidential information submitted by virtue of a non-confidential summary. Contrary to U.S. suggestions, nowhere in Articles 12.4, 12.4.1, 6.5 or 6.5.1 do the *SCM* and *AD Agreements*, respectively, do those provisions address the issues of what constitutes an adequate non-confidential summary, whether and how such a non-confidential summary needs to be identified, or what form the non-confidential summary should take. The United States has failed to address China's arguments based on the facts of this investigation that the non-confidential information provided was sufficient to provide a reasonable understanding to other parties of the confidential information submitted.

3. The approach used in the proceedings at issue to present confidential information in a non-confidential format was adequate to permit a reasonable understanding of the confidential information

8. Although it does not appear that the United States is continuing to contest the adequacy of the non-confidential summaries, the United States now appears to be arguing that it cannot understand the non-confidential summaries because they are in the substantive portion of the text of the petition (Part I) rather than in the portion of the text which describes the categories of information for which confidential treatment is sought and which makes the request for confidential treatment. This issue is irrelevant to the sufficiency of the actual non-confidential summaries and the ability of a party to understand the factual support for the allegations in the petition. The fact that the non-confidential information is set forth in the very same portion of the petition which contains the corresponding confidential information would seem to undermine the U.S. claim. Moreover, neither of the relevant Articles from the *AD* and *SCM Agreements* addresses the principal issue raised by the United States, namely that the formula or form used to present the non-confidential summaries made it difficult to link the non-confidential information with the confidential information being summarized. In any case, this claim is without factual support. The approach taken by petitioners was really quite simple, straight forward, and clear. Indeed, it is difficult to see how much more obvious the link could be between the confidential and non-confidential information.

C. MOFCOM's Disclosure Of How It Calculated The Margins of Dumping Met The Standard Under Article 12.2 Of The *AD Agreement*

1. Article 12.2 does not require an authority to disclose the specific numbers used to calculate the margins of dumping

9. There is no requirement under Article 12.2 that an authority disclose the details of the calculations of the margins of dumping. Article 12.2.2 requires disclosure of "all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures." The United States has not provided the Panel any basis in the *AD Agreement* to conclude that China's disclosure of the methodology used to determine the margins of dumping and the specific sources of the information used in the actual calculations does not constitute disclosure of "all relevant information on the matters of fact and law." As such, given the absence of any legal or interpretive basis for the U.S. claim, China believes that the U.S. claim must fail. Given that the claim should have been properly brought under Article 6.9 and not Article 12.2, the U.S. claim must also fail.

2. MOFCOM's disclosure was sufficient to allow the U.S. respondents to both protect their interests and to replicate the authority's calculation

10. Since the U.S. claim is not supported by any requirement imposed by the relevant Articles of the *AD Agreement*, it relies on an argument that the disclosure was insufficient to allow the U.S. respondents to adequately protect their interests in the investigation. This claim is wrong as a matter of fact. In its disclosure, China provided the details of its calculation methodology and the source of

all of the data used in making the calculation of the margins of dumping. This disclosure enabled the respondents to comment on both the methodology used (e.g did the authority use the correct starting price) and the underlying data applied to the methodology. It also enabled respondents to challenge as being incorrect both the methodology used and the application of the methodology based on the source of the data used for the calculation of each element of the margins of dumping. The disclosure in fact allowed respondents to replicate and check the accuracy of the calculation.

D. MOFCOM Application Of Facts Available With Respect To The Government Purchase Of Goods Program Was Consistent With Article 12.7 Of The *SCM Agreement*

1. The company respondents failed to provide necessary information

11. In its initial questionnaire in the underyling proceeding MOFCOM requested that the company respondents provide transaction data for sales of all steel products over the period of investigation ("POI"). The United States cannot contest that ATI provided no transaction data at all, and AK Steel only belatedly provided POI data on GOES, a very small subset of all POI sales, 126 days beyond the final extended deadline for submission for that information and only three business days before verification. Instead, the United States continues to distract and insist that the scope of information deemed "necessary" by MOFCOM for purposes of the Government Purchase of Goods program included 15 years of information. But the United States has not articulated any purpose under Article 12.7 of the *SCM Agreement* for the fact it is trying to assert – that the application of facts available turned on the company respondents' failure to provide 15 years of data.

12. Although the United States argues about when MOFCOM made known its detailed considerations with respect to its subsidy analysis, the only obligation under the *SCM Agreement* relates to ensuring a clear articulation of the information required by the investigating authority to render its determination. In the underlying proceeding the company respondents knew exactly what MOFCOM was requesting from them. Even if one assumes that beyond an obligation to adequately explain what information is required, an investigating authority must articulate a more detailed explanation of the types of subsidies it is considering in conjunction with its requests, the United States has no argument. The record reflects that MOFCOM made this known as well.

13. The United States has advanced its Article 12.7 claim with respect to the application of facts available to the government purchase of goods program without any foundation for explaining why MOFCOM's choice to apply facts available was inappropriate. MOFCOM made clear in its investigation that it was considering indirect subsidies as contemplated by GATT Article VI.3 and therefore required information on intermediate sales to government contractors and information on sales of non-subject merchandise. The United States has neither brought a substantive claim under GATT Article VI.3, nor has it offered any contextual analysis of GATT Article VI.3 to help define its Article 12.7 claim. Under the circumstances, there is no basis for the Panel to even begin considering whether the requested information was "necessary" in the sense of Article 12.7.

2. The company respondents refused to cooperate to the best of their ability and thereby seriously impeded the investigation

14. Despite the respondents' clear understanding of what MOFCOM sought, they chose to largely ignore MOFCOM's requests for information. Neither respondent made any specific request for an extension of time in which to provide the requested information, indicated that they were preparing the information, or that compilation of the requested information was too difficult. The United States has done very little to address the implications of the underlying record. In summary, the company respondents failed each element of paragraph 3 of Annex II of the *AD Agreement*, which both parties agree is relevant here. They failed to provide information that was: (1) verifiable; (2) appropriately

submitted so that it can be used in the investigation without undue difficulties; (3) supplied in a timely fashion, and, where applicable; and (4) supplied in a medium or computer language requested by the authorities. Where a party fails to satisfy three, and sometimes four, of these elements, an authority is entitled to resort to facts available.

3. MOFCOM's choice of facts available was reasonable under the circumstances created by the respondents

(a) The company respondents were responsible for creating a factual void in the record

15. The company respondents' non-cooperation produced a critical factual void in the record, not by coincidence, but by the calculated choices of the company respondents. There is no other reasonable interpretation of the record evidence. ATI did nothing at all and AK Steel provided only a partial response extremely late in the investigation. In any case, the AK Steel response was still selective. Having provided a full customer list earlier, but with none of the additional quantity and value details that MOFCOM needed to prioritize and evaluate that information, this time AK Steel provided some detail for GOES (that could have been provided months earlier), but no detail at all for other steel sales. MOFCOM knew from the customer lists that AK Steel had many more customers for steel products other than GOES. MOFCOM also knew from the various responses that sales of GOES were a small portion of total AK Steel sales of steel products. Yet AK Steel still refused to provide any meaningful information about the sales other than GOES sales. The United States has not addressed these points to any significant degree in this proceeding. It has simply maintained that the respondents cooperated. Given the record, MOFCOM was entitled to a very different conclusion.

(b) MOFCOM was entitled to infer a less favorable fact than those positioned before MOFCOM through the company respondents' calculated non-co-operation

16. Article 12.7 is intended to ensure that the failure of an interested party to provide necessary information does not hinder an agency's investigation. It is designed to address circumstances in which respondents seek to "game" an investigation result by granting the authority the ability to incentivize cooperation through the application of certain facts, even if those facts are "less favorable" than other facts that might be available. Indeed, authorities may draw certain inferences – plainly adverse -- from that failure to cooperate, and the breadth of inferences available grows commensurate with the level of non-cooperation. Absent this discretion, the investigative process would grind to a halt. The United States has not contested this understanding of Article 12.7.

17. As explained in China's First Written Submission, MOFCOM had four alternatives before it: (1) find 0% utilization; (2) find 29% utilization based on the AK Steel 10-K report; (3) find some other degree of utilization; or (4) find 100% utilization, as it did in the preliminary determination. In the final analysis, MOFCOM had to choose among these alternatives and 100% utilization proved to the must reasonable under the circumstances of the respondents' non-cooperation.

18. China reiterates that respondents who willfully and strategically create a factual void in the record should not be allowed to benefit from that non-cooperation under Article 12.7 of the *SCM Agreement*. To allow such an outcome would undermine the entire purpose of the investigation and allow respondents to manipulate the process by withholding unfavorable information in a calculated manner. Indeed, such manipulation is seen on the face of the U.S. argument. The United States effectively argues that because AK Steel chose to provide insufficient and unusable sales data to MOFCOM with which to investigate the program at issue, Article 12.7 of the *SCM Agreement* requires MOFCOM to accept that no more than 29% of AK Steel's sales can be found to be related to the program at issue. In other words, MOFCOM should be forced to use this information because

sales data is unique and no secondary source exists. This could not have been the intent of the Members in drafting Article 12.7 or Annex II of the *AD Agreement*.

E. MOFCOM Properly Analyzed The Adverse Price Effects From The Subject Imports

19. The record from the underling proceeding shows that domestic prices were falling at the end of 2008 and early 2009. Domestic prices were not covering the increasing costs, and so profitability was falling in 2008 and early 2009. These facts are not in dispute, so the United States tries to shift the focus of its pricing arguments. But the U.S. emphasis is simply an effort to hide a fundamental weakness in its overall case: MOFCOM did rely heavily on adverse volume effects as part of its overall injury findings, and the United States has nothing really to say about these adverse volume effects and so has not challenged these findings. But it is against this context that MOFCOM also found the adverse price effects – both price suppression and price depression – that the United States has made the centerpiece of its claims.

1. MOFCOM properly found price depression and price suppression

20. The key facts are not really in dispute. Domestic prices began to decline in late 2008 and continued to decline sharply in early 2009. Similarly, average domestic prices over the full year 2008 did not increase enough to match the rising costs so profitability, and the falling domestic prices in early 2009, put even stronger downward pressure on domestic industry profitability. These facts support the MOFCOM findings of price depression and price suppression in 2008 and early 2009.

21. Since the United States cannot dispute these key facts, it has tried to shift the focus to price undercutting. Since the United States has no factual or legal basis to challenge MOFCOM's findings of price depression, the United States instead tries to graft price undercutting findings onto the price depression findings, and then attack the price undercutting findings. This U.S. argument is flawed on many levels, and should be rejected.

22. First, price depression can occur with or without price undercutting. The two concepts are factually and legally distinct. Price depression occurs whenever domestic industry prices are declining. Price depression does not depend on any comparison with subject import price levels; it focuses exclusively on the trend in domestic prices. It is this decline in domestic prices that Article 3.2 and Article 15.2 recognize as an adverse price effect. Second, price depression can result from the volume of subject imports. The United States implicitly admits as much, when it argues that the price depression "was not solely because imports were increasing."

23. The U.S. arguments also reflect a misunderstanding of price suppression analysis. Price depression focuses on domestic industry price trends alone. Price suppression goes one step further, and considers domestic prices trends relative to changing costs. Price suppression analysis recognizes that even when prices are going up, there can still be adverse price effects. If prices are going up because costs are also going up, but prices are being "suppressed" and not allowed to increase enough to cover rising costs, Article 5.2 and Article 15.2 recognize such price suppression as an adverse price effect. The United States now complains that MOFCOM did not disclose any information about the changing costs. But these complaints do not really address the issue of price suppression – the price-cost squeeze that MOFCOM documented for both 2008 and early 2009.

24. Perhaps recognizing the weakness of its arguments about both price depression and price suppression, the United States tries to slip into its arguments the notion of causation – that even if price depression and price suppression was occurring, these adverse price effects were not caused by subject imports. For purpose of the claims under Article 3.2 and Article 15.2, however, this approach is legally incorrect. These provisions require only the showing of the existence of the adverse price

effects – the declining prices (price depression), or the price-cost squeeze and declining profitability (price suppression) – and do not require any explanation as to the causes of these adverse price effects.

2. MOFCOM had no obligation to find price undercutting

25. The United States concedes that an authority can find adverse price effects without finding price undercutting. The concession is worded strangely – "we do not disagree" – but the concession has been made nonetheless. But the United States selectively quotes from *EC – Salmon* to suggest price undercutting analysis is "necessary." A full reading of the selected passage stands for something very different. In any event, the MOFCOM determination certainly discussed the issue of relative prices – as the United States repeatedly has pointed out – so there is no issue whether price undercutting was "considered" at some level. After considering all the facts, MOFCOM chose to base its determination on price depression and price suppression.

26. China also disagrees with the panel in *EC -- Salmon* that price undercutting must be considered. The text of both Article 3.2 and Article 15.2 use the key term "or." In other words, the authority "shall consider" either price undercutting or price depression or price suppression. Nothing in the text suggests that all three must each be considered. Given the interpretative significance of this key term "or," the United States is wrong to assert that analysis of price undercutting is "essential to a complete analysis of price effects." Such a view is at odds with the text and at odds with the absence of any requirement for the authorities to use any particular methodology. China recognizes that an authority could reasonably chose to consider price undercutting as part of its analysis; but the authority has the discretion under Article 3.2 and Article 15.2 to consider or not consider price undercutting.

3. Any concerns about price undercutting do not affect MOFCOM's conclusions about price depression or price suppression

27. As discussed above, price depression and price suppression analysis does not depend on the relative prices of domestic product and subject imports. Both price depression and price suppression can occur regardless of whether subject import prices are higher or lower than domestic prices. To this end, U.S. efforts in response to a question from the Panel to use its arguments about price undercutting to attack the MOFCOM findings on price depression and price suppression fail. The United States is confusing the mention of "low price" with specific findings of price undercutting.

28. The U.S. argument is really that MOFCOM did not exercise its discretion to conduct more detailed analysis than that required by Article 3.2 and Article 15.2. The United States appears frustrated that MOFCOM did not engage in analysis of "transaction prices." Although authorities could certainly choose to do so, they are not required to do so. MOFCOM did not pursue specific findings on price undercutting in this particular case because it did not believe such findings were the most appropriate analytic tool given the data available in this case. Moreover, MOFCOM also had to take into account the fact that it would be conducting analysis based on cumulated subject imports, so that any transaction specific data would be blurred and obscured with combined on a cumulated basis. For both of these reasons, MOFCOM focused the broader measure of average prices as reflected in average unit values.

29. Thus, given the data available in this case, MOFCOM properly exercised its discretion to make:

- Specific findings of price depression, based on the facts that domestic prices (as measured by average unit values) began to fall in Q4 2008 and fell more sharply in Q1 2009.

- Specific findings of price suppression, based on the facts that domestic prices did not increase enough in 2008 to cover rising costs, leading to a drop in per unit profits, and domestic prices fell in Q1 2009 exacerbating the drop in per unit profits.
- The general observation that subject import prices were "low" and were "lower than" domestic prices throughout the period.

30. All of these findings are fully supported by the evidence on the record before MOFCOM, and can be seen in both the MOFCOM determinations and in other public documents on the record of this investigation.

F. MOFCOM Properly Analyzed The Ways In Which Subject Imports Caused Material Injury To The Domestic Industry

1. Causal link

31. Essentially, the United States argues that because of its concerns about MOFCOM's lack of any specific findings on price undercutting – analysis that the United States has conceded is not required – then the price effects findings fail and thus the overall finding of a causal link also fails. This U.S. argument ignores the unchallenged findings about adverse volume effects – the significant increase in subject imports and their significant gain of market share. This U.S. argument also ignores the distinct findings on price depression (domestic prices declined) and price suppression (prices did not cover costs, so per unit profits also fell), both of which stand regardless of any price undercutting (the relative prices of subject imports and domestic products). It is hard to see how issues about an optional analysis of price undercutting trump these undisputed volume and price effects that establish a sufficient causal link.

32. Prior panels have deferred to the authorities when assessing claims that the authorities improperly found a causal link. Given the number of aspects of the causal link analysis that the United States has not challenged at all, it is hard to see how one could conclude that MOFCOM "could not" reach the conclusion of causal link that it found here. Increasing volumes of dumped and subsidized imports were taking significant market share away from the domestic industry, and this loss of volume was causing undisputed material injury to the domestic industry. Regardless of the arguments about certain aspects of price effects, the MOFCOM finding on causal link should stand.

2. Non-attribution

33. MOFCOM fully complied with the obligations in Article 3.5 and Article 15.5. First, MOFCOM did "examine" the change in domestic industry capacity. Any implication in the U.S. argument that China did not examine this factor is simply incorrect. Second, MOFCOM fully addressed this issue. It rejected respondents' arguments that the expansion of domestic industry capacity was causing the injury. Third, although MOFCOM could have stopped its analysis by simply noting the respondents' factual premise was incorrect, MOFCOM went further and ensured that it did not "attribute" any effects of the change in domestic industry capacity to subject imports. MOFCOM ensured non-attribution by comparing the relative trends to see whether there was any correlation in the trends that would suggest some adverse effects being improperly attributed. This analysis thus confirmed what MOFCOM had already found – that increased domestic capacity was not the problem, but rather subject imports were the problem.

34. In its arguments on this issue, the United States is confusing two distinct issues. The first issue is what arguments the respondents made to MOFCOM, and how MOFCOM responded to those arguments. But MOFCOM is properly within its discretion to evaluate the issue in light of the facts and arguments before the authorities. The second issue is what the United States must now present to establish a *prima facie* case for its claim. The U.S. argument on this issue is little more than to disagree with the various statements made by MOFCOM in its determination. But each of MOFCOM's findings was correct and supported by the record.

35. The U.S. claim on non-attribution also suffers from other factual and legal defects. The United States has improperly re-characterized the nature of the alternative cause at issue here. It has shifted its argument to "overproduction," and "production growing far more rapidly than demand," even though these arguments about excess production had never been presented to MOFCOM during the investigation. MOFCOM addressed the alternative cause that respondents had raised – excess capacity – and it is improper for the United State now to propose an alternative cause that had never been raised before the authorities.

36. The United States has also tried to dismiss China's argument about domestic capacity expanding less than the total domestic consumption, claiming this fact cannot be "verified from any information MOFCOM disclosed." Yet this statement is incorrect. MOFCOM made a specific finding that there was still a "gap" between domestic industry capacity and total domestic consumption.

37. Beyond these factual defects, the U.S. arguments also suffer from a fundamental legal defect – the United States has at most proposed an alternative explanation for one aspect of domestic industry performance. As other panels have found, such an alternative explanation is not enough, finding inadequate non-attribution arguments that do no more than posit an alternative explanation or a partial explanation for the condition of the domestic industry. This Panel should do the same, and reject the U.S. claim under Article 3.5 and Article 15.5.

III. CONCLUSION

38. For the reasons set forth in this submission, China requests the Panel to issue findings and recommendations consistent with the arguments presented in China's First Written Submission and those set forth above, and uphold the determinations and measures at issue.

ANNEX F

ORAL STATEMENTS OR EXECUTIVE SUMMARIES THEREOF, OF THE PARTIES AT THE SECOND SUBSTANTIVE MEETING

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ANNEX F-1

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

I. MOFCOM's CVD Initiation Was Proper

1. The key issue is whether the application contained "sufficient evidence" under Article 11.2 and 11.3 of the SCM Agreement for purposes of initiation. In its first submission China addressed both the factual evidence contained in the application with respect to the various allegations and the relevant legal standard to confirm that initiation was proper. We demonstrated that there was sufficient evidence to commence an investigation. In many respects the United States is really delving into the ultimate merits of the allegations from the standpoint of a preliminary or final determination, not whether the allegation was supported by sufficient evidence for the limited purposes of initiation. China also disagrees with U.S. characterizations regarding what constitutes evidence of specificity, financial contribution, and benefit.

II. MOFCOM's Application Of Facts Available Under The Government Purchase of Goods Program Was Justified

2. Let me turn to U.S. claims regarding the application of facts available in the CVD investigation with respect to the government purchase of goods program. There are four fundamental issues to address. First, was MOFCOM's request for information clearly articulated? Second, what was the scope of "necessary information" for which MOFCOM had to fill gaps with facts available? Third, did the respondents seriously impede the investigation by failing to provide necessary information? Fourth, were the foundations of MOFCOM's choice of 100 percent utilization rate legitimate and contemplated under Article 12.7 of the SCM Agreement?

3. On the first point, China acknowledges that MOFCOM has an obligation to articulate clearly its requests for information. This point is reflected in Article 12.1 of the SCM Agreement, but more on point with respect to the U.S. claim under Article 12.7 of the SCM Agreement, this point is reflected in paragraph 1 of Annex II of the AD Agreement, which both parties agree is relevant here. In this regard, China explained in great detail in its responses to the Panel's questions not only the clarity with which MOFCOM requested information, but also the respondents' obvious understanding of MOFCOM's requests as early as their initial questionnaire responses. China reiterates that the administering authority has no obligation to articulate to the respondents any detailed theory of subsidization it may be considering during the course of the investigation. MOFCOM clearly articulated its request for information, which was its only obligation under Article 12.7.

4. Moving to the second fundamental issue– the scope of necessary information – the United States has not really advanced a coherent argument to challenge MOFCOM's decision. First, the United States protests a request for 15 years of transaction data, but gets the facts wrong about what was requested in the initial questionnaire that ultimately drove MOFCOM's facts available decision. Moreover, the United States has not articulated any purpose for the fact it is trying to assert – that the application of facts available turned on the respondents' failure to provide 15 years of data. China recalls that the legal claim is that China's application of facts available was inconsistent with Article 12.7 of the SCM Agreement. Even assuming that the application of facts available turned on the respondents' failure to provide 15 years of transaction data, which it did not, what is the legal significance the United States it attributing to its asserted fact? Ultimately, the record shows that the application of facts available did not turn on the respondents' failure to provide 15 years of transaction data in response to the supplemental questionnaire.

5. Moving to the third fundamental issue at play – whether the respondents seriously impeded the investigation – there is no question that this was the case. There was an undeniable, outright refusal to provide information to MOFCOM. By attempting to dictate the terms of MOFCOM's investigation and withholding information, the respondents denied MOFCOM any reasonable ability to verify utilization or calculate any corresponding benefit according to its investigation plan.

6. Ultimately, the United States is reduced to arguing that MOFCOM should have conducted its investigation in a different manner, effectively asserting that respondents have the power to dictate the terms of an investigation even to the extent of denying information when they have the capacity to supply it. Note, however, that the United States never really contends that the information MOFCOM sought was not relevant or in fact necessary. The United States simply contends, with no support, that there was an alternative, perhaps more direct, path. But China believes the most direct and comprehensive path was pursued and MOFCOM had discretion to determine that path. The Panel should also note that the United States has not articulated a single objection to MOFCOM's request for data on all sales that is grounded in some substantive provision of the SCM Agreement. Under the circumstances, absent some other procedural defect related to MOFCOM's efforts at articulating its request, providing enough time, or accommodating any other logistical problems experienced by the respondents that were associated with the request, the Panel must set aside the U.S. Article 12.7 claim.

7. This leads me to the final fundamental issue – whether MOFCOM's application of a 100 percent utilization rate as "facts available" was appropriate and permitted under Article 12.7 of the SCM Agreement. The United States has oversimplified the issue by first presenting the question in the context of a cooperating respondent by claiming MOFCOM was compelled to apply the 29 percent figure from AK Steel's annual report as the only facts available on the record. In *EC – DRAMs*, however, the panel in interpreting Article 12.7 concluded that authorities may draw certain inferences – plainly adverse -- from a failure to cooperate, and the breadth of inferences available grows commensurate with the level of non-cooperation. Part of the analysis is the fact that limited facts are available because the respondents refused to cooperate. Thus, the fact that a 29% figure for a particular grouping of sales appears in an annual report, with no factual basis for concluding it constituted the universe of sales under the program, is not grounds for compelling use of that figure where the respondents so completely refused to cooperate as in the case at issue.

III. MOFCOM's Explanation Of Its Benefit Determination Under the Government Purchase of Goods Program Was Proper

8. The United States continues to argue under Article 22.3 of the SCM Agreement that MOFCOM failed to adequately explain its benefit determination. In doing so, it focuses on isolated words out of context and then mischaracterizes the nature of MOFCOM's determination. First, the United States continues to point out that MOFCOM used the term "competitive bidding process" in its discussion of the Buy American Act to suggest that MOFCOM has somehow conceded the entire benefit issue by using this term. In fact, the obvious context that the United States ignores is that MOFCOM's discussion of the "competitive bidding process" under the program was to demonstrate that name was a misnomer and a fallacy.

9. Second, the United States in its second submission latches on to a new argument made by Korea to claim that MOFCOM's benefit determination did not comply with Article 22.3 of the SCM Agreement because MOFCOM failed to do a proper analysis of the market to establish that U.S. market prices were unusable as benefit benchmarks as required by Article 14(d) of the SCM Agreement. The Panel should view this argument with a great deal of circumspection and caution. Not only is the United States trying to impermissibly bootstrap a substantive claim through its procedural challenge under Article 22.3, it is doing it very late in this process. China addressed all of the U.S. Article 22.3 arguments after the U.S. first submission and it seems the United States believes

it needs to shift the focus. The second submission is the first time the United States broaches the Article 14 issue in any form. Nowhere is this issue raised in the U.S. request for consultations or its panel request.

IV. MOFCOM Properly Analyzed The Adverse Price Effects From The Subject Imports

10. Let me now turn to the injury issues. The factual record from the underling proceeding demonstrates three key trends. First, domestic prices were falling at the end of 2008 and early 2009. Second, domestic prices were not successfully covering the increasing costs, and so profitability was falling in 2008 and early 2009. Third, subject import prices remained relatively low throughout the period. These facts are not in dispute. It is against this factual context that MOFCOM found adverse price effects – more specifically, MOFCOM found both price suppression and price depression. Although the United States has made its attack against these MOFCOM's findings a centerpiece of its claims, the United States cannot avoid the fundamental problems with its attack.

11. The key facts regarding price depression are not really in dispute. Domestic prices began to decline in late 2008 and continued to decline sharply in early 2009, supporting MOFCOM's findings of price depression and price suppression in 2008 and early 2009. Since the United States cannot dispute these key facts, it has tried to shift the focus, but the U.S. argument is flawed on many levels, and should be rejected.

12. First, contrary to the U.S. argument, price depression can occur with or without price undercutting. The two concepts are factually and legally distinct. Second, price depression can result from the volume of subject imports. The text of Article 3.2 and Article 15.2 speak only of "the effect of the [dumped/subsidized] imports on prices," and does not limit itself to a focus on the prices of those dumped or subsidized imports. Third, perhaps recognizing the weakness of its arguments about price depression, the United States tries to slip into its arguments the notion of causation – that even if price depression was occurring, these adverse price effects were not caused by subject imports. For purpose of the claims under Article 3.2 and Article 15.2, however, this approach is legally incorrect.

13. The U.S. arguments also reflect a misunderstanding of price suppression analysis. Price depression focuses on domestic industry price trends alone. Price suppression goes one step further, and considers domestic prices trends relative to changing costs. Price suppression analysis recognizes that even when prices are going up, there can still be adverse price effects. If prices are going up because costs are also going up, but prices are being "suppressed" and not allowed to increase enough to cover rising costs, Article 5.2 and Article 15.2 recognize such price suppression as an adverse price effect.

14. Much of the U.S. argument seems to rest on its dissatisfaction with the manner in which MOFCOM wrote up its findings. MOFCOM noted price depression that began in late 2008, but MOFCOM did not discuss the quarterly data in its public discussion. MOFCOM noted price suppression during 2008, but discussed only per-unit costs. These U.S. arguments focusing on either 2008 or 2009 individually, however, largely ignore the evidence of adverse price effects over the combined period late 2008 to early 2009.

15. Given this well supported MOFCOM findings of price depression and price suppression, it is hardly surprising the United States focused its argument elsewhere, on price undercutting. As we noted in our Second Written Submission, the United States has conceded that an authority can find adverse price effects without finding price undercutting. Moreover, the United States does not even attempt to address in its Second Written Submission the extensive body of WTO panel precedent that has confirmed this legal interpretation. Given that MOFCOM had no legal obligation to find price undercutting, and given that MOFCOM in fact found price depression and price suppression, the U.S. arguments about the failure to disclose information about price undercutting largely miss the point.

16. As we have discussed, price depression and price suppression analysis does not depend on the relative prices of domestic products and subject imports. Both price depression and price suppression can occur regardless of whether subject import prices are higher or lower than domestic prices. The U.S. argument is really that MOFCOM did not exercise its discretion to conduct analysis not required by Article 3.2 and Article 15.2. MOFCOM did not make specific findings on price undercutting in this particular case because it did not believe such findings were the most appropriate analytic tool given the data available in this case, and given the need to consider the cumulative effect of imports from both the United States and Russia. For both of these reasons, MOFCOM focused the broader measure of average prices as reflected in average unit values.

V. MOFCOM Properly Analyzed The Ways In Which Subject Imports Caused Material Injury To The Domestic Industry

17. The U.S. Second Written Submission does not advance any new arguments on the causal link itself, as opposed to its arguments about non-attribution. Once again, the United States has essentially said that since the findings of adverse price effects were incorrect, the finding of a causal link is also incorrect.

18. The U.S. arguments really focus more on other causes, and whether MOFCOM met its obligations in Article 3.5 and Article 15.5 not to attribute the effects of other causes to subject imports. MOFCOM examined the change in domestic industry capacity, and concluded that the domestic industry capacity was not injuring the domestic industry. Any implication in the U.S. argument that China did not examine this factor is simply incorrect.

19. The United States also complains about the way that MOFCOM handled the issue of non-subject import, complaining there was insufficient disclosure and insufficient analysis. These arguments lack any merit. China would like to remind the Panel that these arguments are all completely new. Neither the comments by Allegheny Ludlum after the preliminary determination, nor the comments by the U.S. Government after the disclosure of basic facts said anything about non-subject imports. China finds it rather odd that the United States now presents an argument that was not raised at all by the foreign respondents during the investigation before MOFCOM. Notwithstanding this complete absence of any discussion of this issue by the foreign respondents, MOFCOM did in fact consider this issue.

VI. MOFCOM's Provision Of Non-Confidential Summaries Was Proper

20. Turning now to the issue of non-confidential summaries, the United States still has not met its burden to establish that non-confidential summaries provided in the application were inadequate. As China has previously noted, neither of the relevant articles from the AD and SCM Agreements specify a form or formula for providing non-confidential summaries. The Agreements are concerned only with whether or not the non-confidential summaries allow a reasonable understanding of the confidential information being summarized. In addition, neither of the relevant Articles addresses the principal issue now being raised by the United States, namely that the formula or form used to present the non-confidential summaries made it difficult to "link" the non-confidential information with the confidential information being summarized. Notwithstanding that this is not a requirement in the relevant provisions of either Agreement, this claim is also without factual support.

VII. The United States Has Not Established Any Legal Or Factual Basis For Its Complaint Regarding Disclosure of the Dumping Calculations

21. China must agree to disagree with the United States on MOFCOM's obligations with respect to disclosure of the calculations of the margins of dumping. As addressed extensively and with

specific reference to the texts of the relevant portion of Article 12.2, there is no requirement that an authority disclose the details of the calculations of the margins of dumping. Article 12.2.2 requires disclosure of "all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures." This does not encompass the actual calculations. There is no reference in Article 12.2.2 to the calculation of the margins of dumping. Rather, the only reference to the margins of dumping is in Article 12.2.1(iii) which requires that the margins of dumping established be disclosed in the relevant notice or separate report. The margins of dumping are the results of the comparison of export price or constructed export price with normal value as specified in Article 2.4.2 of the AD Agreement. That is, the margins of dumping are the results of particular calculations done by the authorities pursuant to the rules of Article 2 of the AD Agreement and based on the information provided by respondents. The margins of dumping are not the underlying calculations that lead to the margins. Thus, while Article 12.2.2, by virtue of the incorporation of Article 12.2.1(iii), requires authorities to provide notice of the results of its calculations in the form of notice as to the margins of dumping for each respondent, it does not impose any specific requirement regarding the calculation of those margins of dumping.

ANNEX F-2

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

1. The United States appreciates this opportunity to provide further views on the reasons why China's antidumping (AD) and countervailing duty (CVD) measures on U.S. grain oriented flat-rolled electrical steel (GOES) 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. 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.

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

2. As the United States demonstrated in its previous submissions, China's decision to initiate a CVD investigation with respect to 11 programs was inconsistent with Article 11 of the SCM Agreement, because the application did not contain sufficient evidence to justify initiation of an investigation – and indeed, in many instances, contained no evidence at all for one or more elements of the subsidy claim. China's response is two fold: first, relying on panel reports addressing Article 5.2 of the AD Agreement (not Article 11 of the SCM Agreement), it asserts that it need not demonstrate that evidence was sufficient but rather merely that "raw information" was contained in the petition. Second, it attempts to rewrite the record in an effort to demonstrate that the evidence provided therein meets the standard China has invented.

3. Regarding China's first assertion, as noted in our previous submissions, China's reliance on panel reports interpreting the AD Agreement for its proposition that all that is needed is "raw information" is misplaced. First, the text of the two provisions is different. Whereas Article 5.2(iii) of the AD Agreement requires "information on prices …", Article 11.2(iii) of the SCM Agreement requires "evidence with regard to the existence, amount and nature of the subsidy in question." This difference matters, because the language reflects the fact that the type of evidence that would merit initiation of a CVD investigation – evidence with regard to financial contribution, benefit, and specificity – is distinct from that required to initiate an AD investigation – e.g., "information on prices." The panel reports cited by China are simply not informative of the meaning of the SCM Agreement obligation at issue.

4. China also argues that Article 5.2(iii) of the AD Agreement specifies a precise type of evidence, while suggesting that Article 11.2(iii) of the SCM Agreement does not specify a precise type of evidence. Contrary to what China suggests, Article 11.2 is precise in what it requires. It makes clear that an application must contain "sufficient ... evidence with regard to the existence, amount and nature of the subsidy in question." Thus, Article 11.2 requires "sufficient evidence" with regard to the existence of a financial contribution and benefit, the amount of the benefit, and whether the subsidy is specific.

5. China attempts to distract the panel from the clear language of the SCM Agreement because when applied to the facts it leads to only one conclusion: The evidence contained in the application was insufficient to initiate a CVD investigation for several programs under Article 11 of the SCM Agreement. While China points to various documents to assert otherwise, and in its second written submission even claims that these documents were the type of information described by the United States as sufficient evidence, the facts demonstrate that this is simply not the case.

B. China Failed to Require Adequate Non-confidential Summaries of Confidential Information

6. In its second written submission, China suggests that the United States has "changed its focus" from the adequacy of the non-confidential summaries to "whether or not there was 'a link' between the non-confidential information and the redacted confidential information." China misrepresents the U.S. position. The United States has consistently argued that the non-confidential summaries provided were labeled as such, but were entirely inadequate.

7. Our second written submission details various instances where China's theory of what constitutes an adequate non-confidential summary would require respondents to engage in a fishing expedition to surmise an understanding of the confidential information. For instance, China attempts to rely on percentage changes provided more than 50 pages later in the petition to argue that the redacted information was somehow discoverable from other parts of the petition. Forcing respondents to engage in this highly speculative exercise fails to satisfy the relevant provisions.

8. China also asserts that the AD and SCM Agreements do not provide enough guidance for determining how best to comply with Article 12.4.1 of the SCM Agreement and Article 6.5.1 of the AD Agreement, and that therefore it is free to decide for itself what constitutes an adequate summary. In asserting that there is no guidance for applying Articles 12.4.1 and 6.5.1, China ignores the fact that previous panels and the Appellate Body have found sufficient guidance in Article 12.4.1 of the SCM Agreement and Article 6.5.1 of the AD Agreement to resolve questions regarding what qualifies as an adequate non-confidential summary and when adequate non-confidential summaries are not required. Insofar as China continues to pursue its exceptional circumstances argument, the fact is the applicants provided no explanation as to why there were exceptional circumstances that precluded more detailed summarization. The Appellate Body has held that a statement of reasons why summarization is not possible must be provided in the record. Without a statement on the record of reasons why a more detailed summarization was not possible, China cannot excuse the deficient non-confidential summaries contained in the application. For the above reasons, China breached Article 12.4.1 of the SCM Agreement and Article 6.5.1 of the AD Agreement.

C. China's Resort to and Application of Facts Available is Inconsistent with Article 12.7 of the SCM Agreement

9. China continues to attempt to obscure the issues at hand in its second written submission. China asserts that the U.S. claim under Article 12.7 somehow fails because the United States has not brought a claim under GATT Article VI:3 or otherwise provided an Article VI:3 analysis of China's request for data. There is no GATT Article VI:3 claim within the terms of reference of this Panel. As the United States has made clear, it is challenging China's decision to resort to facts available and its selection of a 100% utilization rate. China's extensive comments regarding GATT Article VI:3 are not germane to that inquiry.

10. Although China claims that the "record speaks for itself", throughout the proceeding China has sought to back away from the very specific instructions contained in its own questionnaires – largely ignoring its own instructions regarding how to respond to irrelevant or inapplicable questions in general and specifically with respect to the government procurement program, denying the over-broad and burdensome nature of its request (while simultaneously conceding that 93% of their request was irrelevant), and re-translating the questions at issue twice in an apparent attempt to somehow prove the clarity of their request. China claims that the quantity and value data it sought in question 4 of its questionnaire was the only information that would have allowed it to test the U.S. companies' factual assertions and confirm the extent of utilization. This is a gross exaggeration. This information at best provided a roundabout way of confirming the extent of utilization. China itself notes that there

was a more direct means of identifying sales transactions that likely were ultimately destined for use in a government project. Specifically, China states that it was likely that the customers in an indirect transaction would request manufacturer's certificates certifying compliance with Buy American provisions. Yet China never asked for any such certificates.

11. Moreover, we note that China's purported need for the requested quantity and value data was to prepare for verification. That is, according to China, the information was to be mined in order to develop a verification strategy. Given this, there was nothing preventing China from using the databases filed in the AD proceedings to develop its verification strategy. Yet China chose not to do so.

12. Finally, we note that China also claims that its selection of a 100% utilization rate was reasonable and "best reflected the 'facts available' on the record", an assertion that strains credulity. First, China asserts that the United States conceded that the correct utilization rate was greater than zero. The United States is unaware of such a concession, and China's only support for such a concession appears to be its own assertions in a previous submission. How China arrived at 100% as a reasonable rate remains a mystery. The application itself, the source of the 29% alternative proposed by one of the U.S. companies, did not support anything close to a 100% utilization rate. All other evidence on the record indicates that even this 29% figure would be adverse. Selecting a 100% utilization rate in light of the customer lists, the petition, the sales databases, and other record evidence was inconsistent with Article 12.7 of the SCM Agreement.

D. China Acted Inconsistently With Its Obligations Under Article 12.2.2 of the AD Agreement

13. China baldly asserts that the United States has pointed to no text in Article 12.2.2 obligating an investigating authority to make available the specific dumping calculations. To the contrary, China simply has ignored the U.S. arguments on this point. China continues to argue that if any obligation to provide the final dumping calculations exists, it resides in Article 6.9 of the AD Agreement, not Article 12.2.2. Article 6.9, however, pertains to disclosure of the essential facts *before* a final determination. The U.S. claim, on the other hand, pertains to the actual *final* dumping calculations. The final dumping calculations performed by an investigating authority cannot be disclosed prior to the final determination.

14. Finally, China continues to claim that the respondents in the investigation were able to replicate and check the dumping calculations. The United States has already explained why China is wrong on this point, and China's claim is undermined by the express request of ATI during the investigation that MOFCOM release its calculations so that ATI would have "the opportunity to review those calculations for mathematical errors and to provide meaningful comments on the methodology MOFCOM used to calculate dumping margins ...." More fundamentally, the obligation of an investigating authority under Article 12.2.2 exists even if the respondent companies are able to replicate some (or even all) of the authority's calculations. Therefore, China acted inconsistently with Article 12.2.2 of the AD Agreement by failing to make available to the two respondent companies the final dumping calculations it performed.

E. The Injury Analysis in MOFCOM's Final Determination was Inconsistent with China's WTO Obligations

15. China's attempts to rewrite MOFCOM's injury determination are inconsistent with the nature of this dispute resolution process. The dispute resolution process concerns the findings the authority actually made, and during Panel proceedings Members may not offer new rationales or explanations to justify their findings. China's argument that the MOFCOM injury determination can be justified on the basis of volume effects alone cannot be reconciled with the determination itself. MOFCOM's

injury determination relied heavily on price effects findings. If the price effects findings are inconsistent with Articles 3.1 and 3.2 of the AD Agreement and Articles 15.1 and 15.2 of the SCM Agreement, MOFCOM's injury determination cannot stand.

16. Moreover, in an attempt to produce positive evidence to support its price effects findings, China's most recent submissions to the Panel rely heavily on findings nowhere made in the MOFCOM determination and evidence never disclosed to the parties. China's actions cannot be reconciled with the obligations of Articles 6.9 and 12.2.2 of the AD Agreement and Articles 12.8 and 22.5 of the SCM Agreement which require authorities to explain their findings and disclose pertinent non-confidential evidence to the parties. As we will explain, China repeatedly flouts this obligation.

17. A prime illustration of how China has tried to rewrite MOFCOM's price effects analysis appears in paragraph 93 of its second written submission. There China asserts that "[t]he subject imports were gaining market share, and the domestic industry reacted with lower prices to stop the further loss of market share. These lower prices then led to the price depression and price suppression that MOFCOM found." This assertion is incorrect in at least four respects.

18. First, it conforms to no finding that MOFCOM actually made. As we have stated repeatedly during these proceedings, MOFCOM's actual findings were that price depression and price suppression were caused by "low" prices of the imports under investigation. Thus MOFCOM's "low price" finding purported to explain price declines during the first quarter of 2009, notwithstanding MOFCOM's admission that the imports under investigation were priced higher than the domestically produced product. China has consistently declined to defend MOFCOM's "low price" findings, which we have contended are inconsistent with Articles 3.1 and 3.2 of the AD Agreement and Articles 15.1 and 15.2 of the SCM Agreement.

19. Moreover, according to the argument that China has made in paragraph 93, the critical point at which prices for the domestically produced product began to fall was the fourth quarter of 2008. In paragraph 121 of its answers to the first set of panel questions, China points to information it asserts is in the MOFCOM record supporting this proposition. However, MOFCOM's Final Determination supplied no data concerning quarterly pricing or price trends during 2008. It provided only annual average unit value data. The finding that MOFCOM actually made was that prices for domestically produced products followed the same trends as those of the imports under investigation. The only data the determination provided concerning the imports were annual average unit value data. MOFCOM's findings concerning domestic pricing patterns cannot be deemed to refer to quarterly data that nowhere appear in the decision.

20. Second, even if MOFCOM had made the finding that China now attributes to it, it is clear that quarterly pricing data for 2008 is a critical element of MOFCOM's analysis of price effects. But MOFCOM provided no quarterly pricing data in its Essential Facts Disclosure. Indeed, China did not provide the 2008 quarterly pricing data MOFCOM purportedly used until it submitted its answers to the first set of panel questions. This information, incidentally, indicates that the trend data can readily be disclosed in a non-confidential summary format. By not disclosing these essential facts to the parties during the MOFCOM investigation, China violated Article 6.9 of the AD Agreement and Article 12.8 of the SCM Agreement.

21. Third, even if MOFCOM can be deemed to have made a finding concerning quarterly price trends in 2008, it did not conduct the objective examination required by Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement. This is because pricing trends would be the only indicator on which MOFCOM would have performed a quarterly analysis for 2008. MOFCOM did not conduct a quarterly analysis of any other factor that would indicate whether price suppression or price depression was the effect of the imports under investigation, as required by Article 3.2 of the

AD Agreement and Article 15.2 of the SCM Agreement. It did not conduct a quarterly examination of import volumes, and it did not conduct a quarterly examination of import prices.

22. Fourth, China's attempted re-framing of MOFCOM's price effects finding is still not supported by positive evidence. According to China's re-framing in paragraph 93 of its second written submission, increasing subject import market penetration required domestic producers to cut their prices in an effort to regain market share. However, the only time during MOFCOM's period of investigation when the domestic industry lost market share was 2008. And during the bulk of 2008, the domestic industry was not cutting prices. Instead, the information China provided in paragraph 121 of its answers to the first set of panel questions – information, we reiterate, that MOFCOM never disclosed during its investigation – indicates that prices for domestically produced GOES increased throughout the first three quarters of 2008. Prices fell only in the fourth quarter, when the volume of the imports under investigation fell from prior quarterly peaks.

23. Furthermore, contrary to what China suggests in its second written submission, it is not correct that under Articles 3.2 and 15.2 the question is simply whether there is "price suppression" or "price depression" in the abstract. The language of those provisions is clear – the question concerns "the effect of" the imports. An examination of the "effect" of imports necessarily involves a causation analysis. The question is then whether imports have the effect of suppressing or depressing prices. Therefore, an investigating authority's failure to establish a causal link between the imports and the price effects is relevant evidence of a breach of Articles 3.2 and 15.2. The cases cited by China for its theory that these articles do not have any causation aspect do not in fact support China's theory. Rather, these cases involved the separate question of a non-attribution analysis. The causation analysis under Articles 3.2 and 15.2 is analytically distinct from a non-attribution analysis, and the EC – DRAMs panel report, cited by China, is fully consistent with the U.S. approach.

24. The only information in the record concerning quarterly import volumes, which is that in CHN-33 which we reformatted in US-41, indicates that the volume of imports under investigation increased most rapidly during the second and third quarters of 2008. These were the same quarters that, according to China, average unit values for domestically produced GOES peaked. By the fourth quarter of 2008, the quarterly volumes of imports under investigation had begun to decline. Thus, the record does not show that the Chinese industry was forced to cut prices to counter rising import volumes. When quarterly import volumes were reaching their peak, so were quarterly domestic average unit values.

25. Moreover, in attempting to attribute the falling average unit value levels during the fourth quarter of 2008 to the imports under investigation, MOFCOM overlooks other data in its record indicating why prices fell during this time. The ATI comments in CHN-31, whose discussion of pricing trends China has cited with approval, explain that raw materials prices for steel declined beginning in October 2008, and the prices for all types of steel – not merely GOES – declined. Indeed, the data in US-41 indicate that average unit values for both the imports under investigation and nonsubject imports declined in the fourth quarter of 2008. By focusing on per-unit profits, without any consideration of the cost components, MOFCOM had no basis to assess whether changes in per-unit profits were simply related to the start-up of Baosteel's new plant.

26. There are additional evidentiary and logical flaws in the price effects analysis that China has presented to the Panel. MOFCOM's price suppression analysis assumed that the GOES industry faced the same cost structure in 2007 and 2008. It did not, because of the entry of a new producer in 2008. As we explained in our second written submission, new steel production facilities frequently face high costs. MOFCOM's failure to examine whether the entry of a new producer in China skewed any comparison of 2007 and 2008 cost data demonstrates a lack of objective examination.

27. China's current arguments on pricing proceed as if there were a self-evident correlation during MOFCOM's period of investigation between the volume of the imports under investigation, the domestic industry's market share, and the domestic industry's price levels. This is not the case. While subject import volumes rose throughout the period of investigation, during some periods – such as 2007 and the first quarter of 2009 – the domestic industry's market share rose, and at other times, such as 2008, it fell. Similarly, as the quarterly data for 2008 indicate, during certain periods when the imports under investigation were increasing their presence in the market, prices for the domestically produced product rose.

28. There is a more fundamental flaw with MOFCOM's stated reason for finding price effects. There is no correlation between "low" prices for the imports under investigation and the domestic industry's market share. We explained in our first written submission why what MOFCOM presented as a comparative analysis of pricing was not an objective analysis because it did not measure prices at all. MOFCOM combined data for all grades of GOES into a single value measure, and combined all annual transactions into a single price point. We also explained why China violated the obligation to disclose essential facts by not disclosing the non-confidential data it had collected concerning price comparisons. China has now attempted to rectify this omission far too late through the chart it provided on the first page of its November 25 submission to the Panel. (We note, however, that this chart does not provide data for the first quarter of 2009.) Under China's calculations, the largest difference between the value of the imports under investigation and the value of the domestically produced product occurred in 2007 – a year that the Chinese industry raised prices, increased profits by over 50 percent, and gained market share. Consequently, the record for the entire period of investigation does not indicate that lower values of the imports under investigation from 2006 to 2008 required the domestic industry to adjust its pricing to preserve market share.

29. With respect to the issue of causal link, China has repeatedly mischaracterized the U.S. arguments and misrepresented the record. In paragraph 109 of its second written submission, China references the "number of aspects of the causal link analysis that the United States has not challenged at all." This statement does not reflect the U.S. position that MOFCOM's price effects findings were essential to its causation analysis.

30. Further in paragraph 109, China makes the statement that "increasing volumes of dumped and subsidized imports were taking significant market share away from the domestic industry, and this loss of volume was causing undisputed material injury to the domestic industry." This statement does not reflect any finding that MOFCOM actually made. It also does not accurately characterize the record. The only period in which the domestic industry lost market share was 2008. During that year, multiple important indicators of industry performance were positive and many rose by double digit percentages. These included output, sales prices, sales revenues, employment, and wages. The industry's pre-tax profit also rose in 2008. This hardly reflects "undisputed material injury."

31. By contrast, during the first quarter of 2009, numerous indicators of domestic industry performance, including operating income, fell. But this could not have been due to loss of volume to the subject imports. The domestic industry's sales quantities and market share were both higher during that period than they were during the first quarter of 2008. China's inability to show any correlation either between import volume and domestic industry market share, or between the domestic industry's market share and its performance, confirms why the price effects findings that we have challenged are essential to the causation analysis. The contrasts between 2008, when the domestic industry's market share declined and its performance was strong, and the first quarter of 2009 when market share increased and performance deteriorated, indicates that the record does not support the notion that maintaining market share was critical to the condition of the domestic industry.

32. China similarly confuses both the record and the U.S. argument with respect to the issue of non-attribution. Our argument is straightforward: there is no positive evidence supporting

MOFCOM's finding that the imports under investigation were the cause of the domestic industry's difficulties during the latter portion of the period of investigation. Specifically, any objective examination of the record would have indicated that the domestic industry's sharp increases in capacity after 2008 resulted in excessive production and inventory overhangs which in turn led to the domestic industry's price and profitability declines. In light of this, the third sentence of Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement required MOFCOM to engage in a non-attribution analysis to ensure it did not attribute to the imports under investigation any injury attributable to other causes. China's failure to conduct any such analysis consequently violated the agreements.

33. China has used a variety of strategies to avoid responding to our arguments. In its first written submission and at the first panel meeting, it contended that MOFCOM was not required to engage in a non-attribution analysis because the United States had not established that causes other than subject imports had "dramatic" effects. As we explained in our second written submission, nothing in the agreements provides that a non-attribution analysis is required only when factors other than subject imports are having "dramatic" effects. Moreover, the agreements place upon the authority, not the parties challenging imposition of duties, the responsibility to assess the effects of other known causes of injury.

34. In its second written submission, China changed its approach and argued that the overproduction and resulting inventory overhang was not a "known" cause of injury because the only arguments submitted to it concerned excess capacity. This argument is baseless. We observe initially that, in its comments on the preliminary determination that appear at CHN-31, ATI references "the supply-demand relation" several times as an alternate cause of injury. Thus, the asserted cause of injury was not merely a change in capacity, but a change in the amount supplied – in other words, excess production. The petitioners clearly understood this, because their response to the ATI comments in CHN-32 directly, albeit inaccurately, referenced the industry's production levels. Moreover, any possible ambiguity in ATI's comments was rectified by the comments of the U.S. Government. As MOFCOM acknowledged at page 72 of its Final Determination, the United States argued that "the more likely cause of any problems experienced by the Chinese producers is the enormous increase in inventories due to the domestic industry's incorrect assessment of demand." Thus, MOFCOM was well aware that excessive production and inventory overhangs were being asserted as an alternative cause of injury.

35. In its November 25 response to the Panel, China attempts to provide a factual basis for MOFCOM's findings. It has not succeeded. We observe initially that China disclosed critical nonconfidential trend data – most notably concerning capacity utilization levels and the level of the increase in capacity – for the first time in that response. While China apparently now believes that such data are necessary for an understanding of the MOFCOM determination, MOFCOM never disclosed these data to the parties. This provides yet another instance of China's violation of its obligations under Article 6.9 of the AD Agreement and Article 12.8 of the SCM Agreement.

36. China's response does not in fact provide positive evidence to support MOFCOM's findings concerning the effects of causes of injury other than the imports under investigation. While we hope to provide a complete written response, we can now summarize why. First, the information China has submitted confirms that the capacity increase was far greater than warranted by increases in domestic demand. China states that there was an average consumption growth of 20 percent per year. Capacity, however, more than doubled between 2006 and 2008.

37. Second, the capacity increase was large not only in relative terms, but also in absolute terms. This can be illustrated by the confidential data China provided comparing the percentage of Chinese demand the domestic industry could supply at the conclusion of the period of investigation with the percentage it could supply at the beginning of the period. Given the magnitude of this increase, the

only way in which the Chinese industry could have obtained full capacity utilization was by displacing the overwhelming majority of both subject and nonsubject imports from the market. China has not provided – and we cannot discern – any economic basis for the proposition that any capacity increase by a domestic industry is reasonable as long as total domestic industry capacity does not exceed national demand.

38. Third, it was not merely capacity, but also production that increased far more quickly than demand. China did not provide the specific confidential data that the Panel requested concerning demand, capacity, production, and inventories. Nevertheless, we have been able to estimate some data for demand, capacity, and production for 2008 by combining the limited confidential data China did provide with the nonsubject import data for 2008 in US-41. Based on our estimates, the record indicates that even if the volume of imports under investigation had not increased by a single ton in 2008, there still would have been substantial domestic industry overproduction – and consequently an inventory overhang – that year.

39. Moreover, China's November 25 submission conspicuously fails to provide any confidential data concerning the first quarter of 2009. Information in MOFCOM's Essential Facts Disclosure, however, indicates that compared to the first quarter of 2008, production increased by 55.23 percent while demand only increased by 12.46 percent. The Chinese industry's decision to increase production by far more than the increase in demand during the first quarter of 2009 cannot be attributed to the industry losing market share to low-priced imports under investigation, inasmuch as the domestic industry gained market share during this period and the imports under investigation were priced higher than the domestically produced product. The Chinese producers' flooding the market with excess production remains the only plausible explanation for the sharp decline.

40. Finally, China has not justified its failure either to discuss in its determination or disclose to the parties during the course of the MOFCOM investigation information about the volume and prices of nonsubject imports. We have explained in our written submissions how China's inactions in this regard violate Articles 6.9 and 12.2.2 of the AD Agreement and Articles 12.8 and 22.5 of the SCM Agreement. China asserts that MOFCOM did not need to provide any discussion of nonsubject imports because no party raised an argument concerning the issue. But parties could not defend their interests and assert arguments because MOFCOM did not disclose – and indeed, China has continued to fail to disclose – the public data on which it relied. The available data in the record that we have provided in US-41 demonstrate that there is no basis for China's suggestion that nonsubject imports were irrelevant to the injury analysis. Instead, during 2008 – the year China has characterized as critical to the MOFCOM pricing analysis – nonsubject imports had a greater volume and lower average unit values than the imports under investigation.

ANNEX F-3

CLOSING STATEMENT OF CHINA AT THE
SECOND MEETING OF THE PANEL

1. We thank the Panel once again for their dedication to this proceeding. In this closing statement China would like to make a few brief points. We expect to address any other issues through the Panel's written questions.

2. First, in our opening statement we highlighted China's concern regarding the U.S. attempt to raise substantive claims through its procedural challenges where those substantive claims are not part of the terms of reference of the Panel. This was in the context of Articles 22.3 and 14 of the SCM Agreement and U.S. arguments about pricing benchmarks. China appreciates the Panel's own attention to this matter through its questions on the first day with respect to Articles 6.9 and 12.2.2 of the Anti-Dumping Agreement and Articles 12.8, 22.3 and 22.5 of the SCM Agreement. We believe Members should be very concerned about attempts to use procedural provisions as a means for challenging the substantive aspects of a measure. We intend to address this more fully in our responses to the Panel's questions.

3. Second, on initiation, we believe the Panel has raised an interesting point about the textual distinction in Article 11.2(iii) with respect to specificity, where that provision uses the term "subsidy" by which one may refer to the definition of that term in Article 1.1, but then uses the term "nature" rather than any more specific association with the legal element of specificity. China believes this is an important point and helps inform the standard to be applied with respect to evidence of specificity found in an application under Article 11. China will address this issue in more detail in response to the Panel's written questions.

4. Let me now turn to what are the more significant issues in this case related to the application of facts available and injury. On facts available China believes the issue has been narrowed to a simple question. Did the respondents adequately respond to MOFCOM's questionnaire. The United States has taken off the table any issue related to the substantive relevance of the requests for information, the factual relevance, and any question related to burdens placed on the respondents. China has discussed the clarity of MOFCOM's requests as reinforced through its deficiency meetings and letter as well as the plain understanding of the respondents with respect to the nature and expectations of MOFCOM's inquiry. Any objective examination of the record leads to this conclusion.

5. On the question of how MOFCOM would or could have used the requested data if it had been provided, China believes the burden is really on the United States to definitively demonstrate that this data was irrelevant or not useful to the investigation. But, in a situation when the requested information was not even provided, China does not see how U.S. arguments can gain any traction here. China is forced to engage in hypothetical responses about how the information could or would be used in the investigation. All of its uses in this regard will never be known because the respondents deliberately withheld the information. The investigation may have headed down other paths had the respondents in fact done something when they were asked. The United States seems to divine what these paths should or could have been, or what might have been a "better approach." These are not valid arguments. First, the U.S. is not the investigating authority. Second, these are post hoc arguments offered in the face of the respondents refusal to provide the information – a refusal clearly based on their belief regarding the legal relevance of the information, which is an issue the United States does not challenge in this proceeding. Nonetheless, China has explained that, at a minimum, the prospect of assembling AUV time series by product and client would allow MOFCOM

to ask further questions about particular sales that exhibited characteristics indicating utilization – including higher than typical price and/or concentration of such prices around particular customers.

6. On the question of injury, simply stated the United States is pressing the Panel on a series of alternative explanations to explain why MOFCOM's explanation does not suffice. But China would remind the United States of the standard of review involved in this proceeding. The fact that the United States can imagine alternative explanations to the facts in no way renders MOFCOM's explanation WTO inconsistent. It is the Panel's obligation to determine if MOFCOM's explanation was reasonable, not whether there were other reasonable explanations or whether a given alternative explanation sounds better. Even if the United States has offered a reasonable alternative explanation – or even if the U.S. explanation is better – that is not enough. The U.S. alternative explanation must so much better as to render the MOFCOM explanation unreasonable. We submit that the U.S. arguments on price effects and causation in this case do not meet that standard. Even given the U.S. arguments, the MOFCOM explanation stands as a WTO consistent explanation of the factual record before MOFCOM.

7. This concludes China's closing statements. Thank you again for your time.

ANNEX F-4

CLOSING STATEMENT OF THE UNITED STATES AT THE
SECOND MEETING OF THE PANEL

1. Mr. Chairman, Members of the Panel. The United States would like to begin by thanking you and the Secretariat for your efforts in the preparation for and conduct of this hearing.

2. We hope that the discussion held here yesterday and today has assisted the Panel in enhancing its understanding of the issues before it in this case. We look forward to elaborating on our comments in further written submissions.

3. Before these hearings formally close, the United States would like to make a few brief comments.

4. First, while there was limited discussion of the U.S. disclosure claims at this meeting of the Panel, we wish to highlight MOFCOM's repeated failure to disclose essential non-confidential information to the parties during its investigation and to provide more than skeletal information in its Final Determination concerning the facts and reasoning central to its determination. This is evidenced by China's repeated submission to the Panel of new information and new justifications for MOFCOM's determination. What China has complained are the shifting U.S. arguments simply reflect our need to confront a moving target. Had MOFCOM disclosed its facts and underlying reasoning, as required by the Agreements, these proceedings could have been far more focused.

5. With respect to initiation, China in its opening statement referred to our claims regarding Article 11 of the SCM Agreement as "a distraction to other matters before the panel." Contrary to China's assertion, Article 11 of the SCM Agreement is not a distraction – it is an obligation that ensures that CVD investigations are not initiated based on frivolous claims. A party should not have to spend time and resources defending unsubstantiated allegations. MOFCOM did not meet the obligations of Article 11 in this instance.

6. With respect to Facts Available, we would like to emphasize that our position is that the U.S. Companies were cooperative and responded MOFCOM's questions on Government Procurement in accordance with the instructions in the questionnaire. Even if the panel does not ultimately share that assessment, the record does not reflect the sort of egregious non-cooperation that China attempts to paint here. Moreover, the information that China claims should have been provided was in a form that, as we explained, could not have done what China purports it would do. Thus, this information could hardly be critical to MOFOCOM's inquiry.

7. Given the companies engagement with MOFCOM on the question of utilization, the limited value of the alleged missing information, and the overwhelming facts showing that the utilization rate (direct or indirect) was zero, an adverse inference that 100% utilization on all sales of all products is not appropriate. At most, the record would support an adverse rate of 29%, which would represent an adverse inference of 100% utilization for the infrasturcture/construction sales, the only sector sales for which the applicant alleged a subsidy.

8. With respect to injury, we have had a great deal of discussion on price effects. We would like to highlight two principal points. First, the Agreements specifically require that any price depression and suppression be significant and be the effect of the subject imports. The Panel should not permit China to read this language out of the Agreements. Second, China's price depression and price

suppression analysis are ultimately dependent on MOFCOM's low price findings. These findings are not supported by positive evidence and do not reflect an objective examination.

9. Finally, we emphasize that even if subject import prices were low, they cannot explain domestic industry price declines in the first quarter of 2009 far greater than necessary to meet import competition, which led to the industry's decline in financial performance. These can be explained only by the massive inventory overhangs that developed due to overproduction. MOFCOM's conclusion that the overproduction and inventory overhang did not cause injury is not supported by positive evidence.

10. The United States would like to conclude by again thanking the Panel and Secretariat for their efforts. We look forward to receiving your written questions and continuing this discussion in future submissions.

ANNEX G

REQUEST FOR THE ESTABLISHMENT OF A PANEL

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ANNEX G-1

REQUEST FOR THE ESTABLISHMENT OF A PANEL BY
THE UNITED STATES

WORLD TRADE ORGANIZATION

WT/DS414/2
14 February 2011

(11-0758)

Original: English

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

Request for the Establishment of a Panel by the United States

The following communication, dated 11 February 2011, from the delegation of the United States to the Chairman of the Dispute Settlement Body, is circulated pursuant to Article 6.2 of the DSU.

On September 15, 2010, the United States Government requested consultations with China pursuant to Article 4 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes (*"DSU"), Article XXII:1 of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994"), Article 17.3 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("AD Agreement"), and Article 30 of the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement").[1] The United States and China held such consultations on November 1, 2010. Unfortunately these consultations did not resolve the dispute.

The United States considers that certain measures of the Government of the People's Republic of China ("China") are inconsistent with China's commitments and obligations under the GATT 1994, the AD Agreement, and the SCM Agreement. The measures impose countervailing duties and anti-dumping duties on grain oriented flat-rolled electrical steel ("GOES") from the United States, and are set forth in Ministry of Commerce of the People's Republic of China ("MOFCOM") Notice No. 21 [2010], including its annexes.

These measures appear to be inconsistent with the following provisions of the AD Agreement, SCM Agreement, and GATT 1994:

[1] WT/DS414/1.

Initiation of the Investigation

1. Articles 11.2 and 11.3 of the SCM Agreement, because:

   (a) The application for a countervailing duty investigation failed to contain information reasonably available to the applicant regarding the existence of a financial contribution, a benefit, or specificity for several of the alleged subsidy programs; and

   (b) There was insufficient evidence in the application to justify the initiation of an investigation for several of the alleged subsidy programs.

Subsidy Rate Determinations

2. Article 12.7 of the SCM Agreement, because China improperly made its subsidy rate determinations based on the facts available. In particular, China was not entitled to reject necessary information submitted by respondent producers. The respondent producers submitted the necessary information in a reasonable period of time, and did not significantly impede the investigation. In addition, China applied facts available in a punitive manner, and disregarded its own findings in doing so.

3. Article 12.8 of the SCM Agreement, because China failed to disclose the essential facts underlying its final determination with regard to the subsidy rates, thus impairing the respondents' ability to defend their interests.

4. Article 22.3 of the SCM Agreement, because China failed to provide in sufficient detail the findings and conclusions it reached on all issues of fact and law it considered material in making its preliminary and final determinations, including with respect to its use of facts available.

All Others Subsidy Rate Determination

5. Article 12.7 of the SCM Agreement, because China improperly applied facts available in determining the duty rate applicable to exporters that were not known at the time of the investigation, including potential "new shippers" and exporters that were not given notice of the information required by the investigating authority. In addition, China applied facts available in a punitive manner, and disregarded its own findings in doing so.

6. Article 12.8 of the SCM Agreement, because China failed to disclose the essential facts underlying its determination regarding the all others subsidy rate, thus impairing the interested parties' ability to defend their interests.

7. Article 22.3 of the SCM Agreement, because China failed to provide in sufficient detail the findings and conclusions it reached on all issues of fact and law it considered material in makings its preliminary and final determinations. China also did not explain why the all others subsidy rate increased from the preliminary determination to the final determination.

Antidumping Margin Determinations

8. Articles 6.9 and 12.2.2 of the AD Agreement, because China failed to disclose the essential facts underlying its determination and make available all relevant information on the matters of fact and law and reasons which led to the imposition of the final measures, thus impairing the respondents' ability to defend their interests.

All Others Dumping Determination

9. Article 6.8 and paragraph 1 of Annex II of the AD Agreement, because China improperly applied facts available in determining the duty rate applicable to exporters that were not known at the time of the investigation, including potential "new shippers" and exporters that were not given notice of the information required by the investigating authority.

10. Article 6.9 of the AD Agreement, because China failed to disclose the "essential facts" underlying its determination regarding the all others dumping rate, thus impairing the respondents' ability to defend their interests.

11. Article 12.2 of the AD Agreement, because China failed to provide in sufficient detail the findings and conclusions it reached on all issues of fact and law it considered in making its preliminary or final determination regarding the all others dumping rate. China also did not explain why the all others dumping rate increased from the preliminary determination to the final determination.

12. Article 12.2.2 of the AD Agreement because China failed to make available all relevant information on the matters of fact and law and reasons which led to the imposition of the final measure.

Explanation of Final Countervailing Duty Determination

13. Article 22.5 of the SCM Agreement because China failed to make available all relevant information on the matters of fact and law and reasons which led to the imposition of the final measure.

Confidential Information

14. Articles 6.4 and 6.5.1 of the AD Agreement, and Articles 12.3 and 12.4.1 of the SCM Agreement, because China failed to provide, or require the applicant to provide, adequate non-confidential summaries of allegedly confidential information. China's treatment of confidential information did not allow the interested parties to obtain a reasonable understanding of the substance of the confidential information prior to the preliminary and final determinations, such that they could prepare presentations on the basis of this information. China did not give any indication that the information could not be summarized and did not provide the reasons why summarization was not practicable.

Injury Determination: Price Effects Analysis

15. Article VI of the GATT 1994 and Articles 3.1, 3.2 , 6.9, and 12.2.2 of the AD Agreement, and Articles 12.8, 15.1, 15.2, and 22.5 of the SCM Agreement, because in its analysis of the price effects of imports under investigation, China did not discharge its obligations to determine whether there had been significant price undercutting by the allegedly dumped imports, whether the effect of such imports was to depress prices to a significant degree, or prevent price increases which would otherwise have occurred to a significant degree. In particular:

(a) China never disclosed several pieces of information critical to its price effects analysis;

(b) China failed to provide in sufficient detail the findings and conclusions reached on all issues of fact and law it considered material and failed to provide the reasons for the

acceptance or rejection of the relevant argument or evidence by the exporters or importers; and

(c) China's findings that the dumped and subsidized imports had significant price effects failed to reflect an objective examination of the evidence in the record and/or are unsupported by positive evidence.

Injury Determination: Causation

16. Articles 3.1, 3.5, 6.9, and 12.2.2 of the AD Agreement, and Articles 12.8, 15.1, 15.5, and 22.5 of the SCM Agreement, in particular:

(a) China's causal link analysis relied on findings that did not reflect an objective examination of the record and/or are unsupported by positive evidence. China failed to examine all relevant evidence;

(b) China never disclosed several pieces of information critical to its causation analysis; and

(c) China failed to provide in sufficient detail the findings and conclusions reached on all issues of fact and law it considered material.

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 anti-dumping or countervailing duty measures to be applied under the circumstances provided for in Article VI of the GATT 19994 and conducted in accordance with the AD Agreement and the SCM Agreement. These measures also appear to nullify or impair the benefits accruing to the United States directly or indirectly under the cited agreements.

Therefore, the United States respectfully requests, pursuant to Article 6 of the DSU, Article 17.4 of the AD Agreement, and Article 30 of the SCM Agreement, that the Dispute Settlement Body establish a panel to examine this matter, with the standard terms of reference as set out in Article 7.1 of the DSU.

ANNEX H

RELATIONSHIP BETWEEN DOMESTIC PRODUCTION AND SUBJECT IMPORTS

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ANNEX H-1

RELATIONSHIP BETWEEN DOMESTIC PRODUCTION AND SUBJECT IMPORTS

[[BUSINESS CONFIDENTIAL INFORMATION]]

[[BCI

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