



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

RECOURSE TO ARTICLE 21.5 OF THE DSU BY THE UNITED STATES

REPORT OF THE PANEL

*BCI deleted, as indicated [***]*

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CASES CITED IN THIS REPORT

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Argentina – Ceramic Tiles	Panel Report, <i>Argentina – Definitive Anti-Dumping Measures on Imports of Ceramic Floor Tiles from Italy</i> , WT/DS189/R, adopted 5 November 2001, DSR 2001:XII, p. 6241
Argentina – Poultry Anti-Dumping Duties	Panel Report, <i>Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil</i> , WT/DS241/R, adopted 19 May 2003, DSR 2003:V, p. 1727
Canada – Aircraft (Article 21.5 – Brazil)	Appellate Body Report, <i>Canada – Measures Affecting the Export of Civilian Aircraft – Recourse by Brazil to Article 21.5 of the DSU</i> , WT/DS70/AB/RW, adopted 4 August 2000, DSR 2000:IX, p. 4299
China – Autos (US)	Panel Report, <i>China – Anti-Dumping and Countervailing Duties on Certain Automobiles from the United States</i> , WT/DS440/R and Add.1, adopted 18 June 2014
China – Broiler Products	Panel Report, <i>China – Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States</i> , WT/DS427/R and Add.1, adopted 25 September 2013
China – GOES	Appellate Body Report, <i>China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States</i> , WT/DS414/AB/R, adopted 16 November 2012, DSR 2012:XII, p. 6251
China – GOES	Panel Report, <i>China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States</i> , WT/DS414/R and Add.1, adopted 16 November 2012, upheld by Appellate Body Report WT/DS414/AB/R, DSR 2012:XII, p. 6369
China – HP-SSST (Japan)/ China – HP-SSST (EU)	Panel Reports, <i>China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes (“HP-SSST”) from Japan / China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes (“HP-SSST”) from the European Union</i> , WT/DS454/R and Add.1 / WT/DS460/R and Add.1, circulated to WTO Members 13 February 2015 [adoption/appeal pending]
China – X-Ray Equipment	Panel Report, <i>China – Definitive Anti-Dumping Duties on X-Ray Security Inspection Equipment from the European Union</i> , WT/DS425/R and Add.1, adopted 24 April 2013
EC – Approval and Marketing of Biotech Products	Panel Reports, <i>European Communities – Measures Affecting the Approval and Marketing of Biotech Products</i> , WT/DS291/R, Add.1 to Add.9 and Corr.1 / WT/DS292/R, Add.1 to Add.9 and Corr.1 / WT/DS293/R, Add.1 to Add.9 and Corr.1, adopted 21 November 2006, DSR 2006:III, p. 847
EC – Bananas III (US)	Panel Report, <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas, Complaint by the United States</i> , WT/DS27/R/USA, adopted 25 September 1997, as modified by Appellate Body Report WT/DS27/AB/R, DSR 1997:II, p. 943
EC – Bananas III (Article 21.5 – Ecuador)	Panel Report, <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 of the DSU by Ecuador</i> , WT/DS27/RW/Ecuador, adopted 6 May 1999, DSR 1999:II, p. 803
EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)	Appellate Body Reports, <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas – Second Recourse to Article 21.5 of the DSU by Ecuador</i> , WT/DS27/AB/RW2/Ecuador, adopted 11 December 2008, and Corr.1 / <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 of the DSU by the United States</i> , WT/DS27/AB/RW/USA and Corr.1, adopted 22 December 2008, DSR 2008:XVIII, p. 7165
EC – Bananas III (Article 21.5 – US)	Panel Report, <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 of the DSU by the United States</i> , WT/DS27/RW/USA and Corr.1, adopted 22 December 2008, upheld by Appellate Body Report WT/DS27/AB/RW/USA, DSR 2008:XIX, p. 7761
EC – Bed Linen	Appellate Body Report, <i>European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India</i> , WT/DS141/AB/R, adopted 12 March 2001, DSR 2001:V, p. 2049
EC – Bed Linen	Panel Report, <i>European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India</i> , WT/DS141/R, adopted 12 March 2001, as modified by Appellate Body Report WT/DS141/AB/R, DSR 2001:VI, p. 2077

Short title	Full case title and citation
<i>EC – Bed Linen (Article 21.5 – India)</i>	Appellate Body Report, <i>European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India</i> , WT/DS141/AB/RW, adopted 24 April 2003, DSR 2003:III, p. 965
<i>EC – Bed Linen (Article 21.5 – India)</i>	Panel Report, <i>European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India</i> , WT/DS141/RW, adopted 24 April 2003, as modified by Appellate Body Report WT/DS141/AB/RW, DSR 2003:IV, p. 1269
<i>EC – Chicken Cuts</i>	Appellate Body Report, <i>European Communities – Customs Classification of Frozen Boneless Chicken Cuts</i> , WT/DS269/AB/R, WT/DS286/AB/R, adopted 27 September 2005, and Corr.1, DSR 2005:XIX, p. 9157
<i>EC – Hormones</i>	Appellate Body Report, <i>EC Measures Concerning Meat and Meat Products (Hormones)</i> , WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, p. 135
<i>EC – IT Products</i>	Panel Reports, <i>European Communities and its member States – Tariff Treatment of Certain Information Technology Products</i> , WT/DS375/R / WT/DS376/R / WT/DS377/R, adopted 21 September 2010, DSR 2010:III, p. 933
<i>EC – Salmon (Norway)</i>	Panel Report, <i>European Communities – Anti-Dumping Measure on Farmed Salmon from Norway</i> , WT/DS337/R, adopted 15 January 2008, and Corr.1, DSR 2008:I, p. 3
<i>EC – Sardines</i>	Appellate Body Report, <i>European Communities – Trade Description of Sardines</i> , WT/DS231/AB/R, adopted 23 October 2002, DSR 2002:VIII, p. 3359
<i>EC – Selected Customs Matters</i>	Appellate Body Report, <i>European Communities – Selected Customs Matters</i> , WT/DS315/AB/R, adopted 11 December 2006, DSR 2006:IX, p. 3791
<i>EU – Footwear (China)</i>	Panel Report, <i>European Union – Anti-Dumping Measures on Certain Footwear from China</i> , WT/DS405/R, adopted 22 February 2012, DSR 2012:IX, p. 4585
<i>Korea – Certain Paper (Article 21.5 – Indonesia)</i>	Panel Report, <i>Korea – Anti-Dumping Duties on Imports of Certain Paper from Indonesia – Recourse to Article 21.5 of the DSU by Indonesia</i> , WT/DS312/RW, adopted 22 October 2007, DSR 2007:VIII, p. 3369
<i>Mexico – Olive Oil</i>	Panel Report, <i>Mexico – Definitive Countervailing Measures on Olive Oil from the European Communities</i> , WT/DS341/R, adopted 21 October 2008, DSR 2008:IX, p. 3179
<i>US – Countervailing Duty Investigation on DRAMS</i>	Appellate Body Report, <i>United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMs) from Korea</i> , WT/DS296/AB/R, adopted 20 July 2005, DSR 2005:XVI, p. 8131
<i>US – Countervailing Measures on Certain EC Products (Article 21.5 – EC)</i>	Panel Report, <i>United States – Countervailing Measures Concerning Certain Products from the European Communities – Recourse to Article 21.5 of the DSU by the European Communities</i> , WT/DS212/RW, adopted 27 September 2005, DSR 2005:XVIII, p. 8950
<i>US – FSC (Article 21.5 – EC)</i>	Appellate Body Report, <i>United States – Tax Treatment for “Foreign Sales Corporations” – Recourse to Article 21.5 of the DSU by the European Communities</i> , WT/DS108/AB/RW, adopted 29 January 2002, DSR 2002:I, p. 55
<i>US – FSC (Article 21.5 – EC II)</i>	Appellate Body Report, <i>United States – Tax Treatment for “Foreign Sales Corporations” – Second Recourse to Article 21.5 of the DSU by the European Communities</i> , WT/DS108/AB/RW2, adopted 14 March 2006, DSR 2006:XI, p. 4721
<i>US – Hot-Rolled Steel</i>	Appellate Body Report, <i>United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan</i> , WT/DS184/AB/R, adopted 23 August 2001, DSR 2001:X, p. 4697
<i>US – Lamb</i>	Appellate Body Report, <i>United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia</i> , WT/DS177/AB/R, WT/DS178/AB/R, adopted 16 May 2001, DSR 2001:IX, p. 4051
<i>US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)</i>	Appellate Body Report, <i>United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina – Recourse to Article 21.5 of the DSU by Argentina</i> , WT/DS268/AB/RW, adopted 11 May 2007, DSR 2007:IX, p. 3523

Short title	Full case title and citation
<i>US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)</i>	Panel Report, <i>United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina – Recourse to Article 21.5 of the DSU by Argentina</i> , WT/DS268/RW, adopted 11 May 2007, as modified by Appellate Body Report WT/DS268/AB/RW, DSR 2007:IX, p. 3609
<i>US – Softwood Lumber VI (Article 21.5 – Canada)</i>	Appellate Body Report, <i>United States – Investigation of the International Trade Commission in Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada</i> , WT/DS277/AB/RW, adopted 9 May 2006, and Corr.1, DSR 2006:XI, p. 4865
<i>US – Tyres (China)</i>	Appellate Body Report, <i>United States – Measures Affecting Imports of Certain Passenger Vehicle and Light Truck Tyres from China</i> , WT/DS399/AB/R, adopted 5 October 2011, DSR 2011:IX, p. 4811
<i>US – Wool Shirts and Blouses</i>	Appellate Body Report, <i>United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India</i> , WT/DS33/AB/R, adopted 23 May 1997, and Corr.1, DSR 1997:I, p. 323
<i>US – Zeroing (EC) (Article 21.5 – EC)</i>	Appellate Body Report, <i>United States – Laws, Regulations and Methodology for Calculating Dumping Margins (“Zeroing”) – Recourse to Article 21.5 of the DSU by the European Communities</i> , WT/DS294/AB/RW and Corr.1, adopted 11 June 2009, DSR 2009:VII, p. 2911
<i>US – Zeroing (EC) (Article 21.5 – EC)</i>	Panel Report, <i>United States – Laws, Regulations and Methodology for Calculating Dumping Margins (“Zeroing”) – Recourse to Article 21.5 of the DSU by the European Communities</i> , WT/DS294/RW, adopted 11 June 2009, as modified by Appellate Body Report WT/DS294/AB/RW, DSR 2009:VII, p. 3117

ABBREVIATIONS USED IN THIS REPORT

Abbreviation	Description
Anti-Dumping Agreement	Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994
AK Steel	AK Steel Corporation
AK Steel Supplementary Questionnaire Response	AK Steel Corporation, Supplementary Industry Injury Investigation Questionnaire Response (Exhibit US-18) (BCI)
Allegheny Ludlum	ATI Allegheny Ludlum Corporation
AUV	Average unit value
Baosteel	Baosteel Group Corporation
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
GATT 1994	General Agreement on Tariffs and Trade 1994
GOES	Grain oriented flat-rolled electrical steel
MOFCOM	Ministry of Commerce of the People's Republic of China
Original Determination	MOFCOM, Final Determination in Anti-Dumping and Anti-Subsidy Investigations on GOES Imports from the US and Russia, No. 21, 10 April 2010 (Exhibit US-4)
Price negotiation letters	Price negotiation letters exchanged between a Chinese producer and Chinese purchasers (Exhibits US-7, US-8 and US-9) (BCI)
Redetermination	MOFCOM, Determination on the Re-investigation of Anti-Dumping and Countervailing Duties on Grain Oriented Flat-Rolled Electrical Steel Imports from the United States, Public Notice [2013] No. 51, including its annexes (Exhibit US-1)
Redetermination – China's translation	MOFCOM, Determination of the Ministry of Commerce of the People's Republic of China on the Anti-dumping and Countervailing Reinvestigation on Imports of Grain Oriented Flat-rolled Electrical Steel Originating in the United States (Exhibit CHN-1)
Redetermination Disclosure	MOFCOM, Notice of information disclosure before the industry injury verdict of the anti-dumping on imported grain-oriented silicon electrical steel with the country of origin in the United States and Russia and the anti-subsidy on the imported grain-oriented silicon electrical steel with the country of origin in the United States, Public Notice [2013] No. 327 (Exhibit US-3)
Redetermination Disclosure – China's translation	MOFCOM, Notice of Disclosure Prior to Industry Injury Determination in the Anti-dumping Reinvestigation on Imports of Grain Oriented Flat-rolled Electrical Steel originating in the U.S. and Russia and the Anti-subsidy Reinvestigation on Imports of Grain Oriented Flat-rolled Electrical Steel originating in the U.S. SDCYCH [2013] No. 327 (Exhibit CHN-2)
Russian contract	Contract between a Russian producer and a Chinese purchaser (Exhibit US-6) (BCI)
SCM Agreement	Agreement on Subsidies and Countervailing Measures
Wuhan	Wuhan Iron and Steel Corporation
WTO Agreement	Marrakesh Agreement Establishing the World Trade Organization

1 INTRODUCTION

1.1 Complaint by the United States

1.1. This compliance dispute concerns the challenge by the United States to measures taken by China to comply with the rulings and recommendations of the Dispute Settlement Body (DSB) in *China – Countervailing and Anti-Dumping duties on Grain Oriented Flat-rolled Electrical Steel from the United States*.

1.2. On 13 January 2014, the United States requested consultations with China pursuant to paragraph 1 of the understanding reached on 19 August 2013 between China and the United States in "Agreed Procedures under Articles 21 and 22 of the Dispute Settlement Understanding" (Sequencing Agreement), which states that should the United States consider that the situation described in Article 21.5 of the Understanding on Rules and Procedures Governing the Settlement of Dispute ("DSU") exists, the United States will request that China enter into consultations with the United States.

1.3. Consultations were held on 24 January 2014, but failed to resolve the dispute.

1.2 Panel establishment and composition

1.4. On 13 February 2014, the United States requested the establishment of a panel pursuant to Articles 6 and 21.5 of the DSU with standard terms of reference.¹

1.5. At its meeting on 26 February 2014, the Dispute Settlement Body (DSB) referred this dispute, if possible to the original Panel, in accordance with Article 21.5 of the DSU.

1.6. The Panel's terms of reference are the following:

To examine, in the light of the relevant provisions of the covered agreements cited by the parties to the dispute, the matter referred to the DSB by the United States in document WT/DS414/16 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.²

1.7. In accordance with Article 21.5 of the DSU, the Panel was composed on 17 March 2014 as follows:

Chairperson: Mr John Adank
Members: Mr Anthony Abad
Mr Jan Heukelman

1.8. The European Union, India, Japan and the Russian Federation notified their interest in participating in the Panel proceedings as third parties.

1.3 Panel proceedings

1.3.1 General

1.9. After consultation with the parties, the Panel adopted its Working Procedures³ and timetable on 22 May 2014. After further consulting the parties, the Panel revised its timetable on 24 October 2014. The Panel further modified its timetable on 19 January 2015.

1.10. The Panel held its substantive meeting with the parties on 14 and 15 October 2014. A session with the third parties took place on 15 October 2014. The Panel issued its Interim Report to the parties on 17 March 2015. At the request of China, the Panel held a further meeting with

¹ WT/DS414/16.

² WT/DS414/17.

³ See the Panel's Working Procedures in Annex A-1.

the parties to consider issues identified in the parties' requests for interim review on 23 April 2015. The Panel issued its Final Report to the parties on 5 May 2015.

1.3.2 Working procedures on Business Confidential Information (BCI)

1.11. After consultation with both parties, the Panel adopted, on 22 May 2014, additional procedures for the protection of BCI.⁴

2 FACTUAL ASPECTS

2.1 The measures at issue

2.1. This dispute concerns measures taken by China to implement the DSB recommendations and rulings in *China – Countervailing and Anti-Dumping duties on Grain Oriented Flat-rolled Electrical Steel from the United States*, as set forth in MOFCOM's Redetermination issued on 31 July 2013, pursuant to which China continues to impose anti-dumping and countervailing duties on imports of GOES from the United States.

3 PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

3.1. The United States requests that the Panel find that:

- a. MOFCOM's injury determination is inconsistent with Articles 3.1, 3.2, 3.4 and 3.5 of the Anti-Dumping Agreement and Articles 15.1, 15.2, 15.4 and 15.5 of the SCM Agreement. Specifically:
 - i. MOFCOM's price effects analysis is inconsistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement and Articles 15.1 and 15.2 of the SCM Agreement;
 - ii. MOFCOM's impact analysis is inconsistent with Articles 3.1 and 3.4 of the Anti-Dumping Agreement and Articles 15.1 and 15.4 of the SCM Agreement; and
 - iii. MOFCOM's causation analysis is inconsistent with Articles 3.1 and 3.5 of the Anti-Dumping Agreement and Articles 15.1 and 15.5 of the SCM Agreement.
- b. MOFCOM acted inconsistently with its obligations under Article 6.9 of the Anti-Dumping Agreement and Article 12.8 of the SCM Agreement by failing to disclose certain essential facts in connection with its Redetermination.
- c. MOFCOM acted inconsistently with its obligations under Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement and Articles 22.3 and 22.5 of the SCM Agreement by failing to set forth in sufficient detail in its Redetermination or a separate report, China's findings and conclusions on certain material issues of fact and law in connection with its Redetermination.

3.2. China requests that the Panel reject the United States' claims in this dispute in their entirety.

4 ARGUMENTS OF THE PARTIES

4.1. The arguments of the parties are reflected in their executive summaries, provided to the Panel in accordance with paragraph 18 of the Working Procedures adopted by the Panel (see Annexes B and C).

5 ARGUMENTS OF THE THIRD PARTIES

5.1. The arguments of the European Union and Japan are reflected in their executive summaries, provided in accordance with paragraph 19 of the Working Procedures adopted by the Panel (see Annex D). India and the Russian Federation did not submit written or oral arguments to the Panel.

⁴ See Additional Working Procedures on BCI in Annex A-2.

6 INTERIM REVIEW

6.1. On 17 March 2015, the Panel submitted its Interim Report to the parties. On 31 March 2015, the United States and China both submitted written requests for the review of precise aspects of the Interim Report. In addition, China requested an interim review meeting, which was held on 23 April 2015.

6.2. In accordance with Article 15.3 of the DSU, this section of the Report sets out the Panel's response to the parties' requests made at the interim review stage. We modified certain aspects of the Report in light of the parties' comments where we considered it appropriate, as explained below. As a result of the changes that we have made, the numbering of footnotes in the Final Report has changed from the Interim Report. References to footnotes in this section relate to the Final Report. References to paragraph numbers are to the Interim Report.

6.1 Requests submitted by the United States

6.3. The United States requests that the Panel revise the last sentence of paragraph 7.20 of the Interim Report to reflect the fact that it challenged China's argument regarding the replacement of the term "low" with the term "unfair" in MOFCOM's Redetermination, referring to its oral statement at the Panel's meeting with the parties in this regard.⁵ China did not comment on this request.

6.4. We have reviewed the United States' oral statement at the Panel's meeting with the parties, and we have amended the last sentence of paragraph 7.20 to reflect more accurately the arguments made by the United States.

6.5. The United States requests that the Panel revise the last sentence of paragraph 7.63 of the Interim Report to align this sentence with the standard of review as enunciated by the Panel at paragraph 7.4 and as applied by the Panel in paragraphs 7.58 and 7.120.⁶ China did not comment on this request.

6.6. We agree that, for consistency and clarity, the same terminology should be used in our report where, as in this instance, the same standard is being applied and the same meaning is intended. We have therefore amended the last sentence of paragraph 7.63 to align this sentence with other references to the standard of review as set out in paragraphs 7.4, 7.58 and 7.120.

6.7. The United States requests that the Panel modify its findings in paragraph 8.2 of the Interim Report. The United States recalls that it requested the establishment of the Panel pursuant to Article 21.5 of the DSU because it considered that China's measures taken to comply were inconsistent with the covered agreements, and as a result, China failed to comply with the DSB's recommendations and rulings in this dispute, and suggests that the Panel modify paragraph 8.2 to frame its findings of inconsistency in similar terms.⁷ At the interim review meeting, China commented that there was no need for the new language suggested by the United States, contending that since the measures at issue no longer exist, there is no basis for a statement that China has failed to bring its measures into compliance.⁸

6.8. Having considered the matter, and in light of our decision regarding the United States' request concerning paragraph 8.6 of the Interim Report below, we have granted the United States' request and modified paragraph 8.2, albeit using different language from that suggested by the United States. Notwithstanding China's views concerning the termination of the measures, in this proceeding we have found that the measures taken by China to comply with the recommendations and rulings in the original dispute are inconsistent with relevant provisions of the Anti-Dumping and SCM Agreements. In this context, we consider that the conclusion that China failed to comply with the recommendations and rulings of the DSB is justified, regardless of subsequent events.

6.9. The United States requests that the Panel delete the recommendation set out in paragraph 8.6 of the Interim Report. The United States notes that this is a compliance proceeding, and suggests that there is consequently no need for the Panel to make a recommendation that

⁵ United States' request for interim review, paras. 3-4.

⁶ Ibid. paras. 5-7.

⁷ Ibid. paras. 8-10.

⁸ China's oral statement at the interim review meeting, para. 15.

China bring its measures taken to comply into conformity. The United States contends that a panel in a compliance proceeding is tasked with determining whether a measure taken to comply by the Member concerned that is within the panel's terms of reference exists or is inconsistent with a covered agreement, and asserts, relying on the report of the Appellate Body in *US – FSC (Article 21.5 – EC II)*⁹, that the Panel fulfils its mandate when it concludes that China has failed to implement the recommendations and rulings of the DSB, and that until a Member has brought its measures found to be inconsistent by the DSB into full compliance with its WTO obligations, the original recommendation by the DSB will remain operative, and no further recommendation pertaining to the measure taken to comply is necessary.¹⁰ At the interim review meeting, China argued that the original recommendations were no longer operative, as there are no longer any disputed measures in effect to which those recommendations could apply, and asserted that termination of the measures at issue in this proceeding brings China into full compliance.¹¹

6.10. While *US – FSC (Article 21.5 – EC II)* concerned in particular a recommendation under Article 4.7 of the SCM Agreement, the Appellate Body's reasoning suggests that a recommendation to bring the measures taken to comply into conformity is not necessary in an Article 21.5 compliance proceeding in any case, as the original recommendations and rulings of the DSB under Article 19.1 remain in effect until fully complied with. The Appellate Body and a number of panels have in fact taken this view and not issued recommendations in Article 21.5 proceedings.¹² As discussed below, at paragraphs 6.20-6.25, we have no evidence properly before us on the basis of which we could conclude that there is no longer any disputed measure in effect to which the original recommendations and rulings of the DSB could apply, and thus no basis on which we could conclude that China is in compliance with those recommendations and rulings.

6.11. Having considered the matter, we agree with the United States that a recommendation is not necessary in this proceeding, and have therefore decided to grant the United States' request and modified paragraph 8.6 to reflect our views.

6.2 Requests submitted by China

6.12. China requests that paragraph 7.21 of the Interim Report be modified to reflect its view that the term "unfair imports" is not unclear and that the change from "low-priced imports" to "unfair imports" was not cursory, and that the changes were necessary to refer more precisely to the imports at issue and avoid confusion about whether MOFCOM had engaged in price comparisons. China makes no specific suggestions in this regard.¹³ At the interim review meeting, the United States recalled its arguments on this issue and argued that China provided no basis for its request.¹⁴

6.13. We recall that we found China's explanation for the change in terminology, rather than the term "unfair imports" itself, to be unclear. Nothing in China's request affects our conclusion that the change in terminology appears to have been made primarily to avoid the reference to low prices that both we and the Appellate Body found problematic in the original dispute. Moreover, we considered the change in terminology specifically in evaluating whether it demonstrated a change in the Redetermination sufficient to allow the United States to challenge MOFCOM's analysis of the relevant injury factors, concluding that it did not. Accordingly, we see no reason to make any changes to paragraph 7.21, and deny China's request.

⁹ Appellate Body Report, *US – FSC (Article 21.5 – EC II)*, paras. 85-87, 100.

¹⁰ United States' request for interim review, paras. 11-12.

¹¹ China's oral statement at the interim review meeting, paras. 12-14.

¹² E.g. Panel Report, *Korea – Certain Paper (Article 21.5 – Indonesia)*, para. 7.4 (the panel found that the Korean investigating authority's redetermination finding violated the Anti-Dumping Agreement but stated that since the original DSB recommendations and rulings remained operative, it would make no new recommendation under Article 19.1 of the DSU); Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 470; Panel Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 9.2 (neither the panel nor the Appellate Body made a new recommendation, but the Appellate Body recommended that "the DSB request the United States to implement fully the recommendations and rulings of the DSB [in the original proceeding]"); Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*, para. 186; Panel Report, *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*, para. 8.2 (neither the panel nor the Appellate Body made a new recommendation but the Appellate Body recommended that the DSB request the United States to "implement fully the recommendations and rulings of the DSB"). See Panel Report, *EC – Bananas III (Article 21.5 – US)*, paras. 6.50, 8.13.

¹³ China's comments on the interim report, para. 3.

¹⁴ United States' oral statement at the interim review meeting, para. 23.

6.14. China requests that the Panel delete paragraphs 7.55-7.57 and 7.66 of the Interim Report. China notes that the Panel stated that it could "draw no conclusion" on the quarterly data under the standard of review, and states that it is not clear why the Panel included this discussion. In China's view, the Panel should discuss and rely upon only those facts that the Panel finds properly within its purview under the standard of review. China suggests that the discussion at these paragraphs, and "elsewhere" in the Interim Report, of facts the Panel believes are not properly before it should be deleted. In addition, with respect to paragraph 7.56, China states that the Panel appears to have transposed inadvertently the shift in market share by subject imports and non-subject imports in Q1 2004. China makes no specific suggestions in this context, and cites no support with respect to its assertion regarding paragraph 7.56.¹⁵ At the interim review meeting, the United States observed that the facts at issue were evidence submitted by China to the Panel, and that it was therefore appropriate for the Panel to examine and discuss that evidence, including its role in light of the standard of review and of the fact that it provided further support for the Panel's findings. The United States asserted that no changes to the report were therefore necessary.¹⁶

6.15. With respect to the alleged "inadvertent transposition" of data in paragraph 7.56, we have double-checked the figures set out in that paragraph against those provided by China in its response to Panel question 14, and they are the same. Therefore, there is no evidentiary basis for any changes to paragraph 7.56 in this regard. Turning to the remainder of China's comments regarding paragraphs 7.55 to 7.57 and 7.66, we note that while we made "observations" in paragraphs 7.55 to 7.57 on the basis of the quarterly data submitted by China, our findings in paragraph 7.66 were made on the basis of China Customs import data that was available to MOFCOM and the data on subject import volume in Q1 2009 set out in MOFCOM's Redetermination Disclosure. We do not consider that we are precluded from making the observations in paragraphs 7.55 to 7.57, despite the fact that the information in question was not relied on by MOFCOM. We made it clear that we drew no conclusions, adverse or otherwise, concerning shifts in market share based on the quarterly data submitted in this proceeding by China, relying in our conclusions on evidence that was appropriately before us in light of the standard of review. In light of the foregoing, we deny China's request to delete paragraphs 7.55-7.57 and 7.66, and have made no changes to paragraph 7.56.

6.16. China requests the Panel to clarify that the only pricing data on the record were average unit values ("AUVs") and to reflect China's explanation that MOFCOM addressed the price data, but did not compare the relative prices of subject imports and the domestic like product because of the deficiencies associated with AUV comparisons pointed out by the Appellate Body, referring specifically to paragraphs 7.58 and 7.63-7.65 of the Interim Report in this regard.¹⁷ At the interim review meeting, the United States, noting that China offered no basis for the Panel to modify the reasoning or findings in question, stated its view that no changes were necessary.¹⁸

6.17. China's request essentially would require us to make a finding that the "only" price data before MOFCOM was AUV data. It is not clear to us, and China has not explained, why such a finding is necessary or appropriate. The issue before us was not whether the AUV data was the "only" price data available to MOFCOM, but rather whether MOFCOM could have reached the specific conclusions that it did, regarding the linkages between increases in volume of subject imports and price effects suffered by the domestic industry, without comparing the prices of subject imports and the domestic like product. Whether AUV data was the only data before MOFCOM on prices is not relevant to our consideration of that issue. Insofar as China requests us to include its explanation that MOFCOM addressed the price data regarding subject imports and the domestic like product, China's request does not clearly identify which specific aspect of MOFCOM's consideration of the price data remained unexplained in our report, what specific explanations it seeks to have included, or any support for such explanations. We therefore deny these aspects of China's request. However, having reviewed China's arguments in this regard, we grant China's request that we reflect its explanation that MOFCOM did not make price comparisons between subject imports and the domestic like product because of the deficiencies in the price data that were highlighted by the Appellate Body, as this relates to an aspect of China's own arguments. We have therefore added a new footnote 128 to paragraph 7.65 in this report.

¹⁵ China's comments on the interim report, paras. 4-5.

¹⁶ United States' oral statement at the interim review meeting, paras. 24-26.

¹⁷ China's comments on the interim report, para. 6.

¹⁸ United States' oral statement at the interim review meeting, para. 27.

6.18. China asserts that the Panel dismissed as insufficient MOFCOM's verification of the domestic industry's production capability with respect to high grade GOES despite the fact that MOFCOM properly addressed the issue of whether subject imports and the domestic like product were substitutable, referring to paragraphs 7.72-7.81 of the Interim Report. China expresses concern that the Panel's finding sets a precedent that "an authority must address every factual assertion placed on record, even where it is adequately addressed by other means, and no matter the context in which it is offered or the extent to which its significance is rendered moot by other facts and findings of the authority."¹⁹ China makes no specific requests for changes to the interim report, and cites no evidence in support of its concerns. At the interim review meeting, the United States, noting that it had responded to China's arguments on this issue, and the Panel had explained its findings, stated its view that no changes are necessary.²⁰

6.19. We explained the basis of our conclusions in paragraphs 7.72-7.81, which include our review of the evidence before MOFCOM, relevant arguments provided by the parties and MOFCOM's ultimate conclusions as provided in its Redetermination finding. In the absence of any specific suggestions for change, we see no basis to modify our analysis and conclusions and have made no changes in this section of the report.

6.20. Finally, China stated in its request for interim review that the measures at issue in this proceeding would expire on 10 April 2015 because the domestic industry did not request a review of those measures, which might have resulted in their continuation, and requested that the Panel take this into consideration and issue no recommendations in the final report.²¹ On 21 April 2015, China submitted exhibit CHN-3, a copy of MOFCOM's public notice of termination of the measures dated 10 April 2015. At the interim review meeting, the United States argued that the Panel should reject China's attempt to introduce new evidence during the interim review stage of this proceeding as contrary to the DSU, inconsistent with paragraph 8 of the Working Procedures of the Panel and not based on the evidence before the Panel.²² The United States noted that in its request for interim review, China stated its expectations regarding the future termination of the measures at issue. In the United States' view, since China's request was not based on any evidence that had been developed by the parties and considered by the Panel prior to issuance of the report, there was no need or basis for the Panel to review its findings further.²³ Finally, the United States asserted that China's new evidence, in addition to being untimely, was not relevant to the matter being examined by the Panel, noting that the Appellate Body has stated that, as a general rule, the measures subject to a panel's review "must be measures that are in existence at the time of the establishment of a panel," and therefore the task of the panel is to determine whether the measures at issue are consistent with the obligations at issue "*at the time the Panel was established*."²⁴ According to the United States, China's exhibit has no relevance to the legal situation that existed on the date of the Panel's establishment when the DSB referred the matter to the Panel, and thus is not relevant to the Panel's legal assessment and its findings and conclusions in this proceeding.

6.21. Article 15.2 of the DSU entitles parties to submit a written request for the panel to review "precise aspects of the interim report" prior to circulation of the final report. However, a number of panels and the Appellate Body have held that Article 15.2 is available only for the panel to review precise aspects of the interim report and does not permit parties to introduce new evidence.²⁵ Further, the panel in *EC - IT Products* concluded that evidence regarding the repeal of a measure at issue in that dispute, submitted by the EC subsequent to the issuance of the interim report, was such "new evidence" and could not be considered at the stage of interim review.²⁶ The panel in

¹⁹ China's comments on the interim report, para. 7.

²⁰ United States' oral statement at the interim review meeting, para. 28.

²¹ China's comments on the interim report, para. 8.

²² United States' oral statement at the interim review meeting, paras. 6-14.

²³ *Ibid.* paras. 15-16.

²⁴ *Ibid.* paras. 17-18, citing Appellate Body Report, *EC - Chicken Cuts*, para. 156; Appellate Body Report, *EC - Selected Customs Matters*, para. 264; Panel Report, *EC - Approval and Marketing of Biotech Products*, para. 7.456.

²⁵ Appellate Body Report, *EC - Sardines*, para. 301; Appellate Body Report, *EC - Selected Customs Matters*, para. 259; Panel Report, *EC - Bananas III (Article 21.5 - US)*, paras. 6.1-6.18; Panel Report, *EC - IT Products*, para. 6.48.

²⁶ Panel Report, *EC - IT Products*, para. 6.48. The panel observed:

Consistent with the Appellate Body's approach and in the interest of protecting the due process rights of the complainants, who had no opportunity to make submissions for the record on the

that case retained its recommendation under Article 19.1, observing that there was no evidence "properly before the Panel" confirming the repeal of some of the measures at issue.

6.22. The situation in the present case is analogous to that in *EC - IT Products*. As in that case, China has submitted new evidence, i.e. Exhibit CHN-3, subsequent to the issuance of the interim report. In our view, MOFCOM's public notice of termination is new evidence that was not before the Panel at the time it issued its interim report.

6.23. We note in this context the similarities between this case and the proceedings in *EC - Bananas III (Article 21.5 – US)*. In that case, as here, both parties requested during interim review that the panel delete the recommendation made in the interim report, but for different reasons: the United States because it considered such a recommendation to be unnecessary in a compliance proceeding, and the then-European Communities because it had adopted an amending regulation eliminating the measure challenged by the United States in that compliance dispute. The European Communities informed the compliance panel of the repeal of the measure when it filed its comments on the interim report, and submitted a copy of the amending regulation at the interim review meeting. The panel found the evidence regarding the amending regulation to be inadmissible as it had been submitted after the comments on interim review had been filed, at which stage it could no longer consider new evidence, but decided to delete the recommendation, considering that the original DSB recommendations and rulings continued to be operative in the compliance proceeding.²⁷

6.24. On appeal, the European Communities argued that the panel's statement that the original DSB recommendations continued to be operative in the compliance proceeding constituted a "concealed recommendation" and that the panel had erred in issuing such a recommendation in relation to an expired measure. The Appellate Body disagreed, concluding that the panel had made no recommendation in relation to a measure which was no longer in force.²⁸ The Appellate Body itself made no recommendation on the ground that the measure at issue had ceased to exist.²⁹

6.25. In light of the above, we deny China's request. Nonetheless, we note that, if the measures have in fact expired, there would in our view be no further obligation on China to "bring the [expired] measure[s] into conformity".

6.3 Editorial changes

6.26. Finally, we have made a number of changes of an editorial nature to improve the clarity and accuracy of the Report or to correct typographical errors, including certain changes suggested by the United States.³⁰

7 FINDINGS

7.1 General principles regarding treaty interpretation, the standard of review, and burden of proof

7.1.1 Treaty interpretation

7.1. Article 3.2 of the DSU provides that the WTO dispute settlement system serves to clarify the existing provisions of the covered agreements "in accordance with customary rules of interpretation of public international law". Article 17.6(ii) of the Anti-Dumping Agreement similarly requires panels to interpret that Agreement's provisions in accordance with the customary rules of

documents provided, we decline to consider further the documents attached by the European Communities to its request for interim review. The Panel also declines to make adjustments to the Interim Reports to exclude the measures in question from the Panel's recommendation and to add text about the European Communities' confirmation that certain measures have been repealed, as requested by the European Communities.

²⁷ Panel Report, *EC – Bananas III (Article 21.5 – US)*, paras. 6.50, 8.13.

²⁸ Appellate Body Report, *EC – Bananas III (Article 21.5 – US)*, para. 272.

²⁹ *Ibid.* para. 479.

³⁰ United States' request for interim review, paras. 13-37.

interpretation of public international law.³¹ It is generally accepted that the principles codified in Articles 31 and 32 of the Vienna Convention on the Law of Treaties are such customary rules. While we have not found it necessary to engage with any significant issues of treaty interpretation in this proceeding, we have nonetheless been mindful of these principles in our analysis.

7.1.2 Standard of review

7.2. Article 11 of the DSU provides, in relevant part, that:

[a] panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements.

In addition, Article 17.6 of the Anti-Dumping Agreement sets forth the special standard of review applicable to disputes under the Anti-Dumping Agreement:

(i) in its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned;

(ii) the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.

Thus, Article 11 of the DSU and Article 17.6 of the Anti-Dumping Agreement together establish the standard of review we will apply with respect to both the factual and the legal aspects of the present dispute.

7.3. The Appellate Body has explained that where a panel is reviewing an investigating authority's determination, the "objective assessment" standard in Article 11 of the DSU requires a panel to review whether the authorities have provided a reasoned and adequate explanation as to (i) how the evidence on the record supported its factual findings; and (ii) how those factual findings support the overall determination.³² In the context of Article 17.6(i) of the Anti-Dumping Agreement, the Appellate Body has clarified that a panel should not conduct a *de novo* review of the evidence, nor substitute its judgment for that of the investigating authority. A panel must limit its examination to the evidence that was before the investigating authority during the course of the investigation and must take into account all such evidence submitted by the parties to the dispute.³³ At the same time, a panel must not simply defer to the conclusions of the investigating authority; a panel's examination of those conclusions must be "in-depth" and "critical and searching".³⁴

7.4. The Appellate Body has clarified a panel's standard of review of the facts pursuant to the above provisions in the following terms:

It is well established that a panel must neither conduct a *de novo* review nor simply defer to the conclusions of the national authority. A panel's examination of those conclusions must be critical and searching, and be based on the information contained in the record and the explanations given by the authority in its published report. A panel must examine whether, in the light of the evidence on the record, the conclusions reached by the investigating authority are reasoned and adequate. What

³¹ Article 17.6(ii) of the Anti-Dumping Agreement also provides that if a panel finds that a provision of the Anti-Dumping Agreement admits of more than one permissible interpretation, it shall uphold a measure that rests upon one of those interpretations.

³² Appellate Body Reports, *US – Countervailing Duty Investigation on DRAMS*, para. 186; and *US – Lamb*, para. 103.

³³ Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, paras. 187-188.

³⁴ Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93.

is 'adequate' will inevitably depend on the facts and circumstances of the case and the particular claims made, but several general lines of inquiry are likely to be relevant. The panel's scrutiny should test whether the reasoning of the authority is coherent and internally consistent. The panel must undertake an in-depth examination of whether the explanations given disclose how the investigating authority treated the facts and evidence in the record and whether there was positive evidence before it to support the inferences made and conclusions reached by it. The panel must examine whether the explanations provided demonstrate that the investigating authority took proper account of the complexities of the data before it, and that it explained why it rejected or discounted alternative explanations and interpretations of the record evidence. A panel must be open to the possibility that the explanations given by the authority are not reasoned or adequate in the light of other plausible alternative explanations, and must take care not to assume itself the role of initial trier of facts, nor to be passive by 'simply *accept[ing]* the conclusions of the competent authorities.'³⁵ (Footnote omitted.)

7.1.3 Burden of proof

7.5. The general principles applicable to the allocation of the burden of proof in WTO dispute settlement require that a party claiming a violation of a provision of a WTO Agreement must assert and prove its claim.³⁶ Therefore, as the complaining party in this proceeding, the United States bears the burden of demonstrating that certain aspects of the measures at issue are inconsistent with the Anti-Dumping Agreement and the SCM Agreement. The Appellate Body has stated that a complaining party will satisfy its burden when it establishes a *prima facie* case, namely a case which, in the absence of effective refutation by the defending party, requires a panel, as a matter of law, to rule in favour of the complaining party.³⁷ Finally, it is generally for each party asserting a fact to provide proof thereof.³⁸

7.2 The United States' claim with respect to adverse impact

7.6. In this section of our report, we examine the United States' claim that MOFCOM's finding that the subject imports had an adverse impact on the domestic industry was not based on an objective examination of all relevant economic factors and indices having a bearing on the state of that industry. More specifically, the United States claims that, in its Redetermination, MOFCOM failed to examine the impact of subject imports on the domestic industry and to evaluate all relevant economic factors and indices having a bearing on the state of the industry consistently with China's obligations under Articles 3.1 and 3.4 of the Anti-Dumping Agreement and Articles 15.1 and 15.4 of the SCM Agreement. China responds, in the first instance, that the United States' claim is not properly before the Panel in a compliance proceeding under Article 21.5 of the DSU. China adds that, even if it were to be considered, the US claim would fail on the merits. Given China's jurisdictional objection, we must first consider whether the US claim with respect to adverse impact falls within our terms of reference before turning, if necessary, to its merits.

7.2.1 Main arguments of the parties

7.7. The United States argues that its claim is properly before the Panel because it challenges aspects of China's compliance measure that are inconsistent with the covered agreements. The United States specifically alleges that MOFCOM modified its adverse impact analysis in the Redetermination by (i) replacing all references to imports of product concerned "at a low price" with references to "unfair" imports of the subject merchandise and (ii) relying significantly on market conditions in 2008, in contrast to its original impact analysis.³⁹ The United States considers that its claim relates directly to China's compliance measure, which it argues includes a revised

³⁵ Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93.

³⁶ Appellate Body Report, *US – Wool Shirts and Blouses*, para. 337.

³⁷ Appellate Body Report, *EC – Hormones*, paras. 98, 104.

³⁸ Appellate Body Report, *US – Wool Shirts and Blouses*, para. 337.

³⁹ United States' second written submission, para. 67.

injury analysis and newly disclosed facts.⁴⁰ It maintains that China's arguments regarding the admissibility of claims under Article 21.5 of the DSU are misguided.

7.8. China asserts that the United States is not entitled to expand the scope of the dispute in this Article 21.5 proceeding to include a wholly new claim not previously addressed by the panel, and that it would be extremely unfair to allow this claim.⁴¹ China notes there is no question that this is a new claim by the United States, as there was no reference to either Article 3.4 of the Anti-Dumping Agreement or Article 15.4 of the SCM Agreement in the original request for consultations.⁴² China relies on several Appellate Body reports in arguing that a complaining Member ordinarily would not be allowed to raise a claim in an Article 21.5 proceeding that it could have pursued in the original proceedings, but did not. According to China, the first mention of any such claim was in the United States' first written submission in this proceeding. Moreover, China maintains that MOFCOM's discussion of injury in the Redetermination is essentially unchanged from the original.⁴³ China argues that the introduction of a new claim at this stage of the proceedings would be contrary to basic principles of fairness and due process.⁴⁴ It would give the United States a second chance to raise a claim it failed to raise in the original proceeding and would expose China to possible suspension of concessions for a violation it was never given a fair opportunity to address.⁴⁵

7.2.2 Evaluation by the Panel

7.9. In the original proceedings, the United States made no claim concerning MOFCOM's evaluation of the various economic factors and indices having a bearing on the state of the domestic industry for purposes of the injury determination under Articles 3.4 and 15.4 of the Anti-Dumping and SCM Agreements, respectively. Accordingly, the Panel and Appellate Body did not consider any claim under these Articles and made no findings in this respect. Therefore, the question we must resolve is whether this aspect of the Redetermination is subject to review by the Panel in this Article 21.5 proceeding.

7.10. Article 21.5 of the DSU provides, in relevant part:

Where there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings such dispute shall be decided through recourse to these dispute settlement procedures, including wherever possible resort to the original panel.

7.11. Inherent in proceedings under Article 21.5 of the DSU is the need to balance important systemic interests. Expanding the scope of a compliance proceeding to measures not originally challenged by the complaining Member may be necessary to ensure prompt and thorough verification of compliance. However, it could also result in circumvention of the normal dispute settlement process if it allows the complaining Member to obtain a finding of non-compliance and potentially seek retaliation without the responding Member having had a reasonable period of time in which to bring any inconsistent measures into compliance.

7.12. The scope of a panel's jurisdiction with respect to what measures and claims it may consider in an Article 21.5 compliance proceeding has been addressed by a number of panels and the Appellate Body. Several fundamental principles have emerged from these decisions. Thus, it is now accepted that nothing in Article 21.5 limits a compliance panel to considering only certain issues, or certain aspects of a measure taken to comply. Panels have found that to satisfy the objective of prompt settlement of disputes, a complainant can challenge all aspects of a new measure taken to comply, not only those related to issues covered by the original proceedings.⁴⁶

7.13. Similarly, the Appellate Body has found that a panel is not limited, in conducting its review under Article 21.5, to examining the measures taken to comply from the perspective of the claims,

⁴⁰ United States' second written submission, para. 69.

⁴¹ China's first written submission, para. 68.

⁴² Ibid. para. 71.

⁴³ China's second written submission, paras. 60-61.

⁴⁴ China's first written submission, paras. 71, 74.

⁴⁵ Ibid. para. 71.

⁴⁶ See, e.g. Panel Report, *EC – Bananas III (Article 21.5 – Ecuador)*, paras. 6.3-6.12.

arguments and factual circumstances that related to the measure that was the subject of the original proceedings.⁴⁷ The Appellate Body has observed that if a compliance panel were restricted to examining the new measure from this limited perspective, it would be unable to examine fully, in accordance with Article 21.5, the consistency with a covered agreement of the measures taken to comply.⁴⁸ The Appellate Body has also upheld compliance panels' rulings that new claims challenging a changed component of the measure taken to comply are admissible.⁴⁹

7.14. However, the Appellate Body has also concluded that, in the context of a compliance proceeding, a Member may be precluded from bringing the same claim with respect to an aspect of another Member's redetermination that is unchanged from the determination at issue in the original dispute.⁵⁰ An unchanged aspect of the original measure that a Member does not have to change, and does not change, in complying with the recommendations and rulings of the DSB thus should not be susceptible to challenge in a compliance proceeding.⁵¹ One panel, in applying these principles, distinguished between a new claim on an aspect of the measure taken to comply that constituted a new or revised element of the original measure, and which thus could not have been raised in the original proceedings, and another new claim that concerned aspects of the original measure that were unchanged.⁵² The panel found the former to be admissible, and the latter inadmissible.⁵³

7.15. We now proceed to consider the facts of this case, in light of the principles just described, to determine whether the United States' claim with respect to adverse impact is properly before us in this compliance proceeding.

7.16. Were we to conclude that MOFCOM changed the substance of its analysis or conclusions regarding adverse impact in the Redetermination, such that the United States could not have meaningfully raised the claim it now asserts in the original proceeding, we might conclude that allowing the United States' claim in this compliance proceeding would not unduly deprive China of its due process rights. However, should the changes in MOFCOM's Redetermination not be sufficient to justify this conclusion, we may find that the United States is challenging aspects of the original measure that are essentially unchanged, and which it could have challenged in the original dispute, and therefore conclude that allowing the United States' new claim in this compliance proceeding could jeopardize fundamental principles of fairness and due process and should therefore not be allowed to proceed. We are of the view that the latter conclusion is warranted in this case.

7.17. It is undisputed that the United States is introducing a new claim in this compliance proceeding. The United States made no claims under Articles 3.4 and 15.4 of the Anti-Dumping and SCM Agreements in the original proceeding. However, the United States asserts that MOFCOM's Redetermination was changed from its original Determination, and that its claim is a justified challenge to this changed Redetermination. In arguing that MOFCOM's Redetermination is changed from its original Determination, the United States focuses on the deletion of references to subject imports "at a low price" and an alleged change in the temporal focus of MOFCOM's injury analysis to 2008. China maintains that MOFCOM's Redetermination is essentially unchanged from its original Determination.

⁴⁷ See, e.g. Appellate Body Report, *Canada – Aircraft (Article 21.5 – Brazil)*, paras. 37-41.

⁴⁸ Appellate Body Report, *Canada – Aircraft (Article 21.5 – Brazil)*, paras. 37-41.

⁴⁹ See, e.g. Appellate Body Report, *US – FSC (Article 21.5 – EC)*, paras. 197-222.

⁵⁰ Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, paras. 88-89. In that case, the Appellate Body found that India was seeking to challenge an unchanged aspect of the original measure that the European Communities did not have to change, and did not change, in complying with the recommendations and rulings of the DSB. The Appellate Body considered that: (i) the EC's redetermination could be separated into distinct parts; (ii) India was merely reasserting a claim that it had raised, and as to which it had failed to make a *prima facie* case before the original panel; and (iii) India was precluded from bringing the same claim with respect to an aspect of the redetermination that was unchanged from the determination at issue in the original dispute.

⁵¹ Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, paras. 88-89.

⁵² Panel Report, *US – Countervailing Measures on Certain EC Products (Article 21.5 – EC)*, paras. 7.1-7.77.

⁵³ *Ibid.*

7.18. MOFCOM's injury analysis in the original Determination contained four references to imports of the product concerned "at a low price".⁵⁴ In the Redetermination, these four references have been reformulated, and now refer to "unfair" imports of subject merchandise in the otherwise nearly identical text.⁵⁵ China contends that "none of these references are engaging in price comparisons of any sort" and that "references to 'low price' imports in this discussion are just synonyms for unfairly traded imports."⁵⁶ China thus suggests that these different formulations are simply interchangeable references to the subject imports in the context of MOFCOM's injury analysis.

7.19. The Panel and Appellate Body in the original proceeding considered MOFCOM's discussion of the "low price" of subject imports in the context of price effects and found that, "although MOFCOM did not make a finding of significant price undercutting, MOFCOM's finding as to the 'low price' of subject imports referred to the existence of price undercutting between 2006 and 2008, and that MOFCOM relied on this factor to support its finding of significant price depression and suppression."⁵⁷ The Appellate Body specifically was not persuaded by China's arguments that the references to "low price" were simply references to the prices of subject imports in relation to their historical prices or to the low price established by virtue of the sale of subject imports at dumped and/or subsidized levels.⁵⁸ Thus, MOFCOM's references to "low price" were considered more significant by the Panel and Appellate Body in the original proceedings than was argued by China.

7.20. Accordingly, we have considered whether the deletion of these references from MOFCOM's injury analysis in the Redetermination and their replacement by a term that does not directly implicate price reflects a change in the focus and substance of the Redetermination from the original. We specifically asked China to clarify why MOFCOM replaced the original term in the Redetermination. China responded that MOFCOM replaced the Chinese term meaning "low" with one meaning "unfair" to avoid any confusion with the concept of price undercutting.⁵⁹ China further responded that MOFCOM thus inserted what it deemed to be the more precise term for "unfair" in its injury analysis in the Redetermination to refer to subject merchandise in the sense of "unfairly traded dumped or subsidized imports."⁶⁰ The United States argued that China provided no support for this assertion, and that the Appellate Body had already rejected this argument.⁶¹

7.21. In our view, the term "unfair imports" appears to connote a broader concept than the term "low-priced imports", as it implies that the imports in question are dumped or subsidized. But dumping and subsidization are determinations that can only be reached following thorough investigation and analysis. Accordingly, we find China's explanation for this change in terminology unclear. The change seems to be a cursory attempt to eliminate the reference to low prices that both we and the Appellate Body found problematic in the original dispute. Nevertheless, in the present proceeding, we consider this change in references specifically to assess whether it demonstrates a change in the Redetermination sufficient to allow the United States to challenge MOFCOM's analysis of the relevant injury factors.

7.22. On the basis of China's explanation, and in light of the text of the Redetermination and the arguments in the original dispute, we are of the view that the injury analysis and determination component of the measure taken to comply in this case, that is, the Redetermination, has not been changed from the original determination in a manner that makes it susceptible to challenge in this compliance proceeding. As was the case in *EC – Bed Linen (Article 21.5 – India)*, there was no need for MOFCOM in this case to change its determination of injury in seeking to comply with

⁵⁴ MOFCOM, Final Determination in Anti-Dumping and Anti-Subsidy Investigations on GOES Imports from the US and Russia, No. 21, 10 April 2010 (Original Determination) (Exhibit US-4), pp. 60-63.

⁵⁵ Compare Original Determination, (Exhibit US-4), pp. 60-63, with MOFCOM, Determination on the Re-investigation of Anti-Dumping and Countervailing Duties on Grain Oriented Flat-Rolled Electrical Steel Imports from the United States, Public Notice [2013] No. 51, including its annexes (Redetermination) (Exhibit US-1), pp. 29-32; and MOFCOM, Determination of the Ministry of Commerce of the People's Republic of China on the Anti-Dumping and Countervailing Reinvestigation on Imports of Grain Oriented Flat-rolled Electrical Steel Originating in the United States (Redetermination – China's translation) (Exhibit CHN-1), pp. 29-33.

⁵⁶ China's second written submission, para. 64.

⁵⁷ Appellate Body Report, *China – GOES*, para. 196.

⁵⁸ *Ibid.* para. 194.

⁵⁹ China's response to Panel question No. 48, para. 135.

⁶⁰ *Ibid.* para. 136.

⁶¹ United States' opening statement at the meeting of the Panel, para. 48.

the DSB's recommendation.⁶² As that determination was unchallenged in the original proceeding, the Redetermination simply incorporates elements of the original determination, unchanged in any material respect. In our view, the changes in wording between the original determination and the Redetermination are not substantively relevant to MOFCOM's analysis and determination of injury, and do not constitute a change that gives rise to a new aspect of that analysis and determination that can be challenged in this compliance proceeding.

7.23. The same reasoning applies to the United States' allegation that MOFCOM changed the temporal focus of its injury analysis to 2008. The texts of the original Determination and Redetermination with respect to MOFCOM's injury analysis are identical in almost all respects⁶³; the minor changes between the original determination and the Redetermination do not reflect a shift in the temporal focus of MOFCOM's analysis to 2008.⁶⁴

7.24. Finally, while the United States has focused on the changes in wording in the Redetermination, the new claim it is raising in this compliance proceeding does not relate specifically to those changes, but rather to aspects of MOFCOM's analysis and conclusions regarding the injury factors that are unchanged from the original determination and unaffected by the change in wording. We note that in a previous dispute, the Appellate Body emphasized that disallowing Brazil's claim in the compliance proceeding in *Canada – Aircraft* would have resulted in Brazil being precluded from making claims that it could not have raised in the original dispute.⁶⁵ In contrast, in this case, the substance of MOFCOM's injury analysis in the original determination and in the Redetermination are identical to such a degree that it is clear to us that the United States could have raised, in the original dispute, the same claim regarding the injury analysis in the original determination it now seeks to bring before us with respect to the Redetermination. It chose not to do so in the original proceeding, and we conclude that it may not do so in this compliance proceeding.

7.2.3 Conclusion regarding adverse impact

7.25. Thus, we find that the few changes between MOFCOM's original determination and Redetermination are inconsequential in the context of the latter, and the United States in this case seeks to challenge aspects of the Redetermination that are essentially unchanged from the original determination. In these circumstances, allowing the United States' new claim under Articles 3.1, 3.4 and 15.1, 15.4 of the Anti-Dumping and SCM Agreements respectively, with respect to adverse impact in the present compliance proceeding would jeopardize fundamental principles of fairness and due process, and we therefore conclude it is not properly before us.

7.3 Whether MOFCOM's Redetermination regarding price effects is consistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement and Articles 15.1 and 15.2 of the SCM Agreement

7.3.1 Introduction

7.26. The United States contends that the following three aspects of MOFCOM's Redetermination on price effects were not based on an objective examination of positive evidence, in violation of China's obligations under Articles 3.1 and 3.2 of the Anti-Dumping Agreement and Articles 15.1 and 15.2 of the SCM Agreement:

- a. Subject imports suppressed domestic prices in 2008 and Q1 2009;
- b. Subject imports depressed domestic prices by 30.25% in Q1 2009; and
- c. Pricing policies of subject country exporters caused price depression in Q1 2009.

⁶² Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, paras. 86-87.

⁶³ Original Determination, (Exhibit US-4), pp. 60-64; Redetermination, (Exhibit US-1), pp. 28-33; and Redetermination – China's translation, (Exhibit CHN-1), p. 29-33.

⁶⁴ Redetermination, (Exhibit US-1), p. 28 (The only textual change of a temporal nature in MOFCOM's injury analysis in the Redetermination consists of the addition of the phrase "during the same period" at the end of the last full paragraph on page 28 in reference to the period 2007, 2008 and Q1 2009). See also Redetermination – China's translation, (Exhibit CHN-1), p. 29.

⁶⁵ Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 88, discussing Appellate Body Report, *Canada – Aircraft (Article 21.5 – Brazil)*. That is not the situation in this case.

In particular, the United States makes a number of fact-specific arguments questioning MOFCOM's finding that subject imports had the "effect" of suppressing and depressing domestic prices, and also questions MOFCOM's decision to not make price comparisons between subject imports and the domestic like product, as part of its price effects analysis.⁶⁶

7.27. China rejects the United States' contentions, asserting that MOFCOM's conclusions that the increased volume of subject imports and the domestic industry's loss in market share had a suppressive and depressive effect on domestic like product prices were supported by factual findings indicating a competitive relationship between subject imports and the domestic like product.⁶⁷ China further argues that price negotiation letters exchanged between Chinese producers and customers, as well as provisions of a contract between a Russian producer and a Chinese customer (collectively referred to as "pricing policy documents") supported MOFCOM's conclusions regarding the existence of price competition and also the influence of prices on purchaser decisions as well as attempts by subject country exporters to set prices lower than those of the domestic like product.⁶⁸ These three factors, in turn, supported MOFCOM's conclusion that subject imports had had a suppressive and depressive effect on domestic prices.⁶⁹

7.3.2 Provisions at issue

7.28. Article 3.1 of the Anti-Dumping Agreement provides:

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

Article 3.2 of the Anti-Dumping Agreement provides:

With regard to the volume of the dumped imports, the investigating authorities shall consider whether there has been a significant increase in dumped imports, either in absolute terms or relative to production or consumption in the importing Member. With regard to the effect of the dumped imports on prices, the investigating authorities shall consider whether there has been a significant price undercutting by the dumped imports as compared with the price of a like product of the importing Member, or whether the effect of such imports is otherwise to depress prices to a significant degree or prevent price increases, which otherwise would have occurred, to a significant degree. No one or several of these factors can necessarily give decisive guidance.

Articles 15.1 and 15.2 of the SCM Agreement are identical to Articles 3.1 and 3.2, respectively, of the Anti-Dumping Agreement, with the exception that all references to "dumped imports" are replaced by references to "subsidized imports".

7.3.3 Main arguments of the parties

7.3.3.1 United States

7.29. The United States rejects MOFCOM's conclusion that the increased volume of subject imports and consequential loss of market share by the domestic industry, predominantly to subject

⁶⁶ See, e.g. United States' first written submission, para. 46.

⁶⁷ China's second written submission, para. 23. In this regard, China argues that MOFCOM's factual findings regarding the following seven factors supported its finding of a directly competitive relationship between subject imports and the domestic like product: (a) like product analysis; (b) cumulation analysis; (c) statement by US producer Allegheny Ludlum that the subject merchandise that it produced or exported to China was highly substitutable and competitive with the Chinese domestic like product and the like product from other countries; (d) parallel price trends of subject imports and the domestic like product; (e) pricing policy documents; (f) customer overlap; and (g) market share replacement. See also China's opening statement at the meeting of the Panel, p. 5; China's response to Panel question No. 4, para. 18.

⁶⁸ China's response to Panel question No. 1, paras. 13-17.

⁶⁹ Ibid.

imports, had the effect of suppressing or depressing the prices of the domestic like product.⁷⁰ The United States argues that MOFCOM could not have concluded that subject imports had the effect of suppressing or depressing domestic like product prices without comparing the actual prices of subject imports and the domestic like product, which MOFCOM admittedly did not do.⁷¹ Further, the United States questions the linkage that MOFCOM drew between increases in the volume of subject imports in 2008 and adverse effects on the domestic like product prices in Q1 2009, contending that the volume of subject imports declined from Q3 2008 to Q4 2008 and from Q4 2008 to Q1 2009, making it less plausible that the decline in domestic industry prices in Q1 2009 was related to subject imports.⁷² The United States also requests the Panel to reject as *ex post facto* rationalizations arguments made by China in this proceeding on the basis of quarterly 2008 market share data concerning shifts in market shares of subject imports, non-subject imports and the domestic like product. The United States asserts that this information was neither considered by MOFCOM in the Redetermination nor disclosed to the interested parties.⁷³ The United States emphasizes, however, that the quarterly market share data casts further doubt on MOFCOM's conclusions regarding the linkage between increases in the market share of subject imports and price effects in Q1 2009. According to the United States, the fact that non-subject imports gained market share in Q4 2008 makes it more plausible that the decline in domestic like product prices in Q1 2009 was in response to increases in non-subject imports' market share rather than that of subject imports.⁷⁴

7.30. The United States submits that MOFCOM's factual findings purporting to demonstrate that the subject imports and the domestic like product competed on price were flawed. First, the United States contends that MOFCOM failed to consider submissions by the US exporter AK Steel that [***].⁷⁵ In particular, the United States emphasizes that MOFCOM failed to consider evidence submitted by AK Steel that GOES produced by domestic producers was not certified for use in large transformers, i.e. transformers of 500kW and above.⁷⁶

7.31. Further, the United States questions MOFCOM's conclusions concerning price competition on the ground that the factual findings relied upon by MOFCOM in support of this conclusion were either general in nature, or were not representative of the market dynamic as a whole.⁷⁷

7.3.3.2 China

7.32. China rejects the United States' contention that MOFCOM could not have reached its conclusions regarding the suppressive and depressive effect of subject imports on the domestic like product prices without considering evidence of actual prices of subject imports compared to the prices of the domestic like product. China contends that Article 3.2 of the Anti-Dumping Agreement and Article 15.2 of the SCM Agreement do not require investigating authorities to make comparisons between the prices of subject imports and the prices of the domestic like product.⁷⁸ Further, China argues that while MOFCOM did not compare the prices of subject imports and the domestic like product, MOFCOM's Redetermination discussed and demonstrated the competitive relationship between subject imports and the domestic like product.⁷⁹

7.33. China submits that increases in the volume of subject imports, and in particular, gains in market share, may affect domestic prices regardless of whether the subject imports are priced higher or lower than the domestic like product.⁸⁰ China notes that the domestic industry lost 5.65 percentage points of market share in 2008 while subject imports gained 5.56 percentage points of market share in the same period.⁸¹ China submits that this showed that it was the

⁷⁰ See, e.g. United States' first written submission, paras. 49-53, 59-62; and second written submission, paras. 23-27, 48-56.

⁷¹ United States' first written submission, para. 47.

⁷² Ibid. para. 78.

⁷³ United States' comments on China's response to Panel question No. 14.

⁷⁴ Ibid.

⁷⁵ United States' opening statement at the meeting of the Panel, para. 30.

⁷⁶ United States' comments on China's response to Panel question No. 40.

⁷⁷ United States' opening statement at the meeting of the Panel, paras. 25-35.

⁷⁸ China's first written submission, para. 15.

⁷⁹ Ibid. para. 25.

⁸⁰ Ibid. para. 19.

⁸¹ China's response to Panel question No.1, para. 9.

subject imports, which were taking market share from the domestic industry, which forced the domestic industry to respond to that loss by restraining or reducing prices.⁸² In addition, China also submits that MOFCOM had specific evidence that the domestic industry lowered its prices in reaction to the loss of market share during 2008.⁸³

7.34. China argues that MOFCOM's factual findings regarding (a) likeness and cumulation, (b) statements by US exporter Allegheny Ludlum that its exports were highly substitutable with the domestic like product, (c) parallel price trends, (d) consumer overlap, (e) market share replacement and (f) pricing policy documents, all supported its conclusion that subject imports and the domestic like product competed on price.⁸⁴

7.35. Regarding the United States' arguments concerning evidence furnished by US exporter AK Steel, China argues that first, while AK Steel submitted a questionnaire response during the original proceeding, it did not make any comments on the factual disclosure or the preliminary determination in the original investigation regarding the non-substitutability of certain product categories exported by it with the domestic like product or make any comments on this issue during the Redetermination proceedings.⁸⁵ Second, AK Steel's exports of high-end GOES accounted for only about ten per cent of total subject country exports to China.⁸⁶ Therefore, according to China, the United States' argument regarding MOFCOM's failure to consider AK Steel's submission would have no bearing on MOFCOM's review of the effect of subject imports as a whole.⁸⁷

7.36. Further, China asserts that while it may be true that test manufacturing of 500 kW transformers employing domestically-produced materials was not expected until the end of 2009, i.e. subsequent to the period of investigation, it did not necessarily follow that the domestic industry did not produce GOES capable of being used in 500 Kw transformers earlier.⁸⁸

7.3.4 Main arguments of the third parties

7.37. The European Union contends that an increase in the volume of subject imports and a decline in the domestic industry's market share, taken together with the existence of price competition between subject imports and the domestic like product, will generally indicate that subject imports suppress or depress domestic like product prices.⁸⁹ However, the European Union adds that while in principle, it may be possible to establish price competition between subject imports and the domestic like product without comparing the prices of subject imports and the domestic like product, it is unclear whether in practice, it is possible to do so.⁹⁰ Further, the European Union submits that by disregarding evidence that may call into question the explanatory force of subject imports for price effects, an investigating authority acts contrary to its obligations under Articles 3.1 and 3.2 of the Anti-Dumping Agreement and Articles 15.1 and 15.2 of the SCM Agreement.⁹¹

7.38. Japan submits that an increase in the volume of subject imports and a decline in the domestic industry's market share, coupled with the existence of price competition, will not be sufficient to demonstrate price depression or price suppression within the meaning of Articles 3.1 and 3.2 of the Anti-Dumping Agreement.⁹² It contends that if increases in import volume and decreases in domestic industry market share were sufficient to find price effects, the price effects analysis would be rendered redundant.⁹³ In Japan's view, an increase in the volume of subject imports or parallel pricing between subject imports and the domestic like product only establishes

⁸² China's response to Panel question No.1, para. 9.

⁸³ Ibid.

⁸⁴ China's opening statement at the meeting of the Panel, p. 5.

⁸⁵ China's comments on the United States' response to Panel question No. 40.

⁸⁶ Ibid.

⁸⁷ Ibid.

⁸⁸ Ibid.

⁸⁹ European Union's third-party response to Panel question No. 3.

⁹⁰ European Union's third-party response to Panel question No. 1.

⁹¹ Ibid.

⁹² Japan's third-party response to Panel question No. 3.

⁹³ Ibid.

the potential for subject imports to suppress or depress domestic like product prices, and not actual price suppression or depression by subject imports.⁹⁴

7.39. Japan finds MOFCOM's reliance on (a) the likeness analysis, (b) parallel pricing between subject imports and the domestic like product, (c) overlap in consumers between subject country exporters and domestic industry and (d) pricing policies of subject countries producers to establish price competition between subject imports and the domestic like product to be flawed.⁹⁵ Japan submits that while investigating authorities may assess a competitive relationship for the purpose of a likeness enquiry, such inquiry is different from the scope, purpose and depth of consideration of a competitive relationship necessary in the context of a price effects analysis.⁹⁶ With respect to parallel pricing, Japan argues that parallel movement in prices of subject imports and the domestic like product is not evidence of a competitive relationship between subject imports and the domestic like product, and that the existence of parallel pricing between subject imports and the domestic like product does not necessarily mean that subject import prices are having an effect on domestic like product prices.⁹⁷ Further, Japan questions MOFCOM's reliance on consumer overlap, arguing that when subject imports and the domestic like product are concentrated at different ends of the like product spectrum, the fact that the same consumer may be procuring from subject country exporters and the domestic industry does not mean that price competition exists between subject imports and the domestic like product.⁹⁸ Finally, with respect to pricing policies of subject country exporters, Japan states that the mere consideration of prices of other producers while setting prices does not by itself establish the existence of a competitive relationship.⁹⁹

7.3.5 Evaluation by the Panel

7.40. The principal issue before us is whether MOFCOM's conclusions regarding the price suppressing effect of subject imports in 2008 and the price suppressing and depressing effect of subject imports in Q1 2009 were based on an objective examination of positive evidence, in accordance with Articles 3.1 and 3.2 of the Anti-Dumping Agreement and Articles 15.1 and 15.2 of the SCM Agreement. In other words, we must determine whether the conclusions reached by MOFCOM, as explained in the Redetermination, are such as could be reached by an objective and impartial decision-maker on the basis of the information and arguments that were before MOFCOM.

7.41. Regarding price suppression and depression, Articles 3.2 and 15.2 require investigating authorities to consider whether the effect of subject imports is to "depress prices to a significant degree or prevent price increases, which otherwise would have occurred, to a significant degree". The Appellate Body has stated that this requires investigating authorities to consider whether certain price effects are the "consequence" of subject imports.¹⁰⁰ We agree. But Articles 3.2 and 15.2 do not prescribe any particular methodology for that consideration. Therefore, investigating authorities retain some degree of discretion in adopting a methodology they deem fit for this purpose. This discretion, however, is not without limit. It is qualified by the overarching obligation set out in Articles 3.1 and 15.1 that investigating authorities shall base their determinations on an objective examination of positive evidence of, *inter alia*, the effect of subject imports on the market prices of domestic like products.

7.42. In *China – GOES*, the Appellate Body stated that the objective examination of positive evidence, in the context of price suppression or depression, requires that when an investigating authority "is faced with elements other than subject imports that may explain the significant price depression or suppression of domestic prices, it must consider relevant evidence pertaining to such elements for purposes of understanding whether subject imports indeed have a depressive or suppressive effect on domestic prices".¹⁰¹ The Appellate Body found support for this conclusion in Articles 3.2 and 15.2, which obligate investigating authorities to consider whether subject imports prevented price increases "which otherwise would have occurred".¹⁰² We agree with the Appellate

⁹⁴ Japan's third-party submission, para. 9.

⁹⁵ Japan's third-party response to Panel question No. 1.

⁹⁶ *Ibid.*

⁹⁷ *Ibid.*

⁹⁸ *Ibid.*

⁹⁹ *Ibid.*

¹⁰⁰ Appellate Body Report, *China – GOES*, para. 136.

¹⁰¹ *Ibid.* para. 152.

¹⁰² *Ibid.*

Body that investigating authorities may not disregard evidence which raise questions as to whether it is subject imports or some other element or elements that are suppressing or depressing domestic like product prices.

7.43. In this case, the United States argues that MOFCOM failed to compare the prices of subject imports and the domestic like product, despite evidence in the record indicating that there was a substantial divergence in the prices of subject imports and the domestic like product, and that in Q1 2009, subject imports were priced higher than the domestic like product. The United States argues that this evidence raised questions as to whether subject imports in fact had a suppressive or depressive effect on the domestic like product prices which MOFCOM, by not comparing the subject import and domestic like product prices, failed to consider. The United States contends that MOFCOM failed to explain how subject imports had the effect of suppressing or depressing domestic like product prices when subject import prices were higher in Q1 2009 than domestic like product prices. China argues that Articles 3.2 and 15.2 do not require investigating authorities to compare the prices of subject imports and the domestic like product, relying, in particular, on the Appellate Body's statement that, in light of the text of Articles 3.2 and 15.2, price suppression or depression may stem from "the price and/or volume of such imports".¹⁰³ China contends that increases in the volume of subject imports may have the effect of suppressing or depressing domestic prices independently of any effect of the prices of those imports, and that therefore no consideration of their prices in comparison to domestic like product prices is necessary in making such a determination.

7.44. In our view, the issue in the present case is not whether price comparisons are mandated under Articles 3.2 and 15.2, whether increased volumes of subject imports may have a price suppressive or depressive effect independent of any consideration of their relative prices, or whether higher priced imports may have a suppressive or depressive effect on domestic like product prices. Instead, the issue is whether, with respect to the findings of price suppression and depression, MOFCOM's Redetermination in this case, on its own merits, was based on an objective examination of positive evidence and provides reasoned explanations for those findings, in light of the evidence and arguments before it. Therefore, we do not consider it necessary to determine whether price comparisons are or are not required by Articles 3.1 and 3.2 of the Anti-Dumping Agreement or Articles 15.1 and 15.2 of the SCM Agreement as a general matter of law. Rather, we will consider, as part of our overall review of MOFCOM's conclusions on price effects, whether MOFCOM's failure to make price comparisons in this particular case, in light of the evidence and arguments before it, meant that it failed to make reasoned determinations regarding price effects on the basis of an objective examination of positive evidence.

7.45. MOFCOM concluded that the increases in the volume of subject imports and consequential gains in their market share, at the expense of the domestic like product sales, had the effect of suppressing and depressing domestic like product prices. China asserts that its conclusions were supported by factual findings demonstrating that the subject imports and the domestic like product competed on the basis of price. Therefore, we will commence our analysis by considering MOFCOM's conclusions on the effect of the increased volume of subject imports and consequential increase in their market share in 2008 on the prices of the domestic like product in 2008 and Q1 2009. Second, we will consider MOFCOM's findings concerning price competition between subject imports and the domestic like product. In that context, we will also consider whether, as argued by the United States, MOFCOM failed to properly take into account specific assertions by US exporter AK Steel that certain product categories it exported could not be commercially supplied by the Chinese domestic industry. Finally, we will assess whether, as argued by China, these findings, viewed as a whole, are sufficient to sustain MOFCOM's conclusions with respect to the price suppressing and depressing effects of subject imports.

7.3.5.1 The effect of the increase in the volume and market share of subject imports on domestic like product prices

7.46. MOFCOM found that the volume of subject imports increased in 2008 and the domestic industry consequently lost 5.65 percentage points of market share in 2008, predominantly to subject imports, which gained 5.56 percentage points of market share in the same period. MOFCOM concluded that the domestic industry had no option "but to compete with the subject

¹⁰³ Appellate Body Report, *China – GOES*, para. 138.

merchandise on pricing".¹⁰⁴ This precluded price increases in 2008, despite rising costs, resulting in a 7% decline in the domestic industry's price-cost differential.¹⁰⁵ On this basis, MOFCOM concluded that subject imports suppressed domestic like product prices in 2008.

7.47. Further, MOFCOM found that as a result of the increase in the volume of subject imports in 2008, and a decline of 1.25% in subject import prices in Q1 2009 as compared to Q1 2008, the domestic industry reduced its prices by 30.25% in Q1 2009 as compared to Q1 2008 so as to avoid further loss of market share, resulting in price depression in Q1 2009.¹⁰⁶ MOFCOM also found that, as a result of the decline in the domestic like product prices, the price-cost differential of the domestic industry declined by 75% in Q1 2009, as compared to Q1 2008, and thus found that subject imports also suppressed prices in Q1 2009.¹⁰⁷

7.48. In this regard, we note China's argument that although market share increases of subject imports alone do not necessarily explain price effects in all cases, in this particular case they did.¹⁰⁸ China focuses on the close correspondence between the domestic industry's loss of market share and gains in market share by subject imports. Further, China contends that the "extent and nature of the other evidence in this case" was sufficient to support the inference that subject import had adverse price effects and also that MOFCOM had "specific evidence" that the domestic industry lowered its prices in reaction to the loss of market share during 2008.¹⁰⁹

7.49. China has not identified any "specific evidence" before MOFCOM that indicates that the domestic industry lowered its prices in reaction to the loss of market share during 2008. Nor has China identified the "other evidence in this case" whose "extent and nature" allegedly supports the inference that subject imports suppressed and depressed domestic prices. To the extent that China's reference to such evidence is actually a reference to the various factors relied on by MOFCOM in its conclusions on price competition, we discuss these separately below.

7.50. Before examining MOFCOM's conclusions, we recall that Articles 3.2 and 15.2 require investigating authorities to consider two lines of enquiry. With regard to the volume of dumped or subsidized imports, investigating authorities are required to consider whether there has been a significant increase in dumped or subsidized imports, in absolute terms, or relative to production or consumption in the importing Member. With regard to the effect of the dumped imports on prices, investigating authorities are required to consider "whether there has been a significant price undercutting by the dumped imports as compared with the price of a like product of the importing Member, or whether the effect of such imports is otherwise to depress prices to a significant degree or prevent price increases, which otherwise would have occurred, to a significant degree". In our view, it is clear that these two lines of enquiry are separate, and that increases in subject import volume and/or market share may, or may not, have consequences for domestic prices. In order to decide which the case in any given investigation is, the investigating authority must specifically consider the question of price effects, guided by the requirements of Articles 3.2 and 15.2. It is clear to us that it cannot simply be assumed that an increase in subject import volume and market share will have a price suppressing or depressing effect on domestic prices. If investigating authorities could simply assume that an increase in subject imports' volume and market share suppresses and/or depresses domestic like product prices, without specifically explaining whether the effect of such dumped or subsidized imports was to suppress or depress prices, the second prong of Articles 3.2 and 15.2 would be rendered redundant.

7.51. Therefore, in our view an investigating authority may conclude that increases in the volume of subject imports and consequential market share gains have a price suppressing and depressing effect on the domestic like product only if it establishes a linkage between the subject import's increased volume and market share on the one hand and the price suppression or depression observed on the other. Furthermore, where an authority is faced with elements other than subject imports that may explain the price depression or suppression, it must consider the evidence

¹⁰⁴ Redetermination, (Exhibit US-1), p. 26; and Redetermination – China's translation, (Exhibit CHN-1), p. 27.

¹⁰⁵ Ibid.

¹⁰⁶ Redetermination, (Exhibit US-1), p. 24; and Redetermination – China's translation, (Exhibit CHN-1), p. 25.

¹⁰⁷ Redetermination, (Exhibit US-1), p. 26; and Redetermination – China's translation, (Exhibit CHN-1), p. 27.

¹⁰⁸ China's response to Panel question No. 1, para. 9.

¹⁰⁹ Ibid.

relevant to such elements for purposes of understanding whether subject imports indeed have a depressive or suppressive effect on domestic prices.¹¹⁰ By taking into account such elements, an investigating authority ensures that its consideration of significant price depression and suppression under Articles 3.2 and 15.2 is properly based on positive evidence and involves an objective examination, as required by Articles 3.1 and 15.1.¹¹¹ With this understanding in mind, we turn to the specific facts in this case.

7.3.5.1.1 Price Suppression in 2008

7.52. MOFCOM concluded that subject imports suppressed domestic like product prices in 2008 because the volume of subject imports increased in 2008 and the domestic industry lost market share as a consequence, predominantly to subject imports, which precluded price increases by the domestic industry despite rising costs. MOFCOM's analysis and determination raise a number of concerns.

7.53. First, MOFCOM assumed that if the domestic industry was losing market share, predominantly to subject imports, any inability to raise domestic prices must be a consequence of that loss in market share. We see no reference in MOFCOM's Redetermination to any evidence which could have led MOFCOM to the conclusion that the domestic industry's inability to increase prices and cover increased costs was actually the result of the loss in the domestic industry's market share to subject imports. Nor is there any explanation of how MOFCOM linked lost market share, which may well translate into lost revenues, to the industry's inability to increase prices to cover costs. MOFCOM's assumptions are particularly problematic in light of its failure to engage with or consider relevant evidence on the record, which could have affected MOFCOM's conclusion that the close correspondence between the domestic industry's loss of 5.65 percentage points of market share and the subject imports' gain of 5.56 percentage points of market share showed the suppressive effect of increased imports on domestic industry prices.

7.54. For instance, while MOFCOM concluded that price suppression was an effect of the domestic industry's loss of significant market share almost entirely to the subject imports, as we discuss below in considering MOFCOM's causation analysis, it failed to consider the impact of non-subject imports on domestic like product prices, even though the volume of such imports was greater than that of subject imports. Moreover, as MOFCOM itself observed, the prices of non-subject import prices were "close to" the price of subject imports in 2008.¹¹² Since subject imports, non-subject imports and the domestic like product all competed in the Chinese market, it is unclear how MOFCOM reached the conclusion that domestic industry prices were precluded from increasing as a result of the increased volume of subject imports, but that the significant volume of non-subject imports in the Chinese market, at prices similar to those of subject imports, had no such effect. Similarly, it is not clear to us how MOFCOM concluded that relative changes in market share between the domestic industry and subject imports had the effect of suppressing and depressing domestic prices, but relative changes in the much greater volume of non-subject imports did not.

7.55. China argues that non-subject imports gained only 0.09 percentage points of the 5.65 percentage points of market share lost by the domestic industry in 2008, given that subject imports gained 5.56 percentage points. Therefore, China contends that it was the subject imports' volume and market share increase that had the effect of suppressing and depressing domestic prices.¹¹³ In response to questions from the Panel, China provided the following information concerning quarterly shifts in market share in 2008 and Q1 2009 to the Panel, which was not set out in MOFCOM's Redetermination.¹¹⁴

¹¹⁰ Appellate Body Report, *China – GOES*, para. 152.

¹¹¹ *Ibid.*

¹¹² See Redetermination, (Exhibit US-1), p. 37; and Redetermination – China's translation, (Exhibit CHN-1), p. 37; GOES: Imports into China (China Customs import data), (Exhibit US-12) (this exhibit contains no page numbers).

¹¹³ China's first written submission, para. 119.

¹¹⁴ China's response to Panel question No. 14, para. 52.

Quarterly shifts in market share

	Q1 2008	Q2 2008	Q3 2008	Q4 2008	Q1 2009	Q1 2009 compared to Q1 2008
Domestic Industry	...	-1.85%	-5.00%	0.39%	7.50%	1.04%
Subject imports	...	10.28%	4.14%	-4.69%	-8.75%	1.17%
Non-subject imports	...	-8.44%	0.86%	4.30%	1.08%	-2.21%

Source: China's response to Panel question No. 14.

7.56. While, in light of the standard of review, we draw no conclusions on the basis of this quarterly data, we observe that it undermines to a degree MOFCOM's conclusion that the market share lost by the domestic industry in 2008 was taken up almost exclusively by subject imports. For instance, we note that China submits, relying on this quarterly data, that in Q4 2008, "subject imports remained very high", "the domestic industry began to react" to increases in volumes of subject imports, and that the domestic AUV fell in Q4 2008, in comparison to Q3 2008.¹¹⁵ Further, China explains that it is only in Q1 2009, with the cumulative effect of price decreases in Q4 2008 and Q1 2009, that the domestic industry began to regain market share that it had lost in 2008.¹¹⁶

7.57. Yet, the quarterly data show that in Q4 2008, non-subject imports gained 4.30% market share, in comparison to Q3 2008, whereas subject imports lost 4.69% of market share, in comparison to Q3 2008. We observe that MOFCOM's conclusion that in 2008 the domestic industry lost market share predominantly to subject imports does not adequately reflect the market dynamics prevalent in Q4 2008, and thereby understates the relevance or possible effect of non-subject imports on the domestic like product prices in 2008. This is particularly difficult to understand because China's submissions indicate that the price reactions from the domestic industry started in Q4 2008 and continued in Q1 2009, both of which are quarterly periods when non-subject imports gained and the subject imports lost market share.¹¹⁷ Therefore, we observe that far from offering relevant context for MOFCOM's conclusion regarding linkages between increases in subject import volume and adverse price effects suffered by the domestic industry, the quarterly data casts further doubt on MOFCOM's conclusions.

7.58. Second, in our view, a reasonable and unbiased investigating authority could not have concluded that the domestic industry reacted to increased volumes of subject imports by competing on price without considering the relative prices of subject imports and the domestic like product. We recall that there was information before MOFCOM on the prices of the subject imports, non-subject imports, and the domestic like product. While we draw no conclusions as to the probative value of that information, we do question MOFCOM's failure to consider it at all in the Redetermination. Such a consideration is, in our view, important to understand the relationship between subject import and domestic like product prices. For example, if there is a significant variation between the price levels of subject imports and the domestic like product, it may be questioned whether domestic industry prices were, in fact, precluded from increasing by the increases in the volume of subject imports in the market, or whether other factors were responsible for such price suppression. It is undisputed that MOFCOM did not make price comparisons.¹¹⁸ In our view, MOFCOM could not have reached a reasoned and adequate conclusion that the domestic industry's prices were suppressed by the volume of subject imports, having failed to consider the relative prices of subject imports and the domestic like product at all.

7.3.5.1.2 Price suppression and depression in Q1 2009

7.59. With respect to the price suppressing and depressing effect of subject imports in Q1 2009, MOFCOM concluded that (a) the "large increase" in the volume of subject imports since 2008 *and*

¹¹⁵ China's response to Panel question No. 14, paras. 55-56.

¹¹⁵ Ibid. para. 55.

¹¹⁶ Ibid. para. 56.

¹¹⁷ Ibid. paras. 55-56.

¹¹⁸ See, e.g. China's response to Panel question No. 7, para. 29.

(b) the "sharp decrease" in the price of those imports in the first quarter of 2009, together depressed and suppressed the price of the Chinese domestic like product in Q1 2009.¹¹⁹

7.60. In our view, when an investigating authority concludes that the increased volume and decreased prices of subject imports, taken together, affects domestic prices, it is not for a panel to independently seek to determine the price suppressive or depressive effect of either the volumes or prices of subject imports alone. Absent some indication that the investigating authority itself considered the effect on domestic prices of the volumes and prices independent of each other, such an inquiry would require us to undertake a *de novo* analysis of the facts, which we are not permitted to do.¹²⁰ Therefore, we asked China to clarify whether MOFCOM found that the domestic industry's loss of market share to subject imports in 2008 and the 1.25% decline in subject import prices in Q1 2009, taken together, forced the domestic industry to lower prices by 30.25% in the same period.

7.61. China clarified, referring to other parts of MOFCOM's Redetermination, that while MOFCOM noted both the increased volume of subject imports and consequential gains in market share and the decrease in import prices, it placed much more emphasis on the loss of domestic market share and was more concerned with the decline in subject import prices in the face of rising domestic costs than it was with the extent of the decline in subject import prices.¹²¹ The following statement reflects this:

In the first quarter of 2009, drawing upon the lesson of losing market share in 2008, the domestic industry was forced to cut price to avoid further losing market share. Given that sales price of the domestic like product fell by 30.25% compared to the previous year, the domestic industry won back part of the market share that was lost in 2008, but still failed to recover to the market share level of 2007 when the subject merchandise had not yet been imported in large quantities.¹²²

7.62. This statement refers to the effect of the increased volume of subject imports and consequential loss in domestic industry's market share alone on the domestic like product prices, suggesting that MOFCOM did consider the effect of the volume of subject imports independent of the effect of the price decline.¹²³ Therefore, we now turn to consider whether MOFCOM's conclusion regarding the linkage between the increased volume of subject imports in 2008 and price effects in Q1 2009 was based on an objective examination of positive evidence.

7.63. We have two specific concerns regarding the linkage that MOFCOM draws between increases in subject import volume and price effects in Q1 2009. First, MOFCOM found that the domestic industry was forced to lower prices to avoid further loss of market share.¹²⁴ However, MOFCOM made no attempt to compare the prices of subject imports and the domestic like product. If subject imports were priced higher than the domestic like product, it is not clear that further price reductions by the domestic industry would enable it to limit further market share losses, which occurred even though domestic prices were lower than subject import prices. We note in this context that the US government specifically argued that subject imports were priced higher than the domestic like product in Q1 2009 and MOFCOM did not find this assertion of fact to be incorrect.¹²⁵ In our view, MOFCOM could not have reached a reasoned and adequate conclusion regarding the linkage between increases in subject import volume and price effects suffered by the domestic industry, without examining the price levels of subject imports and the domestic like product.

¹¹⁹ Redetermination, (Exhibit US-1), pp. 28, 41; and Redetermination – China's translation, (Exhibit CHN-1), pp. 28, 42.

¹²⁰ See Appellate Body Report, *China – GOES*, paras. 216, 220.

¹²¹ China's response to Panel question No. 27, para. 93.

¹²² Redetermination, (Exhibit US-1), p. 49; and Redetermination – China's translation, (Exhibit CHN-1), p. 49.

¹²³ In this regard, we find no similar independent references to the depressive or suppressive effect of a 1.25% decline or sharp decrease on domestic like product prices, nor does China argue that MOFCOM's finding could be sustained on the basis of a sharp decrease in subject import prices in Q1 2009. Therefore, we do not consider this issue further.

¹²⁴ Redetermination, (Exhibit US-1), p. 26; and Redetermination – China's translation, (Exhibit CHN-1), p. 27.

¹²⁵ Redetermination, (Exhibit US-1), p. 41; and Redetermination – China's translation, (Exhibit CHN-1), p. 42.

7.64. We recall that, in the original proceeding, the Appellate Body found that the "fact that there was a substantial divergence in pricing levels over that period [Q1 2009] could suggest that the two products [subject imports and the domestic like product] were not in competition with each other or that there were other factors at work".¹²⁶ In the Redetermination, instead of considering whether this substantial divergence in pricing levels (which China does not deny existed) brought into question its determination, MOFCOM simply chose not to make price comparisons or take the price levels into consideration at all.¹²⁷ In our view, in situations where a panel or the Appellate Body highlights certain concerns, based on the underlying evidence, regarding the consistency of a measure with the Anti-Dumping Agreement or SCM Agreement, it is on its face problematic for an investigating authority to simply decline to engage with the evidence that was the basis of the decision it is seeking to implement by making a new determination based on the same record evidence.

7.65. In this case, given the nature and scope of the findings in the original proceeding, we would have expected MOFCOM, in making a new determination based on the same record evidence, to provide some analysis or explanation as to why the evidence regarding divergences in price levels between subject imports and the domestic like product did not affect its conclusions, or why it found it unnecessary to consider such evidence at all. However, MOFCOM chose not to address that question, and ignored the evidence altogether, relying on the Appellate Body's statement that price comparisons are not required as a matter of law.¹²⁸ Even if price comparisons are not required in order to make a determination regarding the price effects of imports as a matter of law, a failure to at least consider evidence of price divergences where such evidence is before the investigating authority is difficult to understand. An analytical approach based on disregarding evidence which might lead to a different conclusion casts doubt on the reasonableness and objectivity of the investigating authority's examination of the evidence and its conclusions. This is particularly so in a case like the present one, when there were specific arguments advanced by the United States government that subject imports were priced higher than the domestic like product in Q1 2009, both the panel and the Appellate Body questioned the adequacy of MOFCOM's analysis of the pricing evidence in the original determination, the record evidence underlying the Redetermination is unchanged from the original proceeding, and the same ultimate conclusions were reached by MOFCOM.

7.66. Second, MOFCOM's conclusions seem even more questionable given that, as argued by the United States, subject imports declined from Q3 2008 to Q4 2008 and from Q4 2008 to Q1 2009, undermining the plausibility of a conclusion that the price suppression and depression in Q1 2009 were the effect of increases in subject import volumes.¹²⁹

7.67. China questions the United States' reliance on quarterly import statistics from China Customs, on the ground that quarterly data may have anomalies.¹³⁰ China argues that such anomalies may arise because it takes time for subject imports to arrive in China and be counted, while decisions about how much to import and how much to charge for those shipments are based on information from an earlier time.¹³¹ However, China clarified that its arguments "relate more to

¹²⁶ Appellate Body Report, *China – GOES*, para. 226.

¹²⁷ See, e.g. Redetermination, (Exhibit US-1), p. 41; and Redetermination – China's translation, (Exhibit CHN-1), p. 42.

¹²⁸ In this regard, China argues that it did not consider the price differences between subject imports and the domestic like product because, in the original proceeding, the Appellate Body found deficiencies in the price data that was used for price comparisons. In the absence of new price data in the redetermination proceeding, MOFCOM could not have made price comparisons without using the same deficient price data. China's comments on the interim report, para. 6. In its Redetermination, MOFCOM decided not to collect new evidence and based its redetermination on the evidence from the original investigation and determination. While China may, in the first instance, seek to bring its measures into conformity with its WTO obligations in whatever manner China deems appropriate, any measure taken to comply with its WTO obligations, in this case, MOFCOM's Redetermination, must itself be consistent with China's WTO obligations. In this case, for the reasons set out in this Report, we have found that MOFCOM's failure to make price comparisons, as well as other errors, resulted in findings and explanations which were not "reasoned and adequate" to support MOFCOM's determination, and therefore concluded, *inter alia*, that the Redetermination is inconsistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement and Articles 15.1 and 15.2 of the SCM Agreement. We do not consider that China's explanation as to why MOFCOM did not make price comparisons between subject imports and the domestic like product justifies the errors that we found in MOFCOM's price effects analysis.

¹²⁹ United States' first written submission, para. 78.

¹³⁰ China's first written submission, para. 62; and response to Panel question No. 35, paras. 108-110.

¹³¹ China's response to Panel question No. 35, para. 108.

the price than the volume" and that given the closer proximity to the market, domestic producers could react with a new price while the subject imports would react on a delayed basis.¹³² Since the United States' argument concerns the effect of the declining volume of subject imports rather than their price, we do not consider that China's argument undermines the argument raised by the United States, that is, whether MOFCOM's redetermination could be considered reasonable since MOFCOM focused on shifts in market share in 2008 as a whole, while ignoring evidence that the volume of subject imports declined from Q3 2008 onwards.¹³³

7.68. MOFCOM's Redetermination does not suggest that this issue was considered by MOFCOM, nor has China argued to the contrary. In our view, a reasonable and unbiased investigating authority could not conclude that an increase in the volume of subject imports and a consequential market share gain of 5.56 percentage points in 2008 resulted in domestic price declines in Q1 2009 to avoid further loss of market share, without taking into account the fact that subject imports actually declined from Q3 2008 to Q4 2008 and again from Q4 2008 to Q1 2009. In our view, this evidence is clearly relevant to assessing the linkages, if any, between market share shifts in 2008 and price declines in Q1 2009.

7.69. To be clear, we do not mean to suggest that it is impossible that the Chinese domestic industry experienced price depression in Q1 2009 in the face of a declining volume of subject imports from Q3 2008 to Q1 2009. However, we do consider that, faced with evidence of declining import volumes toward the end of the period, which could potentially affect any findings regarding the price suppressing and depressing effect of subject imports, MOFCOM should have, at a minimum, considered and addressed this evidence. MOFCOM failed to do so.

7.70. Our review of MOFCOM's determination with respect to price suppression and price depression in 2008 and Q1 2009 based on subject import volumes and market share has revealed serious errors in MOFCOM's analysis of the underlying evidence, which in our view call into question whether MOFCOM's conclusions regarding price effects could have been reached by an investigating authority considering the evidence objectively, and are supported by reasoned explanations. Nonetheless, we now turn to an examination of whether this evidence, considered in conjunction with evidence of price competition between the subject imports and the domestic like product is an adequate basis for MOFCOM's conclusions regarding the price suppressing and depressing effect of subject imports on domestic like product prices.

7.3.5.2 MOFCOM's finding regarding price competition between subject imports and the domestic like product

7.71. Turning to MOFCOM's findings on price competition, we will first examine MOFCOM's consideration of evidence furnished by the US exporter AK Steel that certain product categories manufactured by it could not be commercially supplied by the domestic industry. In our view, the inability of the domestic industry to meet the needs of certain specific end-uses may well affect a finding of price competition between subject imports and the domestic like product. Second, we will examine whether, as argued by China, MOFCOM's seven factual findings concerning price competition, taken as a whole, supported MOFCOM's conclusions regarding price competition between subject imports and the domestic like product. Finally, we will consider whether, and if so how, MOFCOM's finding of price competition, taken together with its findings regarding the volume and market share of subject imports, reasonably explain and support its conclusions regarding the price effects of those imports.

7.3.5.2.1 AK Steel's evidence of non-substitutability of certain product categories

7.72. The United States argues that MOFCOM failed to adequately consider evidence submitted by AK Steel that [***].¹³⁴ Further, AK Steel also contended that lower grade Chinese-produced GOES was not readily substitutable for imported GOES and that any substitution would require downstream users to make significant manufacturing changes, with consequent adverse effects on the final product and on manufacturing costs.¹³⁵ In particular, the United States emphasizes that

¹³² China's response to Panel question No. 35, paras. 108-109.

¹³³ See Redetermination, (Exhibit US-1), p. 50; and Redetermination – China's translation, (Exhibit CHN-1), p. 50.

¹³⁴ United States' opening statement at the meeting of the Panel, para. 30.

¹³⁵ Ibid.

MOFCOM failed to consider evidence submitted by AK Steel that GOES produced by domestic producers was not certified for use in large transformers, i.e. transformers of 500kW and above.¹³⁶ The United States asserts that AK Steel was a much more significant participant in the Chinese market than the other participating US exporter, Allegheny Ludlum, and that by ignoring AK Steel's submissions, MOFCOM disregarded evidence relating to a significant proportion of the imports under investigation.¹³⁷

7.73. China responds first that, while AK Steel submitted a questionnaire response during the original proceeding containing the assertions relied on by the United States, it did not make any comments on MOFCOM's factual disclosure or preliminary determination in the original investigation with respect to the issue of non-substitutability of certain product categories or any comments on this issue during the Redetermination proceedings.¹³⁸ Second, China contends that AK Steel's exports of high-end GOES accounted for only about ten per cent of total subject country exports to China and for that reason, would not have had any material impact on MOFCOM's analysis of the cumulated effect of subject imports as a whole.¹³⁹ Further, China asserts that while it may have been true that the Government of China did not expect test manufacturing of 500 kW transformers employing domestically-produced GOES until the end of 2009, i.e. subsequent to the period of investigation, it did not necessarily follow that the domestic industry did not produce GOES capable of being used in such transformers.¹⁴⁰ Finally, China submits that since AK Steel did not distinguish the product categories exported by it from those exported by Allegheny Ludlum, MOFCOM was well within its rights to forego any further consideration of AK Steel's contentions.¹⁴¹

7.74. China referred to the following excerpt from MOFCOM's Redetermination, which China contends responded to the submissions of AK Steel regarding the inability of the domestic industry to manufacture certain product types in commercial quantities, without explicitly referring to AK Steel by name:

The interested parties that submitted responses to the questionnaire for overseas producers and domestic importers at one point argued that laser scribing, low iron loss and other high-end products can only be produced in the U.S., Japan and other countries. During the verification of the domestic producers, the Investigating Authority verified their production lines of laser scribing, collected evidence such as their product catalogues, product testing reports and sales invoices, which prove that the domestic industry indeed did produce and sell laser-scribing and low-iron-loss grain GOES product. The domestic industry also provided use evaluation reports from the downstream users, proving that domestic like product is of similar quality to the subject merchandise and that the two are competitive and substitutable.¹⁴²

7.75. There is a considerable degree of factual dispute between the parties as to whether AK Steel's submissions were considered by MOFCOM and whether AK Steel's submissions were accurate in light of MOFCOM's conclusions concerning the substitutability of different product types. While we will not undertake a *de novo* review of the information provided by AK Steel, we will examine carefully whether the "explanations given disclose how the investigating authority treated the facts and evidence in the record" and whether the "explanations provided demonstrate that the investigating authority took proper account of the complexities of the data before it, and that it explained why it rejected or discounted alternative explanations and interpretations of the record evidence".¹⁴³

7.76. First, we do not accept that merely because AK Steel did not advance specific arguments on an issue beyond providing information in its questionnaire, MOFCOM was entitled to disregard the

¹³⁶ United States' response to Panel question No. 40, para. 22.

¹³⁷ United States' opening statement at the meeting of the Panel, paras. 30, 32.

¹³⁸ China's comments on the United States' response to Panel question No. 40.

¹³⁹ *Ibid.*

¹⁴⁰ *Ibid.*

¹⁴¹ *Ibid.*

¹⁴² Redetermination, (Exhibit US-1), p. 51; and Redetermination – China's translation, (Exhibit CHN-1), p. 51.

¹⁴³ Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93.

relevant facts submitted by AK Steel. [***]¹⁴⁴ We understand China to be arguing that in order for MOFCOM to consider whether this was in fact true, AK Steel was required to make some additional submission specifically raising an argument based upon the facts presented in its questionnaire response. We disagree. If interested parties make available relevant evidence to the investigating authority, within prescribed timelines, there is no obligation on those parties to, in addition, make further arguments based on that evidence in the form of separate written or oral submissions. On the other hand, investigating authorities are required, in order to ensure an objective examination of the evidence, to consider all the evidence presented, and not merely that which is the subject of elaborated arguments.

7.77. Further, MOFCOM based the Redetermination on "record evidence submitted by interested parties as well as record evidence collected by the investigating authority in the original investigation".¹⁴⁵ It is clear that AK Steel was not required to resubmit its questionnaire response again in the Redetermination proceeding, and the same consideration we discussed above means it was not required to make additional arguments on the basis of the facts it submitted originally in the Redetermination proceeding. Therefore, as the questionnaire response continued to be part of the evidence on record before MOFCOM in the Redetermination proceeding, MOFCOM remained obligated to consider the information in its analysis and conclusions or explain why it was not relevant or probative.

7.78. Second, we reject China's argument that, absent an attempt by AK Steel to distinguish its steel from that shipped by Allegheny Ludlum, or any arguments on the issue, MOFCOM was entitled to forego any further consideration of AK Steel's contentions. Indeed, we find it difficult to understand this argument, given that it is entirely possible that one exporter simply has no knowledge of the product mix of another exporter, and therefore could not make such an argument. Moreover, even if the exporter did have this information, we cannot accept the view that the failure of an interested party to make certain arguments justifies an investigating authority's failure to consider relevant evidence submitted to it. China has pointed to no provision in the Anti-Dumping Agreement or the SCM Agreement, which would allow this. To the contrary, it is clear to us that the obligation of an investigating authority is to consider all the evidence presented to it, evaluate and weigh it, and draw conclusions supported by reasoned explanations. We fail to see how an investigating authority can satisfy this standard if it refuses to consider seemingly relevant information without a sufficient explanation.

7.79. Third, looking at MOFCOM's statement concerning arguments regarding [***], we observe that while MOFCOM took note of the assertions by interested parties that laser scribing, low iron loss and other high-end products could only be produced in the US, Japan and other countries, it is unclear to us how this responds to the specific assertions of AK Steel.¹⁴⁶ For instance, AK Steel stated that "HiB grades" manufactured by Wuhan were not certified for use in large transformers of 500 kW and above, and that based on AK Steel's feedback from its customers, Chinese transformer manufacturers were refusing to use domestically-produced GOES for these applications.¹⁴⁷ It is not discernible from MOFCOM's analysis or explanations how or if it considered this specific assertion. In our view, the fact that the domestic industry was allegedly unable to satisfy a specific end-use need in the Chinese market, i.e. supply GOES for use in large transformers of 500 Kw or above, was a relevant fact which should have been considered and resolved by MOFCOM in concluding that the domestic product and subject imports competed on price.

7.80. Finally, China contends that AK Steel did not quantify its shipments of GOES destined for use in transformers of capacity 500 Kw and above and therefore questions the United States'

¹⁴⁴ United States' response to Panel question No. 40, paras. 10-13 (quoting AK Steel Corporation, Supplementary Industry Injury Investigation Questionnaire Response, (AK Steel Supplementary Questionnaire Response), (Exhibit US-18) (BCI)).

¹⁴⁵ Redetermination, (Exhibit US-1) (this part of the Redetermination contains no page numbering); and Redetermination – China's translation, (Exhibit CHN-1), p. 1.

¹⁴⁶ Redetermination, (Exhibit US-1), p. 51; and Redetermination – China's translation, (Exhibit CHN-1), p. 51.

¹⁴⁷ United States' response to Panel question No. 40, paras. 13, 22 (quoting AK Steel Supplementary Questionnaire Response, (Exhibit US-18) (BCI), p. 4). See also News article, *China encourages domestic production of grain-oriented electrical steel for large transformers*, (Exhibit US-19). This Exhibit was presented as evidence in the original investigation before MOFCOM and cited in AK Steel's supplementary questionnaire response. See AK Steel Supplementary Questionnaire Response, (Exhibit US-18) (BCI), p. 4.

reliance on AK Steel's information.¹⁴⁸ Further, China argues that high-end GOES accounted for only about 10% of total subject imports and for that reason, United States' argument was not material to MOFCOM's analysis of the effect of subject imports as a whole.¹⁴⁹ We reject both of these arguments. The fact that the volume of imports of a grade not produced by the domestic industry may be relatively small as a percentage of total imports may well be relevant in assessing the question of price competitiveness, but it does not justify an investigating authority's refusal to undertake an analysis on the issue. Further, it is not for the Panel to make *de novo* findings as to whether MOFCOM's failure to consider such evidence was inconsequential in light of the limited volume of exports of such product categories into China.¹⁵⁰ There is nothing in the Redetermination that suggests that MOFCOM itself took this view.

7.81. In sum, MOFCOM's Redetermination does not explain how MOFCOM actually considered the information submitted by AK Steel in the context of its conclusion that the subject imports competed with the domestic like product on the basis of price.

7.3.5.2.2 Seven factors supporting MOFCOM's finding of price competition

7.82. China argues that, in making its determination of price effects, MOFCOM considered the domestic industry's loss of market share to increased volumes of subject imports in conjunction with other evidence demonstrating a competitive relationship based on price between subject imports and the domestic like product.¹⁵¹ We agree that price competition may be a relevant element in determining whether subject imports had an effect on domestic like product prices. In that context, an investigating authority must be able to explain the connection between a factual finding of price competition between the domestic like product and subject imports and its ultimate conclusions concerning the price effects of those imports.

7.83. We now turn to consider each of the seven factors which China argues supported MOFCOM's finding of price competition. We note that China acknowledges that each of these factors, viewed in isolation, may be insufficient to support a finding regarding price competition or price effects.¹⁵² Thus, while we review each of the factors individually, our conclusions will take into account all of them as a whole.

Like product and cumulation

7.84. In the Redetermination, MOFCOM summarized its analysis of likeness as follows:

In summary, the GOES produced by China's domestic industry and the subject merchandise are not different in terms of physical character, and aspects such as production techniques and processes, product use, product substitutability, evaluations by consumers and producers, and sales channel are *fundamentally similar* and the price trends are *overall consistent*. Being similar and comparable, they are substitutable. Therefore, the GOES produced by China's domestic industry and the subject merchandise are like products.¹⁵³ (emphasis added)

With respect to cumulation, MOFCOM stated:

Based on investigation, comparing the subject merchandise and the subject merchandise and the Chinese domestic like products, the physical characteristics, production techniques and processes and end uses are *fundamentally the same*, the sales channel and sale price trends are *fundamentally the same*, they all arose in the

¹⁴⁸ China's comments on the United States' response to Panel question No. 40.

¹⁴⁹ See, e.g. China's comments on the United States' response to Panel question No. 40.

¹⁵⁰ In this regard, we do not share China's view that because AK Steel's exports [***] constituted only ten per cent of total subject imports, it would not materially affect MOFCOM's analysis of price competition between subject imports and the domestic like product. In our view, the non-substitutability of even ten per cent of subject imports with the domestic like product may well be relevant in assessing the extent of price competition. In any event, investigating authorities may not summarily reject arguments regarding non-substitutability solely because they affect a relatively small segment of the domestic market.

¹⁵¹ China's response to Panel question No. 5, para. 21.

¹⁵² China's response to Panel question No. 4, para. 19.

¹⁵³ Redetermination, (Exhibit US-1), p. 12; and Redetermination – China's translation, (Exhibit CHN-1), p. 13.

Chinese market at *fundamentally the same time*, product quality is *similar*, they satisfy customer requirements, they are substitutable, a competitive relationship exists between them, and the competition conditions are *fundamentally the same*.¹⁵⁴ (emphasis added)

7.85. The United States argues that MOFCOM's determinations of likeness and cumulation did not go beyond very general similarities or include any meaningful consideration of the nature of price competition or lack thereof.¹⁵⁵ China contends that it is difficult to conceive that subject imports and the domestic like product which were (a) "fundamentally the same", in terms of physical characteristics and terms of use, (b) travelled through the same channels, (c) were directly competitive with each other, (d) and were substitutes of each other, were not competing on price.¹⁵⁶ China argues that the finding of substitutability, in particular, strongly supported the notion of price competition.¹⁵⁷

7.86. We agree that products which have similar physical characteristics and uses and are directly competitive and substitutable with each other are likely to compete on price. However, MOFCOM's findings are qualified, as indicated by the text italicized in the quotations above. Thus, in our view, the extent of similarities between subject imports and the domestic like product is less than clear, and thus the conclusion of price competition is somewhat attenuated. For instance, MOFCOM finds that the end uses of the domestic like product and the subject imports were "fundamentally the same". However, the extent and nature of the differences might well give insight as to whether the domestic product and subject imports are only broadly similar or close substitutes which could be used interchangeably for many, most, or all commercial purposes. In particular, we recall the assertions of AK Steel that certain GOES manufactured by the domestic industry was not certified for use in large transformers, and thus did not compete with the imported product.¹⁵⁸ MOFCOM's qualified conclusions give no indication as to whether or how it considered these assertions, which in our view would be relevant to a conclusion that the domestic like product competed with subject imports on the basis of price.

Statement by US producer Allegheny Ludlum

7.87. MOFCOM also relied on US producer Allegheny Ludlum's statement that the subject merchandise it produced and exported to China was highly substitutable and competitive with the domestic like product and the like product from other countries in its finding of price competition between subject imports and the domestic like product.¹⁵⁹ The United States asserts that MOFCOM could not have properly drawn conclusions regarding price competition based on Allegheny Ludlum's statement, particularly because MOFCOM failed to consider the submission of AK Steel, a bigger participant in the Chinese market, which argued that [***].¹⁶⁰

7.88. While MOFCOM was entitled to take into account Allegheny Ludlum's statement that its exports were highly substitutable and competitive with the domestic like product, we note that there is nothing in MOFCOM's determination suggesting that the product types exported by Allegheny Ludlum were representative of subject imports from the United States, or subject countries, as a whole. We recall our concerns with MOFCOM's failure to fully consider the information submitted by AK Steel, and the fact that AK Steel's exports accounted for a larger share of US exports than did those of Allegheny Ludlum. Since MOFCOM was making a finding with respect to subject imports as a whole, it is not clear to us why MOFCOM would rely on Allegheny Ludlum's statement without thoroughly considering the submissions of AK Steel, whose exports to China were greater than those of Allegheny Ludlum, and would thus seem to have been more likely to be representative of US imports, even if not of subject imports as a whole. In these circumstances, we consider that Allegheny Ludlum's statements give little support to MOFCOM's conclusion of price competition.

¹⁵⁴ Redetermination, (Exhibit US-1), p. 21; and Redetermination – China's translation, (Exhibit CHN-1), p. 22.

¹⁵⁵ United States' second written submission, para. 31.

¹⁵⁶ China's second written submission, para. 34.

¹⁵⁷ Ibid.

¹⁵⁸ United States' response to Panel question No. 40, para. 9.

¹⁵⁹ China's opening statement at the meeting of the Panel, p. 5 (quoting Redetermination, (Exhibit US-1), p. 51; and Redetermination – China's translation, (Exhibit CHN-1), p. 51).

¹⁶⁰ United States' opening statement at the meeting of the Panel, paras. 29-30.

Parallel price trends from 2006 to 2008

7.89. MOFCOM also relied on parallel trends in the prices of imports and the domestic like product in finding price competition. China argues that the divergence in the price trends of subject imports and the domestic like product in Q1 2009 did not undermine MOFCOM's conclusions because MOFCOM adequately explained the reasons for that divergence.¹⁶¹ According to MOFCOM, the domestic industry reduced prices in Q1 2009 in order to regain market share lost to subject imports in 2008.¹⁶² The United States contends that MOFCOM's reliance on parallel price trends to show price competition was misplaced, especially in light of the substantial divergence in the price trends of subject imports and the domestic like product in Q1 2009.¹⁶³

7.90. MOFCOM relied on the following data concerning the average unit values (AUV)¹⁶⁴ of subject imports and domestic like product over the period of investigation¹⁶⁵:

Percentage changes in AUV of subject imports and domestic like product

	2007	2008	Interim 2009
Subject imports	+2.9%	+17.57%	-1.25%
Domestic like product	+6.66%	+14.53%	-30.25%

Source: United States' second written submission¹⁶⁶

On the basis of this data, MOFCOM concluded:

The Investigating Authority based on the investigation determines that the conclusion that the pricing trends are fundamentally consistent was arrived at from the analysis of the import price of the subject merchandise during the period of the investigation and domestic price of the Chinese domestic like product. From 2006 through the first quarter of 2009, the two prices first increased and then decreased. The trends are fundamentally consistent.¹⁶⁷

7.91. In response to arguments by the US government and AK Steel that the 1.25% drop in subject import price in Q1 2009, compared to the drop of 30.25% in domestic like product prices, indicated a lack of correlation between the prices of subject imports and the domestic like product, MOFCOM noted as follows:

The Investigating Authority finds that the analysis in the price effects section of the redetermination comprehensively analysed the situation in 2008 and the first quarter of 2009. After taking into full consideration the import volume of the subject merchandise, corresponding changes in the market share of the subject merchandise and domestic like product and the corresponding changes in average price, the Investigating Authority finds that the continual substantial increase in the import volume of the subject merchandise caused the domestic [industry] to face a dilemma: if the domestic industry maintained the proper price level, the domestic industry would lose its market share; if the domestic industry wanted to avoid losing market

¹⁶¹ China's first written submission, para. 43.

¹⁶² Redetermination, (Exhibit US-1), p. 49; and Redetermination – China's translation, (Exhibit CHN-1), p. 49.

¹⁶³ United States' second written submission, paras. 34-35.

¹⁶⁴ Average unit values or AUVs, as noted in the original proceeding, represented the volume weighted average unit values for all transactions during a given calendar year. See Panel Report, *China – GOES*, footnote 497. China clarified that the AUV data on domestic prices was the same data on domestic prices available and discussed in the original determination. See China's response to Panel question No. 7, para. 25. We understand that MOFCOM used AUVs as proxies for actual prices of the domestic like product.

¹⁶⁵ See United States' first written submission, p. 19. The United States provided, in table form, the percentage changes in prices of subject imports and the domestic like product, as considered by MOFCOM, in the Redetermination.

¹⁶⁶ United States' second written submission, para. 33. The figures are based on percentage changes in price trends that were disclosed by MOFCOM in the Redetermination.

¹⁶⁷ Redetermination, (Exhibit US-1), pp. 39-40; and Redetermination – China's translation, (Exhibit CHN-1), p. 40.

share, then it had to lower the price. The evidence that the Investigating Authority obtained fully support[s] this determination.¹⁶⁸

7.92. We recall that in the original proceeding the panel and the Appellate Body had questioned MOFCOM's failure to explain why the different rates of decrease in the prices of subject imports and domestic like product did not affect its parallel price trends analysis or its overall price effects analysis.¹⁶⁹ China argues that MOFCOM did explain this in the Redetermination and that MOFCOM's analysis addressed trends both over the 2006 to 2008 period, as well as the divergence in Q1 2009, referring to the following:

The domestic industry had no choice in the first quarter of 2009 but to substantially lower the price to avoid further losing its market share. Based on a comprehensive rather than isolated analysis of the situation in 2008 and the first quarter in 2009, the abovementioned evidence fully support the decision of the Investigating Authority, namely that in light of the impact of the large volume of the subject merchandise starting in 2008, the domestic industry was facing a the [*sic*] loss of market share and the decline in profitability; if the domestic industry hoped to maintain its market share, it had to reduce price and bear a further decrease in profitability.¹⁷⁰

7.93. We have already explained our concerns with MOFCOM's conclusions regarding the price suppressing and depressing effects of the increased volume of subject imports and consequential gains in market share. For the same reasons, we find MOFCOM's explanation of the divergence in the prices of subject imports and the domestic like product in Q1 2009 to be unpersuasive, and thus the finding of parallel price trends lends little if any support to the finding of price competition.¹⁷¹

Customer overlap

7.94. In the Redetermination, MOFCOM found a degree of overlap between the users of subject imports and the domestic like product:

Based on the comparison of the top ten clients by purchase volume provided by the domestic importers and domestic producers, the overlap ratio of the downstream users of the subject merchandise and domestic like product is around 50%. The sales contracts for the subject merchandise and the price negotiation documents between the domestic industry and the downstream clients that were provided by the domestic producers also prove that the subject merchandise and domestic like product are directly competitive and price is an important factor in the purchasing decisions of the downstream clients.¹⁷²

7.95. The United States argues that MOFCOM's finding on consumer overlap does not support MOFCOM's conclusions on price competition, because the same customers may be buying different types of GOES for different applications from different sources.¹⁷³ China emphasizes that MOFCOM's finding was part of its overall evaluation and that MOFCOM reasonably established that

¹⁶⁸ Redetermination, (Exhibit US-1), pp. 48-49; and Redetermination – China's translation, (Exhibit CHN-1), pp. 48-49.

¹⁶⁹ Appellate Body Report, *China – GOES*, footnote 350.

¹⁷⁰ Redetermination, (Exhibit US-1), pp. 49-50; and Redetermination – China's translation, (Exhibit CHN-1), p. 49.

¹⁷¹ In this regard, we also note China's assertion that from Q4 2008 to Q1 2009, domestic AUVs fell by 31.11% while subject import AUVs fell by only 18.32%. On the other hand, subject import AUVs were 1.25% lower in Q1 2009 than in Q1 2008, while domestic AUVs were 30.25% lower. China emphasizes that the difference in the decline in AUVs of subject imports and the domestic like product was less from Q4 2008 to Q1 2009 than it was from Q1 2008 to Q1 2009. China argues that this quarterly data regarding changes in AUVs of subject imports and the domestic like product from Q4 2008 to Q1 2009 was before MOFCOM but not discussed in the Redetermination, and strongly supports the finding of parallel pricing. Since we can find no reference in MOFCOM's Redetermination to such quarterly data, or any consideration thereof, we decline to rely on China's arguments in this regard, as there is no indication that MOFCOM itself took this into account in the Redetermination. See China's response to Panel question No. 10, para. 42.

¹⁷² Redetermination, (Exhibit US-1), p. 51; and Redetermination – China's translation, (Exhibit CHN-1), p. 51.

¹⁷³ United States' first written submission, para. 72; and second written submission, para. 43.

subject imports and the domestic like product had (a) common customers, (b) sold the same products and (c) there was no attenuated competition due to specialty products.¹⁷⁴

7.96. In our view, MOFCOM's analysis on customer overlap is at a level of generality which is insufficient to shed light on the issue as to whether there was price competition between subject imports and the domestic like product. In particular, it is not clear to us from MOFCOM's analysis how it reached a conclusion that the subject imports and domestic like product competed on the basis of price, simply because half of the customers in a sample provided to MOFCOM purchased both the subject imports and the domestic like product. MOFCOM's analysis offers no insight as to whether individual customers were sourcing the same GOES from both subject imports and the domestic industry for the same uses. It may very well be, as suggested by the United States, that customers purchased subject imports and domestic product for use in different applications. Thus, we conclude that MOFCOM's finding of consumer overlap lends little support to its finding of price competition.

Market share recapture

7.97. In the Redetermination, MOFCOM stated that the domestic industry was able to regain some market share in Q1 2009 by reducing its prices.¹⁷⁵ China argues that the domestic industry was able, in Q1 2009, to regain 5.15 of the 5.65 percentage points of market share that it had lost over 2008.¹⁷⁶ China acknowledges that there is no specific reference to the extent of market share recapture in Q1 2009 in MOFCOM's Redetermination but contends that recapture of market share, pursuant to a significant decline in domestic like product prices, was indicative of price competition between subject imports and the domestic like product.¹⁷⁷ The United States argues that MOFCOM's Redetermination does not refer to a 5.15 percentage point gain in market share in Q1 2009, and therefore, this line of argument is entirely *ex post facto* rationalizations.¹⁷⁸

7.98. As noted, China itself admits that there is no reference in MOFCOM's Redetermination to the extent of market share regained in Q1 2009.¹⁷⁹ Indeed, there is nothing in the Redetermination that would suggest that the extent or quantum of market share recaptured by the domestic industry in Q1 2009 was even considered by MOFCOM in finding price competitiveness between subject imports and the domestic like product.¹⁸⁰ We agree with the United States that this focus on the amount of market share re-captured in Q1 2009 is an *ex post facto* argument, and we will not consider it, but will rather focus on MOFCOM's actual findings as set out in the Redetermination.

7.99. MOFCOM did find that the domestic industry was able to regain "some" of the market share that it lost in 2008, as a result of a reduction in its prices.¹⁸¹ The question therefore is whether this finding supports MOFCOM's conclusions on price competition between subject imports and the domestic like product.

7.100. We recall that the domestic industry's prices declined significantly in Q1 2009. In our view, the fact that the domestic industry is able to regain market share from subject imports when its prices decline, suggests that consumers were reacting to the price decline. This could indicate that customers were sensitive to price changes and were basing their purchasing decisions on price considerations. Therefore, in our view, it was plausible for MOFCOM to consider that the gain in market share in Q1 2009 supported the conclusion of price competition between subject imports and the domestic like product.

¹⁷⁴ China's second written submission, paras. 50-51.

¹⁷⁵ China's opening statement at the meeting of the Panel, p. 5 (citing Redetermination, (Exhibit US-1), p. 28; and Redetermination – China's translation, (Exhibit CHN-1), p. 27).

¹⁷⁶ China's opening statement at the meeting of the Panel, para. 20.

¹⁷⁷ China's response to Panel question No. 18, para. 66.

¹⁷⁸ United States' comments on China's response to Panel question No. 18 (citing Panel Report, *Argentina – Ceramic Tiles*, para. 6.27).

¹⁷⁹ China's response to Panel question No. 18, para. 66.

¹⁸⁰ See, e.g. China's response to Panel question No. 18, paras. 66-68 (citing Redetermination, (Exhibit US-1), pp. 26, 34, 43; and Redetermination – China's translation, (Exhibit CHN-1), pp. 25-27, 32, 43).

¹⁸¹ See Redetermination, (Exhibit US-1), p. 26; and Redetermination – China's translation, (Exhibit CHN-1), p. 27.

Pricing policy documents

7.101. MOFCOM relied on a contract between a Russian supplier and a Chinese customer and price negotiation letters exchanged between domestic producers and Chinese suppliers ("pricing policy documents") in support of its findings of price competition.¹⁸² China clarified that MOFCOM also considered that these pricing policy documents demonstrated that prices were influencing purchaser decisions and that subject country exporters were attempting to set lower prices than those set by the domestic industry.¹⁸³ As we find MOFCOM's conclusions and the parties' arguments based on these documents to be interlinked, we examine them together below.

7.102. In the Redetermination, MOFCOM made the following findings on the basis of the pricing policy documents:

During the verification period, domestic producers submitted to the Investigating Authority a contract concerning the foreign producers' sales of subject merchandise in the Chinese market, in which relevant provisions of the contract demonstrate that in the first quarter in 2009 Russian producers adopted a pricing strategy that set lower prices than those of the domestic like products. The domestic producers also submitted documents on price negotiations with downstream users, which demonstrated that the prices of subject merchandise imported from the United States in the first quarter of 2009 were lower than that of the domestic like products, forcing the domestic industry to lower its prices. The Investigating Authority finds that the aforementioned evidence reveals that the subject merchandise has a direct competitive relationship with the domestic like products in terms of sales and pricing, that prices have a marked influence on the purchasing decisions of downstream users, and that in the first quarter of 2009 the subject merchandise attempted to set the price in the Chinese domestic market lower than the domestic like product.¹⁸⁴

7.103. We turn first to the contract between a Russian producer and a Chinese purchaser ("Russian contract"). MOFCOM considered that the Russian contract indicated that "in the first quarter in 2009 Russian producers adopted a pricing strategy that set lower prices than those of the domestic like products".¹⁸⁵ The United States argues that [***].¹⁸⁶ We agree with the United States, as in our view, the contract is clear that [***]. We do not consider that a reasonable investigating authority could have inferred from the cited provisions of the contract that the Russian exporter adopted a "price strategy that set lower prices". Moreover, the contract certainly cannot be understood as providing any information as to the pricing policies of exporters in other subject countries, or even other Russian exporters. We do not consider that this contract demonstrates that subject country exporters attempted to set lower prices than those of the domestic industry.

7.104. In relation to MOFCOM's conclusions regarding price competition and the relevance of prices in consumers' purchasing decisions, the fact that [***]. Therefore, we consider that MOFCOM could have relied upon the contract as part of its overall evaluation of price competition between subject imports and the domestic like product. Nevertheless, since the Russian contract set out the terms and conditions applicable only between one specific Chinese purchaser and the Russian supplier, the contract offered only very limited insight into the competition between subject imports and the domestic like product as a whole.

7.105. Second, [***]

7.106. The United States argues that the price negotiation letters, involving limited tonnage, provided nothing more than limited, anecdotal evidence and that since these letters all pertained

¹⁸² China's opening statement at the meeting of the Panel, p. 5. See Contract between a Russian producer and a Chinese purchaser, (Russian contract), (Exhibit US-6) (BCI), p. 3 and Price negotiation letters exchanged between a Chinese producer and Chinese purchasers, (Price negotiation letters), (Exhibits US-7, US-8 and US-9) (BCI).

¹⁸³ China's response to Panel question No. 3, para. 13.

¹⁸⁴ Redetermination, (Exhibit US-1), p. 24; and Redetermination – China's translation, (Exhibit CHN-1), p. 25.

¹⁸⁵ Ibid.

¹⁸⁶ United States' first written submission, para. 69.

to negotiations in Q1 2009, they offered no insight on price competition prior to that.¹⁸⁷ China argues that the price negotiation letters indicate that the domestic consumers were using subject import prices to drive down domestic prices and the pricing policy documents as a whole were further evidence of a competitive relationship between subject imports and the domestic like product.¹⁸⁸

7.107. MOFCOM stated that the "domestic producers also submitted documents on price negotiations with downstream users, which demonstrated that the prices of subject merchandise imported from the United States in the first quarter of 2009 were lower than that of the domestic like product, forcing the domestic industry to lower its prices".¹⁸⁹ In the absence of any comparison of the prices of subject imports and the domestic like product, we have serious concerns regarding a conclusion that the price negotiation letters "demonstrated" that the prices of subject merchandise imported from the United States in Q1 2009 were lower than those of the domestic like product. However, we can accept that, as suggested by China, MOFCOM's reference to the "lower" prices was only a description of the prices mentioned in the documents themselves, and not a finding as to the overall relationship between the price levels of subject imports and the domestic like product.¹⁹⁰ However, in this context, the reference to "lower" prices gives little support to MOFCOM's conclusions regarding price competition overall.

7.108. With respect to the conclusions reached by MOFCOM in light of these letters we consider that, like the Russian contract, they have some relevance to understanding the competitive relationship between prices of subject import and the domestic like product. However, it is unclear from MOFCOM's Redetermination why it considered the price negotiation letters, which concern specific transactions of limited tonnage, to be representative of direct price competition between subject imports and the domestic like product as a whole. There is nothing in MOFCOM's Redetermination that would even suggest that these three groups of letters were somehow representative of the entire spectrum of competition between subject imports and the domestic like product. Given their limited scope, while they do show that, in the transactions concerned, customers used the prices of subject imports in negotiating prices with Chinese suppliers, we have no basis on which to conclude that the facts represented in those letters, i.e., that subject import prices were lower than the originally quoted domestic like product prices, were true. Thus, these three groups of letters at most demonstrate the existence of price negotiations driven by customers, which suggests some degree of price competition in the transactions at issue. However, they lend at best little support to MOFCOM's overall conclusions.

7.3.5.2.3 Conclusions on price competition

7.109. While as set out above, we do have some concerns regarding the factual findings relied upon by MOFCOM in support of its conclusions on price competition between subject imports and the domestic like product, as well as MOFCOM's failure to adequately consider submissions made by AK Steel, the question before us is whether MOFCOM's conclusion regarding price competition between subject imports and the domestic like product, on the basis of the factual findings taken as a whole, is one an objective investigating authority could have reached based on the facts and explanations given.

7.110. We consider that the concerns highlighted above with respect to MOFCOM's price competition finding weaken MOFCOM's conclusion concerning price competition. In particular, MOFCOM's failure to engage with evidence furnished by AK Steel regarding [***], raises doubts as to whether subject imports and the domestic like product were in competition with each other across at least some part of the spectrum of the GOES like product. Nonetheless, we find that the facts overall, including the fact that the domestic industry was able to regain market share from subject imports (as well as from non-subject imports), provided a reasonable basis for MOFCOM to

¹⁸⁷ United States' comments on China's response to Panel question No. 3; and second written submission, para. 39.

¹⁸⁸ China's first written submission, para. 47; and second written submission, para. 56.

¹⁸⁹ See Redetermination, (Exhibit US-1), p. 24; and Redetermination – China's translation, (Exhibit CHN-1), p. 25.

¹⁹⁰ China's response to Panel question No. 3, para. 13. In this regard, we also have concerns with MOFCOM's statement that prices of subject merchandise imported from the United States in the first quarter of 2009 "were lower" than those of the domestic like product, forcing the domestic industry to lower its prices, in light of the specific argument by the US government that subject imports were priced higher than the domestic like product in Q1 2009, which was not examined by MOFCOM.

conclude that subject imports and the domestic like product competed on the basis of price. However, we recall that the core issue we are called upon to resolve is whether MOFCOM's conclusion that the volume and market share of subject imports had a suppressive and depressive effect on domestic like product prices is one that could be reached by a reasonable decision maker on the basis of the evidence and arguments before MOFCOM, and not simply whether subject imports and the domestic like product competed on price.

7.111. The concern that remains, having considered MOFCOM's Redetermination in light of the evidence and arguments presented to it and to us, is that it does not explain how MOFCOM's findings on price competition support its conclusions regarding the suppressive and depressive effect on domestic like product prices of the volume and market share of subject imports. We consider price competition to be an important analytical tool that goes to the question of whether subject imports have the potential to affect domestic prices – if subject imports and the domestic like product do not compete on price, it is unlikely that subject imports will affect domestic like product prices. However, it does not necessarily follow, in our view, that just because subject imports and the domestic like product compete on price, increases in subject import volumes and market share will necessarily have a suppressive or depressive effect on the domestic like product prices.¹⁹¹ Therefore, we consider that it is incumbent on an investigating authority to demonstrate how its factual findings concerning price competition support its conclusions regarding the price effects of subject imports on the domestic like product.¹⁹² MOFCOM failed to draw any such analytical linkage in this case.

7.3.6 Conclusion

7.112. Based on the foregoing, we conclude that MOFCOM's conclusions regarding the price effects of subject imports are not consistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement and Articles 15.1 and 15.2 of the SCM Agreement.

7.4 The United States' claim with respect to causation

7.113. In this section of our report, we consider the United States' claim that MOFCOM's finding of causation in the Redetermination is inconsistent with China's obligations under Articles 3.1 and 3.5 of the Anti-Dumping Agreement and Articles 15.1 and 15.5 of the SCM Agreement because it is not based on an "objective examination" and "positive evidence" as required by those provisions. The United States argues both that MOFCOM's determination of causation under Articles 3.5

¹⁹¹ See, e.g. Japan's third-party submission, para. 9. Japan argues that factors such as increases in volume of subject imports or parallel price trends between subject imports and the domestic like product at best only establish the potential for subject imports to suppress or depress domestic prices. As explained, in our view, even the fact of price competition between subject imports and the domestic like product at best only establishes the potential for subject imports to suppress or depress domestic prices. See also, Appellate Body Report, *US – Tires (China)*, para. 192. The Appellate Body in *US – Tires* commented on the relevance of an analysis of the conditions of competition between subject imports and the domestic like product in the context of the causation analysis under paragraph 16.4 of China's Accession of Protocol to the WTO. We are mindful that the discipline under paragraph 16.4 which stipulates that market disruption shall exist when imports of an article, which is like or directly competitive with an Article produced by the domestic industry, is increasing rapidly, either absolutely or relatively, so as to be a significant cause of material injury, or threat of material injury to the domestic industry, is different from the considerations set out in Articles 3.2 and 15.2 of the Anti-Dumping Agreement and SCM Agreement respectively. The Appellate Body also commented that unless there is actual or potential competition between imports and the domestic like product, imports cannot be a significant cause of material injury to the domestic industry, but noted that the examination of the conditions of competition is an analytical tool which is not dispositive on the question of causation. In other words, while competition may be a necessary element for causation of material injury, it is not necessarily sufficient. Similarly, in our view, while price competition may be a necessary element of price suppression or depression, it is not necessarily sufficient.

¹⁹² See, e.g. Panel Report, *China – Autos*, para. 7.265. In this regard, we find it relevant that the panel considered that although parallel pricing may provide some basis for a determination that subject imports depressed domestic like product prices, such a determination must explain the role of parallel pricing in the price depression found. In the case before us, MOFCOM relied on parallel pricing analysis in support of its intermediate finding of price competition. However, we consider that as explained by the panel in *China – Autos* ultimately, the investigating authority must show how its findings on factors such as parallel pricing supports its ultimate conclusions regarding the suppressive or depressive effect of subject imports on domestic like product prices. In that sense, we find no analysis in MOFCOM's Redetermination as to how its conclusions on parallel pricing or the other factors, on the basis of which it reached its intermediate finding of price competition, supported its conclusions regarding the suppressive or depressive effect of subject imports.

and 15.5 of the Anti-Dumping and SCM Agreements is undermined by its defective conclusions with respect to price effects under Articles 3.2 and 15.2 of the Anti-Dumping and SCM Agreements, and that MOFCOM's analysis of the effect of subject imports on the domestic industry under Articles 3.5 and 15.5 of the Anti-Dumping and SCM Agreements is itself invalid. With respect to the latter aspect, the United States focusses on MOFCOM's conclusions regarding the industry's inability to benefit from economies of scale, and its failure to consider properly the effects of other causes of injury, i.e., domestic industry expansion and increased production, as well as non-subject imports. China counters that none of the United States' arguments undermine MOFCOM's basic finding that the increasing volume and market share of the directly competitive subject imports caused material injury to the domestic industry.

7.4.1 Provisions at issue

7.114. Articles 3.1 and 15.1 of the Anti-Dumping and SCM Agreements are set out above at paragraph 7.28.

7.115. Article 3.5 of the Anti-Dumping Agreement provides:

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

7.116. Article 15.5 of the SCM Agreement is virtually identical to Article 3.5 of Anti-Dumping Agreement but for references to "subsidized imports" and "subsidies" in place of "dumped imports" and "dumping".

7.4.2 Factual background

7.117. In the original dispute, the United States claimed that MOFCOM's analysis and conclusion regarding causation were inconsistent with Articles 3.5 and 15.5 of the Anti-Dumping and SCM Agreements, respectively, because MOFCOM's finding of a causal link was inadequate, and because MOFCOM failed to adequately consider the effects of other known factors causing injury to the domestic industry. We agreed, finding:

- a. With respect to price effects, MOFCOM's findings on price depression and price suppression suffered from a number of analytical shortcomings. As MOFCOM relied primarily on the price effects of subject imports in its finding that subject imports caused material injury to the domestic industry, these shortcomings undermined its conclusion. While MOFCOM had also considered the adverse effects of the volume of subject imports, the Panel concluded that it would be inappropriate to consider the possibility that MOFCOM's finding of causation might be upheld purely on the basis of MOFCOM's analysis of the effects of the volume of subject imports.
- b. With respect to other causes of injury, MOFCOM had concluded that the increase in the domestic industry's inventories was caused by the increase in subject imports rather than the increase in the domestic industry's capacity and production. However, the Panel noted that the increase in the domestic industry's production was greater than the increase in subject imports. As a result, the increased domestic production would have accounted for at least some of the increase in inventories. As MOFCOM had failed to address the fact that domestic production increased more than subject imports in this

context, the Panel concluded that MOFCOM had failed to adequately consider other factors possibly causing injury.

7.118. China did not appeal our finding that MOFCOM's causation determination was inconsistent with Articles 3.1 and 3.5 of the Anti-Dumping Agreement and Articles 15.1 and 15.5 of the SCM Agreement. The Appellate Body observed that, as a result, the Panel's finding regarding MOFCOM's causation finding stands.¹⁹³

7.4.3 Legal framework

7.119. The interpretation of Articles 3.5 and 15.5 of the Anti-Dumping and SCM Agreements has been considered by a number of panels and the Appellate Body. In addition, given the near identity of the texts of Article 3.5 of the Anti-Dumping Agreement and Article 15.5 of the SCM Agreement, we consider that the principles derived from these decisions are equally applicable in cases involving either.¹⁹⁴ It is by now well understood that investigating authorities are required, as a part of their causation analysis, to examine all "known factors" other than dumped imports that are causing injury to the domestic industry. Where such other known factors are causing injury, the investigating authority must ensure that the injurious effects of these factors are not attributed to the dumped imports. The non-attribution analysis requires "separating and distinguishing the injurious effects of the other factors from the injurious effects of the dumped imports", rather than making "mere assumptions" about the effects of the imports and the other factors.¹⁹⁵

7.120. It is also well established that the role of a panel considering an investigating authority's causation findings is not to conduct a *de novo* review of the facts considered by the investigating authority in making its determination.¹⁹⁶ However, neither may a panel simply defer to the conclusions of the investigating authority.¹⁹⁷ Rather, we must determine whether the explanations given by the investigating authority for the conclusions reached are reasoned and adequate to support those conclusions, in the light of other plausible alternative explanations.

7.4.4 Price effects

7.4.4.1 Main arguments of the parties

7.121. The United States argues that MOFCOM's conclusion that a causal link exists between subject imports and the material injury suffered by the domestic industry rests on a price effects analysis that is contrary to the evidence, lacks a discernible factual basis, and fails to reflect an objective examination of the record.¹⁹⁸ The United States claims the present case is analogous to *China – Autos*, in which the Panel concluded that MOFCOM's defective price effects analysis undermined its causation analysis.¹⁹⁹ The United States argues that, far from being collateral to its injury determination, MOFCOM's price effects analysis was an important element of that determination in this case, as in *China – Autos*.²⁰⁰ The United States further argues that, as in *China – Autos*, it would be difficult for MOFCOM to have made its determination of causation in this case without relying on price effects.²⁰¹ Absent a demonstration that subject imports had any significant price effects on the domestic like product, MOFCOM's causation analysis must therefore fail.²⁰²

7.122. China does not accept that MOFCOM relied on an allegedly defective analysis of price effects to establish causation. China first maintains MOFCOM was not required to, and did not in

¹⁹³ Panel Report, *China – GOES*, paras. 7.620-7.638; Appellate Body Report, *China – GOES*, para. 114.

¹⁹⁴ See also Declaration on Dispute Settlement Pursuant to the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 or Part V of the Agreement on Subsidies and Countervailing Measures.

¹⁹⁵ See, e.g. Appellate Body Report, *US – Hot-Rolled Steel*, para. 226.

¹⁹⁶ Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93.

¹⁹⁷ *Ibid.*

¹⁹⁸ United States' first written submission, para. 109.

¹⁹⁹ United States' second written submission, para. 81 (citing Panel Report, *China – Autos*, para. 7.327).

²⁰⁰ *Ibid.* para. 82.

²⁰¹ *Ibid.*

²⁰² United States' first written submission, para. 110.

fact, make price comparisons in considering price effects.²⁰³ Rather, MOFCOM considered the increased volume of imports, along with a number of other elements (i.e., product comparability and substitutability, price trends consistent with a competitive relationship, overlap in customers, and evidence of purchasers' attempts to use subject import prices to reduce the prices of the domestic like product) in its analysis, and made well-reasoned findings that properly establish the explanatory force of increasing subject import volumes and market share on domestic prices and thus establish the necessary causal link.²⁰⁴

7.4.4.2 Main arguments of the third parties

7.123. Japan agrees with the United States that a flawed price effects determination necessarily results in a flawed causation analysis, citing several panels that have reached this conclusion, and argues that the Panel should follow the same approach in evaluating MOFCOM's determination in this proceeding.²⁰⁵

7.4.4.3 Evaluation by the Panel

7.124. As discussed above, MOFCOM found that the subject imports caused price suppression and depression based primarily on the volume and market share of the subject imports, considered together with its findings regarding price competition between the subject imports and the domestic like product. Given the shortcomings we have identified in MOFCOM's findings regarding price effects, as set out above, we consider that those findings cannot adequately support a finding that the subject imports caused material injury to the domestic industry. We recall that several panels have similarly found determinations of causation to be inadequate where underlying determinations of price effects were found to be inadequate.²⁰⁶ It is clear to us that MOFCOM's causation determination rests, at least in part, on its conclusions regarding the price effects of subject imports. Accordingly, we find that, to the extent that it is based on the price effects of subject imports, MOFCOM's causation determination is inconsistent with Articles 3.5 of the Anti-Dumping Agreement and 15.5 of the SCM Agreement.

7.125. While this finding resolves the United States' claim with respect to its arguments regarding the element of price effects, the United States made further arguments regarding economies of scale, domestic industry expansion and increased production, and non-subject imports. Accordingly, we now proceed to consider specifically these additional elements below.

7.4.5 Economies of scale

7.4.5.1 Main arguments of the parties

7.126. The United States argues that MOFCOM's conclusion that the domestic industry was prevented by subject imports from reaping the benefits of economies of scale does not rest on an objective examination of positive evidence. The United States maintains that MOFCOM's findings in this context are merely conclusory assertions unsupported by any factual analysis.²⁰⁷ The United States asserts that Baosteel commenced production of GOES in May 2008 and Wuhan's largest capacity expansion occurred in the first quarter of 2009.²⁰⁸ Given that steel production facilities have high start-up costs, the United States asserts that it was unrealistic for MOFCOM to expect the domestic industry to realize economies of scale and attendant profits immediately upon bringing significant new capacity online.²⁰⁹ The United States further argues that neither of the two separate and competing companies in the domestic industry could be expected to realize economies of scale as a result of an increase in the production capacity of the other.²¹⁰

²⁰³ China's first written submission, para. 97.

²⁰⁴ Ibid. para. 98; and second written submission, para. 92.

²⁰⁵ Japan's third-party written submission, para. 16 (citing Panel Reports, *China – GOES*, para. 7.620; *China – X-Ray Equipment*, paras. 7.239-7.240; and *China – Autos*, paras. 7.327-7.328).

²⁰⁶ Panel Reports, *China – X-Ray Equipment*, para. 7.239; *China – Autos*, paras. 7.327-7.328; and *China – HP-SSST (Japan)/China – HP-SSST (EU)*, para. 7.191.

²⁰⁷ United States' first written submission, para. 112; and second written submission, para. 89.

²⁰⁸ United States' first written submission, para. 113.

²⁰⁹ Ibid.; and second written submission, para. 84.

²¹⁰ United States' first written submission, para. 115; and second written submission, para. 87.

7.127. China counters that MOFCOM determined that the domestic industry reasonably invested in new or additional GOES production capacity in an expanding domestic market.²¹¹ China argues that investment in greater production capacity in an expanding domestic market should have allowed domestic producers to realize economies of scale and reduce per-unit costs.²¹² However, in the present case, unfairly traded subject imports captured a significant part of the expanding domestic market.²¹³ Domestic producers' resulting inability to benefit from the expected economies of scale thus constitutes an adverse effect that reasonably supports a finding of causation.²¹⁴

7.4.5.2 Main arguments of the third parties

7.128. Japan argues that "even if MOFCOM's finding that the domestic industry was prevented from realizing the benefits of economies of scale had certain evidentiary support and was not a mere conclusory assertion, that finding cannot be sufficient to establish a causal link."²¹⁵ It argues that it would be untenable to allow investigating authorities to impose anti-dumping duties simply on the basis that the domestic industry was prevented from realizing the benefits of economies of scale.²¹⁶ Japan maintains that investigating authorities must base their causation determinations on examinations of the volume of dumped imports and their price effects.²¹⁷

7.4.5.3 Evaluation by the Panel

7.129. Economies of scale may be defined generally as the cost advantages realized by an enterprise as a result of the size, output or scale of its operations. Assuming fixed costs that can be spread over additional units of output, economies of scale would generally cause the cost per unit of output to decrease as the size, output or scale of an enterprise's operations increases, and thus result in increased profits at the same price level. However, there are a number of underlying considerations as to the nature of the industry, product, market, etc. that must be taken into account in an analysis of economies of scale. MOFCOM's Redetermination does not address, much less establish, even basic premises and assumptions, such as the extent to which economies of scale may be realizable in this particular segment of the steel industry.

7.130. In the Redetermination, MOFCOM refers to the domestic industry's inability to realize economies of scale as evidence of the causal relationship between the subject imports and injury to the domestic industry. However, the Redetermination contains only passing references to economies of scale.²¹⁸ MOFCOM does not analyze economies of scale in the same manner in which it analyzes the other principal indicators of injury in the Redetermination.

7.131. In its answers to our questions, China asserted that fixed costs for this industry "in the range of 30-40 percent of total costs" constitute "a significant percentage of the total costs" and, based on "accounting truisms", concluded that a lower production volume necessarily results in higher fixed costs per unit.²¹⁹ However, China itself characterizes MOFCOM's consideration of economies of scale simply as a qualitative assessment and as establishing a qualitative connection.²²⁰ China concludes by confirming that MOFCOM did not perform any specific calculations in this regard.²²¹

7.132. We also note that the impact of the timing of the domestic industry's capacity expansions is important. Wuhan was the only domestic producer of GOES for much of the POI, until Baosteel's later entry into the market, with its capacity coming online at the end of 2008 and in the first quarter of 2009. It is unclear what, if any, data MOFCOM had before it on the basis of which it could conclude that either Wuhan (which expanded its capacity steadily from 2006 through 2008,

²¹¹ China's second written submission, para. 96.

²¹² China's first written submission, para. 100.

²¹³ Ibid.

²¹⁴ China's second written submission, para. 95.

²¹⁵ Japan's third-party written submission, para. 17.

²¹⁶ Ibid.

²¹⁷ Ibid.

²¹⁸ Redetermination, (Exhibit US-1), pp. 28, 29, 42, 43; and Redetermination – China's translation, (Exhibit CHN-1), pp. 29, 43, 44.

²¹⁹ China's response to Panel question No. 58, paras. 158-160.

²²⁰ China's second written submission, paras. 94, 98.

²²¹ China's response to Panel question No. 57, para. 156.

with the greatest increase of 51.65% in 2008²²²) or Baosteel (which entered the market in 2008) individually were unable to benefit from economies of scale, or that the domestic industry as a whole was unable to benefit from economies of scale towards the end of the POI. Similarly, it is entirely unclear how MOFCOM linked this alleged inability to benefit from economies of scale to the subject imports. China argues that "when subject imports gained volume and market share at the expense of the domestic industry, subject imports by definition imposed higher per unit costs on the domestic industry."²²³ However, while increased volume and market share of subject imports may well have affected the domestic industry's sales and profitability, this does not necessarily mean that unit costs increased as a result, particularly in view of continued increases in the domestic industry's output, which would tend to lead to lower unit costs. Nothing in the Redetermination explains how, or to what degree, unit costs for the industry increased as a result of the subject imports' increased market share, and thus we fail to see how MOFCOM linked the increased imports to the domestic industry's failure to achieve economies of scale.

7.133. Given the lack of underlying information and the minimal nature of MOFCOM's analysis of economies of scale, we find MOFCOM's conclusions in this context insufficient to support its determination of causation.

7.4.6 Domestic industry expansion and increased production

7.4.6.1 Main arguments of the parties

7.134. The United States argues that the domestic industry's overexpansion and overproduction caused injury that MOFCOM failed to attribute properly. It maintains that MOFCOM assumed that the domestic industry could have reasonably expected the domestic market to absorb all of its increased production from increased capacity²²⁴, but that Baosteel and Wuhan in fact were forced to compete aggressively with each other for customers in the domestic market, as their expanded capacity and production far outstripped the growth in demand in the domestic market.²²⁵ The United States further argues that MOFCOM avoided acknowledging the role of the domestic industry's overexpansion and overproduction in the large increase in domestic inventories by attributing this increase instead to unspecified "sales obstacles".²²⁶

7.135. The United States also challenges MOFCOM's use of 2007 as the baseline for its analysis, as it is the year in which the domestic industry had the highest market share, thus understating the domestic industry's contribution to inventory overhangs.²²⁷ The United States further challenges MOFCOM's failure to consider the first quarter of 2009 separately from 2008.²²⁸ It argues that the domestic industry's contribution to inventory overhangs through overproduction was particularly significant in the first quarter of 2009, which was the only part of the period of investigation when the domestic industry's prices declined and the domestic industry was not profitable.²²⁹

7.136. China argues that the volume of GOES resulting from Baosteel's entry into the market and Wuhan's production capacity expansion did not exceed the growth in overall demand on the domestic market, and that MOFCOM properly separated and distinguished the effect of this excess volume by identifying subject imports as the "sales obstacles" hindering the domestic industry.²³⁰ It also contends that MOFCOM explained its choice of 2007 as the base year as being a reasonable basis for the industry's market forecasts, a comparable and representative year for evaluating changes in 2008, and a year in which imports were stable and the industry was not showing declines.²³¹ China also contends that MOFCOM explained its consideration of inventory build-up

²²² United States' first written submission, para. 123; China's response to Panel question No. 59, para. 162.

²²³ China's second written submission, para. 95.

²²⁴ United States' first written submission, para. 133.

²²⁵ Ibid. paras. 122-123.

²²⁶ Ibid. para. 124.

²²⁷ United States' first written submission, para. 130; and second written submission, paras. 91-92.

²²⁸ United States' second written submission, para. 93.

²²⁹ United States' first written submission, para. 132.

²³⁰ China's first written submission, paras. 105-106.

²³¹ China's second written submission, para. 105.

over the period 2008-Q1 2009 on the principle that inventory accumulates over time, and thus requires a different approach to understand the reasons for increases.²³²

7.4.6.2 Main arguments of the third parties

7.137. Japan maintains that MOFCOM does not appear to have distinguished properly the injurious effects of the domestic industry's overexpansion and overproduction from those of the subject imports.²³³

7.4.6.3 Evaluation by the Panel

7.138. In the original proceeding, we found that the increase in production by the domestic industry from 2007 to 2008 was greater than the increase in subject imports, and would have accounted, at least in part, for the inventory accumulation, which thus could not be attributed entirely to the lesser increase in subject imports.²³⁴ We were unable to verify MOFCOM's finding that total domestic capacity did not exceed total domestic demand because China failed to provide the underlying data.²³⁵ Nevertheless, we concluded that "even if this finding were accurate, it would not change the fact that subject imports did not account for the totality of the injurious inventory overhangs."²³⁶ We concluded that MOFCOM had failed to examine properly whether a known factor other than subject imports was simultaneously injuring the domestic industry, as "an objective and impartial investigating authority could not properly have found that the domestic industry's increase in production was not a cause of injury."²³⁷

7.139. In the present compliance proceeding, the United States makes essentially the same argument it had made in the original dispute. The United States contends that "[t]he domestic industry's expansion of capacity and production outstripped the growth in demand for GOES in the Chinese market by wide margins."²³⁸ In support of its argument, the United States relies on information on growth in demand, capacity and output in MOFCOM's original Determination and the Redetermination²³⁹ to calculate and compare the percentage changes in these growth rates from 2006 to 2008. We have compiled this information, including the United States' calculation, in the chart below:

Changes in demand, capacity, output and inventories

	Demand	Capacity	Output	Inventories
2007	22.80%	35.33%	36.76%	-49.01%
2008	18.09%	53.67%	23.91%	839.02%
2006-08 ²⁴⁰	45.01%	107.96%	69.46%	--
Q1 2009 ²⁴¹	12.46%	80.13%	55.23%	978.81%

Source: MOFCOM's Determination and Redetermination, United States' first written submission²⁴²

7.140. China faults the United States for making comparisons on the basis of percentage changes in demand, capacity and output, each with potentially different base levels. However, the Redetermination does not contain the underlying data from which these changes were calculated, as MOFCOM treated the information as confidential. China has not pointed us to any additional information in the record before MOFCOM on these factors. Thus, the United States' argument is

²³² China's second written submission, para. 111.

²³³ Japan's third-party submission, paras. 18-20.

²³⁴ Panel Report, *China – GOES*, para. 7.632.

²³⁵ *Ibid.* para. 7.635.

²³⁶ *Ibid.* para. 7.635.

²³⁷ *Ibid.* para. 7.632.

²³⁸ United States' first written submission, para. 122.

²³⁹ Original Determination, (Exhibit US-4), p. 60; Redetermination, (Exhibit US-1), p. 28; and Redetermination – China's translation, (Exhibit CHN-1), p. 29.

²⁴⁰ United States' first written submission, para. 122.

²⁴¹ Compared with Q1 2008.

²⁴² Original Determination, (Exhibit US-4), pp. 60-61; Redetermination, (Exhibit US-1), pp. 28, 30; and Redetermination – China's translation, (Exhibit CHN-1), pp. 29, 31; United States' first written submission, para. 122.

based on the only information available to it, the percentage changes reported in the Redetermination. While it may well be that the underlying base values are different, which could affect the validity of the comparisons made, there is no better basis of information for either the United States' argument or our review. At a minimum, the United States' argument highlights seemingly relevant comparisons in the changes in the growth of demand, capacity, output and inventory that would have merited more detailed examination and explanation by MOFCOM. Indeed, even if the base levels from which the changes began were different, it is clear that the rate of increase in the domestic industry's capacity and output was notably greater than the growth in demand during the entire period examined. Unless demand was fairly high at the beginning of the period, and capacity and output were very low, at these rates of increase it is difficult to envision a situation in which domestic industry capacity and output did not surpass domestic demand.

7.141. MOFCOM also compared percentage changes in demand and output in the Redetermination.²⁴³ It found that domestic demand was "almost twice" the output of the domestic like product in 2007, and that the growth in domestic demand of 18.09% in 2008 must therefore be "roughly equivalent" to a 36% increase in output over the level of 2007. It then concluded that this 36% figure was greater than the increase in output in 2008 over 2007 of 23.91%.²⁴⁴ This is simply an approximation of output relative to demand which we cannot verify from the limited information before us. Nothing in China's arguments in this proceeding persuades us that our original conclusion, that, relative to the increase in domestic demand, the increases in the domestic industry's capacity and production were at least partly responsible for the accumulation of inventory in 2008 and the first quarter of 2009, was wrong.

7.142. As to MOFCOM's choice of 2007 as the baseline year for its analysis of domestic demand and output, as well as the consideration of 2008 and the first quarter of 2009 as a whole for its analysis of inventories, China asserts that the WTO agreements do not specify any particular methodology. China also contends that MOFCOM sufficiently and reasonably explained its choices.²⁴⁵ We agree with China that the Anti-Dumping and SCM Agreements do not specify a particular methodology in this context, especially not at the level of detail of how an investigating authority establishes a baseline year for its analysis. However, an investigating authority's choice of methodology or baseline year should not affect the objectivity of its analysis, as the United States argues happened in this case.²⁴⁶

7.143. In this situation, an explanation is necessary to enable us to ensure that the choice of baseline year was appropriate. To justify MOFCOM's choice of baseline year, China argues that using 2006 as the baseline year would not have allowed MOFCOM to focus on the impact of subject imports at the end of the period of investigation and specifically the effect of the surge in subject imports in 2008.²⁴⁷ However, we fail to see how the use of 2006 as the baseline year could have prevented MOFCOM from focusing on these specific developments in 2008. China also reiterates MOFCOM's explanation that inventory accumulation is a continual process, warranting its analysis across time periods.²⁴⁸ However, production and sales could also be argued to be continual processes, yet MOFCOM did not analyse them across time periods as it did inventories. Moreover, companies are likely to assess these elements at specific times to gauge performance and establish accounts. In our view, inventories are not significantly different from production, sales, or indeed, other economic factors, and we find nothing further in the Redetermination that

²⁴³ Redetermination, (Exhibit US-1), p. 52; and Redetermination – China's translation, (Exhibit CHN-1), p. 52.

²⁴⁴ Ibid.

²⁴⁵ China's first written submission, para. 116. China cites to pages 53 and 54 of the Redetermination, which provides the following main reasons for the choice of 2007 as the baseline year for MOFCOM's analysis: (i) 2007 is the closest, most comparable and representative year to 2008, when the volume of subject imports and domestic inventories started to increase substantially; and (ii) 2007 can be regarded as a year of normal market conditions during which the volume of subject imports did not increase substantially and the domestic industry did not yet show signs of being adversely affected.

²⁴⁶ United States' second written submission, paras. 90-95. The United States argues that MOFCOM's choice of 2007 as the baseline year for its analysis minimizes the responsibility of the domestic industry's overproduction for inventory overhangs in 2008 and the first quarter of 2009, because the domestic industry's market share increased significantly in 2007. Had MOFCOM used 2006 as the baseline year, its analysis would not have been distorted by the domestic industry's significant market share gain in 2007. The United States argues that MOFCOM modified its analysis in this context to obtain the result it wanted.

²⁴⁷ China's first written submission, para. 116.

²⁴⁸ Ibid. para. 117 (citing Redetermination, (Exhibit US-1), pp. 54-55).

explains why inventories, whether in this particular industry or more generally, should be treated differently.

7.144. While MOFCOM considered the fifteen months of 2008 and the first quarter of 2009 together, it accorded particular weight to inventory data for 2008.²⁴⁹ However, in the first quarter of 2009, the volume of subject imports decreased while inventories skyrocketed. In our view, an objective and impartial investigating authority examining this evidence would not have considered the first quarter of 2009 together with the rest of 2008, and virtually disregarded the changes happening in the first quarter of 2009 for purposes of its analysis. MOFCOM's approach fails to consider the changes in inventories in a manner that would ensure that any injurious effects of those inventories are not attributed to subject imports.

7.145. In the continued absence of underlying data regarding growth in domestic demand, capacity and output, even if only in summary form to preserve its confidentiality, and given the inconsistencies in MOFCOM's analytical approach to inventories and time periods, we conclude that MOFCOM's determination that the domestic industry's expansion and increased production did not cause injury to the domestic industry is not one that could have been reached on the basis of the information and arguments in this case. Accordingly, we find that MOFCOM failed to ensure that injuries caused by increased inventories were not attributed to the subject imports consistently with the requirements of Articles 3.5 and 15.5 of the Anti-Dumping and SCM Agreements.

7.4.7 Non-subject imports

7.4.7.1 Main arguments of the parties

7.146. The United States argues that, given the rising and substantial volumes and competitive prices of non-subject imports, MOFCOM should have considered more carefully whether it was attributing to subject imports injury actually caused by non-subject imports.²⁵⁰ The Redetermination includes additional evidence in this context that was not in the original Determination, but the United States contends MOFCOM did not examine this evidence objectively.²⁵¹ The United States questions how the increase in non-subject imports throughout the period of investigation could have had no injurious effects on the domestic industry.²⁵² The United States also focuses specifically on the first quarter of 2009, during which the volume of subject imports decreased while that of non-subject imports increased.²⁵³ In addition, the United States argues that MOFCOM's analysis of market share conflates shifts in market share with absolute market share data.²⁵⁴ The United States alleges that MOFCOM limited its analysis to the former and ignored the latter.²⁵⁵

7.147. China argues that the United States errs in focusing entirely on the absolute volume of non-subject imports and average sales values, while completely ignoring the market share shifts that MOFCOM emphasized in its analysis.²⁵⁶ China further argues that MOFCOM's emphasis on market shares was important because market share figures adjust for the changing size of the overall market when it is expanding and market share figures allow for a direct comparison of all the analytically relevant actors in the market (i.e., the domestic industry, subject imports and non-subject imports).²⁵⁷ MOFCOM established that subject imports accounted for the vast majority of the increase in imports in 2008 and the first quarter of 2009, and that the condition of the domestic industry began to deteriorate when subject imports surged in 2008.²⁵⁸ By comparison, non-subject imports never gained market share and were fairly traded.²⁵⁹ China thus maintains that MOFCOM properly accounted for the effect of non-subject imports.

²⁴⁹ China's second written submission, para. 113.

²⁵⁰ United States' first written submission, para. 139.

²⁵¹ Ibid. para. 138.

²⁵² Ibid. para. 141.

²⁵³ Ibid. para. 140; and second written submission, para. 96.

²⁵⁴ United States' second written submission, para. 100.

²⁵⁵ Ibid.

²⁵⁶ China's first written submission, para. 121.

²⁵⁷ Ibid. para. 120; and second written submission, para. 120.

²⁵⁸ China's first written submission, para. 122; and second written submission, para. 121.

²⁵⁹ China's first written submission, para. 124.

7.4.7.2 Main arguments of the third parties

7.148. Japan maintains that MOFCOM does not appear to have distinguished properly the injurious effects of the non-subject imports from those of the subject imports.²⁶⁰

7.4.7.3 Evaluation by the Panel

7.149. It is apparent from the Redetermination that the volume of non-subject imports was greater than that of subject imports throughout the period of investigation. In fact, the volume of non-subject imports was twice that of subject imports in 2007, more than twice that of subject imports in 2008, and almost three times that of subject imports in the first quarter of 2009. Even in 2008, when the difference was the smallest, the volume of non-subject imports was one and one-half times that of subject imports. The price of non-subject imports was also below that of subject imports in 2006 and 2008. The volume of subject imports increased significantly in 2008, when they were priced higher than non-subject imports, and declined significantly in the first quarter of 2009 as compared to the first quarter of 2008, when they were priced well below non-subject imports.²⁶¹

7.150. The data relied on by MOFCOM in the Redetermination, including those relating to non-subject imports which were not provided by MOFCOM in the original Determination²⁶², are compiled in the chart below:

Volumes and prices of subject and non-subject imports

	Subject Imports Volume (tons)	Subject Imports Price (RMB/ton)	Non-Subject Imports Volume (tons)	Non-Subject Imports Price (RMB/ton)
2006	83,837	25,913	169,846	25,468
2007	84,600	26,684	183,349	28,701
2008	135,900	31,372	213,517	30,999
Q1 2009	19,400	26,673	54,206	32,359

Source: MOFCOM's Determination and Redetermination²⁶³

7.151. MOFCOM's reliance primarily on shifts in market share for purposes of assessing the causal link between subject imports and injury to the domestic industry causation in this context is perplexing. The data considered in the Redetermination suggest that the price of the larger volume of non-subject imports fluctuated as much as that of the smaller volume of subject imports. Subject imports recorded the most striking increase in terms of volume during the period of investigation (approximately 60% from 2007 and 2008), at a time when their price increased faster and to a higher level than that of non-subject imports. In addition, the volume of subject imports dropped in the first quarter of 2009, at the same time as their prices declined from 2008 levels to approximately 18% below that of non-subject imports, which by contrast had increased from 2008 levels.

7.152. In our view, this relationship between volumes and prices, with volumes of subject imports increasing when their prices are higher than those of non-subject imports and vice versa, would seem to warrant a more careful examination and more detailed explanation than MOFCOM provided in the present case. For example, the volume of non-subject imports and the changes in their prices are such that it is conceivable respondents and members of the domestic industry occasionally may have established their volumes and prices in response to non-subject import trends. A simple comparison of percentage changes in the market share of the various sets of actors, rather than a comparison of actual or even indexed volume and price data established on clear bases, cannot serve to explain satisfactorily the trends in this market.

²⁶⁰ Japan's third-party submission, paras. 18-20.

²⁶¹ Redetermination, (Exhibit US-1), pp. 23, 24, 36, 37; and Redetermination – China's translation, (Exhibit CHN-1), pp. 24, 37.

²⁶² Original Determination, (Exhibit US-4), pp. 57-58 (data on subject imports only); Redetermination, (Exhibit US-1), pp. 23, 24, 36, 37 (data on subject and non-subject imports, respectively); and Redetermination – China's translation, (Exhibit CHN-1), pp. 24, 37.

²⁶³ Original Determination, (Exhibit US-4), pp. 57-58; Redetermination, (Exhibit US-1), pp. 23, 24, 36, 37; and Redetermination – China's translation, (Exhibit CHN-1), pp. 24, 37.

7.153. Given the shortcomings in MOFCOM's analytical approach to non-subject imports, we conclude that its determination that non-subject imports were not a cause of injury is flawed. Accordingly, we find that MOFCOM failed to examine properly whether non-subject imports injured the domestic industry at the same time as subject imports consistently with the requirements of Articles 3.5 and 15.5 of the Anti-Dumping and SCM Agreements.

7.4.8 Conclusion regarding causation

7.154. For all the above reasons, we conclude that MOFCOM's revised finding that subject imports caused material injury to the domestic industry is inconsistent with Articles 3.1 and 3.5 of the Anti-Dumping Agreement and Articles 15.1 and 15.5 of the SCM Agreement.

7.5 The United States' claim with respect to disclosure

7.5.1 Introduction

7.155. In this section of our report, we consider the United States' claim that MOFCOM failed to disclose facts under consideration that formed the basis for the Redetermination, inconsistent with China's obligations under Articles 6.9 of the Anti-Dumping Agreement and 12.8 of the SCM Agreement. The United States contends that the facts allegedly not disclosed were significant in MOFCOM's determination and formed part of the basis for its determination and decision to apply definitive measures. China contends that the United States has failed to demonstrate that these facts were "essential", and in any event argues that MOFCOM did disclose all the facts identified in the US claim, while striking a balance between necessary disclosure and the need to protect confidential information.

7.5.2 Provisions at issue

7.156. Article 6.9 of the Anti-Dumping Agreement provides as follows:

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

Article 12.8 of the SCM Agreement is identical to Article 6.9 of the Anti-Dumping Agreement but for the addition of a reference to "all interested Members" as well as all interested parties in the first sentence, which is not relevant in this dispute.

7.5.3 Legal framework

7.157. The scope of the disclosure obligation under Articles 6.9 of the Anti-Dumping Agreement and 12.8 of the SCM Agreement has been discussed in a number of previous panel and Appellate Body reports. Recently, the Appellate Body in *China – GOES* observed that "essential facts" are those that (a) form the basis for the decision to apply definitive measures and (b) ensure the ability of interested parties to defend their interests.²⁶⁴ Further, Articles 6.9 and 12.8 do not require the disclosure of all facts before an investigating authority.²⁶⁵ Facts that do not form the basis of the decision to impose definitive measures do not constitute essential facts.²⁶⁶ Also, as we observed in the original proceeding, essential facts refer to facts that were actually under consideration by the investigating authority rather than facts that should have been considered by the authority.²⁶⁷

7.158. The Appellate Body has indicated that what constitutes an "essential" fact must be determined in light of the findings an investigating authority must make to satisfy the substantive obligations of the Anti-Dumping and SCM Agreements in order to apply definitive measures under the Anti-Dumping and SCM Agreements.²⁶⁸ Put differently, the relevant facts are those that are

²⁶⁴ Appellate Body Report, *China – GOES*, para. 240.

²⁶⁵ *Ibid.*

²⁶⁶ Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.223.

²⁶⁷ Panel Report, *China – GOES*, para. 7.653.

²⁶⁸ Appellate Body Report, *China – GOES*, para. 241.

essential to reach conclusions on the issues of dumping and/or subsidization, material injury and causation, as well as other issues the investigating authority must resolve in a particular case in concluding that whether to impose definitive measures.²⁶⁹ However, essential facts are not limited to those facts that support a determination, but rather are the body of facts essential to any determinations that are being considered in the process of analysis and decision-making by the investigating authority.²⁷⁰ The obligation to disclose under these provisions applies only to facts, as opposed to reasoning. In addition, the obligation to disclose applies even where the essential facts in question are confidential, in which case investigating authorities may discharge their obligation through disclosure of non-confidential summaries of those facts. Investigating authorities may not, however, rely on confidentiality to justify a failure to disclose essential facts.²⁷¹

7.159. With this understanding of the relevant obligations in mind, we turn to the specific facts at issue in the dispute before us. In our evaluation, we will address separately the allegedly undisclosed essential facts with respect to MOFCOM's determination regarding price effects and the allegedly undisclosed essential facts regarding its determination of causation. As noted above, disclosure must come before the determination is final, so as to allow parties to defend their interests. Therefore, the relevant document for our consideration of whether MOFCOM disclosed the essential facts in this case is the Redetermination Disclosure provided to interested parties on 4 July 2013.²⁷²

7.5.4 Failure to disclose essential facts regarding MOFCOM's price effects determination

7.160. The United States' claim of failure to disclose essential facts relating to MOFCOM's price effects determination focuses on the following three elements:

- a. Information underlying MOFCOM's assertion that the trends of the prices of the subject imports and the domestic like product were the same;
- b. Information regarding the evidence that MOFCOM allegedly considered, and the analysis that it allegedly conducted, in concluding that the domestic industry's loss of market share in 2008 led it to slash prices by over 30% in the first quarter of 2009; and
- c. Information regarding MOFCOM's assertion that the price-cost differential for Wuhan decreased in 2008.

7.5.4.1 Main arguments of the parties

7.5.4.1.1 United States

7.161. First, with respect to MOFCOM's statement that the price trends of subject imports and the domestic like product in 2007, 2008 and Q1 2009 were the same, the United States argues that MOFCOM failed to disclose the basis of MOFCOM's conclusions and in particular, takes issue with China's argument that some of the data could not be disclosed because it was confidential.²⁷³ The United States argues that while there may be some complications where essential facts are confidential information, this does not excuse the investigating authority from its obligation to disclose the essential facts which formed the basis of the decision to apply definitive measures.²⁷⁴

7.162. Second, the United States asserts that MOFCOM failed to disclose the essential facts under consideration with respect to its conclusion that the domestic industry's loss in market share in

²⁶⁹ Panel Report, *Mexico – Olive Oil*, para. 7.110.

²⁷⁰ Panel Report, *EC – Salmon (Norway)*, para. 7.796.

²⁷¹ Appellate Body Report, *China – GOES*, para. 247.

²⁷² MOFCOM, Notice of information disclosure before the industry injury verdict of the anti-dumping on imported grain-oriented silicon electrical steel with the country of origin in the United States and Russia and the anti-subsidy on the imported grain-oriented silicon electrical steel with the country of origin in the United States, Public Notice [2013] No. 327 (Redetermination Disclosure) (Exhibit US-3); and MOFCOM, Notice of Disclosure Prior to Industry Injury Determination in the Anti-Dumping Reinvestigation on Imports of Grain Oriented Flat-rolled Electrical Steel originating in the U.S. and Russia and the Anti-subsidy Reinvestigation on Imports of Grain Oriented Flat-rolled Electrical Steel originating in the U.S. SDCYCH [2013] No. 327 (Redetermination Disclosure – China's translation) (Exhibit CHN-2).

²⁷³ United States' second written submission, para. 107.

²⁷⁴ *Ibid.* para. 109.

2008 led it to slash prices by over 30% in Q1 2009.²⁷⁵ The United States emphasizes that the information disclosed by China could not be considered to be essential facts but was, in fact, the reasoning provided by MOFCOM for its conclusions.²⁷⁶

7.163. Third, the United States contends that China failed to disclose any essential facts in the Redetermination Disclosure relevant to MOFCOM's conclusions regarding a decline in Wuhan Iron and Steel's price-cost differential over 2008.²⁷⁷ It reiterates the view that claims of confidentiality do not justify failure to disclose essential facts.²⁷⁸

7.5.4.1.2 China

7.164. China argues that the United States has failed to make a *prima facie* case with respect to the specific claims made by the United States with regard to MOFCOM's alleged failure to disclose all essential facts that formed the basis of the Redetermination.²⁷⁹ China contends that the United States' non-disclosure claim is factually, as well as legally, incorrect.

7.165. First, China contends that MOFCOM did disclose the essential facts relevant to MOFCOM's finding that the price trends of subject imports and the domestic like product were the same. The price trends or percentage changes in subject import prices were based on China Customs data and both the trends and the underlying data are set out in the Redetermination Disclosure.²⁸⁰ The price trends of the domestic industry were based on verified data of the domestic industry and are set out in the Redetermination Disclosure. The underlying data was treated as confidential and thus not disclosed.²⁸¹ China asserts that the percentage changes in domestic like product prices, disclosed in the Redetermination Disclosure, constitute an adequate public summary of that confidential information.²⁸²

7.166. Second, China argues that MOFCOM's conclusion that the domestic industry's loss in market share in 2008 led it to slash prices by over 30% in Q1 2009 was based on the following information, which was disclosed in the Redetermination Disclosure:

- a. subject imports surged in 2008 resulting in loss of market share for the domestic industry²⁸³;
- b. one-to-one correlation between the market share lost by the domestic industry and the market share gained by subject imports²⁸⁴; and
- c. faced with a continued surge in the volume of subject imports in Q1 2009, the domestic industry was forced to lower prices by 30.25% to compete with the subject imports to regain market share.²⁸⁵

China submits that these statements and the specific facts, upon which they were based, were the essential facts that were under consideration before MOFCOM.²⁸⁶

7.167. Third, China rejects the United States' assertion that MOFCOM failed to disclose essential facts regarding the extent of the decline in Wuhan's price-cost differential. In this regard, China asserts that MOFCOM did disclose the extent of decline in Wuhan's gross profit, and that gross profit is a common way of expressing the price-cost differential.²⁸⁷ China contends that the

²⁷⁵ United States' second written submission, para. 115.

²⁷⁶ Ibid.; and comments on China's response to Panel question No. 62.

²⁷⁷ China's second written submission, para. 116.

²⁷⁸ Ibid.

²⁷⁹ United States' first written submission, paras. 130-135.

²⁸⁰ China's first written submission, para. 138; and second written submission, para. 128.

²⁸¹ China's second written submission, para. 128.

²⁸² China's comments on the United States' response to Panel question No. 64.

²⁸³ China's first written submission, para. 141 (quoting Redetermination Disclosure, (Exhibit US-3), p. 10); and response to Panel question No. 62, para. 175.

²⁸⁴ Ibid.

²⁸⁵ Ibid.

²⁸⁶ China's response to Panel question No. 62, para. 175.

²⁸⁷ China's first written submission, paras. 142-143; and second written submission, para. 132.

percentage figures showing the extent of decline in Wuhan's gross profit constituted an adequate non-confidential summary of the confidential information.²⁸⁸

7.5.4.2 Main arguments of the third parties

7.168. Japan supports the United States' claims regarding MOFCOM's failure to fulfill its disclosure obligations under Articles 6.9 and 12.8 of the Anti-Dumping and SCM Agreements. It contends that the facts identified by the United States were taken into consideration by MOFCOM in its injury and causation determination, and therefore should have been disclosed.²⁸⁹

7.5.4.3 Evaluation by the Panel

7.5.4.3.1 Alleged non-disclosure of information underlying MOFCOM's conclusion that the trend of the prices of the subject imports and the domestic like product were the same

7.169. With respect to the question of whether parallel price trends of subject imports and the domestic like product constituted "essential facts" for the purpose of Articles 6.9 and 12.8 which MOFCOM allegedly failed to disclose, we recall that "essential facts" include all facts necessary to the process of analysis and decision-making by an investigating authority.

7.170. In the Redetermination Disclosure, MOFCOM found that the prices of subject imports and the domestic like product first went up and then went down.²⁹⁰ On this basis, MOFCOM concluded that the prices of subject imports and the domestic like product kept "in line", i.e., were parallel.²⁹¹ MOFCOM relied on this finding of parallel pricing in support of its finding of price competition, which MOFCOM relied on in turn in its final conclusions regarding the price effects of imports and causation. Indeed, this is precisely what China has argued before us. Thus, it is clear that the facts on which the finding of parallel pricing was based were part of the facts under consideration in MOFCOM's analysis and conclusions regarding the effect of subject imports on domestic like product prices. Put differently, they were essential facts under consideration which formed the basis of MOFCOM's decision to impose definitive measures.

7.171. The question raised by the United States' claim is whether MOFCOM failed to disclose these essential facts. In the Redetermination Disclosure, MOFCOM stated that the price of the subject imports was based on Chinese Customs data and that the price of the like products was based on the verified data of the domestic industry.²⁹² The price trends on which MOFCOM based its conclusion of parallel prices were based on the weighted average unit values of imports from the Russian Federation and the United States combined with respect to subject imports, and the weighted average unit values of the domestic like product. MOFCOM disclosed the weighted average prices of subject imports from the United States and the Russian Federation. Therefore, it is clear that information concerning subject import prices was disclosed to interested parties. However, we do not consider that this was sufficient to constitute disclosure of the essential facts underlying MOFCOM's conclusions on parallel pricing.

7.172. China maintains that price trends of the domestic like product over the period of investigation were based on confidential AUV data of the domestic producers and therefore could not be disclosed to the interested parties.²⁹³ We note that China provided, in the course of this proceeding, information on domestic price ranges on a confidential basis. While this information provides a better understanding of MOFCOM's finding of parallel pricing, and apparently was part of the record before MOFCOM, it was not included in the Redetermination Disclosure. As a

²⁸⁸ China's second written submission, para. 132.

²⁸⁹ Japan's third-party submission, para. 24.

²⁹⁰ Redetermination Disclosure, (Exhibit US-3), p. 10; and Redetermination Disclosure – China's translation, (Exhibit CHN-2), p. 11.

²⁹¹ Ibid.

²⁹² Redetermination Disclosure, (Exhibit US-3), pp. 9-10; and Redetermination Disclosure – China's translation, (Exhibit CHN-2), p. 11.

²⁹³ China's first written submission, para. 138. In this regard, we note that MOFCOM's parallel pricing analysis concerned price trends in 2007, 2008 and Q1 2009. The AUV data for 2007 was based on Wuhan's prices alone while the AUV data for 2008 and Q1 2009 reflected the weighted average of Baosteel's and Wuhan's prices. See China's response to Panel question No. 7, para. 27.

consequence, it cannot be considered in our evaluation of whether China complied with the disclosure obligations at issue.

7.173. Further, while we are sympathetic to the fact that in situations where there are only two domestic producers, disclosure of even average domestic sales prices may allow the competing producers in that two producer industry to calculate each other's information, this does not obviate the obligation to disclose essential facts, at least in some non-confidential summary form. There is no indication in the Redetermination that MOFCOM even attempted to do so, and no explanation of why it was impossible to do so, if that was MOFCOM's view. We emphasize that we do not understand Article 6.9 or Article 12.8 to require an investigating authority to disclose confidential information which it is obliged to protect pursuant to Article 6.5 of the Anti-Dumping Agreement or Article 12.4 of the SCM Agreement. We note that the United States has not challenged MOFCOM's decision to treat the domestic price information as confidential. Nonetheless, we find that having failed to even attempt to provide a non-confidential disclosure of essential facts regarding domestic prices which formed the basis of its consideration of parallel pricing, MOFCOM acted inconsistently with Articles 6.9 and 12.8 of the Anti-Dumping and SCM Agreements.

7.5.4.3.2 Alleged non-disclosure of essential facts regarding MOFCOM's finding that the domestic industry's loss in market share in 2008 led it to slash prices by over 30% in Q1 2009

7.174. In the Redetermination, MOFCOM found that the domestic industry's loss of market share in 2008 led it to slash prices by over 30% in Q1 2009. MOFCOM relied on this finding in support of its conclusions regarding the price effects of imports and causation. Thus, again, it is clear that the facts on which the finding was based were part of the facts under consideration in MOFCOM's analysis and conclusions regarding the effect of subject imports on domestic like product prices. Put differently, they were essential facts under consideration which formed the basis of MOFCOM's decision to impose definitive measures.

7.175. China asserts that the following statements, along with the specific facts upon which they were based, are the "essential facts" which were under consideration and that formed the basis of MOFCOM's decision:

- a. subject imports surged in 2008 resulting in loss of market share for the domestic industry;
- b. there was a one-to-one correlation between the market share lost by the domestic industry and the market share gained by subject imports; and
- c. faced with a continued surge in the volume of subject imports in Q1 2009, the domestic industry was forced to lower prices by 30.25% to compete with subject imports and to regain market share.

7.176. We note that the United States contends that "MOFCOM fail[ed] to support its assertion that the domestic industry's loss of market share led it slash prices by over 30% in the first quarter of 2009".²⁹⁴ Further, the United States submits that "obligations contained in the covered agreements apply to the disclosure of facts, and not reasoning".²⁹⁵ We understand the United States to argue that the three factors relied upon by China, set out in paragraph 7.175 above, were in fact "reasons" provided by MOFCOM for its conclusions rather than essential facts. As noted above, Article 6.9 of the Anti-Dumping Agreement and Article 12.8 of the SCM Agreements require the disclosure of "essential facts", not the reasoning of the investigating authority.²⁹⁶ In this instance, it seems to us that the United States is arguing that MOFCOM disclosed reasoning, but not facts, and that the reasoning was unsupported by facts disclosed to the parties.

²⁹⁴ United States' second written submission, para. 115.

²⁹⁵ Ibid.; and comments on China's response to Panel question No. 62.

²⁹⁶ See, e.g. Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.225. The panel in that case concluded that the "essential facts" within the meaning of Article 6.9 of the Anti-Dumping Agreement did not include motives, causes or justifications for the investigating authority's findings. We agree.

7.177. As explained above, we do have serious concerns regarding MOFCOM's conclusions regarding the linkage between the domestic industry's market share loss in 2008 and the 30.25% decline in the domestic industry's price in Q1 2009. However, MOFCOM did disclose the essential facts under consideration on the basis of which it made these findings, i.e. percentage figures relating to market share shifts and price fluctuations. Moreover, we understand that subject import statistics from China Customs were available to the interested parties. It is not clear to us from the United States' submissions what additional facts it contends MOFCOM should have disclosed, but did not. For these reasons, we reject the United States' claim in this respect.

7.5.4.3.3 Essential facts regarding MOFCOM's finding that the price-cost differential for Wuhan decreased in 2008

7.178. Before considering the United States' claim, we wish to clarify our understanding of why a decline in the price-cost differential for Wuhan in 2008 was relevant to MOFCOM's Redetermination. In the original proceeding, we expressed specific concerns regarding MOFCOM's failure to consider the possible effect of Baosteel's start-up costs in suppressing domestic like product prices in 2008.²⁹⁷ We understand from China's argument that MOFCOM, in the Redetermination, examined this question, and concluded that Wuhan did not experience such start-up costs, and faced an even more significant decline in its price-cost differential. On this basis, MOFCOM found that the effect of Baosteel's start-up costs on the domestic industry was relatively small.²⁹⁸

7.179. In light of China's argument, it seems to us that facts concerning the decline in Wuhan's price-cost differential were considered by MOFCOM in determining whether subject imports had a price suppressive effect in 2008, and in this context, therefore, constituted essential facts under consideration by MOFCOM.

7.180. The United States argues that MOFCOM failed to disclose facts underlying MOFCOM's finding that Wuhan's price-cost differential decreased in 2008. China asserts that the gross profit margin is the difference between price and costs and thus serves as a sufficient proxy for the price-cost differential.²⁹⁹ It further asserts that figures concerning the decline in Wuhan's gross profits were disclosed.³⁰⁰ The United States does not dispute that MOFCOM disclosed facts regarding the gross profit margins, but asserts that this is not a sufficient disclosure of the essential facts. However, the United States does not specifically explain why the disclosure of gross profit margins cannot be considered a sufficient non-confidential summary of a decline in Wuhan's price-cost differential. In light of United States' failure to rebut China's argument, we reject the United States' claim in this respect.

7.5.5 Failure to disclose essential facts regarding MOFCOM's causation determination

7.5.5.1 Main arguments of the parties

7.5.5.1.1 United States

7.181. The United States' claim of failure to disclose essential facts relating to MOFCOM's causation determination focuses on the following four elements:

- a. Information regarding the "sales obstacles" that allegedly prevented the domestic industry from making more sales in 2008 and the first quarter of 2009;
- b. Information underlying MOFCOM's assertion that the domestic industry was prevented by subject imports from realizing economies of scale;
- c. Information underlying MOFCOM's finding that the capacity and output of the domestic GOES industry did not exceed market demand; and

²⁹⁷ Panel Report, *China – GOES*, para. 7.548; and Appellate Body Report, *China – GOES*, para. 168.

²⁹⁸ China's first written submission, para. 30 (quoting Redetermination, (Exhibit US-1), p. 25).

²⁹⁹ Ibid. para. 30.

³⁰⁰ Ibid.

- d. Information supporting MOFCOM's division of responsibility for the inventory overhang.

7.182. The United States argues the following with respect to these four elements:

- a. the Redetermination Disclosure does not make clear what were the sales obstacles to which MOFCOM referred³⁰¹;
- b. MOFCOM failed to disclose any facts underlying its conclusion that the domestic industry was prevented by subject imports from realizing economies of scale³⁰²;
- c. MOFCOM failed to disclose any information underlying its finding that the capacity and output of the domestic industry did not exceed market demand³⁰³; and
- d. MOFCOM failed to disclose any information supporting its allocation of responsibility for the domestic industry's inventory overhang.³⁰⁴

7.5.5.1.2 China

7.183. China maintains the following with respect to these four elements:

- a. MOFCOM's Redetermination Disclosure makes clear that the increase in subject imports that were the sales obstacle in issue³⁰⁵, and the United States does not clearly identify the facts regarding subject imports which MOFCOM purportedly failed to disclose³⁰⁶;
- b. MOFCOM explained the reasoning for its finding regarding economies of scale³⁰⁷;
- c. MOFCOM disclosed not only information on the percentage changes in capacity and output, adjusted for differences in the base amounts of each³⁰⁸, but also facts showing that domestic capacity from 2006 through 2008 remained significantly below the total market demand despite the growth in capacity during that period³⁰⁹; and
- d. MOFCOM extensively discussed the cause of the domestic industry's inventory overhang, relying on the percentage changes in the relevant factors, which were disclosed in the Redetermination Disclosure, to establish that inventories first declined while subject imports were steady in 2007 and then increased when subject imports also increased in 2008.³¹⁰

7.5.5.2 Main arguments of the third parties

7.184. Japan supports the United States' claims regarding MOFCOM's failure to fulfill its disclosure obligations under Articles 6.9 of the Anti-Dumping Agreement and Article 12.8 of the SCM Agreement. It contends that the facts identified by the United States were taken into consideration by MOFCOM in its injury and causation determinations, and therefore should have been disclosed.³¹¹

³⁰¹ United States' second written submission, para. 114.

³⁰² United States' first written submission, para. 146; and second written submission, para. 111.

³⁰³ United States' first written submission, para. 146; and second written submission, para. 117.

³⁰⁴ United States' first written submission, para. 146; and second written submission, paras. 118-119.

³⁰⁵ China's first written submission, para. 140; and second written submission, para. 130.

³⁰⁶ China's second written submission, para. 130.

³⁰⁷ China's first written submission, para. 139; and second written submission, para. 129.

³⁰⁸ China's second written submission, para. 144, footnote 186.

³⁰⁹ China's second written submission, para. 133.

³¹⁰ China's first written submission, para. 145; and second written submission, para. 134.

³¹¹ Japan's third-party submission, para. 24.

7.5.5.3 Evaluation by the Panel

7.5.5.3.1 Essential facts regarding "sales obstacles"

7.185. China asserts in this proceeding that the "sales obstacles" to which MOFCOM made reference in the Redetermination were specifically subject imports.³¹² While the Redetermination Disclosure does contain information on the volumes of subject imports, we see nothing that would connect that information to the notion of subject imports specifically constituting the "sales obstacles" referred to in the Redetermination. Thus, to the extent MOFCOM considered "sales obstacles" in making its determination of causation, we see nothing in the Redetermination Disclosure that could be understood to constitute the essential facts concerning those sales obstacles. In this respect, MOFCOM failed to comply with the obligations set out in Articles 6.9 and 12.8 of the Anti-Dumping and SCM Agreements.

7.5.5.3.2 Essential facts regarding economies of scale

7.186. MOFCOM referred to economies of scale in the context of its injury and causation analyses in the Redetermination.³¹³ These references consist of the repeated statement that the increase in the domestic industry's output and capacity did not result in "corresponding economies of scale" for the domestic industry. However, the references in the Redetermination appear unsupported by any specific underlying facts. China refers to the Redetermination Disclosure at pages 22-23 to argue that MOFCOM disclosed the essential facts regarding economies of scale and at page 13 to argue that the percentage changes in demand, capacity and output are the facts that were the basis for MOFCOM's findings regarding economies of scale. However, pages 22-23 appear to relate to US comments on the disclosure of information in the original investigation and the percentage changes at page 13 do not relate specifically to economies of scale. Thus, we fail to see the relevance of China's references to these pages of the Redetermination Disclosure in the context of this claim.

7.187. As discussed above, MOFCOM's findings with respect to economies of scale rely on several premises that are not explained in the Redetermination, and for which there are no facts set out in either the Redetermination itself, or in the Redetermination Disclosure. Indeed, China acknowledges that there are no facts other than the information concerning percentage changes in demand, capacity and output relevant to the issue of economies of scale set out in the Redetermination Disclosure.³¹⁴ Thus, it appears that MOFCOM did not actually have any other facts before it that could be under consideration with respect to this issue.

7.188. While we have concluded that MOFCOM's findings regarding economies of scale are not sufficiently explained, and therefore are not substantively adequate, it does appear that MOFCOM disclosed the essential facts under consideration with respect to that substantively inadequate determination. In this situation, we see no basis for a finding that MOFCOM failed to comply with the obligation to disclose essential facts set out in Articles 6.9 and 12.8 of the Anti-Dumping and SCM Agreements.

7.5.5.3.3 Essential facts regarding capacity, output and demand

7.189. In support of its conclusion that domestic capacity and output did not exceed demand from 2006 through 2008, MOFCOM referred only to the percentage changes in these factors and a statement that domestic demand in 2007 was "almost twice" domestic output.³¹⁵ China has not asserted that there was any other information in the record that formed the basis for MOFCOM's findings regarding capacity, output and demand.

7.190. While we find it difficult to understand how MOFCOM based its findings regarding these factors on the facts to which China refers, these facts are undisputedly set out in the Redetermination Disclosure. Accordingly, MOFCOM did disclose the essential facts under consideration with respect to its determination. In this situation, we see no basis for a finding that

³¹² China's first written submission, para. 140; and second written submission, para. 130.

³¹³ Redetermination, (Exhibit US-1), pp. 28, 29, 42, 43; and Redetermination – China's translation, (CHN-1), pp. 29, 43, 44.

³¹⁴ China's second written submission, paras. 94, 98; and response to Panel question No. 57, para. 156.

³¹⁵ Redetermination, (Exhibit US-1), p. 52; and Redetermination – China's translation, (CHN-1), p. 52.

MOFCOM failed to comply with the obligation to disclose essential facts set out in Articles 6.9 and 12.8 of the Anti-Dumping and SCM Agreements.

7.5.5.3.4 Essential facts regarding inventory overhang

7.191. In support of its conclusion that subject imports caused the increase in the domestic industry's inventory in 2008, MOFCOM relied on the fact that the domestic industry's inventory and subject imports increased at commensurate rates during that period. China has not asserted that there was any other information in the record that formed the basis for MOFCOM's findings regarding inventory overhang.

7.192. While we consider that MOFCOM's findings regarding inventory overhang are not sufficiently explained, and therefore are not substantively adequate, it does appear that MOFCOM disclosed the facts under consideration with respect to that substantively inadequate determination. In this situation, we see no basis for a finding that MOFCOM failed to comply with the obligation to disclose essential facts set out in Articles 6.9 and 12.8 of the Anti-Dumping and SCM Agreements.

7.6 The United States' claim with respect to public notice

7.6.1 Introduction

7.193. In this section of our report, we consider the United States' assertions that MOFCOM explained neither the matters of fact and law nor the reasons that led it to maintain anti-dumping and countervailing duties in the public notice of the Redetermination, and thus claims that its public notice is inconsistent with China's obligations under Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement and Articles 22.3 and 22.5 of the SCM Agreement. Specifically, the United States contends that MOFCOM's Redetermination does not explain:

- a. MOFCOM's finding that the trends of the prices of the subject imports and the domestic like product were the same;
- b. the evidence that MOFCOM allegedly considered, and the analysis that it allegedly conducted, in concluding that the domestic industry's loss of market share in 2008 led it to slash prices by over 30% in the first quarter of 2009;
- c. its assertion regarding the "sales obstacles" that allegedly prevented the domestic industry from making more sales in 2008 and the first quarter of 2009;
- d. its assertion that the domestic industry was prevented by subject imports from realizing economies of scale; and
- e. MOFCOM's finding that the capacity and output of the domestic GOES industry did not exceed market demand.

The United States contends that these findings and conclusions were material and thus subject to public notice requirements because they had to be resolved before MOFCOM could make an affirmative determination.³¹⁶

7.194. China counters that the Redetermination is sufficiently clear as to the facts and reasoning that led MOFCOM to its conclusions, while also respecting the need to protect confidential information. China maintains that (i) MOFCOM fully respected the requirement to provide a reasoned account of the factual basis for its decision to impose definitive measures³¹⁷, (ii) the United States failed to establish a *prima facie* case³¹⁸, and (iii) some of the United States' claims

³¹⁶ United States' first written submission, para. 154.

³¹⁷ China's first written submission, para. 153.

³¹⁸ *Ibid.*

are factually inaccurate.³¹⁹ In addition, in its second written submission, China contends that the United States abandoned some of its original claims concerning public notice.³²⁰

7.6.2 Provisions at issue

7.195. Article 12.2 of the Anti-Dumping Agreement provides:

Public notice shall be given of any preliminary or final determination, whether affirmative or negative, of any decision to accept an undertaking pursuant to Article 8, of the termination of such an undertaking, and of the termination of a definitive anti-dumping duty. Each such notice shall set forth, or otherwise make available through a separate report, in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities. All such notices and reports shall be forwarded to the Member or Members the products of which are subject to such determination or undertaking and to other interested parties known to have an interest therein.

Article 22.3 of the SCM Agreement is virtually identical to Article 12.2 of the Anti-Dumping Agreement but for references to "Article 18" and "a definitive countervailing duty" in place of "Article 8" and "a definitive anti-dumping duty" in the first sentence.

7.196. Article 12.2.2 of the Anti-Dumping Agreement further provides:

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

Again, Article 22.5 of the SCM Agreement is virtually identical to Article 12.2.2 of the Anti-Dumping Agreement. None of the differences are relevant in this dispute.³²¹

7.6.3 Legal framework

7.197. We begin by recalling the difference in the obligations imposed by Articles 6.9 and 12.2.2 of the Anti-Dumping Agreement and the analogous provisions, Articles 12.8 and 22.5, of the SCM Agreement. As explained by the Appellate Body in the original proceedings, Article 6.9 concerns the disclosure of essential facts prior to a definitive determination. Article 12.2.2 requires "public notice of conclusion" of an investigation, and thus applies once a final determination is made.³²² Therefore, in this case, the document to be considered in resolving the United States' claims is the Redetermination document issued by MOFCOM.

7.198. Further, the chapeau of Article 12.2.2 (i.e., Article 12.2) and the corresponding provision of the SCM Agreement, Article 22.3, require investigating authorities to make available, in sufficient detail, the findings and conclusions reached on all issues of fact and law "considered material by the investigating authorities." Therefore, if an issue of fact or law was not considered material to its determinations, MOFCOM would not be obliged to give public notice of findings and conclusions on that issue, regardless of its relevance or importance to the parties, or a reviewing panel. However, we also agree with the view taken by some panels that material issues of fact and

³¹⁹ United States' second written submission, para. 122.

³²⁰ China's second written submission, para. 137.

³²¹ Article 22.5 refers to "an undertaking" rather than "a price undertaking" in the first sentence, and refers to "paragraph 4" rather than "subparagraph 2.1" and "interested Members" in addition to "exporters and importers" in the second sentence. Article 22.5 of the SCM Agreement also omits the reference at the end of Article 12.2.2 of the Anti-Dumping Agreement to sampling under Article 6.10 of the latter Agreement. There is no corollary provision to Article 6.10 in the SCM Agreement.

³²² Appellate Body Report, *China – GOES*, para. 240.

law include issues that arisen in the course of an investigation and which must necessarily be resolved in order for the investigating authorities to make the necessary determinations.³²³ In other words, an investigating authority cannot simply conclude that an issue that arises in an investigation is not material and make no findings regarding it if, viewed objectively, that issue requires resolution in the context of the findings made by the investigating authority.

7.199. In addition, as we stated in the original proceedings, the public notice requirement under Article 12 of the Anti-Dumping Agreement and Article 22 of the SCM Agreement does not extend to confidential information.³²⁴ Indeed, both provisions make clear that "due regard" must be paid to the requirement to protect confidential information. Where the public notice requirement implicates information treated as confidential in an investigation, investigating authorities may reconcile their obligation to protect confidential information from disclosure with their obligations with respect to public notice by basing the public notice on non-confidential summaries of the relevant information.³²⁵ As the public notice obligations only require investigating authorities to make available "findings" and "conclusions" on issues of fact, and "matters of fact" which have led to arguments being rejected, it is also not necessary to include all relevant underlying, or even supporting facts, in the public notice.³²⁶

7.200. Before we turn to the specific assertions of the United States regarding allegedly inadequate public notice, we have considered the application of judicial economy with respect to those assertions which relate to aspects of MOFCOM's Redetermination which we have, in this report, found to be inconsistent with China's substantive obligations under the Anti-Dumping and SCM Agreements. We note that where we have found such inconsistency, we have based that decision principally on the basis of the explanations of MOFCOM's analysis and conclusions in the Redetermination, consistently with the applicable standard of review. In this situation, we consider immaterial the question of whether the public notice of such an inconsistent determination is "sufficient". We find the question of whether it is necessary or appropriate for us to make findings on the adequacy of the public notice to be particularly relevant in this case as, where we have found substantive inconsistencies in MOFCOM's price effects and causation analysis, the primary basis for those findings is our conclusion MOFCOM failed, in the Redetermination, to engage adequately with relevant evidence before it, and/or failed to explain the basis of its finding. Therefore, where we have found that aspects of MOFCOM's Redetermination are inconsistent with China's substantive obligations we exercise judicial economy and make no finding on the corresponding claims under Articles 12 and 22 of the Anti-Dumping and SCM Agreements respectively.

7.201. Our decision is in keeping with that of several previous panels, which have concluded that, where there is a substantive inconsistency with the provisions of the Anti-Dumping Agreement, it is neither necessary nor appropriate to make findings on claims of violation of Articles 12 and/or 22 of the Anti-Dumping and SCM Agreements.³²⁷ In this regard, we note in particular the findings of the panel in *EC – Bed Linen*:

A notice may adequately explain the determination that was made, but if the determination was substantively inconsistent with the relevant legal obligations, the adequacy of the notice is meaningless. Further, in our view, it is meaningless to consider whether the notice of a decision that is substantive [*sic*] inconsistent with the requirements of the AD Agreement is, as a separate matter, insufficient under Article 12.2. A finding that the notice of an inconsistent action is inadequate does not add anything to the finding of violation, the resolution of the dispute before us, or to the understanding of the obligations imposed by the AD Agreement.³²⁸

We agree with the findings of the panel in *EC – Bed Linen* to this effect, in particular with respect to the lack of any additional value to be had from findings as to whether a notice of a substantively inadequate determination is consistent with the public notice requirements of the Anti-Dumping

³²³ See Panel Reports, *China – Broiler Products*, para. 7.527; and *EU – Footwear (China)*, para. 7.844.

³²⁴ Panel Report, *China – GOES*, para. 7.334.

³²⁵ *Ibid.* para. 7.335; and Appellate Body Report, *China – GOES*, para. 259.

³²⁶ See, e.g. Appellate Body Report, *China – GOES*, para. 256.

³²⁷ Panel Reports, *EC – Bed Linen*, para. 6.259; and *EC – Salmon (Norway)*, para. 7.831.

³²⁸ Panel Report, *EC – Bed Linen*, para. 6.259.

and SCM Agreements. We therefore adopt them as our own, and will follow the same approach in evaluating the United States' public notice claims in this proceeding.

7.6.4 Main arguments of the parties

7.6.4.1 United States

7.202. The United States contends that, *inter alia*, MOFCOM's Redetermination did not contain all relevant information on matters of fact and law which led MOFCOM to conclude that price trends of subject imports and the domestic like product were the same.³²⁹

7.203. The United States further contends that MOFCOM's Redetermination explains neither its conclusions that the domestic industry was prevented by subject imports from realizing economies of scale³³⁰ nor its finding that the capacity and output of the domestic industry did not exceed market demand.³³¹ In its second written submission, the United States further argues that China's representations that increased imports are the "sales obstacles" referred to in the Redetermination are not supported by the Redetermination itself.³³²

7.6.4.2 China

7.204. China argues that by failing to establish that the facts referred to by the United States in its public notice claims were critical to an understanding of the factual basis that led to the imposition of final measures, the United States has failed to make a *prima facie* case that MOFCOM violated Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement and Articles 22.3 and 22.5 of the SCM Agreement.³³³ With regard to MOFCOM's conclusions regarding trends in prices of subject imports and the domestic like product, China argues that MOFCOM provided, in the Redetermination, the public version of the data supporting these conclusions.³³⁴ In relation to MOFCOM's conclusion that the domestic industry's market share loss in 2008 led it to reduce prices significantly in Q1 2009, China submits that MOFCOM disclosed all matters of fact and law that led to this conclusion.³³⁵

7.205. In addition, China contends that MOFCOM fully explained not only its analysis and findings regarding the domestic industry's failure to realize economies of scale due to subject imports, referring to pages 23 and 24 of the Redetermination³³⁶, but also the basis for its finding that domestic capacity and output did not exceed market demand, referring to the Redetermination at page 52.³³⁷ China further contends that it was clear from MOFCOM's Redetermination that subject imports were the sales obstacles in issue, and how MOFCOM considered them, referring to the Redetermination at pages 24-26.³³⁸

7.6.5 Main arguments of the third parties

7.206. Japan argues that the facts identified by the United States in its public notice claims were material because they were taken into consideration by MOFCOM in its injury and causation determinations. Japan requests us to examine carefully whether MOFCOM complied with its obligations in this regard.³³⁹

7.6.6 Evaluation by the Panel

7.207. Turning to the specific assertions of the United States regarding allegedly inadequate public notice, we note that each of these relates to aspects of MOFCOM's Redetermination which

³²⁹ United States' second written submission, para. 122.

³³⁰ United States' first written submission, para. 153.

³³¹ *Ibid.*

³³² United States' second written submission, para. 124.

³³³ China's first written submission, para. 150.

³³⁴ *Ibid.* para. 156.

³³⁵ *Ibid.* para. 159.

³³⁶ *Ibid.* para. 157; and second written submission, para. 143.

³³⁷ China's first written submission, para. 161.

³³⁸ *Ibid.* para. 158.

³³⁹ Japan's third-party submission, para. 24.

we have found, in this report, to be substantively inconsistent with China's obligations. More specifically, the United States' claims regarding the adequacy of the public notice of MOFCOM's price effects and causation determinations relate to our substantive findings as follows:

- a. In relation to MOFCOM's conclusions regarding similar trends in the prices of subject imports and the domestic like product, we note that MOFCOM's conclusions were relevant to its factual findings on parallel trends in prices of subject imports and the domestic like product. The findings on parallel trends formed part of MOFCOM's intermediate findings concerning price competition and were part of MOFCOM's price effects analysis. We found MOFCOM's parallel pricing analysis to be erroneous, for the reasons described above.³⁴⁰ It is also relevant to note that we found MOFCOM's overall price effects analysis to be inconsistent with China's obligations under Articles 3.1 and 3.2 of the Anti-Dumping Agreement and Articles 15.1 and 15.2 of the SCM Agreement.
- b. With regard to the United States' claim concerning MOFCOM's alleged failure to provide in the Redetermination, relevant information on facts and law, which led MOFCOM to the conclusion that the domestic industry's loss of market share in 2008 led it to slash prices by over 30% in the first quarter of Q1 2009 we highlighted specific errors in MOFCOM's analysis, in particular, in light of MOFCOM's failure to engage with probative evidence before it, which could have brought its conclusions into question, and also because of MOFCOM's failure to adequately explain the basis for its finding.³⁴¹ We found MOFCOM's volume based price suppression analysis, in this case, to be flawed and inconsistent with China's obligations under Articles 3.1 and 3.2 of the Anti-Dumping Agreement and Articles 15.1 and 15.2 of the SCM Agreement.
- c. With respect to economies of scale, the US claim is based upon MOFCOM's failure to explain its conclusions that the domestic industry was prevented by subject imports from realizing economies of scale. Similarly, our finding that MOFCOM's conclusions regarding economies of scale do not support its determination of causation is based on the fact that MOFCOM's findings in this context rely on several premises that are not explained in the Redetermination, and for which there are no facts set out in either the Redetermination itself, or in the Redetermination Disclosure.³⁴²
- d. With respect to capacity, output and demand, the US claim is based upon MOFCOM's failure to explain its finding that the capacity and output of the domestic industry did not exceed market demand. Similarly, our finding that MOFCOM's conclusions regarding these three economic factors do not support its determination of causation is based on the continued absence of underlying data regarding growth in domestic demand, capacity and output.³⁴³
- e. With respect to sales obstacles, the US claim is based upon the fact that China's representations that increased imports are the "sales obstacles" referred to in the Redetermination are not supported by the Redetermination itself. Similarly, we have found nothing that would connect the information presented by MOFCOM on the volumes of subject imports to the notion of subject imports specifically constituting the "sales obstacles" encountered by the domestic industry.³⁴⁴

7.208. As the United States' claims of inadequate public notice relate specifically to the aspects of MOFCOM's price effects and causation determinations that constitute the basis of our findings of inconsistency of those determinations with various provisions of the Anti-Dumping and SCM Agreements, we apply judicial economy based on the considerations set out above and make no findings on these public notice claims under Articles 12 and 22 of the Anti-Dumping and SCM Agreements respectively.

³⁴⁰ See, above, paras. 7.89-7.93.

³⁴¹ See, above, paras. 7.40-7.112.

³⁴² See, above, paras. 7.129-7.133.

³⁴³ See, above, paras. 7.138-7.145.

³⁴⁴ See, above, para. 7.185.

8 CONCLUSIONS

8.1. For the reasons set forth in this Report, we conclude that the United States' claim regarding adverse effects under Articles 3.1 and 3.4 of the Anti-Dumping Agreement and Articles 15.1 and 15.4 of the SCM Agreement is not properly before us.

8.2. Further, and for the reasons set forth in this Report, we conclude that:

- a. MOFCOM's conclusions regarding the price effects of subject imports are not consistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement and Articles 15.1 and 15.2 of the SCM Agreement;
- b. MOFCOM's revised finding that subject imports caused material injury to the domestic industry is not consistent with Articles 3.1 and 3.5 of the Anti-Dumping Agreement and Articles 15.1 and 15.5 of the SCM Agreement; and
- c. MOFCOM acted inconsistently with Article 6.9 of the Anti-Dumping Agreement and Article 12.8 of the SCM Agreement with respect to the disclosure of essential facts regarding parallel pricing and sales obstacles.

Accordingly, China's measures taken to comply with the DSB's recommendations and rulings, at issue in this proceeding, are inconsistent with the relevant covered agreements, and therefore China failed to comply with the recommendations and rulings of the DSB.

8.3. In addition, and for the reasons set forth in this Report, we conclude that the United States has failed to demonstrate that MOFCOM acted inconsistently with Article 6.9 of the Anti-Dumping Agreement and Article 12.8 of the SCM Agreement with respect to the disclosure of essential facts regarding the domestic industry's loss of market share in 2008 and price reduction in the first quarter of 2009, the decrease in Wuhan's price-cost differential in 2008, economies of scale, domestic capacity, output and demand, and inventory overhang.

8.4. Finally, in light of our findings of substantive violations, we exercised judicial economy and made no findings with regard to the United States' public notice claims under Article 12 of the Anti-Dumping Agreement and Article 22 of the SCM Agreement.

8.5. Under Article 3.8 of the DSU, in cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment. We conclude that, to the extent that we have found the measures at issue inconsistent with the provisions of the Anti-Dumping and SCM Agreements cited above, they have nullified or impaired benefits accruing to the United States under these agreements.

8.6. We therefore conclude that China failed to implement the recommendations and rulings of the DSB to bring its measures into conformity with its obligations under the Anti-Dumping and SCM Agreements.³⁴⁵ To the extent that China failed to comply with the recommendations and rulings of the DSB in the original dispute, those recommendations and rulings remain operative.

³⁴⁵ We recall that China asserts that the measures at issue expired after the issuance of the Interim Report. However, there is no evidence properly before us in this regard.