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The WTO Panel's Report concerning Anti-Dumping and Countervailing Duties on Certain Automobiles from the United States: Reasoning and Evidence for WT/DS 440

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On June 18, 2014, the WTO's Dispute Settlement Body adopted the Panel report on China – Anti-Dumping and Countervailing Duties on Certain Automobiles from the United States case. There are questions that are still left open or ambiguous, and some notable findings have been introduced. For the procedure, the major issues are whether the non-confidential summaries of data were sufficient to reasonably understand the information, the admissibility of the delayed letter from parties and whether the notice and registration of Investigation Authorities could justify the facts available for determination of Residual rates. As regards the substantive issues, the discussion focuses on whether there is a self-selection process to distort the domestic industry definition and the price comparability between subject imports and the domestic like product. By analyzing the arguments, evidences and reasoning in these regards, this review points out questions that still need future clarification.

Keywords: China – Autos, Anti-dumping, Non-confidential Summaries, Admissibility of Evidence, Self-selection, Price Comparability

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1. Introduction

On May 23, 2014, the WTO's dispute settlement panel delivered its report on *China – Anti-Dumping and Countervailing Duties on Certain Automobiles from the United States* (hereinafter *China – Autos*) case.[1] Its main concern covers a series of procedural and substantive aspects of the anti-dumping and countervailing duty measures imposed by China over certain automobiles from the US, as well as their investigations. At its meeting on June 18, 2014, the Dispute Settlement Body ("DSB") finally adopted the panel report.[2]

China – Autos is the third "double remedies" case in recent years where the US has challenged China's application of anti-dumping and countervailing duties (the former cases are *China – GOES*[3] & *China – Broiler*[4]). In *China – Autos*, most legal arguments were similar or even identical to those in the former two cases. However the Panel made several notable and important legal reasoning and findings.[5]

2. Background

On September 9, 2009, the China Association of Automobile Manufacturers ("CAAM") filed a petition for imposing anti-dumping and countervailing duties on the US made automobiles with an engine capacity equal to or bigger than 2000 cubic centimeters ("cc"). The Ministry of Commerce of the People's Republic of China ("MOFCOM") initiated anti-dumping and countervailing duties investigations on November 6, 2009.[6]

MOFCOM made its preliminary and final decisions on April 2[7] and May 5, 2011,[8] respectively. According to the final determination, the subject product was dumped and subsidized, causing injury to the domestic industry. Also, MOFCOM Notices Nos. 20 and 84 authorized its domestic authorities to levy anti-dumping and countervailing duties rates effective December 15, 2011, at the rates established in the final determination.[9] Such rates shall be applied to the cars from General Motors, Chrysler and Ford Motor, as well as US produced BMW, Mercedes-Benz and Honda.[10]

3. Procedural Questions: Facts and Reasoning

A. Does the Non-confidential Summaries Provide a Reasonable Understanding?

Article 6.5.1 of the Anti-Dumping Agreement and Article 12.4.1 of the Agreement on Subsidies and Countervailing Measures (hereinafter SCM Agreement) require that the non-confidential summaries cover details sufficient to reasonably understand the information submitted in confidence. The Americans argued that MOFCOM violated these provisions because the Ministry did not require CAAM to provide adequate non-confidential summaries in the petition.[11] The issue is whether the non-confidential summaries of data concerning 12 injury factors referenced by the US were adequate.[12]

In this case, CAAM submitted two versions of the petition to MOFCOM: a confidential and a non-confidential version.[13] Each non-confidential summary contains a table in which the column displaying aggregated yearly data for the domestic industry is amended.[14] Moreover, each summary is followed by text describing trends in the table. Besides, some summaries also contain a graph showing a trend line representing the data whose X-axis (horizontal) is labelled with yearly intervals corresponding to the period of investigation ("POI"), but whose Y-axis (vertical) is unlabeled.[15]

As a general matter, the Panel first considered whether the tables, trend lines and texts in the petition could constitute an adequate non-confidential summary.[16] The tables set out yearly industry-wide absolute values, and some of the tables contain an additional column setting out year-on-year percentage changes in the redacted data throughout POI.[17] The US submitted that MOFCOM could have provided an average of absolute values per year in the tables, instead of percentage changes.[18] In this regard, the Panel determined that the percentage changes gave interested parties a reasonable understanding of the substance of the confidential information, and the absolute change in the data being summarized was not a critical component.[19] In *China – Broiler Products,* the Panel considered that a baseline figure should be necessary, since, without it, parties could not reasonably understand the influence of changes in a manner.[20] By contrast, the Panel in this case disagreed with that Panel's reasoning and came to a different conclusion.[21]

The Panel noted that the trend lines were unlabeled on the Y-axis. It was

impossible to determine the percentage changes being depicted. Thus, the trend lines added no value to the information on percentage changes reported in the tables.[22] As to the texts, the Panel also noted that the texts made no additional explanation to the tables.[23] Therefore, the Panel found that the unlabeled trend lines or text did not permit a reasonable understanding of the confidential information.[24]

The Panel then focused on the non-confidential tables summarizing the data for each of the 12 injury factors concerned. These tables were divided into two groups by the Panel pursuant to whether they provided percentage changes or not.[25]

Specifically, among the first group with percentage changes, the eight non-confidential summaries of information regarding production capacity, output, sales volume, inventory, pre-tax profits, the number of employees, productivity, and cash flow all follow a similar pattern, with a table setting out year-on-year percentage changes.[26] As stated above, the Panel considered that the percentage changes permit a reasonable understanding of the redacted confidential information. Thus, the Panel found the eight non-confidential summaries were consistent with Article 6.5.1 of the Anti-Dumping Agreement and Article 12.4.1 of the SCM Agreement.[27] Among the second group, for the absence of percentage changes, it was concluded that the non-confidential summaries for return on investment, salary and sales-to-output ratio were inconsistent with Articles 6.5.1 and 12.4.1.[28]

In addition, China argued that parties concerned would have to infer, derive and piece together a possible summary of confidential information for themselves.[29] It was rejected by the Panel, however. In this regard, the Panel followed the previous jurisprudence that a non-confidential summary which requires interested parties to connect information from different parts of the petition in order to obtain a reasonable understanding of the substance of the confidential information is not consistent with Articles 6.5.1 and 12.4.1.[30]

B. The 'Essential Facts' and the Admissibility of the Mercedes-Benz USA Letter

Article 6.9 of the Anti-Dumping Agreement requires the IA to inform the respondents of all 'essential facts' as the basis of its decision prior to releasing its final determination. In this case, the Panel found that China acted inconsistently with

Article 6.9. Nevertheless, the finding was only due to China's failure to rebut the US *prima facie* case because neither arguments nor evidence was provided by China.[31]

The focus is the admissibility of the letter from Mercedes-Benz USA. During the course of the investigations, MOFCOM issued final disclosure letters to the individual US respondents, as well as two final disclosure letters to the US government.[32] The US argued that MOFCOM failed to inform the US respondents of all 'essential facts.' However, the US asserted that it did not have the copies of the final disclosure letters sent to the US respondents in its possession, and contended that it was China who submitted these letters to the Panel.[33]

China declined to submit them in evidence opining that the burden of proof lay on the US.[34] At the second Panel meeting, the US submitted a letter from Mercedes-Benz USA to MOFCOM dated April 28, 2011 into evidence,[35] which was allegedly to be rebuttal evidence to China's assertion of Article 6.9. In China's viewpoint, however, the Mercedes-Benz USA's letter could not be characterized as rebuttal evidence; it may not be taken into consideration by the Panel.[36]

The Panel considered it appropriate to accept the Mercedes-Benz USA letter, since nothing in either the Understanding on Rules and Procedures governing the Settlement of Disputes ("DSU") or the working procedures precluded the Panel from accepting evidence after the first Panel meeting.[37] Indeed, the Panel accepted that the US could not produce the copies of MOFCOM's final disclosures to its respondent companies for the Panel's review in this dispute.[38] Moreover, according to Article 8 of Working Procedures of the Panel in this case,[39] all the factual evidences shall be indeed submitted no later than the end of the first substantive meeting, except, with respect to evidence necessary for the purposes of rebuttal, for the answers to questions or the comments on answers provided by the other party.

From the author's view, however, the question raised here was whether the US has established the *prima facie* case at the first step. The general principles applicable to the allocation of the burden of proof in the WTO dispute settlement require that a party claiming a violation must assert and prove its claim.[40] The Appellate Body has stated that a complaining party will satisfy its burden when it establishes a *prima facie* case.[41]

In this case, the US did not submit any other evidence except for the letter from

Mercedes-Benz USA. In the author's opinion, it is thus clear that the US, the complainant, should bear the *de jure* and *de facto* burden of demonstrating the violations it alleges. According to Article 8 of Working Procedures, the Panel needs to address whether the Mercedes-Benz USA letter is submitted for the purpose of the *prima facie* case, or for rebuttal, answers or comments. Regrettably, the Panel left open this question.

C. The Facts Available and Determination of 'Residual' Anti-Dumping and Countervailing Duty Rates

MOFCOM finally determined a 'residual' anti-dumping and countervailing rate for 'all other' US companies, which had not registered with MOFCOM in the investigation.[42] The US challenged that MOFCOM violated the procedural obligations laid down at Articles 6.8, 6.9, 12.2 and 12.2.2 and Annex II, paragraph 1 of the Anti-Dumping Agreement, and Articles 12.7, 12.8, 22.3, and 22.5 of the SCM Agreement.[43]

MOFCOM individually contacted the US exporters identified in the petition of the initiations, posted the notices of initiation and the relevant registration forms on its website, and made them available in its public reading room.[44] After having received the registration forms from some the US exporters, MOFCOM sent questionnaires to these respondents.[45] With respect to 'all other' US companies which had not registered in the investigation, and as a consequence, had not filed a questionnaire response, MOFCOM determined the above-mentioned rates.[46]

Although this claim concerned many articles, the major issue is whether the notice of initiation and the registration of MOFCOM were sufficient for the purposes of Article 6.8 and, in particular, Annex II, paragraph 1. The US made no claim or argument suggesting that residual duties were in general not allowed under the Agreements. Rather, its claims concerned the way in which MOFCOM determined the residual rates applied in the investigations at issue.[47]

Article 6.8 of the Anti-Dumping Agreement stipulates that it may be determined by the facts available if a party concerned refuses the access to or otherwise does not provide necessary information, or significantly impedes the investigation. Annex II, Paragraph 1 to the Anti-Dumping Agreement establishes other important requirements concerning the use of facts available. *E.g.*, it re-

quires that, after initiation, the IA *specify in detail* the information required of an interested party and the manner in which that information is to be structured. [Emphasis added]

However, there is nothing in the Anti-dumping Agreement providing how an IA is to fulfil these requirements,[48] especially how an IA is to "specify in detail" the information it requires.[49] While sending questionnaires to known foreign producers will generally suffice in this regard, the situation was complicated in the case of foreign producers that were not known to the IA, or did not exist at the time of the investigation.[50] The US submitted that the unknown US exporters were not notified of the information required and cannot be said to have engaged in any of the acts identified in Article 6.8 as justifying the use of facts available.[51]

The Panel initially confirmed that the notice of initiation and the registration of MOFCOM might identify parties concerned which were participating in the investigation.[52] The Panel considered that MOFCOM took the steps which could reasonably be expected from an IA to contact the unknown exporters. This *per se* was not, however, necessarily sufficient to justify the subsequent use of facts available, as it does not satisfy the obligation set forth in Annex II, paragraph 1.[53] This further led to the concern that to the unknown US exporters or non-existent US exporters, whether the steps taken by MOFCOM have satisfied the requirement of "specify in detail" the information it requires.

In this regard, the Panel stated that the petition included normal value, export price and possibly certain adjustments, while the notice of initiation only contained the identity, volume and value of exporters. The scope of facts maintained by MOFCOM was much wider than that of the information requested from unknown or non-existent US exporters.[54] The Panel thus found that the notice of initiation and registration adopted by MOFCOM were concluded insufficiently, because they did not specify in detail the information requested from the US respondents.[55]

China argued that the registration form and the subsequent dumping questionnaire served as a complementary purpose in China's anti-dumping system, and the determinations with respect to non-cooperating producers might be made on the basis of facts available.[56] China further submitted that any exporter not responding to the notice of initiation can be treated as non-cooperating for the purposes of Article 6.8 of the Anti-Dumping Agreement.[57] The Panel was not persuaded by this

argument. Unless notice specifies in detail the information requested from the respondents and such information is not submitted, according to the Panel, a failure to register did not necessarily satisfy Article 6.8.[58] Consequently, the Panel held that China acted inconsistently with its obligations under Article 6.8 and paragraph 1 of Annex II of the Anti-Dumping Agreement.[59]

Regarding an identical issue, the Panel in *China – GOES* found that MOFCOM had acted inconsistently with Article 6.8 of the Anti-Dumping Agreement.[60] By contrast, the Panel in *China – Broiler Products* came to the opposite conclusion as follows:

> The authority is justified in replacing other information that it cannot collect as a result of that failure, even if it did not specifically request the other information. Such information initially required may include the producer's contact details and information necessary for the authority to decide on sampling.[61]

So far, there might not be consistent and final reasoning and conclusions from the panels. The Panel has noted that Article 6.8 and Annex II, paragraph 1 of the Anti-Dumping Agreement concerned the *substantive aspect.*[62] If following the Panel's reasoning and defining the violation of Article 6.8 as a substantive matter, whether an IA has got the available facts and whether the facts are in favor of residual duty rates are two different nature of questions? In the absence of direct findings on the latter, this conclusion is based on a logical 'speculation.' Just as the European Union, a third party of this case noted that the US neither explained how an IA could give notice to producers that existed but were not known, nor made themselves known to the IA.[63]

4. Substantive Issues: An Objective Examination based on Positive Evidence

A. The Definition of the Domestic Industry for the Purposes of Its Injury Determination

Article 4.1 of the Anti-Dumping Agreement and Article 16.1 of the SCM Agreement define 'domestic industry' for investigations. The US argued that there was

self-selection in this case, considering that CAAM ultimately provided data to MOFCOM from only eight of its member producers.[64] The US also contended that MOFCOM's domestic industry definition failed to capture a major proportion of total production of the domestic like product, in excluding 60 percent of domestic production from its investigations.[65]

Articles 4.1 and 16.1 define the 'domestic industry' as either producers of the domestic like product as a whole, or a subset of those producers, who collectively account for a major proportion of total domestic production. The Panel noted that both the Anti-Dumping and the SCM Agreements refer to *a* major proportion rather than *the* major proportion, so that the percentage of production deemed a 'major proportion' need not be greater than 50 percent of total production.[66] Further, the mere fact that the domestic industry as defined does not include a particular proportion of producers opposing the complaint, would not demonstrate that MOFCOM acted inconsistently with Articles 4.1 and 16.1.[67]

The major arguments and its rulings were concentrated on so-called *self-selection* in the investigations. [Emphasis added] The US argued that MOFCOM, by requiring domestic producers to register in order to participate in the investigations, introduced a self-selection process that distorted its domestic industry definition.[68] Domestic producers posting the strongest performance would have less incentive to participate in the investigations. The US thus contended that the withholding of the performance data of the stronger-performing producers would skew the economic data towards an affirmative finding of injury, leading to the risk of higher duties on subject imports.[69]

The Panel found the US argument unconvincing.[70] According to the Panel, the need for flexibility justified the use of registration process. It made interested parties known to the IA to be considered part of the domestic industry. The mere fact that some producers may choose not to do so, i.e., 'self-select' out of coming forward, did not introduce a material risk of distortion in the IA's process of defining the domestic industry.[71]

Moreover, in the Panel's view, MOFCOM communicated its notices and forms in an open manner, and the possibility of participation in the investigations was equally available to any interested party.[72] Even assuming that stronger-performing producers had not participated in the investigations, nothing on the record suggested that their failure to do so was due to any action or inaction on

the MOFCOM's part.[73] Besides, MOFCOM required producers to register and submit information within a 20-day time limit, which did not exclude any of the producers providing the information in defining the domestic industry.[74] The Panel thus rejected the US arguments concerning alleged self-selection.[75]

It is worthwhile noting that the argument of self-selection has been addressed in *EC – Fasteners (China)* dispute by the Appellate Body. In this case, the Appellate Body ruled that the IA's approach imposed a self-selection process among domestic producers with a material risk of distortion.[76] Nevertheless, the Panel found that MOFCOM's registration requirement in this case differed materially from the actions taken by the EC Commission in *EC – Fasteners (China)*.[77] Unlike the EC Commission in *EC – Fasteners*, MOFCOM did not apply an unrelated benchmark in determining the domestic industry it defined including domestic producers.[78]

In the end, the Panel dismissed the US claim that MOFCOM's domestic industry definition was distorted.[79]

B. Price Effects Analysis and Causation Determination

Article 3.2 of the Anti-Dumping Agreement and Article 15.2 of the SCM Agreement require that an IA undertakes an 'objective examination' based on 'positive evidence.'[80]The Appellate Body stated in *China – GOES* that, in addition to a 'consideration' of the existence of a type of price effect on domestic prices, price effects analysis required an IA to determine whether subject imports had an 'explanatory force' for such price effect(s).[81]

The principal issue in this claim is whether MOFCOM's finding of price depression would be a sufficient basis to satisfy the requirements of Articles 3.2 and 15.2. The Panel found that MOFCOM's price depression analysis did not fully consider an objective examination of the evidence of overselling by the subject imports.[82]

First, according to the Panel, MOFCOM failed to explain how parallel pricing existed in spite of the diverging movements between 2006 and 2007. The record of MOFCOM's final determination clearly shows that, in this period, the Average Unit Values ("AUVs") of subject imports and of the domestic like product moved in different directions.

Table 1: Changes in AUVs[83]

Year	2006-2007	2007-2008	1Q-3Q 2008 – 1Q-3Q 2009
Subject imports	-8.47	39.6	-3.17
Domestic like product	11.08	16.82	-10.13

Unit: Percent

Although not discussed in the final determination, the Panel found that MOFCOM did not adequately explain the role of subject imports in the price depression existing in the domestic market.[84]

Second, the Panel observed that, except for 2007, the average price of subject imports was higher than that of the domestic like product by significant margins.

Table 2: AUVs[85]

Year	2006	2007	2008	1Q-3Q 2009
Subject imports	315,467	288,749	403,089	411,382
Domestic like product	280,596	311,698	364,122	315,535

Unit: CNY(RMB)

The Panel did not preclude the possibility that price depression would be found to exist in a case where there was overselling by subject imports. However, MOFCOM failed to explain how the Ministry considered that evidence, and what impact it would have on MOFCOM's reasoning.[86]

Third, the Panel was concerned with the differentiation of 'like' Chinese automobiles and imported automobiles. The Panel stated that an objective decision-maker needed to make further inquiries into the differences between the two baskets of goods and determined whether they affected prices.[87] An IA had the obligation to ensure price comparability between subject imports and the domestic like product. This obligation was neither affected by the type of price effects being considered, nor found to affect domestic industry prices.[88] Consequently, MOFCOM's reliance on unadjusted AUVs in its price effects analysis did not examine the positive evidence objectively.[89]

Last, the MOFCOM's comparison of market shares ignored the role of other

actors in the Chinese market for automobiles, specifically, both Chinese producers not part of the domestic industry as defined by MOFCOM, and third country imports. Accordingly, the Panel showed that MOFCOM did not adequately explain the linkage between subject import market share gains and its finding of price depression.[90]

Compared with *China – GOES*,[91] the Panel report has expanded the requirements on price comparability. It will be applied not only to price undercutting, but also to price depression and price suppression; not only to the comparison between prices of investigated products and domestic like products, but also to the analysis of price trends.[92]

In addition, with respect to the causation determination, the Panel noted that MOFCOM's dismissal of the relevant evidences in finding a causal relationship was neither reasonable nor adequate.[93] The Panel finally found that China acted inconsistently with Articles 3.1 and 3.5 of the Anti-Dumping Agreement, and Articles 15.1 and 15.5 of the SCM Agreement.[94]

5. Conclusion

Anti-dumping duties are meant to counter instances where goods are sold abroad at prices below their normal value, while countervailing duties are meant to target instances of allegedly unfair subsidies being provided by governments to domestic producers.[95] In its final conclusion and recommendation, the Panel ruled seven important claims in favor of the US and only three issues in favor of China. Nevertheless, the Panel has to some extent confirmed the current practices of China with respect to the notice and disclosure obligations in the investigation process. More specifically, the Panel determined that the absolute change would not be necessary in the data being summarized and the alleged self-selection resulting from Investigation Authorities' registration requirement was unconvincing, etc. For the substantive obligations, the WTO members need to take the Panel's finding of the expansion of the requirements on price comparability seriously, which make the price effects analysis and causation determination of remedies measures more difficult.[96] The Panel obviously adopted certain reasoning and conclusions which are remarkably different from the previous WTO jurisprudence. Panels

would follow prior decisions on this matter unless they find *cogent reasons* not to do so.[97] Since there is no appeal in this dispute, these questions are open to the WTO observer's future discussions.

References

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2. *Id.*
3. Panel Report, *China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States,* WT/DS414/R (June 15, 2012), *available at* http://www.worldtradelaw.net/document.php?id=reports/wtopanelsfull/china-goes(panel)(full).pdf (last visited on Feb. 22, 2015).
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10. *China-Auto*, *supra* note 1, ¶ 2.4.
11. *Id.* at 29.
12. *Id.* ¶ 7.24.
13. *Id.* ¶ 7.8.
14. *Id.* ¶ 7.10.
15. *Id.*
16. *Id.* ¶ 7.32.
17. *Id.* ¶ 7.33.
18. *Id.* ¶ 7.14.
19. *Id.* ¶ 7.34.
20. *Supra* note 4, ¶ 7.63.
21. *China-Auto*, *supra* note 1, ¶ 7.34.
22. *Id.* ¶ 7.36.
23. *Id.* ¶ 7.38.
24. *Id.* ¶ 7.39.
25. *Id.*
26. *Id.* ¶ 7.41.
27. *Id.* ¶ 7.43. The non-confidential summary of data regarding apparent consumption was a little different in that the percentage change from interim 2008 to interim 2009 was missing except for 2006 to 2008. Consequently, the Panel found that the non-confidential summary for apparent consumption was inconsistent with Articles 6.5.1 and 12.4.1 because there was no explanation for this omission. *See id.* ¶¶ 7.45-7.46.
28. *Id.* ¶¶ 7.49 & 7.52.
29. *Id.* ¶ 7.51.
30. Prior panels have found that the possibility for interested parties to infer the 'main point' of the confidential information from the context surrounding redaction, suffice for the purposes of conforming to Articles 6.5.1 and 12.4.1. In this respect, panels have considered that an investigating authority does not discharge its obligation to require adequate non-confidential summaries where the non-confidential version of the petition requires interested parties to "infer, derive and piece together a possible summary of the confidential information." *See supra* note 3, ¶ 7.202; *supra* note 4, ¶ 7.60.
31. *China-Auto, supra* note 1, ¶¶ 7.79-7.85.
32. *Id.* ¶¶ 7.56-7.57.

33. *Id.* ¶ 7.60.
34. *Id.* ¶ 7.62.
35. *Id.* ¶ 7.61.
36. *Id.* ¶ 7.64.
37. The Panel invoked the previous panel reports as its ground. *See*, *e.g.*, Panel Report, *Thailand - Customs and Fiscal Measures on Cigarettes from the Philippines,* ¶ 6.125, WT/DS371/R (Nov. 15, 2010), *available at* http://www.worldtradelaw.net/document.php?id=reports/wtopanelsfull/thailand-cigarettesphilippines(panel)(full).pdf (last visited on Feb. 5, 2015). *See id.* ¶ 7.81.
38. The Panel considered that the ability of the US to obtain the copies of these documents is contingent on companies agreeing to disclose these documents. *See China-Auto*, *supra* note 1, ¶ 7.77.
39. Panel Report Addendum*, China - Anti-Dumping and Countervailing Duties on Certain Automobiles from the United States,* Annex A-2, WT/DS440/R/Add.1 (May 23, 2014), *available at* http://www.wto.org/english/tratop_e/dispu_e/440r_a_e.pdf (last visited on Feb. 5, 2015).
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42. *Supra* note 8.
43. *China-Auto, supra* note 1, ¶ 7.95.
44. *Supra* note 6.
45. *China-Auto, supra* note 1, ¶ 7.88.
46. *Id.* ¶ 7.92.
47. *Id.* ¶ 7.98.
48. *Id.* ¶ 7.123.
49. *Id.* ¶ 7.129.
50. Korea (a third party of this case) divided non-investigated foreign exporters in an AD investigation into three categories, as follows: (i) those willing to participate in the investigation but which are discouraged from doing so for reasons of impracticability; (ii) those unwilling or having no interest in participating in the investigation, and (iii) those that are either unaware of, or non-existent at the time of, the investigation. Korea contended that exporters in the first category should be subjected to a duty rate calculated pursuant to Ar-

ticle 9.4 of the Anti-Dumping Agreement. In Korea's view, exporters who did not exist at the time of the investigation may request a new shipper's review under Article 9.5. *See id.* ¶ 7.117.

51. *China-Auto, supra* note 1, ¶ 7.105.
52. *Id.* ¶¶ 7.130 & 7.131.
53. *Id.* ¶¶ 7.130-7.133.
54. *Id.* ¶ 7.136.
55. *Id.* ¶¶ 7.139-7.140.
56. *Id.* ¶¶ 7.130-7.137.
57. *Id.* ¶ 7.111.
58. *Id.*
59. *Id.* ¶ 7.140.
60. *Supra* note 3, ¶¶ 7.386 & 7.394.
61. *Supra* note 4.
62. *China-Auto, supra* note 1, ¶ 7.120.[Emphasis added]
63. *Id.* ¶ 7.114.
64. *Id.* ¶¶ 7.191 & 7.193.
65. *Id.* ¶ 7.192. MOFCOM determined that the aggregate annual output of the producers represented by the petitioner accounted for 54.16% (2006), 33.54% (2007), 33.75% (2008), 36.32% (interim 2008) & 41.94% (interim 2009) of total Chinese production of the domestic like product. *See Id.* ¶ 7.189.
66. *Id.* ¶ 7.207. [Emphasis added]
67. *Id.* ¶ 7.212.
68. *Id.* ¶ 7.191.
69. *Id.*
70. *Id.* ¶ 7.214.
71. *Id*.
72. *Id.* ¶ 7.215.
73. *Id.* ¶ 7.217.
74. *Id.* ¶¶ 7.212-7.224.
75. *Id.* ¶ 7.226.
76. Appellate Body Report, *European Communities - Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*, ¶ 427, WT/DS397/AB/R (July 15, 2011), *available at* http://www.worldtradelaw.net/reports/wtoab/ec-fasteners(ab).doc (last visited on Feb. 5, 2015).
77. *China-Auto, supra* note 1, ¶ 7.223.
78. *Id.* ¶ 7.221.
79. *Id.* ¶ 7.231.
80. Panel Report, *China – Definitive Anti-Dumping Duties on X-Ray Security Inspection*

Equipment from the European Union, ¶ 7.41, WT/DS425/R (Feb. 26, 2013), *available at* http://www.worldtradelaw.net/reports/wtoab/ec-fasteners(ab).doc (last visited on Feb. 5, 2015); *Supra* note 4, ¶ 7.474.

81. Appellate Body Report, *China - Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States*, ¶ 136, WT/DS414/AB/R (Oct. 18, 2012), *available at* http://www.worldtradelaw.net/reports/wtoab/china-goes(ab).doc (last visited on Feb. 5, 2015).
82. *China-Auto, supra* note 1, ¶ 7.296.
83. *Id.* ¶ 7.259.
84. *Id.* ¶¶ 7.262 & 7.265.
85. *Id.* ¶ 7.269.
86. *Id.* ¶ 7.272.
87. *Id.* ¶ 7.281.
88. *Id.* ¶ 7.277.
89. *Id.* ¶¶ 7.282-7.283.
90. *Id.* ¶¶ 7.284-7.291.
91. *Supra* note 3, ¶ 7.530; *supra* note 3, ¶ 200.
92. Meanwhile, the Panel noted that price adjustments might not be required if the subject product and the domestic like product were identical, or if the IA concluded that any differences between the two baskets of goods did not justify such adjustments. *See China-Auto, supra* note 1, ¶ 7.281.
93. *Id.* ¶ 7.331-7.332, 7.338-7.339, 7.348-7.351 & 7.352-7.362.
94. *Id.* ¶ 7.363.
95. ICTSD, *WTO Panel Finds in US' Favour in China Automobile Duties Dispute*, 18 BRIDGE (2014), *available at* http://www.ictsd.org/bridges-news/bridges/news/wto-panel-finds-in-us-favour-in-china-automobile-duties-dispute (last visited on Feb. 5, 2015).
96. At the time of closing this review, on Feb. 13, 2015, the Panel report of *China- HP-SSST* (EU& Japan) has been circulated to Members. The Panel found that MOFCOM failed to properly account for differences in quantities when comparing the price of Grade C subject imports with the domestic Grade C price in its price effects analysis, contrary to Articles 3.1 and 3.2 of the Anti-Dumping Agreement. *See* Panel Reports, *China-Anti-Dumping and Countervailing Duties on Certain Automobiles from the United States (EU & Japan),* ¶ 8.6, WT/DS454/R & WT/DS460/R (Feb. 13, 2015), *available at* http://www.worldtradelaw.net/document.php?id=reports/wtopanelsfull/china-hp-ssst(panel)(full).pdf (last visited on Feb. 5, 2015).
97. There is no *stare decisis* principle originated from Common Law in the WTO dispute settlement practices. However, the Appellate Body establishes: "Adopted Panel reports are an important part of the GATT acquis…They create legitimate expectations among WTO Members, and, therefore, should be taken into account, where they are relevant to any

dispute." *See* Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, at 14, WT/DS8/AB/R, WT/DS10/AB/R & WT/DS11/AB/R (Oct 4, 1996), *available at* http://www.worldtradelaw.net/reports/wtoab/japan-alcohol(ab).doc. According to the recent WTO jurisprudence, the Appellate Body ruled that: "The legal interpretation embodied in adopted panel and Appellate Body reports becomes part and parcel of the acquis of the WTO dispute settlement system. … absent cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case." *See* Appellate Body Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, ¶ 160, WT/DS344/AB/R (Apr. 30, 2008), *available at* http://www.worldtradelaw.net/reports/wtoab/us-stainlessmexico(ab).doc. Moreover, the Panel recently noted that: "cogent reasons, *i.e.*, reasons that could in appropriate cases justify a panel in adopting a different interpretation, would encompass, inter alia: (i) a multilateral interpretation of a provision of the covered agreements under Article IX:2 of the WTO Agreement that departs from a prior Appellate Body interpretation; (ii) a demonstration that a prior Appellate Body interpretation proved to be unworkable in a particular set of circumstances falling within the scope of the relevant obligation at issue; (iii) a demonstration that the Appellate Body's prior interpretation leads to a conflict with another provision of a covered agreement that was not raised before the Appellate Body; or (iv) a demonstration that the Appellate Body's interpretation was based on a factually incorrect premise." *See* Panel Report, *United States - Countervailing and Anti-Dumping Measures on Certain Products from China,* WT/DS449/R (Mar. 27, 2014); *modified by* Appellate Body Report, *United States - Countervailing and Anti-Dumping Measures on Certain Products from China*, ¶ 7.317, WT/DS449/AB/R (July 7, 2014), *available at* http://www.worldtradelaw.net/reports/wtoab/us-cvadmchina(ab).doc (all last visited on Feb. 25, 2015).