CHINA – ANTI-DUMPING AND COUNTERVAILING DUTY MEASURES ON CERTAIN AUTOMOBILES FROM THE UNITED STATES
(DS440)

EXECUTIVE SUMMARY OF FIRST WRITTEN SUBMISSION OF THE UNITED STATES OF AMERICA

March 19, 2013

I. INTRODUCTION

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

II. STANDARD OF REVIEW

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

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

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

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

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

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

2. The Non-Confidential Summaries Are Inadequate.

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

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

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

b. Other Economic Indicators

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

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

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

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

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

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

10. The calculations and related information MOFCOM should have made available include, but are not limited to: (1) all calculations performed with respect to the derivation of normal value; (2) all calculations performed with respect to the derivation of export price; and (3) all

calculations performed with respect to the determination of costs of production. For normal value, export price, and costs of production, MOFCOM should have provided the details of any data adjustments or manipulations performed by MOFCOM on the data provided by each respondent, made available adjustments and revisions made by MOFCOM to the sales data provided by each respondent, and specifically identified any data provided by each respondent that was eliminated or rejected by MOFCOM. These facts were "essential" to MOFCOM's dumping determination because they formed the basis of its decision to apply definitive measures and the determination of the dumping margins.

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

IV. MOFCOM'S FLAWED ALL OTHERS DUMPING DETERMINATION

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

12. In the final determination, MOFCOM applied the all others dumping margin of 21.5 percent to unexamined U.S. producers/exporters. It did so despite the fact that the dumping margin for the respondents ranged from 2 percent to 8.9 percent. MOFCOM's explanation for its all others dumping margin was that, pursuant to Article 21 of its Anti-Dumping Regulation, it relied on "the best information available and facts that were adopted in the PD, and appl[ied] the dumping margin claimed in the petition" for all other U.S. companies.

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

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

2. China Acted Inconsistently with Article 6.9 of the AD Agreement by Failing to Disclose the Essential Facts under Consideration Regarding its Calculation of the "All Others" Dumping Rate.

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

a. MOFCOM's Determinations and Disclosures

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

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

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

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

3. MOFCOM Failed to Explain Its Determination.

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

V. MOFCOM'S FLAWED ALL OTHERS SUBSIDY RATE DETERMINATION

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

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

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

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

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

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

a. MOFCOM's Determinations and Disclosures

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

12.9 percent. MOFCOM's cursory explanation repeated that of its preliminary determination and final disclosure.

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

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

3. MOFCOM Failed to Explain Its Determination.

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

VI. MOFCOM'S FLAWED INJURY DETERMINATION

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

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

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

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

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

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

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

30. In support of its price depression finding, MOFCOM asserted that "the average sales price of domestic like products varied the same as the import price of Subject products." However, MOFCOM's assertion that parallel pricing existed between the domestic like products and subject imports is plainly contradicted by the evidence on the administrative record. Additionally, merely identifying parallel pricing would do nothing to explain how the effect of subject imports was to significantly depress prices for the domestic like products. MOFCOM did not provide sufficient reasoning and, in fact, said nothing in the final determination to explain how parallel pricing caused the depression of domestic prices.

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

32. MOFCOM failed to make needed adjustments to the average unit values ("AUVs") used in its price effects analysis. The only "pricing" information MOFCOM referenced anywhere in

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

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

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

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

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

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

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

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

39. MOFCOM failed to account for the sharp decline in the Chinese industry's productivity throughout the period of investigation. The "productivity of the domestic industry" is expressly identified in Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement as a factor that "may be relevant" to the causation analysis. MOFCOM's failure to address this factor in its analysis is plainly inconsistent with these provisions.

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

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

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

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

VII. CONSEQUENTIAL CLAIMS

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

VIII. CONCLUSION

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