[[Business Confidential Information Redacted]]

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

(DS414)

RESPONSES OF THE UNITED STATES TO THE PANEL'S QUESTIONS TO THE PARTIES

November 4, 2014

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Short Form	Full Citation
Canada – Aircraft (Article 21.5 – Brazil)(AB)	Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft – Recourse by Brazil to Article 21.5 of the DSU*, WT/DS70/AB/RW, adopted 4 August 2000
China – GOES (AB)	Appellate Body Report, *China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States*, WT/DS414/AB/R, adopted 16 November 2012
China – GOES (Panel)	Panel Report, *China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States*, WT/DS414/R and Add.1, adopted 16 November 2012, upheld by Appellate Body Report WT/DS414/AB/R
EC – Bed Linen (Article 21.5 – India)(AB)	Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India*, WT/DS141/AB/RW, adopted 24 April 2003
US – Softwood Lumber VI (Article 21.5 – Canada) (AB)	Appellate Body Report, *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada*, WT/DS277/AB/RW, adopted 9 May 2006

TABLE OF EXHIBITS

Exhibit No.	Description
Exhibit US-19	AK Steel Corporation, Supplementary Industry Injury Investigation Questionnaire Response – Annexes 3, 4, 6, and 7
Exhibit US-20	AK Steel Corporation, Industry Injury Investigation Questionnaire Response, Exhibit 9

PRICE EFFECTS

UNITED STATES

38. Is the United States challenging MOFCOM's price suppression analysis on the basis that MOFCOM failed to assess the contribution of Wuhan's capacity expansion for price suppression in Q1 2009?[1]

1. The United States is challenging MOFCOM's price suppression analysis on the basis that MOFCOM failed to provide a "reasoned and adequate" analysis in "light of the evidence"[2] showing that any price suppression in 2008 and Q1 2009 was linked to subject imports. And indeed, one important element of MOFCOM's inadequate analysis was MOFCOM's failure to assess the contribution of Wuhan's capacity expansion.

2. As the United States has explained, the disparity between the dramatic 30.25 percent decline in domestic prices and the mere 1.25 percent decline in subject import prices – during a period in which subject imports did not undersell the domestic like product – demonstrates the absence of price competition between subject imports and domestic like products in Q1 2009.[3] And, a more plausible explanation for the sharp drop in the prices of the domestic like product in Q1 2009 is that Wuhan's 51.65 percent capacity expansion – following Baosteel's entry into the market in 2008 and at a time of decelerating growth in demand – negatively affected prices. This record evidence therefore is relevant in assessing whether price suppression was the "effect" of subject imports.[4] The fact that MOFCOM failed to adequately analyze the role of Baosteel's expansion helps to establish that MOFCOM failed to show that "the effect of … [subject] imports [was] … to prevent price increases, which otherwise would have occurred, to a significant degree."

39. The United States argues that MOFCOM disregarded "compelling evidence" that subject imports and domestic products did not compete on price.[5] Could the United States identify the evidence before MOFCOM to which it refers in this regard? In the United States' view, on what bases, other than price, did the subject imports and domestic like products compete? What evidence was before MOFCOM in this regard?

3. The compelling evidence to which the United States refers includes, in essential part, the price movements and market share data for Q1 2009. The domestic industry's prices dropped by 30.25 percent, while the prices of subject imports declined by only 1.25 percent. And, this sharp divergence in prices did not translate into significant shifts in market share. In particular, the domestic industry gained 1.04 percentage points of market share, and subject imports gained 1.17 percentage points – both at the expense of nonsubject imports.[6]

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[1] U.S. First Written Submission, para. 77.
[2] *US – Softwood Lumber VI (Article 21.5 – Canada) (AB)*, para. 93.
[3] *China – GOES (AB*), para. 226.
[4] Exhibit US-10, Table 27.
[5] U.S. Second Written Submission, para. 21.
[6] *See e.g.,* U.S. Opening Statement, para. 20.

4. Other compelling evidence indicates that users of GOES make purchasing decisions based on several non-price factors including quality, availability, product grade, electrical properties, certification for end use, and material consistency. For example, AK Steel's responses to MOFCOM's injury questionnaires presented detailed evidence with respect to several non-price factors that weighed in favour of the purchase of its product over Chinese domestic product during the period of investigation. The United States elaborates on this issue in its response to Question 40 (immediately below).

5. Further, in considering the record as a whole, it is also important to recognize the factors which MOCOM failed to examine. In particular, MOFCOM did not compare the relative prices of subject imports and domestic like products. In other words, MOFCOM had no statistical data or evidence showing that the prices of subject imports adversely affected the prices of the domestic like product.[7] Instead, China offers a variety of other reasons as to why subject imports and domestic like products engaged in price competition. The United States has established that none of these reasons is persuasive.[8]

40. In its opening statement, the United States argues that AK Steel explained to MOFCOM that it supplied certain high-end grades of GOES to the Chinese market that were either not produced in China, or not produced in sufficient quantities to meet demand.[9] In this regard, the Panel notes the following finding by MOFCOM in its Redetermination:

> ***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.[10]***

Further, in another part of its Redetermination, MOFCOM found:

> ***Through investigation, the Investigating Authority determines that the M2 and M3 mentioned by Allegheny Ludlum are common GOES***

[7] U.S. First Written Submission, para. 57.
[8] *See e.g.*, U.S. Opening Statement, paras. 19-41.
[9] U.S. Opening Statement, para. 30.
[10] Exhibit US-1, p. 51; Exhibit CHN-1, p. 51.

> ***products, they are not high-end level GOES and the Chinese domestic industry can produce and sell this kind of product.***[11]
>
> ***Could the United States please explain, in light of these specific findings, why it takes the view that MOFCOM failed to address the information and allegations of AK Steel?***

6. As will be explained in detail below, MOFCOM failed to address evidence submitted by AK Steel with respect to the state of the Chinese industry and the market for high-end GOES. This evidenced showed that AK Steel supplied certain grades of GOES that were not produced in China, or not produced in sufficient quantities to meet demand. AK Steel was a much more significant participant in the Chinese market than Allegheny Ludlum during the period of investigation.[12] Thus, MOFCOM's conclusions regarding substitutability do not reflect an "objective examination" based on "positive evidence."

7. In the paragraphs below, the United States will address specific types of failures in MOFCOM's evaluation of the information provided by AK Steel on the lack of substitutability between domestic and U.S. GOES.

A. MOFCOM Failed to Address Extensive Evidence Provided by AK Steel Regarding the Differences Between GOES Produced in the U.S. and Chinese Domestic GOES

8. In response to MOFCOM's questionnaires, AK Steel provided extensive evidence that the GOES it produced was not produced in China, or not produced in sufficient quantities to meet demand; that China's production of GOES was not substitutable with AK Steel's product; and that Chinese-produced GOES could not be used for certain end uses. MOFCOM's determination was inadequate in that it failed to address this evidence showing a lack of comparability, and failed to explain why it accepted the statements of the other, far less significant U.S. producer.

9. The United States recalls that there were two Chinese producers of GOES: Wuhan and Baosteel. With respect to Wuhan, AK Steel noted that Wuhan possessed only a limited capacity for high-permeability, high-end GOES. Specifically, AK Steel provided evidence indicating that:

- Wuhan had very limited production of high permeability (HiB grade) GOES during the period of investigation (its 2008 production target was 50,000 tons per year, up from 20,000 tons in 2007);[13]

[11] Exhibit US-1, p. 12; Exhibit CHN-1, pp. 12-13.
[12] U.S. Oral Statement, paras. 30-31.
[13] Exhibit US-19, p. 1 ("Wugang is also near its target of producing 50,000 t of HiB silicon steel this year, up from 20,000 t in 2007.")

- Wuhan did not produce higher end GOES in the lower thicknesses (*i.e.*, 9 mil (0.23 mm));[14]
- Wuhan's products in other thicknesses could not meet the same physical properties as AK Steel's product (for example, Wuhan's best grade offered at 11 mil is one step below AK Steel's best grade);[15]
- Wuhan's HiB grade product was not certified for use in large transformers (500 kW and above);[16] and
- As of July 2009, the Government of China did not expect test manufacturing of 500 kW transformers employing domestically-produced materials until the end of the year.[17]

With respect to the other producer (Baosteel), AK Steel explained Baosteel in 2009 was still in the trial manufacture process for the highest grades of laser-scribed GOES.[18]

10. This evidence was requested by MOFCOM, and provided by AK Steel in response to the MOFCOM questionnaire. Yet, despite the obvious relevance of such information, MOFCOM's determination failed to address it. A detailed review of the record shows more of the same: detailed and relevant information on the absence of comparability between domestic and imported GOES, and a failure of MOFCOM to take any account of such relevant information. In particular, the United States calls the Panel's attention to the information provided by AK Steel in its October 2009 supplemental injury response.[19]

11. First, MOFCOM asked AK Steel to compare and analyze the differences and similarities in the physical characteristics of the subject imports and Chinese product:

> ***1. Please compare and analyze the differences and similarities in the physical characteristics and chemical properties between the subject product and the Grain Oriented Flat-rolled Electrical Steel produced in China, and provide relevant evidence.***

AK Steel noted that the high permeability-GOES that it supplied was not produced in China, or was not produced in sufficient commercial quantities. MOFCOM's re-determination failed to address this detailed information:

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[14] Exhibit US-17. *See also* Exhibit US-10, at p. 14 (In the section entitled "2.1 Similarity or likeliness of the subject merchandise and the Chinese domestic like products in physical and chemical features," petitioners did not list a single product at 9 mil (0.23 mm) thickness.)
[15] Exhibit US-17. *See also* Exhibit US-10, at p. 14 (In the section entitled "2.1 Similarity or likeliness of the subject merchandise and the Chinese domestic like products in physical and chemical features," petitioners do not list any high-permeability, laser-scribed products.)
[16] Exhibit US-19, p. 2.
[17] Exhibit US-19, p. 2 ("MIIT expects that the test manufacturing of 500 kW transformers employing domestically-produced materials will be completed by the end of this year . . .").
[18] Exhibit US-19, p. 4 ("Baosteel has trial manufactured 5 top grades of GO silicon steel . . . .").
[19] Exhibit US-18.

As reported in its injury questionnaire response, AK Steel exports [[ ]]. AK Steel's grades of RGO correspond to the American Iron and Steel Institute's grading system and include M-2, M-3, M-4, M-5, and M-6. The "M" identifies the material as "magnetic" and the number provides the relative core loss among the various grades.[20]

High permeability type GOES grades, referred to as "TCH" grades, are [[ ]]. High permeability GOES allows the operation of a transformer at a higher level of flux density than does regular GOES, which permits a transformer to be smaller and have lower operating costs.

Virtually all of the subject product is also coated with CARLITE 3 Insulations, which are inorganic coatings produced by combined thermal and chemical surface treatments. They provide thin, uniform coverage of the surface with a high-resistance film that protects against energy loss from induced currents. The CARLITE 3 Insulation is applied over the mill-anneal finish produced in annealing and is intended for materials that will be used in the form of sheared laminations for power transformers and other apparatus with high volts per turn. In addition to benefits of other insulation, CARLITE 3 provides [[ ]].

In addition, AK Steel's TCH grades H-0 DR, H-1 DR, and H-2 DR are laser scribed, which provides additional beneficial core loss reductions through domain refinement. In this process, a highly focused Nd:YAG laser beam rapidly scans the material surface perpendicular to the rolling direction. The resulting thermal shock produces compressive microstrains in the material which generate new domain walls. By forcing the existing domains to subdivide, the refined domain wall spacing requires less movement during AC magnetization, thereby reducing core loss in the steel.

AK Steel does not believe that high permeability laser domain refined grades (TCH grades H-0 DR, H-1 DR, and H-2 DR) are currently produced in China or are produced in sufficient commercial quantities. Moreover, as indicated in its questionnaire response, AK Steel does not believe that Chinese producers manufacture "Regular" GOES types M-2 and M-3 in sufficient commercial quantities. These AK Steel grades achieve lower core

[20] AK Steel Product Data Bulletin, Selection of Electrical Steels for Magnetic Cores, at 5 (available at http://www.aksteel.com/pdf/markets_products/electrical/Mag_Cores_Data_Bulletin.pdf).

> *loss at lower thicknesses with more advantageous coatings than is possible from Chinese domestically-produced products, which enables Chinese producers of transformers using AK Steel's high-end GOES to make more sophisticated products with more favorable characteristics at lower cost.*

12. Next, MOFCOM asked AK Steel to discuss the differences and similarities in the production equipment and processes for subject imports and Chinese GOES:

> ***2. Please compare and analyze the differences and similarities in the production equipment and the production process between the subject product and the Grain Oriented Flat-rolled Electrical Steel produced in China, and provide relevant evidence.***

AK Steel explained that any Chinese production of high-permeability GOES was very limited, and had not been certified for use in large transformers. Again, MOFCOM's re-determination failed to address this information evidencing a lack of comparability:

> *. . . AK Steel understands that WISCO does not produce domain-refined laser inscribed GOES products. Moreover, Baosteel only announced in September 2009 that it had conducted a successful trial of laser inscribed GOES product.*[21] *Thus, no Chinese producer manufactured domain-refined laser inscribed GOES in commercial quantities, if any at all, during the POI, and Baosteel is only now producing batches of this product. AK Steel, however, does not consider that Baosteel's nominal production of laser inscribed GOES is substitutable with its thin gauge TCH grade products (H-0 DR and H-1 DR).*
>
> *More generally, WISCO's production of high permeability high-end GOES, which it refers to as HiB grade GOES, remains limited, with its target production of only 50,000 tons per year in 2009.*[22] *WISCO's HiB grades, however, have yet to be certified for use in large transformers of 500 kW and above,*[23] *and based on AK Steel's feedback from its customers, Chinese transformer manufacturers are refusing to use domestically-produced GOES for these applications. Thus, although WISCO produces a limited amount of a higher grade GOES, AK Steel does not believe that WISCO's high permeability HiB grade product can be substituted*

[21] Exhibit US-19, p. 4.
[22] Exhibit US-19, p. 1.
[23] Exhibit US-19, p. 2.

> *for AK Steel's lower gauge TCH or RGO grades (H-0, H-1, M-2, and M-3) in a major segment of the large transformer market.*

13. Further, MOFCOM requested that AK Steel provide information regarding the end uses of subject imports and Chinese GOES:

> **3. Please compare and analyze the differences and similarities in the uses between the subject product and the Grain Oriented Flat-rolled Electrical Steel produced in China, and provide relevant evidence.**

AK Steel reiterated that Chinese GOES had not been certified for use in large transformers, and explained that its products are not substitutable with lower grade Chinese products. MOFCOM's re-determination fails to address this information regarding the non-price factors that purchasers of GOES take into account:

> *As discussed in AK Steel's response to the previous question, Chinese produced GOES cannot be used in the production of transformers of 500 kV and above. Moreover, because of the limited, if any, ability to produce lower gauge GOES, the domestically-produced products are not favored in the production of other transformers.*
>
> *Notably, the fact that certain products, at the direction and with the support of the Chinese government, have been qualified for incorporation into 220 kV transformers produced in China does not mean that Chinese GOES producers are manufacturing products with the same characteristics as AK Steel. As stated in AK Steel's questionnaire response, grades with higher core losses or with higher thickness may be substituted into an existing design, provided the transformer manufacturer redesigns its equipment to a lower operating induction. Although this is feasible with GOES, the machines must have a larger and heavier GOES core and larger quantities of conductor windings. Both factors increase the size, weight, and often the total manufacturing cost of the transformer. Thus, any substitution of lower grade domestic products that is possible would require downstream users to make significant manufacturing changes, with consequent adverse effects on the final product and on manufacturing costs. Such adverse effects undermine the competitiveness of downstream Chinese end users in the Chinese market and in key export markets.*

14. In addition, an exhibit to AK Steel's injury response provides a description of the various grades of high-end GOES produced by AK Steel.[24] This exhibit shows the maximum core loss for the products offered and sold by AK Steel in China.[25] A comparison of these data to the maximum core losses that petitioners provided for its products at page 14 of Exhibit US-10 show that Wuhan's products could not meet lower maximum core losses of AK Steel's products to the extent that Wuhan offered products at the same thicknesses.

15. Other exhibits to AK Steel's injury response[26] provide direct comparisons of the high-end GOES capabilities of AK Steel to those of Wuhan and several other producers. As demonstrated by these exhibits – and as corroborated by the table on page 14 of Exhibit US-10 – Wuhan did not offer a product at the 9 mil (0.23 mm) thickness. At the 11 mil (0.27 mm) thickness, the properties of the product offered by Wuhan were inferior to the properties of the product offered by AK Steel at the same thickness, in terms of minimum magnetic induction. Further, the exhibits show that Wuhan could not offer any high-permeability, laser-scribed product with a maximum core loss of less than 0.95 at 50 Hz.

16. High-permeability GOES allows a transformer to operate at a higher level of flux density than does regular GOES. This permits a transformer to be smaller and have lower operating costs. Lower core losses at lower thickness GOES enable producers of transformers to make more sophisticated products with more favorable characteristics at a lower cost. As AK Steel explained in response to question 15 of Exhibit US-15:

> *Grades with higher core losses may be substituted into an existing design; however, that entails that the transformer manufacturer redesigns the equipment to a lower operating induction. While this works with GOES, the machines must have a larger and heavier GOES core and larger quantities of conductor windings. Both factors increase the size, weight, and often the total manufacturing cost of the transformer. Again, this latter type of substitution can only be made by the end-user of the GOES. Therefore, as discussed, lower grade Chinese produced GOES is not readily substitutable for imported GOES, and any substitution that is possible would require downstream users to make significant manufacturing changes, with consequent adverse effects on the final product and on manufacturing costs. Such adverse effects undermine the competitiveness of downstream Chinese end users in the Chinese and export markets.*

[24] Exhibit US-20.
[25] Exhibit US-20, p. 8.
[26] Exhibits US-16, US-17.

17. In sum, MOFCOM's wholesale failure to address in its re-determination this evidence showing a lack of competition and the numerous non-price factors that purchasers of GOES take into account does not reflect an "objective examination" based on "positive evidence."

B. Timing of Chinese Production of High-Grade GOES

18. Another defect in MOFCOM's analysis is that it fails to address the importance of timing with regard to the capacity of the Chinese industry to produce higher grades of GOES. The record indicates that MOFCOM did not restrict its analysis of the capacity of the Chinese industry to the period of investigation. In particular, MOFCOM's verification occurred from January to February 2010.[27] The period of investigation for the injury investigations was earlier, from 2006 through March 31, 2009.[28] Yet, the record provides no indication that MOFCOM ensured that any findings made in the investigation concerning higher grades of GOES were with respect to the period of investigation, as opposed to the latter period (2010) when the verification was conducted.[29]

C. Of the Two U.S. Respondents, AK Steel was a Much Larger Participant in the Chinese Market.

19. MOFCOM's failure to address AK Steel's information was especially significant, given that AK Steel was a much more significant participant in the GOES market than Allegheny Ludlum. Shipments by AK Steel represented over [[ ]] percent of subject imports from the United States.[30] A significant proportion, [[ ]] percent, of AK Steel's subject imports were of its superior high-permeability steel grades. [[ ]] percent of AK Steel's total shipments to China were of HO-DR product, [[ ]] percent were of H1-DR product, and [[ ]] percent were of H2-DR product.[31]

D. Conclusion

20. AK Steel provided evidence showing that Wuhan had very limited production of high-permeability (HiB grade) GOES during the period of investigation[32] and did not offer high-permeability GOES in the lower thicknesses (*i.e.*, 9 mil (0.23 mm)).[33] MOFCOM's re-determination overlooks this evidence. Instead, MOFCOM's findings merely state that that at the time of verification the domestic industry "did produce and sell laser-scribing and low-iron-

[27] Exhibit US-1, at p. 8.
[28] Exhibit US-1, at p. 13.
[29] Exhibit US-1, at p. 51.
[30] U.S. Oral Statement, para. 31.
[31] Exhibit US-18.
[32] Exhibit US-19, p. 1 ("Wugang is also near its target of producing 50,000 t of HiB silicon steel this year, up from 20,000 t in 2007.")
[33] Exhibit US-17. *See also* US-10, at 14 (In the section entitled "2.1 Similarity or likeliness of the subject merchandise and the Chinese domestic like products in physical and chemical features," petitioners did not list a single product at 9 mil (0.23 mm) thickness.)

loss grain GOES product."[34] MOFCOM's re-determination failed to provide an adequate analysis of whether or how Wuhan's limited HiB production capacity was sufficient to satisfy demand for such products during the period of investigation. Similarly, MOFCOM makes no mention of whether Wuhan has any commercial capabilities at 9 mil (0.23 mm) during the period of investigation.[35]

21. AK Steel's statements with respect to Wuhan's high-permeability capabilities at 9 mil (0.23 mm) thickness were corroborated by the petitioners' own statements in Exhibit US-10. In the section entitled "2.1 Similarity or likeliness of the subject merchandise and the Chinese domestic like products in physical and chemical features," petitioners did not list a single product at 9 mil (0.23 mm) thickness. Indeed, the petitioners do not appear to have listed any high-permeability, laser-scribed products in this section of the petition.[36]

22. MOFCOM's re-determination fails to address AK Steel's evidence indicating that Wuhan's products were not certified for use in large transformers (500 kW and above). Also, MOFCOM makes no specific findings with respect to whether Wuhan's HiB grade product was certified for use in large transformers at any time during the period of investigation. If it had made such a finding, MOFCOM provided no explanation or supporting evidence as to why China's own Ministry of Industry and Information Technology in July 2009 made statements indicating that it did not expect test manufacturing of 500 kW transformers employing domestically-produced materials to be completed until the end of the 2009.[37]

23. MOFCOM indicated that it examined product catalogs at verification.[38] MOFCOM, however, failed to specify the product catalogs that it reviewed.

24. It is not of course the role of the panel, or for the disputing parties, to determine whether the above-described information provided by AK Steel was completely correct. Rather, the role of the panel is to determine whether, under a "critical and searching review,"[39] a MOFCOM determination that failed to address this large amount of relevant information meets the standard of providing an adequate explanation for MOFCOM's finding of injury. For all the reasons set out above, the record shows that MOFCOM's re-determination failed to address the information provided by AK Steel and that MOFCOM's injury re-determination was indeed inadequate.

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[34] Exhibit US-1, at p. 51.

[35] MOFCOM's re-determination also fails to address Baosteel's high-permeability, laser-scribed GOES capability at any thickness during the POI. Presumably, MOFCOM was unable to refute AK Steel's assertions – which were based on Baosteel's own press releases – that Baosteel was still in the trial manufacture process for the highest grades of laser-scribed GOES. Exhibit US-19, p. 4.

[36] Exhibit US-10, at p. 14.

[37] Exhibit US-19, p. 2 ("MIIT expects that the test manufacturing of 500 kW transformers employing domestically-produced materials will be completed by the end of this year . . .").

[38] Exhibit US-1, at p. 51.

[39] *US – Softwood Lumber VI (Article 21.5 – Canada) (AB),* para. 93.

BOTH PARTIES

41. Would the parties please indicate whether, in their view, increased volumes of subject imports and declines in the domestic industry's market share together with the existence of price competition between subject imports and domestic like products, is sufficient to demonstrate that subject imports suppress and/or depress domestic prices?

25. Whether increased volumes of subject imports and declines in the domestic industry's market share, together with the existence of price competition between subject imports and domestic like products, are enough to show that subject imports suppress or depress domestic prices is a case-by-case determination. And, on the record in this dispute, the sharp divergence in the price movements of the subject imports and the domestic like product, without any significant shift in market share, indicates an absence of competition on the basis of price and thus an absence of positive evidence of price suppression or depression. The United States has explained this matter at length in its prior submissions.[40]

42. On page 11 of its Redetermination, MOFCOM observed that subject goods were imported under HTS Codes 72251100 and 72261100. Could the parties explain whether, and if so to what extent, subject goods falling under these two distinct headings differed in terms of physical characteristics, end-use and consumer perceptions? Further, could the parties indicate whether, in their view, such differences have any relevance to price comparability?

26. The two HTS codes differ with regard to the width of the GOES product: HTS 7225.11.00 covers GOES of 600 mm or greater; and HTS 7226.11.00 overs GOES of less than 600 mm. As described below, these differences in width can correlate to differences in grade, and thus to price or value.

27. The narrower material that falls under HTS 7226.11.00 is more likely to be used for lower-voltage, lower-efficiency distribution transformers. The GOES entering under 7226.11.00 is therefore more likely to include conventional grades such as M-5. High-permeability products are used to make medium and large power transformers such as those used at electrical substations and power plants. Manufacturers use the widest available steel (which would fall under HTS 7225.11.00) to make the magnetic core for such transformers.

28. Furthermore, the record indicates that the reported average unit values of imports for the two tariff categories within the scope of investigation vary enormously – often exceeding a 25 percent difference in the same period.[41] Average unit values for product entering China under HTS 7226.11.00 were generally lower than the average unit values for product entering under HTS 7225.11.00. This difference likely reflects the lower grade of the narrower material.

[40] *See e.g.* U.S Opening Statement, paras. 19-27, 39-41.
[41] Exhibit US-12.

43. The United States and European Union argue that the result of "price comparisons" constitutes evidence that may not be a priori excluded in evaluating whether subject imports caused price effects. In the parties' view, can a finding of price competition be based exclusively on evidence of (a) like product, (b) cumulation, (c) Allegheny Ludlum's statement, (d) parallel pricing, (e) pricing policy, (f) customer overlap and (g) market share replacement?

29. The United States notes that the two different sentences in Question 43 involve two distinct legal issues. The first sentence involves the issue of the conduct of an injury investigation, and whether relevant evidence (such as price comparisons) may be excluded *a priori*. As discussed below, such evidence may not be excluded. The second sentence addresses a different issue: whether a finding of price competition may be based on particular sets of facts. The answer to this latter question will turn on the specific facts and circumstances of the situation subject to investigation. Indeed, it is for this very reason that the covered agreements require that Members conduct an objective examination, without the *a priori* exclusion of evidence that is likely to affect the outcome of the investigation.

30. An "objective examination" of the price effects of one group of products on a second group of products would include an examination of the relative prices of the two groups. Failing to do so would miss an important aspect of determining whether the two groups are price competitive, and whether subject imports have "explanatory force"[42] for the occurrence of adverse price effects.[43] Moreover, in conducting the price effects analysis required under Articles 3.1 and 3.2 of the AD Agreement and Articles 15.1 and 15.2 of the SCM Agreement, an authority may not *a priori* exclude consideration of any particular factor related to the price effects analysis. This especially holds true with respect to relative prices of the imported and domestic products, because relative prices are closely tied to questions concerning price effects.[44] Furthermore, it is particularly important for an "objective examination" to include a review of the relative prices of subject imports and domestic like products, when, as in this dispute, the petitioner specifically alleged adverse price effects due to the low price of subject imports.[45]

31. With regard to the second sentence of this question, which raises possible outcomes of hypothetical investigations, the answer (as noted) will turn on the results of the objective examination called for under the AD and SCM Agreements. There may be cases in which the results of a price comparison will be inconclusive, and where evidence relating to some of the factors enumerated in this question (factors (a) through (g)) may be more probative with respect to questions of price competition.

32. Turning to the facts of this dispute, MOFCOM affirmatively chose not to review the relative prices of subject imports and domestic like products. Also, the other explanations

[42] *China – GOES (AB)*, para. 136.
[43] *See e.g.*, U.S. Second Written Submission, para. 10.
[44] U.S. Second Written Submission, para. 12.
[45] *See* US-10, at 11, 64,

offered by China do not reflect an "objective examination" based on "positive evidence." As explained:

- The comparisons that MOFCOM made for purposes of the domestic like product and cumulation analyses were at a level of extreme generality, relying mostly on findings that the subject imports and the domestic like product were "fundamentally the same";

- Allegheny Ludlum's statement has little probative value because that company accounted for less than [[ ]] percent of subject imports from the United States, and its statements have no bearing on subject imports from the other U.S. producer, AK Steel, or on producers in Russia;

- MOFCOM's findings of parallel pricing were unsubstantiated;

- MOFCOM's findings that "pricing policies" existed were flawed;

- MOFCOM's reliance on partial customer overlap proved nothing; and

- Market share shifts did not show a competitive linkage between the subject imports and the domestic like product.[46]

In sum, there is nothing in the record of MOFCOM's investigation that supports its finding that the subject imports caused adverse price effects.

44. Can the parties comment on Japan's argument that factors such as increases in volume of subject imports or parallel pricing trends only establish the potential for subject imports to suppress or depress domestic prices, and do not establish actual suppression or depression by subject imports?[47]

33. Japan's argument is well supported by economic logic, as well as by prior findings of the Appellate Body. As the Appellate Body noted: "an investigating authority is required to consider the relationship between subject imports and prices of the domestic products, so as to understand whether subject imports provide explanatory force for the occurrence of significant depression or suppression of domestic prices."[48] An increase in the volume of subject imports or the observation of parallel price trends do not, in and of themselves, shed light on the relationship between subject imports and prices of domestic products such that an authority can determine whether subject imports had the requisite "explanatory force for the occurrence of significant depression or suppression of domestic prices."

[46] *See e.g.,* U.S. Opening Statement, paras. 19-41.
[47] Japan's third party submission, para. 9.
[48] *China—GOES (AB),* para. 154.

ADVERSE IMPACT

UNITED STATES

49. The United States alleges that "MOFCOM's revised injury determination contains several changes"[49] and that MOFCOM's "revised injury analysis" contains "newly disclosed facts that purportedly support that analysis."[50] Other than the change in references from "low-price" to "unfair" subject imports and the alleged shift in temporal focus to 2008, could the United States point to the other specific changes and newly disclosed facts in MOFCOM's Redetermination to which it refers, and explain their relevance to the United States' argument?

34. The change in references from "low-price" to "unfair" subject imports, and particularly the shift in the temporal focus of MOFCOM's injury analysis to 2008,[51] are the changes to which the United States was referring. These changes are significant, and alter the focus of the impact analysis. For instance, MOFCOM modified its impact analysis to rely on market conditions in 2008 when, in contrast, MOFCOM's original impact analysis did not indicate a specific reliance on market conditions in 2008 at all.[52] The United States has shown that in 2008 the positive trends vastly outnumbered and outweighed the negative ones.[53] China failed to provide a compelling explanation as to how, in light of such apparent positive trends, the domestic industry was injured.

50. The Panel notes that the substance of the United States' claims under Article 3.4 and 15.4 of the AD and SCM Agreements does not appear to focus on the differences it has identified between the original Determination and MOFCOM's Redetermination. Could the United States please explain whether, in its view, any change to a measure in the context of implementing a DSB ruling opens the entire changed measure to any claims under the relevant WTO Agreements in a compliance proceeding, regardless of the substance or significance of the changes to the measure at issue in that compliance proceeding from the original measure?

35. The United States disagrees with both the legal and factual premise of China's argument that the Panel is barred from examining the WTO-consistency of China's impact analysis. With regard to the legal premise, China appears to argue that a measure taken to comply would not be subject to review by an Article 21.5 compliance panel if the measure taken to comply "has not been changed in any material way."[54] China misses the point, and appears to be inventing a standard for Article 21.5 review that has no basis in the text of the DSU.

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[49] U.S. Second Written Submission, para. 68.
[50] U.S. Second Written Submission, para. 69.
[51] Exhibit US-1, at pp. 51, 55.
[52] *See* U.S. First Written Submission, para 95.
[53] U.S. First Written Submission, paras. 98-104.
[54] China's Second Written Submission, para. 71.

36. 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.

China's re-determination is a "measure taken to comply" within the meaning of Article. 21.5. Based on its plain text, Article 21.5 is concerned with the "consistency with a covered agreement of measures taken to comply with the recommendations and rulings" of the DSB. The role of a 21.5 compliance panel is to review the WTO-consistency of a compliance measure. The text of Article 21.5 does not distinguish between unchanged or changed elements of a measure taken to comply, or "material" or insignificant changes to a measure.

37. The Appellate Body has affirmed this plain reading of Article 21.5. As the Appellate Body explained in *Canada – Aircraft (Article 21.5 – Brazil)*, a complainant may raise new claims during Article 21.5 proceedings when the proceedings involve a new measure that was not before the panel in the original proceeding. Article 21.5 requires a panel to review the WTO-consistency of a compliance measure, and therefore, a panel is not limited to the reviewing claims that related to the original measure:

> {I}n carrying out its review under Article 21.5 of the DSU, a panel is not confined to examining the "measures taken to comply" from the perspective of the claims, arguments and factual circumstances that related to the measure that was the subject of the original proceedings. Although these may have some relevance in proceedings under Article 21.5 of the DSU, Article 21.5 proceedings involve, in principle, not the original measure, but rather a new and different measure which was not before the original panel. In addition, the relevant facts bearing upon the 'measure taken to comply' may be different from the relevant facts relating to the measure at issue in the original proceedings. It is natural, therefore, that the claims, arguments and factual circumstances which are pertinent to the 'measure taken to comply' will not, necessarily, be the same as those which were pertinent in the original dispute. Indeed, the utility of the review envisaged under Article 21.5 of the DSU would be seriously undermined if a panel were restricted to examining the new measure from the perspective of the claims, arguments and factual circumstances that related to the original measure, because an Article 21.5 panel would then be unable to examine fully the 'consistency with a covered agreement of the measures taken to comply', as required by Article 21.5 of the DSU.[55]

38. China's reliance on *EC — Bed Linen (Article 21.5 — India) (AB)* is unavailing.[56] In that dispute, the complainant raised a claim in the compliance proceeding that was identical to the

[55] *Canada — Aircraft (Article 21.5 — Brazil) (AB)*, para. 41.
[56] China's Second Written Submission, para. 71.

claim that was raised and dismissed in the original proceeding. The Appellate Body rejected the complainant's attempt to resurrect a claim at the 21.5 stage when it failed to make a *prima facie* case in the original proceeding.[57] The Appellate Body therefore has not supported China's view that whether a compliance measure "has not been changed in any material way" is relevant for purposes of Article 21.5 review.

39. The United States also disagrees with the factual premise that China's injury determination is "largely unchanged."[58] The United States has elaborated on this issue in its response to Question 49 (immediately above), and in prior submissions.[59]

40. In conclusion, MOFCOM has revised its injury determination. In light of these revisions, the utility of the compliance proceedings would be "seriously undermined"[60] if the Panel were unable to evaluate whether China's re-determination on this aspect is consistent with the covered agreements.

CAUSATION

41. Questions 51 to 61 all appear to be addressed to China. Accordingly, the United States will not respond to these questions, but notes that it will have the opportunity to comment on China's responses to them.

DISCLOSURE

UNITED STATES

64. Is it the United States' view that the price trends for the domestic industry for the period 2007, 2008 and Q1 2009 disclosed by MOFCOM are an inadequate non-confidential summary of essential facts?

42. The United States considers that the percentage changes in price levels for subject imports and the domestic like product for the period 2007, 2008 and Q1 2009 serve as an inadequate non-confidential summary of essential facts. MOFCOM concluded that pricing trends between the domestic like product and subject imports were "consistent" due to the mere fact that prices "increased and then decreased."[61] China cannot point to anywhere in the record where MOFCOM disclosed the facts underlying this conclusion. China cites percentage changes in price levels for subject imports and the domestic like product from 2006 to 2008 to support its

[57] *EC — Bed Linen (Article 21.5 — India) (AB)*, para. 96.
[58] China's Second Written Submission, para. 68.
[59] *See e.g.*, U.S. Second Written Submission, paras 63-79.
[60] *Canada — Aircraft (Article 21.5 — Brazil) (AB)*, para. 41.
[61] Exhibit US-1, pp. 24, 39-40.

conclusion.[62] However, China fails to mention the first quarter of 2009, when prices levels diverged sharply.[63]

43. As noted by the DSB, "[t]he disclosure obligation does not apply to the reasoning of the investigating authorities, but rather to the 'essential fact' underlying the reasoning."[64] Investigating authorities are not excused from this obligation even when essential facts are based on confidential evidence.[65] China's *ex post facto* rationalizations do not excuse the fact that China has acted inconsistently with Article 6.9 of the AD Agreement and Article 12.8 of the SCM Agreement.

65. At paragraph 81 of its opening statement, the United States asserts that "the re-determination simply does not support China's explanations. Therefore, MOFCOM did not explain its findings in sufficient detail." Could the United States please explain its view that the Redetermination should support the explanations, and that failure to do so demonstrates a failure to explain findings? Does the United States mean, for instance, that a reader cannot understand China's reasoning from reading the Redetermination? Or does the United States mean that the Redetermination does not give sufficient factual information to support the explanations given for the findings made?

44. The answer to this question turns on whether the question relates to the standard to be used in evaluating the substantive U.S. claims with regard to the adequacy of China's injury re-determination, or the procedural U.S. claims under Articles 12.2 and 12.2.2 of the AD Agreement, and Articles 22.3 and 22.5 of the SCM Agreement.

45. With respect to the substantive U.S. claims under the AD Agreement and SCM Agreement, the re-determination simply does not support China's findings and thus fails to comply with the standard of review employed in the examination of substantive determinations under the AD and SCM Agreements. The United States recalls that the standard of review stated by the Appellate Body is whether the authority's determinations are "reasoned and adequate" in "light of the evidence."[66] The Appellate Body has explained that in order to make such a finding:

> 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.

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[62] China's Second Written Submission, para. 128.
[63] U.S. Oral Statement, para. 75.
[64] *China – GOES (Panel),* para. 7.407.
[65] U.S. Second Written Submission, para. 109.
[66] *US – Softwood Lumber VI (Article 21.5 – Canada) (AB),* para. 93.

> 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.[67]

Thus, an authority's re-determination is to be reviewed on the basis of the reasoning set out in the re-determination, and where the reasoning of the re-determination does not support the conclusion, the re-determination fails the standard of review. Based on the face of the re-determination, and under this standard of review, MOFCOM's conclusions do not reflect an "objective examination" based on "positive evidence."

46. With respect to the U.S. procedural claims under Articles 12.2 and 12.2.2 of the AD Agreement, and Articles 22.3 and 22.5 of the SCM Agreement, the issue raised by the United States is that the re-determination does not give sufficient factual information to support the explanations given for MOFCOM's findings, and in many cases, contradicts China's explanations.

47. Article 12.2 of the AD Agreement and Article 22.3 of the SCM Agreement require an authority to disclose "in sufficient detail the findings and conclusions reached on all issues of fact…considered material." Article 12.2.2 of the AD Agreement and Article 22.5 of the SCM Agreement elaborate on this general requirement, directing that a public notice contain "all relevant information" on "matters of fact" "which have led to the imposition of final measures." As the Appellate Body noted, with regard to "matters of fact," an authority must disclose "those facts that allow an understanding of the factual basis that led to the imposition of final measures. The inclusion of this information should therefore give a reasoned account of the factual support for an authority's decision to impose final measures."[68] Therefore, "all relevant information" on "matters of fact" includes those facts that are required to understand MOFCOM's price effects and causation examinations, which led to the imposition of final measures.

48. As explained, the re-determination does not support China's explanations.[69] Therefore, China acted inconsistently with Articles 12.2 and 12.2.2 of the AD Agreement, and Articles 22.3 and 22.5 of the SCM Agreement.

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[67] *US – Softwood Lumber VI (Article 21.5 – Canada) (AB)*, para. 93.
[68] *China—GOES (AB)*, para. 256.
[69] U.S. First Written Submission, paras. 149-154; U.S. Second Written Submission, paras. 120-124; U.S. Opening Statement, paras. 79-81.

PUBLIC NOTICE

49. Questions 66 to 67 all appear to be addressed to China. Accordingly, the United States will not respond to these questions, but notes that it will have the opportunity to comment on China's responses to them.