**[[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)**

# OPENING ORAL STATEMENT OF THE UNITED STATES OF AMERICA AT THE SUBSTANTIVE MEETING OF THE PANEL WITH THE PARTIES

**October 14, 2014**

## TABLE OF EXHIBITS

| **Exhibit No.** | **Description** |
|---|---|
| US-15 | AK Steel Corporation, Industry Injury Investigation Questionnaire Response (Contains Business Confidential Information) |
| US-16 | AK Steel Corporation, Industry Injury Investigation Questionnaire Response, Exhibit 12 (Contains Business Confidential Information) |
| US-17 | AK Steel Corporation, Industry Injury Investigation Questionnaire Response, Exhibit 13 (Contains Business Confidential Information) |
| US-18 | AK Steel Corporation, Supplementary Industry Injury Investigation Questionnaire Response (Contains Business Confidential Information) |

Mr. Chairman, members of the Panel:

1. On behalf of the U.S. delegation, I would like to thank you for agreeing to serve on this compliance panel.

2. The United States begins by noting that we have seen this scenario before. The United States has commenced three dispute settlement proceedings against China concerning antidumping and countervailing duty measures on U.S. exports.[1] Each of the disputes we have brought addresses similar problems under the same procedural and substantive provisions of the covered agreements. In each dispute, the DSB has adopted recommendations and rulings finding that those problems breach China's WTO obligations. We are concerned by China's repeated failure to abide by those WTO obligations. As evidenced by the number of disputes initiated by other Members raising the same claims, and the outcomes of those disputes, other WTO Members are concerned by China's failures to abide by those obligations as well.

3. In this dispute, the DSB found that China imposed antidumping and countervailing duties on U.S. exports of grain oriented flat-rolled electrical steel ("GOES") in a manner that breached China's obligations under the AD Agreement,[2] and the SCM Agreement.[3] As a result, the DSB recommended that China bring its measures into conformity with its obligations under these agreements. However, instead of complying with the DSB's recommendations and rulings, China took a different track. China issued a re-determination of duties that suffers from the same basic flaws as the original investigation, and as a result, China continues to impose antidumping and countervailing duties on imports of GOES in a WTO-inconsistent manner.

4. As explained in the U.S. submissions, despite the findings of the DSB that MOFCOM's findings and conclusions in its original determination were not based on positive evidence or an objective examination of that evidence, MOFCOM chose to base its revised findings on essentially the same faulty record and the same flawed logic.

5. For example, at the outset of its re-investigation MOFCOM stated that "it will re-examine the known evidence and information already obtained" and that it "will make rulings without introducing new evidence."[4] This approach is puzzling in light of the DSB's findings of a lack of positive evidence to support MOFCOM's determinations.[5] Furthermore, China's assertions that MOFCOM has engaged in a "substantially revised analysis of price,"[6] or that it "provides an expanded and clarified rationale for all of the findings previously questioned,"[7] are baseless. The record shows that MOFCOM merely repeated the same flawed injury analysis, based on the same faulty logic and the same lack of positive evidence.

6. As the Appellate Body has indicated, "[a] panel can assess whether an authority's explanation for its determination is reasoned and adequate *only* if the panel critically examines

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[1] *See China – GOES* (DS414), *China – Broiler Products* (DS427), *China – Autos (US)* (DS440).
[2] *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994*.
[3] *Agreement on Subsidies and Countervailing Measures.*
[4] MOFCOM, Public Notice [2013] No. 40 at 1 (Exhibit US-02).
[5] *See China – GOES (AB),* paras. 222-228.
[6] China's Second Written Submission, para. 26.
[7] China's First Written Submission, para. 5.

that explanation in the light of the facts and the alternative explanations that were before that authority."[8] Here, a critical examination reveals that China's continued reliance on evidence that the DSB specifically identified as having dubious probative value, without attempting to rectify the obvious flaws, falls far short of compliance.

7. In this statement, the United States will summarize our main points and address some of the issues that China has raised in its submissions. We will address each of our claims in turn.

## I. CHINA MISINTERPRETS ARTICLES 3.1 AND 3.2 OF THE AD AGREEMENT, AND 15.1 AND 15.5 OF THE SCM AGREEMENT

8. Before addressing the details of the price effects findings in MOFCOM's re-determination, we will focus on the question of the correct interpretation of the covered agreements. We demonstrated in our written submissions that China's disregard of price comparisons is based on a flawed interpretation of the covered agreements and does not reflect an objective examination based on positive evidence.

9. In particular, the United States has established that when examining the "positive evidence" relating to the effect of subject imports on prices in the market, an objective authority would compare the pricing levels of imports and domestically produced products.[9] When properly interpreted, Articles 3.1 and 3.2 of the AD Agreement, and 15.1 and 15.2 of the SCM Agreement, require an authority to consider evidence of relative prices of subject imports and the domestic products as part of an objective examination of "whether the effect of such imports is otherwise to depress prices to a significant degree or prevent price increases, which otherwise would have occurred, to a significant degree."

10. China, by contrast, is promoting an untenable interpretation of the covered agreements when it argues that an authority may choose to conduct a price effects analysis that ignores the question of the relative prices of imports and domestic products.

11. In its second written submission, China focuses heavily on the use of the disjunctive "or" in the second sentence of Articles 3.2 and 15.2.[10] China's argument has no merit. China assumes incorrectly that if an authority relies on significant price depression or suppression in making findings of adverse price effects, then no other examination of the relative prices of imports and the domestic product is required or appropriate. But there is nothing in the text of the covered agreements on the effect of imports on prices to suggest that this is the case.

12. Indeed, examining the relative prices of the domestically produced and imported merchandise is part of a complete analysis of price effects. Articles 3.2 and 15.2 do not provide that an authority may limit its analysis merely to a finding that price depression or price suppression is occurring. The text states that "no one or several of these factors can necessarily

[8] *US – Softwood Lumber VI (Article 21.5 – Canada) (AB*) (DS277), para. 99.
[9] *See e.g.*, U.S. Second Written Submission, paras. 7-18.
[10] China's Second Written Submission, paras. 9-10.

give decisive guidance." Accordingly, regardless of the final basis for a finding of adverse price effects, an authority needs to look at all relevant factors. In addition, even with respect to suppression and depression, the text is clear that an authority must look at the degree of any suppression or depression: an authority is to examine whether "the effect of such imports is otherwise to depress prices to a significant degree or prevent price increases, which otherwise would have occurred, to a significant degree."

13. Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement further reinforce that an analysis of price effects requires an analysis of relative prices. From any perspective, an obligation to conduct an "objective examination" based on "positive evidence" – when reviewing 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"[11] for the occurrence of adverse price effects. This is especially true when, as in this dispute, the petitioner specifically alleged adverse price effects due to the low price of subject imports.[12]

14. For all these reasons, to evaluate whether significant price suppression or depression are the effect of dumped or subsidized imports, an authority must examine the relationship between the prices of the subject imports and the domestically produced product.

15. China argues that MOFCOM was not required to examine relative prices because there is no explicit requirement that authorities do so, and if the negotiating parties had insisted upon a price comparison analysis as part of an examination of price effects, they would have specifically provided for that.[13] China's argument is unpersuasive. The fact that Articles 3.2 of the AD Agreement and Article 15.2 of the SCM Agreement refer to the "effect" of dumped or subsidized imports on domestic prices indicates that authorities may not disregard evidence of relevance to the inquiry. Further, to disregard such pricing evidence is contrary to the requirements to conduct an "objective examination" based on "positive evidence."

16. China also attempts to diminish the significance of Articles 3.1 and 15.1 to an analysis under Articles 3.2 and 15.2. China's arguments, however, ignore the text of the agreement and Appellate Body guidance from this very dispute. The Appellate Body in *China – GOES* has explained that "in addition to setting forth the overarching obligation regarding the manner in which an investigating authority must conduct a determination of injury caused by subject imports to the domestic industry, Articles 3.1 and 15.1 also outline the content of such a determination, which consists of…the effect of such imports on the prices of domestic like

[11] *China – GOES (AB)*, para. 136.
[12] *See* US-10, at 11, 64,
[13] China's Second Written Submission, para. 11.

products."[14] Articles 3.2 and 15.2 elaborate on the "essential components referenced in Article 3.1 and 15.1."[15]

17. China also makes the assertion that Articles 3.2 and 15.2 "define the parameters of an objective examination with respect to price effects"; but this line of argument does not support China's positions. There is nothing in those articles to suggest that it would be "objective" to examine the price effects of one group of products on a second group of products without examining the relative prices of the two groups of products. Under China's interpretation, the "fundamental, substantive obligation"[16] to conduct an objective examination provided for by Articles 3.1 and 15.1 would be negated.

18. Finally, China misconstrues the Appellate Body's findings. China notes that the Appellate Body observed that one could find significant price effects either from a pricing element, a volume element, or a combination of the two.[17] However, it does not follow from this observation that an authority is free to disregard all information regarding relative prices, even if it bases its price effects analysis on volume. If subject imports and the domestic products do not compete on price, as the evidence indicates in this dispute, then an unbiased authority would call into question the "explanatory force" of subject imports for any adverse price effects.[18]

## II. CHINA FAILS TO SHOW THAT SUBJECT IMPORTS HAD "EXPLANATORY FORCE" FOR ANY PRICE SUPPRESSION

19. We will turn now to the details of MOFCOM's price suppression analysis, which consists of little more than observations that: (i) the volume and market share of subject imports increased in 2008; (ii) the domestic industry experienced price suppression; and (iii) therefore subject imports must have caused price suppression. MOFCOM's analysis fails to show that subject imports had any "explanatory force" for any price suppression.

20. Compelling evidence in the record of MOFCOM's investigation indicates an *absence* of price competition between subject imports and the domestic like product. The domestic industry's prices dropped by a staggering 30.25 percent, while the prices of subject imports declined by only 1.25 percent. Yet, this sharp divergence in prices did not translate into significant shifts in market share. 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. If price were an important factor in purchasing decisions, the drastic decline in the domestic industry's prices should have caused a much more significant shift in sales and market share in favor of the domestic industry.

[14] *China – GOES (AB)*, para. 127.
[15] *China – GOES (AB)*, para. 127.
[16] *Thailand-H Beams (AB)*, para. 106.
[17] China's Second Written Submission, para. 14.
[18] Third Party written submission by the European Union, para. 20.

21. The Appellate Body in *China – GOES* recognized this dynamic when it explained:

> [I]t is nevertheless anomalous that in the only period for which domestic prices actually went down – that is, the first quarter of 2009 – there was substantial divergence between the extent of the price decrease for subject imports versus that for domestic products. Indeed, one would normally expect that under the conditions of price competition indicated by these factors, there would be a closer correlation in the movements in subject import and domestic prices.[19]

China's efforts to downplay the significance of what happened in the first quarter of 2009 – and to distance itself from the Appellate Body's observations – are unconvincing. China accuses the United States of "mechanically" applying the Appellate Body's findings, and argues that "the context is different" because MOFCOM's analysis of price effects in the redetermination "has been substantially revised and clarified."[20] This is inaccurate. The only significant change in MOFCOM's price effects analysis is that MOFCOM has changed its *rationale* from the original determination by cutting out nearly all references to relative prices, and to rely now solely on the volume of subject imports.[21]

22. China's assertions that MOFCOM discussed "extensive other evidence"[22] or "other key evidence"[23] in addition to the volume and market share of subject imports, and that this represents a substantially new analysis, are not convincing. The other factual findings that China claims are "new" were in fact, for the most part, proffered by MOFCOM in the original injury determination. MOFCOM's like product and cumulation findings in the re-determination are almost unchanged from those it made in the original injury determination.[24] MOFCOM's reliance on parallel price trends and pricing policy documents also are not new.[25]

23. China also misrepresents the record in stating that "the basis of MOFCOM's original determination on price effects focused on volume, not price."[26] The original panel reached a different conclusion, finding that MOFCOM's original determination did not support China's argument that volume effects were the primary basis for MOFCOM's finding of adverse price effects caused by subject imports.[27] The Appellate Body did not disturb this finding.[28]

24. Whatever changes there have been in MOFCOM's price effects analysis since the original injury determination, the fundamental facts are unchanged. MOFCOM made its re-

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[19] *China – GOES (AB)*, para. 226.
[20] China's Second Written Submission, para. 22.
[21] U.S. Second Written Submission, para. 3.
[22] China's Second Written Submission, para. 3.
[23] China's Second Written Submission, para. 6.
[24] Exhibit US-04, at 23-24 (like product) and 55-56 (cumulation), *compare to* Exhibit US-01, at 11-12 (like product) and 20-21 (cumulation).
[25] Exhibit US-04, at 59, *compare to* Exhibit US-01, at 24.
[26] China's Second Written Submission, para. 21.
[27] *China – GOES (Panel)*,7.539-7.540.
[28] *China – GOES (AB)*, para. 216-221.

determination on the same record as the original injury determination. The pricing and market share data in the first quarter of 2009 continue to point to an absence of price competition between subject imports and the domestic product.

### A. Market Share Shifts Do Not Show Price Competition Between Subject Imports and Domestic Like Product

25. China seeks to avoid the obvious implications of the pricing and market share data for the first quarter of 2009 by suggesting the domestic industry's gain in market share in that quarter was in fact more substantial than 1.04 percent if one compares the first quarter of 2009 to full year 2008 instead of to the first quarter of 2008.

26. China claims that "[t]he increase over the broader period was necessarily more substantial."[29] China, however, provides no evidentiary basis for this assertion. Indeed, if the domestic industry's recapture of market share in the first quarter of 2009 was more substantial if the first quarter of 2009 market share is compared to some unspecified point in 2008, the United States questions why MOFCOM did not explain the magnitude of any such gain in market share. Rather than doing this, MOFCOM simply made vague and generalized statements about taking into account the situation in 2008 and the first quarter of 2009 in a "comprehensive" way.[30]

27. Furthermore, even if the domestic industry's recapture of market share in the first quarter of 2009 was greater than 1.04 percent – if one compares that quarter to some undefined period in 2008 – there still would be a glaring divergence between the extent of drop in domestic prices and the gain in market share. Again, the record evidence strongly suggests an *absence* of price competition between subject imports and the domestic like product.

### B. MOFCOM's Findings in Connection With its Like Product and Cumulation Determinations Prove Nothing

28. The comparisons that MOFCOM made for purposes of the domestic like product and cumulation analyses were at a level of extreme generality. For most of the comparisons between the subject imports and the domestic like product, MOFCOM found merely that the products were "fundamentally the same."[31] These are nothing more than broad-brush generalizations. They are not enough to show that subject imports are sufficiently competitive with the domestic like product to be causing adverse price effects. China's assertion that MOFCOM's analysis went "to a level that indicate[d] that the subject imports were capable of significant price effects"[32] is completely unfounded.

29. China emphasizes a statement by one of the two U.S. respondents, Allegheny Ludlum, to the effect that the merchandise that it produced or exported was highly substitutable with the

[29] China's Second Written Submission, para. 29.
[30] Exhibit US-01, at 50.
[31] Exhibit US-01, at 10-11.
[32] China's Second Written Submission, para. 34.

domestic like product.[33] China neglects to mention several salient facts, which reduce the significance of Allegheny Ludlum's statement.

30. AK Steel, the other respondent, was a much more significant participant in the Chinese market than Allegheny Ludlum during the period of investigation. In its Industry Injury Questionnaire Response, and Supplementary Industry Injury Questionnaire Response, AK Steel explained that [[ ]].[34] AK Steel also explained that 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.[35] Approximately [[ ]] percent of AK Steel's shipments were of higher grade GOES.[36]

31. In its injury response, AK Steel estimated that AK Steel's shipments to China represented approximately [[ ]] percent of total imports of subject merchandise from the United States and Russia.[37] Using these same data, shipments by AK Steel represented over [[ ]] percent of subject imports from the United States.[38]

32. Thus, MOFCOM's conclusions with respect to substitutability, based on Allegheny Ludlum's statement in its questionnaire response, disregard evidence relating to a significant proportion of the imports under investigation. MOFCOM's approach is not consistent with the obligation to conduct an "objective examination" based on "positive evidence."

### C. The DSB Has Already Found That Any Parallel Pricing Does Not Show a Competitive Relationship Based on Price

33. China's assertion that MOFCOM's findings of "parallel pricing" were sufficient to show a competitive relationship between subject imports and the domestic like product is just as unpersuasive.[39] MOFCOM's parallel pricing findings are essentially the same as they were in the original injury determination, and suffer from the same defects identified by the original panel and the Appellate Body.[40] As the Appellate Body explained, "the fact that prices of subject imports and domestic products move in tandem might indicate the nature of competition between the products, and may explain the extent to which factors relating to the pricing behavior of

[33] China's Second Written Submission, para. 39.
[34] Exhibit US-18, Answer to Question 2.
[35] Exhibit US-15, Answer to Question 15.
[36] Exhibit US-18.
[37] Exhibit US-15, Answer to Question 20.
[38] AK Steel reported that its share of GOES for the period of investigation was [[ ]], Exhibit US-15, Answer to Question 20. In Exhibit US-10, at Table 20, the petitioner reported that imports from the United States as follows: 2006: 12,298.37 tonnes; 2007: 11,694.07 tonnes; 2008: 59,419.51 tonnes (in total, 83,411.95 tonnes for the period 2006-2008). [[ ]]/83,411.95 = [[ ]] = [[ ]] percent.
[39] China's Second Written Submission, paras. 42, 44.
[40] *China – GOES (Panel)*,7.528; *China – GOES (AB)*, paras. 208-210.

importers have an effect on domestic prices . . . *but there is no basis on which to draw any such conclusions in this case*."[41]

### D. The DSB Has Already Found That Pricing Policy Documents Have No Probative Value

34. Nor are the so-called pricing policy documents relied on by MOFCOM probative of price competition between the subject imports and the domestic like product. These four documents pertain only to the first quarter of 2009. Both the original panel and the Appellate Body recognized that the probative value of these "pricing policy" documents was undermined by the pricing dynamic in the first quarter of 2009, when the prices of the domestic like product fell by 30.25 percent, while that of the subject imports declined by only 1.25 percent.[42]

### E. A Partial Customer Overlap Does Not Support a Finding of a Competitive Relationship Based on Price

35. Finally, evidence of a partial overlap in customers does not support a finding of a competitive relationship based on price. The fact that some customers buy from subject sources and from domestic producers does not establish that there is direct competition for sales to these purchasers by domestic and subject suppliers, that the domestic and subject suppliers were selling the same products, or that price is an important factor in purchasing decisions.

### F. Conclusion

36. In sum, none of the additional factors that China claims support MOFCOM's price effects analysis stands up to scrutiny. There is nothing in the record of MOFCOM's investigation, aside from temporal coincidence, that supports its finding that the domestic producers' pricing decisions were in response to an increase in subject imports. MOFCOM's findings that the volume of subject imports suppressed domestic prices in 2008 and the first quarter of 2009 is not based on positive evidence, and does not reflect an objective examination of the evidence.

37. When confronted with specific flaws and insufficiencies in MOFCOM's analysis, China repeatedly resorts to arguing that the aspect of the analysis in question is only part of a multi-faceted discussion of the record as a whole,[43] and that the United States somehow fails to see the big picture. If the constituent parts of MOFCOM's analysis do not hold up, these vague appeals to the big picture, or, as China puts it, to a "holistic" analysis,[44] cannot save MOFCOM's analysis.

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[41] *China – GOES (AB)*, para. 210 (emphasis added).
[42] *China – GOES (Panel)*, paras. 7.533-7.534; *China – GOES (AB)* para. 226.
[43] China's First Written Submission, paras. 46, 51, 65; China's Second Written Submission, paras. 22, 24, 30, 50.
[44] China's First Written Submission, para. 27; China's Second Written Submission, para. 53.

## III. CHINA FAILS TO SHOW THAT SUBJECT IMPORTS HAD "EXPLANATORY FORCE" FOR PRICE DEPRESSION IN THE FIRST QUARTER OF 2009

38. Turning now to alleged price depression in the first quarter of 2009, there is no evidence that the sharp drop in the domestic industry's prices in that quarter was in any way related to the gain in the subject imports' market share in 2008. As with its analysis of price suppression, MOFCOM has essentially concocted a reason to link two events with no causal relationship.

39. The United States has noted that it would have been economically irrational for the domestic industry to slash prices by over 30 percent to regain a 5.65 percent loss of market share in 2008, particularly when that loss of market share is seen in the wider context of the 2006-2008 period, when the domestic industry's market share actually rose by 1.9 percent.[45]

40. China contests this point, and asserts that "the price decline did allow the domestic industry to recover a substantial portion of market share loss in very short order."[46] As we have already discussed, however, China's allegations regarding substantial changes in market share are without evidentiary basis. To recall: MOFCOM initially compared the domestic industry's market share in the first quarter of 2009 to its market share in the first quarter 2008, and noted on this basis that the domestic industry's recapture of market share in the first quarter 2009 was 1.04 percent.[47] China's subsequent suggestion that the data for the first quarter of 2009 should have been compared to some unspecified point in 2008, to produce some unspecified rebound in the domestic industry's market share, should be rejected.

41. MOFCOM's price depression analysis was further marred by its claim that price depression was caused by efforts of subject imports to undercut the price of the domestic product in the first quarter of 2009.[48] As noted by the Appellate Body, "the fact there was a substantial divergence in pricing levels over that period suggest that the two products were not in competition with each other, or that there were other factors at work."[49] It simply is not credible to characterize a decline of 1.25 percent in the price of subject imports as an effort to undercut the domestic product, where domestic prices dropped by 30.25 percent and the domestic product was actually underselling subject imports during this period.

## IV. CHINA'S IMPACT ANALYSIS IS INCONSISTENT WITH ARTICLES 3.4 OF THE AD AGREEMENT AND 15.4 OF THE SCM AGREEMENT

42. The United States will now turn to MOFCOM's deficient impact analysis. In previous submissions, the United States showed that MOFCOM's "examination of the impact of the dumped imports on the domestic industry concerned" and "evaluation of all relevant economic

[45] U.S. First Written Submission, para. 77.
[46] China's Second Written Submission, para. 55.
[47] Exhibit US-01, at 31.
[48] Exhibit US-01, at 27.
[49] *China – GOES (AB)*, para. 226.

factors and indices having a bearing on the state of the industry" was not based on an "objective examination" of "positive evidence."

### A. China's Procedural Objection is Unfounded

43. China attempts to challenge on procedural grounds the U.S. demonstration that MOFCOM's re-determination breaches the covered agreements. China's arguments, however, are erroneous from both a legal and factual point of view.

44. First, China misconstrues the text of Article 21.5 of the DSU. Article 21.5 is concerned with the "consistency with a covered agreement of measures taken to comply with the recommendations and rulings." 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 "old" and "new" claims.

45. 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. As noted by the Appellate Body, "in 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.'"[50] The Appellate Body in that dispute disagreed with the panel's refusal to consider a new argument because the argument "did not form part of the basis for the finding" in the original proceedings.[51]

46. Second, China's suggestion that the Panel's consideration of the new claim would lead to any issue of due process has no merit. As the United States explained, 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] Thus, the only procedural unfairness would be if China's objections were sustained, and if the United States thereby were precluded from demonstrating the WTO-inconsistency of China's measure taken to comply based on this modified impact analysis that was not present in the original determination.

47. China sidesteps the changes to its injury re-determination when it asserts that the United States "cites only to the MOFCOM discussion of causation in the redetermination, not the MOFCOM discussion of injury."[53] In truth, the United States cited to a section of MOFCOM's re-determination that explicitly refers to injury. The re-determination provides that "the

[50] *See Canada — Aircraft (Article 21.5 — Brazil) (AB),* para. 41.
[51] *Canada — Aircraft (Article 21.5 — Brazil) (AB),* para. 42; *Canada — Aircraft (Article 21.5 — Brazil) (Panel),* para. 5.17.
[52] *See* U.S. First Written Submission, para 95.
[53] China's Second Written Submission, para. 66.

Investigating Authority has reason to believe that the situation in 2008 has more evidentiary value for *determining injury* and causal link."[54] Thus, China misrepresents the re-determination.

48. In response to the U.S. observation that in its re-determination China has deleted all references to "low price," China makes an argument that has no basis in the record. China writes that "the references to 'low price' in the original determination of injury were simply references to unfairly traded imports."[55] China provides no support for this unsubstantiated assertion. Indeed, the Appellate Body has already rejected this argument.[56] The fact that China has deleted all references to "low price" demonstrates that China's re-determination involves a new measure that was not before the panel in the original proceeding.

49. In light of the text of Article 21.5 of the DSU, and the changes to China's re-determination, the utility of the compliance proceedings would be "seriously undermined"[57] if the Panel were unable to evaluate whether China's re-determination is consistent with the covered agreements based on this aspect of China's own analysis.

### B. China Cannot Defend its Impact Analysis

50. Turning to the merits, MOFCOM's impact causation analysis is inconsistent with Articles 3.1 and 3.4 of the AD Agreement and Articles 15.1 and 15.4 of the SCM Agreement. In the re-determination, MOFCOM identifies the 15-month period encompassing 2008 and the first quarter of 2009 as the period during which subject imports allegedly caused injury to the domestic industry.[58] MOFCOM also states that, because 2008 accounted for 80 percent of this period, "the situation in 2008 is more persuasive for identifying injury and the causal link."[59]

51. As explained in the U.S. submissions, however, MOFCOM's examination of the factors enumerated in Articles 3.4 and 15.4 for 2008 is highly distorted and selective.[60] It is distorted because factors that are identified as being indicative of material injury are not viewed in their proper context; it is selective because MOFCOM simply ignores the fact that many of the factors showed that the domestic industry was in fact performing well in 2008.

52. China also makes much of the fact that the overall market for GOES in China was growing.[61] However, China fails to acknowledge that a number of the domestic industry's performance indicators increased by more than the growth in demand in both 2007 and 2008.

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[54] U.S. First Written Submission, para. 95; Exhibit US-01, p. 55. *See also* Exhibit US-01, p. 53.
[55] China's Second Written Submission, para. 64.
[56] *China – GOES (AB)*, paras. 194-195.
[57] *See Canada — Aircraft (Article 21.5 — Brazil) (AB)*, para. 41.
[58] Exhibit US-01, at 53.
[59] Exhibit US-01, at 55.
[60] U.S. First Written Submission, paras. 91-105, U.S. Second Written Submission, paras. 70-79.
[61] China's Second Written Submission, para. 79.

53. China accuses the United States of making "illogical comparisons of percentage changes."[62] But it is China's argument that is illogical. China is essentially arguing that the domestic industry, which had about half the market, should reasonably have expected to grow its production, sales, and other metrics by amounts that were disproportionate to its market share, and that failure to do should be seen as a sign of material injury.[63]

54. China speaks of "negative trends over the 2007 to 2008 period."[64] It is important to recognize that in a number of cases, what MOFCOM characterized as "negative" was a *deceleration* of growth in 2008 – measured from extraordinarily high levels of growth in 2007, levels that exceeded the overall growth in the market.

55. China makes the odd argument that the U.S. claim regarding China's new 2008 impact analysis is faulty because the U.S. discussion does not address the first quarter of 2009. However, the United States has limited its claim to 2008 because MOFCOM itself stated that "the situation in 2008 is more persuasive for identifying injury and the causal link."[65]

56. China quotes extensively from MOFCOM's re-determination, in an effort to show that MOFCOM "properly balanced the positive trends and the negative trends."[66] What the quoted excerpt from the re-determination in fact shows is that MOFCOM found injury to the domestic industry "particularly in the first quarter of 2009," and, by implication less so in 2008.

57. The United States has shown that in 2008 the positive trends vastly outnumbered and outweighed the negative ones.[67] As a result, the investigating authority was obligated to provide "a compelling explanation of why and how, in light of such apparent positive trends, the domestic industry {is}, or remain{s}, injured."[68] China failed to do so in this dispute.

## V. CHINA'S CAUSATION ANALYSIS IS INCONSISTENT WITH ARTICLES 3.1 AND 3.5 OF THE AD AGEREMENT AND ARTICLES 15.1 AND 15.5 OF THE SCM AGREEMENT

58. MOFCOM'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. The United States will not repeat arguments from its submissions. However, we will address points raised by China in its second written submission.

59. The domestic industry's expansion of capacity and production outstripped the growth in demand for GOES in the Chinese market by wide margins. Numerous errors and unsupported,

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[62] China's Second Written Submission, para. 78.
[63] China's Second Written Submission, para. 78.
[64] China's Second Written Submission, para. 79.
[65] Exhibit US-01, at 55.
[66] China's Second Written Submission, para. 86.
[67] U.S. First Written Submission, paras. 98-104.
[68] *China —X-Ray Equipment (Panel*) (DS425), para. 7.195 (citing *Thailand —H-Beams (Panel)*, para. 7.249).

conclusory statements tarnish MOFCOM's analysis of injury caused by the domestic industry's overexpansion and overproduction.

60. China argues that the United States failed to address three points that MOFCOM made about the issue of the domestic industry's expansion. None of these arguments helps MOFCOM's analysis. First, China asserts that one cannot reasonably compare percentages that are calculated from different base amounts, as the United States did in pointing out that the domestic industry's expansion of capacity and production was far greater than the growth in demand for GOES in the Chinese market.[69] This is a curious argument -- percentages of course are ratios, and different ratios are likely to have different base amounts.

61. In any event, China appears to be arguing that its domestic industry, which had about half the market, should reasonably have expected to grow its production and sales by amounts that were disproportionate to its market share. China presents no basis for this contention. In addition, China's argument is inconsistent with China's own approach, given that MOFCOM itself compared percentage changes from different base amounts, when it was convenient for MOFCOM to do so.[70]

62. The other two points that China raises involve market share shifts in 2008, and the assertion that domestic producers cut their prices in 2009 in an attempt to regain market share.[71] The United States fails to see what these issues have to do with the question of whether MOFCOM's non-attribution analysis with respect to the domestic industry's overexpansion was flawed.

63. In addition, MOFCOM's new disclosures show that nonsubject imports were a much more significant factor in the Chinese market than subject imports, in all parts of the period of investigation. They entered China in significantly greater quantities than cumulated subject imports throughout the period; they continued to grow by significant amounts; and they had lower average unit values than subject imports in 2008.

64. Instead of conducting an objective non-attribution analysis, MOFCOM summarily dismissed the role of nonsubject imports. In doing so, it mischaracterized the relative importance of nonsubject imports. MOFCOM failed to ask how the increasing quantity of subject imports in 2008 could have had injurious effects on the domestic industry, while the increasing and much greater quantity of nonsubject imports sold in 2008 at lower AUVs could have had no injurious effects.

65. China seeks to justify MOFCOM's cursory and inadequate analysis of the effect of nonsubject imports by arguing that since nonsubject imports allegedly did not have any adverse effects on the market in 2006 and 2007, they cannot have done so in 2008 and the first quarter of

[69] China's Second Written Submission, para. 101.
[70] *E.g.*, Exhibit US-01, at 44 (comparing the percentage growth of imports to the percentage growth of domestic demand).
[71] China's Second Written Submission, para. 101.

2009.[72] The United States notes that this is a post hoc rationalization supplied by China; MOFCOM did not rely on this argument in its re-determination.[73]

66. China's response also lacks any basis in economic reason. It is obvious that the effect of imports – be they subject or non-subject – will depend on prevailing market conditions. Market conditions were different in 2008 and the first quarter of 2009 than in 2006 and 2007. It is simply facile to say that since nonsubject imports had no adverse effects at one point in time, they could not have had adverse effects later.

67. China has not disputed the dominant role of nonsubject imports, as compared to subject imports, throughout the period of investigation. Instead, China continues to argue that *shifts* in market share should be dispositive in considering the effects of subject and nonsubject imports.[74] China's position makes no commercial sense because a domestic industry will be affected primarily by the *aggregate* volume and prices of a particular group of imports, rather than by incremental changes in market share. Nonsubject imports were present in the market at much greater volumes than subject imports and at lower prices than subject imports in 2008. MOFCOM simply ignored this fact.

68. China argues that because the relevant text of the covered agreements does not specify any particular methodology for conducting its non-attribution analysis, it should be free to apply any reasonable methodology.[75] However, this merely begs the question of whether MOFCOM's methodology was indeed reasonable. The United States submits that it was not.

## VI. CHINA'S DISCLSOURES ARE INADEQUATE

### A. China Failed to Disclose the Essential Facts, Contrary to Articles 6.9 of the AD Agreement and 12.8 of the SCM Agreement

69. The United States will now turn to MOFCOM's failure to disclose the essential facts that formed the basis of its re-determination. In previous submissions, the United States showed that China failed to meet the requirements of Article 6.9 of the AD Agreement and Article 12.8 of the SCM Agreement.

70. As explained, the facts we have identified are "essential facts" in that they are "facts that are significant in the process of reaching a decision as to whether or not to apply definitive measures."[76] They formed part of the basis for MOFCOM's determination of material injury and decision to apply the definitive measures at issue in this dispute. MOFCOM was required to disclose the essential facts that supported its price effects examination and causation analysis.[77]

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[72] China's Second Written Submission, para. 118.
[73] Exhibit US-01, at 36-37.
[74] China's Second Written Submission, paras. 119-121.
[75] China's Second Written Submission, para. 103.
[76] *China – GOES (AB)*, para. 240.
[77] U.S. First Written Submission, para. 148. *See also* Third Party written submission by Japan, para. 24.

71. Rather than reviewing at length each individual category of essential facts demonstrating the shortcomings in China's approach, the United States will highlight three general errors that China has made that illustrate the defects in China's positions.

72. First, China's response consists of a series of *ex post facto* rationalizations, and disregards the obligations contained in the covered agreements. The covered agreements require that investigating authorities inform interested parties of essential facts under consideration prior to making a final determination. The aim of the requirement is "to permit parties to defend their interests."

73. Yet, with respect to unspecified "sales obstacles" that allegedly prevented the domestic industry from making more sales in 2008 and the first quarter of 2009, for example, China argues in its second written submission that its first written submission "explains clearly and explicitly that 'the sales obstacles were the surge in subject imports.'"[78] But its first written submission merely asserts that the "preliminary disclosure document clearly explains that the sales obstacles were the surge in subject imports."[79]

74. Nowhere in its re-determination disclosure does China indicate that these so-called "sales obstacles" are a purported surge in subject imports. The Appellate Body in *China-GOES* stated that an authority must disclose the essential facts "in a coherent way."[80] China's disclosure is incoherent, and would force interested parties to infer or derive the essential facts.[81]

75. Second, China argues throughout its second written submission that it disclosed percentage changes, and these percentages suffice for purposes of disclosing the essential facts. Again, China's *ex post facto* rationalizations do not satisfy the requirements of the covered agreements. China's assertion that the trends of the prices of the subject imports and the domestic like product were the same is representative. China cites percentage changes in price levels for subject imports and the domestic like product from 2006 to 2008 to support its conclusion.[82] However, China fails to mention the first quarter of 2009, when prices levels diverged sharply. The Appellate Body in this dispute noted this price divergence.[83] China still cannot point to a disclosure of essential facts supporting its conclusion that the trends of the prices of the subject imports and the domestic like product were the same.

76. Third, instead of highlighting the facts on the record, China appears to argue that it disclosed its reasoning supporting its conclusions, and that such disclosure satisfies the obligations of the covered agreements. As explained, a Member is obliged to disclose the essential *facts* underlying the final findings and conclusions supporting the application of definitive measures. The original panel in this dispute noted that the disclosure obligation does

[78] China's Second Written Submission, para. 130.
[79] China's First Written Submission, para. 140.
[80] *China – GOES (AB)*, para. 240.
[81] U.S. Second Written Submission, para. 114.
[82] China's Second Written Submission, para. 128.
[83] *China – GOES (AB)*, para. 226.

not apply to the reasoning of the investigating authorities, but rather to the "essential fact" underlying the reasoning.[84]

77. China tries to assert that the United States confuses facts and reasoning,[85] when in reality, China is confused. With respect to the MOFCOM's conclusion that the domestic industry's loss of market share in 2008 led it to slash prices by over 30 percent in the first quarter of 2009, for instance, China notes a loss of market share supported by percentage changes, and then states that it "drew the reasonable conclusion that this loss of market share in 2008 provided a strong business motivation for the Chinese industry to lower its prices in the first quarter of 2009."[86] China also points to statements made by the petitioner that supported its inferences.[87] China's statements pointing to reasoning and conclusions instead of the actual essential facts reflect a fundamental misunderstanding of its obligations.

78. Accordingly, the compliance panel in this dispute should find that China acted inconsistently with Article 6.9 of the AD Agreement and Article 12.8 of the SCM Agreement by not disclosing the essential facts forming the basis for its re-determination.

### B. China Failed To Explain its Re-determination, Contrary to Articles 12.2 and 12.2.2 of the AD Agreement, and 22.3 and 22.5 of the SCM Agreement

79. China also has failed to rebut the U.S. demonstration that China breached its WTO obligations by failing to explain its re-determination of material injury. Instead, China makes the unfounded assertion that the United States has abandoned some of its claims relating to Articles 12.2 and 12.2.2 of the AD Agreement, and 22.3 and 22.5 of the SCM Agreement.[88] To be clear, the United States has not abandoned these claims.

80. Turning to the merits: for each issue identified by the United States, these issues were "material" within the meaning of Articles 12.2 of the AD Agreement and 22.3 of the SCM Agreement because they had to be resolved before MOFCOM could render an affirmative material injury re-determination. This information also constituted "relevant information on the matters of fact and law and reasons which have led to the imposition of final measures," within the meaning of Article 12.2.2 of the AD Agreement and Article 22.5 of the SCM Agreement.[89]

81. The re-determination simply does not support China's explanations. Therefore, MOFCOM did not explain its findings in sufficient detail. Consequently, China has not satisfied the requirements of the covered agreements.

## VII. CONCLUSION

[84] *China-GOES (Panel)*, Para. 7.407.
[85] China's Second Written Submission, para. 131.
[86] China's Second Written Submission, para. 131.
[87] China's Second Written Submission, para. 131.
[88] China's Second Written Submission, para. 137.
[89] *See also* Third Party written submission by Japan, para. 24.

82. For the reasons set forth above and in our submissions, the United States respectfully requests the compliance panel to find that China has failed to implement the recommendations and rulings of the DSB and its measures taken to comply are inconsistent with China's obligations under the AD Agreement and SCM Agreement.