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)

EXECUTIVE SUMMARY OF THE ORAL STATEMENTS OF THE UNITED STATES OF AMERICA AT THE SUBSTANTIVE MEETING OF THE PANEL WITH THE PARTIES

October 23, 2014

1. 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. Each of the disputes we have brought addresses similar problems under the same procedural and substantive provisions of the covered agreements.

2. 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 and the SCM Agreement. 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.

3. 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 that explanation in the light of the facts and the alternative explanations that were before that authority." 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.

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

4. 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. 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."

5. 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. 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 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.

6. 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" 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.

7. 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. 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.

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

8. 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. 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.

9. 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." 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.

10. 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-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

11. 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. China, however, provides no evidentiary basis for this assertion. 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

12. 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." 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. 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

13. 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. 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.

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

14. 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.

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

15. Finally, evidence of a partial overlap in customers does not support a finding of a competitive relationship based on price.

F. Conclusion

16. In sum, none of the additional factors that China claims support MOFCOM's price effects analysis stands up to scrutiny. 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, 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, cannot save MOFCOM's analysis.

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

17. 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.

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

18. 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. As explained in the U.S. submissions, MOFCOM's examination of the factors enumerated in Articles 3.4 and 15.4 for 2008 is highly distorted and selective. The United States has shown that in 2008 the positive trends vastly outnumbered and outweighed the negative ones. 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." 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

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

20. 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.

21. 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.

VI. CHINA'S DISCLOSURES 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

22. 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. 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

23. 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. 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

24. 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.