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 SECOND WRITTEN SUBMISSION OF THE UNITED STATES OF AMERICA

July 29, 2014

I. INTRODUCTION

1. In its first written submission, the United States demonstrated that a number of aspects of the Determination on the Re-investigation of Antidumping and Countervailing Duties on Grain Oriented Flat-Rolled Electrical Steel Imports from the United States ("Re-determination") that the Government of the People's Republic of China ("China") has adopted with respect to imports of grain oriented flat-rolled electrical steel ("GOES") from the United States are inconsistent with China's obligations under the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("AD Agreement"), and the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement"). Accordingly, China has failed to comply with the recommendations and rulings of the Dispute Settlement Body ("DSB") to bring its measures into conformity with China's obligations under the AD and SCM Agreements.

2. China's responses are characterized by unsubstantiated assertions, and a failure to address the substance of the U.S. arguments. Contrary to China's assertions, the issues in this dispute do not involve questions of how to interpret conflicting evidence, and the United States is not asking the Panel to second-guess China's Ministry of Commerce ("MOFCOM"). Instead, on issue after issue, the United States has proven that MOFCOM's analysis does not rest on an objective examination based on positive evidence. MOFCOM's analysis is not based on data that provide an accurate and unbiased picture, and has not been conducted without favoring the interests of any party.

3. China's responses suffer from a fundamental weakness. Despite the findings of the DSB that MOFCOM had not provided positive evidence to support the findings and conclusions contained in its original determination, MOFCOM chose to base its revised findings on essentially the same faulty record. MOFCOM continued to rely on evidence that the DSB specifically identified as having dubious probative value, without attempting to rectify the obvious flaws. Instead of rectifying its evidentiary shortcomings, in its Re-determination, MOFCOM simply deleted references to "low prices," and switched its rationale to rely solely on the volume of subject imports. The little new information contained in the revised materials only serves to underscore the fact that the deficiencies of the original determination have not been remedied in MOFCOM's Re-determination.

4. When the Panel scrutinizes MOFCOM's Re-determination and China's arguments, the United States is confident that the Panel will agree that China failed to comply with the DSB's recommendations and rulings as well as China's obligations under the AD and SCM Agreements. In this submission, the United States focuses on some of the key issues in this dispute, including those that have arisen as a result of China's first written submission.

II. CHINA CANNOT DEFEND MOFCOM'S REVISED PRICE EFFECTS ANALYSIS

5. As demonstrated in the U.S. first written submission, China breached Articles 3.1 and 3.2 of the AD Agreement and Articles 15.1 and 15.2 of the SCM Agreement because MOFCOM's price effects analysis was fundamentally flawed in a number of respects. In response, China offers arguments that are unconvincing and do not serve to rebut the U.S. showing that China's price effects analysis in the Re-determination fell far short of meeting China's WTO obligations.

A. 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

6. According to China, an authority may choose to conduct a price effects analysis that does not even consider the record evidence concerning the relative prices of imports and domestic products. The text of the covered agreements is the starting point for showing that China's legal position is incorrect. First, under Article 3.2, the question to be examined is the "effect of the dumped imports on prices in the domestic market for like products." Second, Article 3.1 states that an injury determination must be based on "positive evidence" and must involve an "objective examination" of this question of price effects. Third, Article 3.2 contains some details on what factors are relevant to determining what, if any, effects imports may have had on domestic prices. Fourth, Article 3.2 closes with the statement that "No one or several of these factors can necessarily give decisive guidance." The common sense reading of these provisions is that an objective assessment of all of the relevant factors would require an evaluation of evidence on relative prices.

7. The United States also notes that China provides no support for its position in any prior panel or Appellate Body reports. The United States further notes that the fact that MOFCOM neglected to undertake price comparisons suggests that available evidence of prices would have weakened the "explanatory force" of subject imports for any adverse price effects. Finally, China misrepresents the U.S. position in this dispute.

B. China Fails to Show that Subject Imports Had "Explanatory Force" for Any Price Suppression

8. In its first written submission, the United States showed that MOFCOM's price effects analysis in its Re-determination contains a crucial gap because it fails to show that subject imports had any "explanatory force" for the asserted price effects. In essence, MOFCOM's analysis consisted of little more than its observations that: (i) the volume and market share of subject imports increased in 2008; (ii) the domestic industry experienced price suppression and depression; and (iii) consequently subject imports must have caused these price effects. MOFCOM ignored compelling evidence in the record of an absence of price competition between subject imports and the domestic like product. Instead of addressing the evidence, China attempts to explain away this fundamental gap in MOFCOM's analysis.

1. Market Share Shifts in 2008 Do Not Demonstrate a Linkage Between Subject Imports and Prices of the Domestic Like Product

9. China contends that by merely noting the domestic industry's loss of market share to subject imports in 2008 "MOFCOM more than met its burden of showing that subject imports had some explanatory force." MOFCOM's analysis contains a crucial flaw. MOFCOM simply *assumed* that the increasing volume and market share of subject imports in 2008 had explanatory force for the alleged price suppression experienced by the domestic industry in 2008 and the first quarter of 2009. The problem with MOFCOM's so-called analysis is that coincidence is not tantamount to evidence of price effects, nor does it automatically amount to explanatory force.

The sharply divergent price trends, along with the muted market share response, in the first quarter of 2009 demonstrated the absence of price competition between subject imports and the domestic like product.

10. Moreover, China's efforts to discount the relevance of the Appellate Body's discussion of the price movements in the first quarter of 2009 are unavailing. The Appellate Body specifically addressed China's argument regarding "the importance of the increase in subject import volume to MOFCOM's finding of significant price depression and suppression," and did not find it persuasive.

11. Additionally, China makes much of its characterization that the subject imports' gain in market share and the domestic industry's loss of market share in 2008 were of similar magnitude. But China's characterization is misleading because it ignores a key fact. China has failed to acknowledge that the overall market was experiencing substantial growth, and that sales of both imported products and domestic products were increasing. In short, MOFCOM can point to no evidence linking the increase in the subject imports' market share in 2008 to any price suppression in 2008 or the first quarter of 2009.

2. MOFCOM's Findings in Connection With its Like Product and Cumulation Determinations Do Not Support MOFCOM's Assumption that Competition Was Based on Price

12. China maintains that MOFCOM's findings in two different contexts – its determination of the domestic like product, and its determination to cumulate imports from the United States and Russia – support a conclusion that subject imports and the domestic like product were competitive for purposes of MOFCOM's price effects analysis. China's contention is unfounded. MOFCOM's like product and cumulation analyses do not go beyond very general similarities between subject imports and the domestic like product, and do not include any meaningful consideration of the nature of price competition – or lack thereof – between these products. China's assertion that these analyses were sufficient to show that there was direct competition between subject imports and the domestic like product – such that subject imports could be found to have "explanatory force" for price effects – is without any merit.

3. Any Findings of "Parallel Pricing" Do Not Show a Competitive Relationship Based on Price

13. As noted in the U.S. first written submission, the Appellate Body explained that, although it could "conceive of ways in which an observation of parallel price trends might support a price depression or suppression analysis . . . there is no basis on which to draw any such conclusion in this case." China claims that its findings on parallel pricing have "expanded significantly." This "expanded analysis," however, is merely rhetoric regarding the same conclusory statements made in the original determination. MOFCOM's reliance on parallel pricing, thus, is just as unsupported in the Re-determination as it was in the original determination.

14. Moreover, MOFCOM's theory of parallel pricing has two problems. First, the price trends that it identifies are at such a level of generality as to have no probative value. The second

flaw in MOFCOM's theory is that it simply mischaracterized the data, or characterized it in such a broad-brush fashion as to be of little value. MOFCOM stated that "[i]n 2007 and 2008, the rate change in the price of the subject merchandise was close to that of domestic like products;" and that "from 2006 to 2008, the trend of change between the subject merchandise and the domestic like product was consistent and the rate of change was similar." This is clearly a mischaracterization of the data.

15. In addition, China urges the Panel not to "second-guess" MOFCOM. But, contrary to the way in which China seeks to portray this issue, this is not an instance where there are divergent but reasonable ways to evaluate the evidence. In concluding that the data discussed above showed that there was parallel pricing sufficient to establish the existence of a competitive relationship between subject imports and the domestic like product, MOFCOM failed to engage in an objective examination.

4. China's Reliance on Alleged Pricing Policies is Misplaced

16. The United States showed in its first submission that the four verification documents relied upon by MOFCOM were not probative of price competition between the subject imports and the domestic like product. China fails to rebut the U.S. argument. The United States noted at the outset that these verification documents pertain only to the first quarter of 2009, and thus shed little, if any, light on competitive conditions in 2008, the part of the period of investigation that MOFCOM now deems to have "more evidentiary value for determining injury and causal link." China fails to address this point. Further, China's assertion that the United States "concedes . . . that purchasers were using *offers for subject merchandise* to negotiate for lower domestic prices" is incorrect. Moreover, the original panel and the Appellate Body both recognized that the probative value of the "pricing policy" documents was undermined by the pricing dynamic in the first quarter of 2009, when the price of the domestic like product fell by 30.25 percent, while that of the subject imports declined by only 1.25 percent.

5. Evidence of a Partial Customer Overlap Does Not Support a Finding of a Competitive Relationship Based on Price

17. The United States showed in its first submission that a partial overlap of customers does not provide any support for MOFCOM's conclusion that subject imports compete with the domestically produced product on the basis of price. China's response to this is first to accuse the United States of engaging in "speculation." This is nothing more than a disingenuous attempt to divert attention from the gap in MOFCOM's reasoning. China then conflates the customer overlap issue with MOFCOM's consideration of a different issue – namely the question of whether there were certain specialty products that the Chinese industry did not produce. Neither the partial overlap of customers nor MOFCOM's findings that the Chinese GOES industry produces certain specialty products supports MOFCOM's conclusion that subject imports are competitive with the domestic like product.

6. Conclusion

18. 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. MOFCOM has not shown that "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." When confronted with the flaws and insufficiencies in each component of MOFCOM's analysis discussed above, China often 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, or that MOFCOM "holistically" reviewed all of the evidence. If the constituent parts of MOFCOM's analysis are unsupported by positive evidence, not based on an objective examination, or otherwise inconsistent with the WTO agreements, these appeals to the "big picture" cannot save MOFCOM's analysis. Accordingly, China has acted inconsistently with Articles 3.1 and 3.2 of the AD Agreement and Articles 15.1 and 15.2 of the SCM Agreement.

C. MOFCOM's Finding that Price Depression in the First Quarter of 2009 Was an Effect of Subject Imports Is Inconsistent with the Obligation to Base Findings on Positive Evidence and an Objective Examination

1. China's Effort to Link Price Depression in the First Quarter of 2009 to Market Share Shifts in 2008 Falls Short

19. Although China contends that MOFCOM has "significantly expanded and clarified its reasoning" of price depression in the Re-determination, this is not so. According to China, the increasing volume and market share of subject imports in 2008 constitute "evidence," and MOFCOM's conclusion that the domestic industry slashed its prices by 30.25 percent in response constitutes the requisite "analysis." However, the fact that there is no evidence that the 30.25 percent drop in the domestic industry's prices in the first quarter of 2009 was in any way related to the gain in the subject imports' market share in 2008 undermines MOFCOM's theory. MOFCOM has essentially concocted a reason to link two events with no apparent cause-effect relationship. This does not constitute "analysis." The United States explained in its first submission that 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. China has failed to address this issue.

20. Moreover, the Appellate Body made clear that "Articles 3.2 and 15.2 contemplate an inquiry into the relationship between subject imports and domestic prices" and that "an investigating authority is required to examine domestic prices in conjunction with subject imports in order to understand whether subject imports have explanatory force for the occurrence of significant depression or suppression of domestic prices." Notwithstanding MOFCOM's claim that it engaged in a "comprehensive" analysis, MOFCOM's consideration of the price depression issue is as unsupported as it was in the original injury determination.

2. MOFCOM's Finding That Alleged Pricing Policies Caused Price Depression in Interim 2009 Has No Foundation

21. China's assertion that "the pricing policy documents show the ways in which purchasers were using *subject import prices* to drive down domestic prices" is incorrect. The Appellate Body was clear that, in light of the pricing dynamic in the first quarter of 2009 – where the price of subject imports declined by 1.25 percent, while the price of domestic products plunged by 30.25 percent, and subject imports oversold the domestic product – there was no basis to conclude that a policy of price undercutting could explain depressive or suppressive effects on domestic prices.

22. China's contends that Panel and Appellate Body criticism of MOFCOM's reliance on pricing policy documents no longer apply because these criticisms allegedly focused on MOFCOM's old explanation involving "low price." China misreads the Appellate Body report. The Appellate Body's analysis was not based on MOFCOM's "low price" findings in the original determination. In short, the Appellate Body's analysis is as relevant to the Re-determination as it was to MOFCOM's original injury determination.

III. CHINA CANNOT DEFEND MOFCOM'S REVISED IMPACT ANALYSIS

A. The United States Properly Challenges Revised Aspects of MOFCOM's Impact Analysis

23. China asserts that the United States improperly brings a new claim before this Panel. Specifically, China attempts to challenge on procedural grounds the U.S. demonstration that MOFCOM's Re-determination breaches Articles 3.1 and 3.4 of the AD Agreement, and Articles 15.1 and 15.4 of the SCM Agreement. China, for instance, asserts that "the introduction of a new claim at this stage of proceedings is contrary to basic principles of fairness and due process." China is incorrect. This claim, like other U.S. claims, is appropriate because the claim challenges aspects of China's compliance measures that are inconsistent with the covered agreements. Thus, China's arguments relating to claims that may be alleged under Article 21.5 of the DSU are misguided.

24. The United States raises a claim to address an aspect of China's compliance measure that is inconsistent with the covered agreements. MOFCOM's revised injury determination contains several changes. In light of these changes, the utility of the compliance proceedings would be "seriously undermined" if the Panel were unable to evaluate whether China's Re-determination on this aspect is consistent with the covered agreements.

B. China's Arguments Regarding the Impact of the Subject Imports on the Domestic Industry Fail

25. The United States showed in its first written submission that MOFCOM's examination of the factors enumerated in Articles 3.4 of the AD Agreement and 15.4 of the SCM Agreement for 2008 is highly distorted and selective.

26. Contrary to China's argument, the United States is not arguing that it is not reasonable, or that it is distortive, for an authority to focus on the latter portion of its period of investigation when assessing injury. The United States *is* arguing that – when focusing on a recent period, or any period, for that matter – data must be viewed in their proper context. MOFCOM "focused on the trends in growth rates," or on the velocity of growth, without considering the trends in their proper context.

27. The "examination" contemplated by Articles 3.4 of the AD Agreement and 15.4 of the SCM Agreement must be based on a "thorough evaluation of the state of the industry" and it must "contain a persuasive explanation as to how the evaluation of relevant factors led to the determination of injury." Additionally, an authority's factual findings under Articles 3.4 and 15.4 must comply with the "objective examination" and "positive evidence" requirements set out in Articles 3.1 of the AD Agreement and 15.1 of the SCM Agreement. MOFCOM's conclusion that the domestic industry experienced material injury in 2008 is not based on a thorough evaluation of the state of the industry in that year, is not based on a persuasive explanation, and is neither objective nor based on positive evidence.

IV. CHINA CANNOT DEFEND MOFCOM'S REVISED CAUSATION ANALYSIS

A. MOFCOM's Causation Analysis Fails Because of its Reliance on its Defective Price Effects Findings

28. MOFCOM's price effects analysis represented an important element of its overall injury determination, notwithstanding China's suggestion that it was merely "collateral." Because MOFCOM failed to establish that subject imports had any significant price effects on the domestically produced product, a necessary element of MOFCOM's causal link analysis is compromised. Accordingly, due to its failure to demonstrate significant price effects, China has failed to demonstrate that dumped or subsidized imports are causing injury, as required by the covered agreements.

B. MOFCOM's Assertion That the Domestic Industry Was Prevented by Subject Imports from Realizing the Benefits of Economies of Scale Does Not Rest on an Objective Examination Based on Positive Evidence

29. In the Re-determination, MOFCOM made a number of conclusory assertions to the effect that the increased output and capacity of the domestic industry did not produce the corresponding economies of scale. MOFCOM's assertions were not supported by any factual analysis. MOFCOM's findings about economies of scale are nothing more than conclusory assertions, unsupported by any factual analysis. MOFCOM's findings that the domestic industry was

injured because it was prevented by subject imports from realizing the benefits of economies of scale does not rest on an objective examination based on positive evidence.

C. MOFCOM's Non-Attribution Analysis With Respect to Injury Caused by the Domestic Industry's Overexpansion and Overproduction Continues to be Seriously Flawed

30. The United States showed in its first written submission that MOFCOM's non-attribution analysis with respect to the injury caused by the domestic industry's overexpansion and overproduction was marred by errors and unsupported, conclusory statements. Rather than addressing the flaws in MOFCOM's analysis, China, for the most part, asserts that, because the covered agreements do not specify any particular methodology, MOFCOM was free to address this issue in any manner. China's argument misses the point. The covered agreements provide that an authority's analysis must be based on positive evidence and an objective analysis. MOFCOM's analysis did not meet these fundamental standards. Thus, MOFCOM's redetermination is inconsistent with Articles 3.1 and 3.5 of the AD Agreement, and Articles 15.1 and 15.5 of the SCM Agreement by having failed to conduct an objective non-attribution analysis to ensure that it was not attributing to subject imports injury caused by the Chinese GOES industry's over-expansion and over-production.

D. MOFCOM's Non-Attribution Analysis With Respect to Injury Caused by Nonsubject Imports Is Inadequate

31. MOFCOM's non-attribution analysis makes no commercial sense. MOFCOM failed to address the question of 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 in 2008, sold at lower AUVs than subject imports, could have had no injurious effects. MOFCOM also failed to explain how the smaller quantity of subject imports in the first quarter of 2009 could have had injurious effects on the domestic industry, while the much greater quantity of nonsubject imports in that period allegedly had no injurious effects. Additionally, China's argument for using market share data conflates shifts in market share with absolute market share data. Had MOFCOM examined the relative market shares of subject and nonsubject imports, it would have been apparent that nonsubject imports were a much more significant factor in the market than subject imports in 2008 and the first quarter of 2009. Because of these flaws in MOFCOM's non-attribution analysis with respect to nonsubject imports, MOFCOM failed to comply with Articles 3.1 and 3.5 of the AD Agreement, and Articles 15.1 and 15.5 of the SCM Agreement.

V. CHINA BREACHED ARTICLE 6.9 OF THE AD AGREEMENT AND ARTICLE 12.8 OF THE SCM AGREEMENT THROUGH MOFCOM'S FAILURE TO DISCLOSE THE ESSENTIAL FACTS

32. As demonstrated in the U.S. first written submission, MOFCOM acted inconsistently with Article 6.9 of the AD Agreement and Article 12.8 of the SCM Agreement by failing to disclose the "essential facts" forming the basis of MOFCOM's decision to apply definitive measures. The provisions dictate the timing of the disclosure, as such disclosure must take place

"before a final determination is made." In addition, what constitutes "essential facts" are those facts that relate to the elements an authority is required to examine in the context of an injury analysis, which are set out in Articles 3.1, 3.2, 3.4, and 3.5 of the AD Agreement and Articles 15.1, 15.2, 15.4, and 15.5 of the SCM Agreement.

A. China Cannot Defend MOFCOM's Failure to Disclose the Essential Facts Underlying its Injury Re-determination

33. The United States identified categories of essential facts that must have been taken into account by MOFCOM in its price effects and causation determinations. As the United States has explained, for each category of essential facts, China's disclosure was non-existent. As a result, China breached Article 6.9 of the AD Agreement and Article 12.8 of the SCM Agreement.

MOFCOM's assertion that the trends of the prices of the subject imports and the domestic like product were the same.

34. In its response, China cannot point to anywhere in the record where MOFCOM discloses the data underlying MOFCOM's assertion that the price trends of the subject imports and the domestic like product were the same. In short, though there may be some complications presented where essential facts are based in part on confidential information, the authority is not excused from its obligation to disclose to interested parties the essential facts which formed the basis of the decision to apply definitive measures.

MOFCOM's assertion that the domestic industry was prevented by subject imports from realizing economies of scale.

35. Again, China cannot point to anywhere in the record where MOFCOM discloses the data underlying MOFCOM's assertion that the domestic industry was prevented by subject imports from realizing economies of scale.

"Sales obstacles" that allegedly prevented the domestic industry from making more sales in 2008 and the first quarter of 2009.

36. China cites a series of general statements in the preliminary disclosure that do nothing to reveal the essential facts supporting the existence of these alleged sales obstacles.

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.

37. MOFCOM fails to support its assertion 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.

MOFCOM's assertion that the price-cost differential for Wuhan decreased in 2008.

38. China points to a decline in gross profit, but it does not cite any essential facts to support its conclusion that Wuhan's price-cost differential decreased in 2008.

MOFCOM's finding that the capacity and output of the domestic GOES industry did not exceed market demand.

39. Unsupported with a citation to the record, China asserts that "it was clear that the growth in domestic capacity in 2008 was actually less than the growth in overall in overall demand." It is unclear as to what data China is referring, particularly since the available data actually show capacity and output outstripping demand.

MOFCOM's division of responsibility for the inventory overhang

40. China claims that "MOFCOM's preliminary disclosure document included extensive discussion on the cause of the domestic industry's inventory overhand." China, however, omits the fact that nowhere in the preliminary disclosure document does MOFCOM provide the data supporting its division of responsibility for the inventory overhang.

VI. CHINA BREACHED ARTICLES 12.2 AND 12.2.2 OF THE AD AGREEMENT AND ARTICLES 22.3 AND 22.5 OF THE SCM AGREEMENT

41. As demonstrated in the U.S. first written submission, MOFCOM 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 by failing to explain in sufficient detail the matters of fact that MOFCOM took into consideration in its injury Re-determination. 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. In its response, China makes a series of statements that are unsupported by the record. The Re-determination does not support China's explanations. MOFCOM did not explain its findings in sufficient detail and, consequently, China has not satisfied the requirements of the covered agreements.

VII. CONCLUSION

42. For the reasons set forth in this submission and its first written submission, the United States respectfully requests the Panel to find that China's measures fail to comply with the recommendations and rulings of the DSB; and are inconsistent with China's obligations under the AD Agreement and SCM Agreement.