China – Countervailing and Anti-Dumping Duties on
Grain Oriented Flat-rolled Electrical Steel from the United States

(DS414)

Response of the United States to Questions from the Panel to the Parties Following the First Substantive Meeting of the Panel

October 3, 2011

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(a) Initiation of the countervailing duty investigation

(i) To both parties

1. Could the parties outline what type of evidence of (a) financial contribution; (b) benefit; and (c) specificity they would expect an applicant to submit in a petition for initiation under Article 11.2 of the Agreement on Subsidies and Countervailing Measures ("SCM Agreement").

1. Article 11.2 of the SCM Agreement provides that an application must include "sufficient evidence" of each of these elements in order for an investigating authority to initiate an investigation of an alleged subsidy. This means that with respect to financial contribution, an application must contain sufficient evidence of one or more of the types of financial contributions enumerated in Article 1.1(a) of the SCM Agreement. The type of evidence that may be sufficient depends on the particular facts of a given case. The evidence can be from official government sources, such as laws or regulations, or from third-party sources, such as industry information or news publications. For example, a copy of the legislation or other documentation showing that a government or public body has set up a grant or loan program, or provided for tax breaks, may be sufficient. In other cases, such as cases involving the provision of goods or services or government equity infusions, the evidence might be different. It is difficult to speculate on all the types of evidence of a financial contribution that may be presented in any given application, but the question always is whether the evidence is sufficient to indicate the existence of a financial contribution.

2. If the application does not contain sufficient evidence of one or more of the types of financial contributions enumerated in SCM Article 1.1(a), then an investigating authority cannot initiate an investigation. For example, the application at issue did not contain sufficient evidence of a financial contribution with respect to the Indiana Steel Advisory Service because there was no evidence of any of the financial contributions enumerated in Article 1.1(a). The sole information in the petition consisted of this statement: "State of Indiana forms Steel Advisory Commission to examine state and federal laws affecting the steel industry and to consider industry problems such as foreign competition and economic decline."[1] Evidence of forming a

[1] Exhibit US-31, pg. 3.

commission to consider problems is not evidence of one of the enumerated types of financial contributions, and therefore was insufficient.

3. Regarding benefit, the application must contain sufficient evidence that there was a benefit conferred within the meaning of Article 1.1(b) of the SCM Agreement. The type of evidence provided may depend upon the type of subsidy being alleged. For some subsidies, such as grants, evidence of a benefit conferred may be relatively straight-forward, because a grant is a direct transfer of funds that is not available from market sources. For others, an applicant might provide evidence that there was a benefit using a market benchmark, consistent with the guidelines in Article 14. While it may not always be possible for an applicant to provide evidence of the precise amount of the benefit or information on all actual recipients of a particular program, the evidence must indicate the existence of a benefit within the meaning of the SCM Agreement.

4. For example, with respect to the Economic Recovery Tax Act of 1981, the evidence showed that this program was in effect for only two years.[2] As the alleged subsidy program expired roughly 25 years before the period of investigation, there was no evidence indicating that respondents could have received a countervailable benefit during the period of investigation.

5. Regarding specificity, an applicant must provide sufficient evidence to indicate that the subsidy is specific to an enterprise or industry or group of enterprises or industries under the provisions of Article 2 or constitutes a prohibited subsidy under Article 3. For example, the applicant could submit sufficient evidence that the granting authority explicitly limited access to a subsidy to an enterprise or industry or groups of enterprises or industries. This could be accomplished through provision of the legislation or other documentation. The applicant could also submit sufficient evidence to indicate that access to the subsidy is limited in fact to an enterprise or industry, or groups of enterprises or industries. The evidence could, for example, be sourced from company or industry information. We discuss specificity in fact in more detail in our response to Panel Question 5.

6. It is not necessary that the applicant definitively establish the presence of each of these three elements through evidence provided with the petition. However, there must be at least some evidence of each of these elements. It is not sufficient, as China suggests, to rely on "the broader context provided by the application" in place of evidence for one or more of these elements.[3]

2. Could the parties elaborate on their views of the standard for "sufficient evidence" under Articles 11.2 and 11.3 of the SCM Agreement.

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2 Exhibit CHN-4, pg. 133, Exhibit US-30, pg. 133.

3 China First Written Submission, para. 36.

7. To meet the standard for "sufficient evidence" under Article 11.2, an application must contain a "degree of actual evidence."[4] Statements of conclusions unsubstantiated by facts cannot satisfy Article 11.2.[5]

8. Regarding Article 11.3, as the panel stated in *Mexico – Steel Pipes and Tubes*, "the accuracy and adequacy of the evidence is relevant to the investigating authority's determination whether there is sufficient evidence to justify the initiation of an investigation."[6] When reviewing what constitutes "sufficient evidence" for purposes of Article 11.3, a panel should "determine whether an unbiased and objective investigating authority would have found that the application contained sufficient information to justify the initiation of the investigation."[7]

9. Further, an investigating authority must determine whether there is "sufficient evidence" to initiate an investigation at the time of initiation. Article 11.3 does not authorize investigating authorities to engage in fishing expeditions after initiating an investigation to bolster a deficient application.[8]

(ii) To the United States

3. Does the United States have any additional comments on China's position that an applicant need not provide any reasoning or analysis of evidence it submits in an application for initiation of a countervailing duty investigation under Article 11.2 of the SCM Agreement?

10. China's reliance on panel reports interpreting Article 5.2 of the AD Agreement in support of that position is also misplaced. It is important to note the textual differences between Article 5.2 of the AD Agreement and Article 11.2 of the SCM Agreement. Article 11.2 of the SCM Agreement refers to an application including "sufficient evidence" of the existence of a subsidy, whereas Article 5.2 of the AD Agreement only refers to "evidence" of the existence of dumping.

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4 *Mexico – Steel Pipes and Tubes*, para. 7.24.

5 *Guatemala – Cement II*, para. 8.53.; *see also U.S. – Softwood Lumber V (Panel)*, para. 7.78. ("Statements and assertions, unsubstantiated by any evidence do not constitute sufficient evidence" for purposes of Article 11.3).

6 *Mexico – Steel Pipes and Tubes*, para. 7.79.

7 *U.S. – Softwood Lumber V (Panel)*, para. 7.78.

8 Korea Third Party Oral Statement, para. 7 ("initiation of a CVD investigation is not supposed to be an automatic rubber-stamp process once a petition is filed by a domestic industry."); *see also* Saudi Arabia Third Party Oral Statement, para. 6 ("The time to verify the accuracy and adequacy of the complaint is prior to initiation. Verification after initiation falls far short of the duty entrusted to investigating authorities to identify and reject inadequate claims.").

Likewise, Article 11.2(iii) refers to "evidence," whereas Article 5.2(iii) only refers to "information." Thus, China's reliance on panel reports interpreting the AD agreement for its propositions that all that is needed is "the inclusion of raw information,"[9] and that information need not be linked with allegations,[10] is misplaced in the context of the SCM Agreement. The text of the SCM Agreement makes clear that what is required is *sufficient evidence*.

11. As Honduras has noted, "The term 'evidence' is defined as an instrument intended to ascertain the truth or falsity of a matter, or an indication, sign or testimony that is given in relation to something."[11] While the United States is not suggesting that an applicant must engage in an in-depth analysis of the available information, an applicant nevertheless must set forth "sufficient evidence" qualifying as "an instrument intended to ascertain the truth or falsity of a matter, or an indication, sign or testimony that is given in relation to something." It is insufficient for an applicant to merely throw allegations and paper against the wall to see what, if anything, sticks.

4. Is it the United States' position, as asserted in China's first written submission, para. 13, that if there is insufficient evidence under Article 11.2 of the SCM Agreement in relation to one of the measures included in the application for initiation of the countervailing duty investigation, then the entire application is inconsistent with Article 11.2?

12. No. A defect regarding one subsidy program does not necessarily render the entire application insufficient. Rather, if the Panel concludes that the petitioners failed to adequately allege a particular subsidy with respect to all or any of the 11 subsidy programs described in the U.S. first written submission, the United States requests the Panel to find that China breached its obligations by initiating an investigation of such subsidy programs.

5. How does the United States respond to China's position that the additional petition included adequate evidence of specificity with respect to the 2003 Economic Stimulus Plan of Pennsylvania because one part of the programme was "focused on…'resources that allow our traditional industries, especially manufacturing, to access new technology to enhance their productivity'"? (China's first written submission, para. 54).

13. The petition did not contain adequate evidence of specificity regarding the 2003 Economic Stimulus Plan of Pennsylvania. It appears that the applicant made an allegation of

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9 China First Written Submission, para. 22.

10 China First Written Submission, paras. 26-27.

11 Honduras Third Party Oral Statement (courtesy translation), para. 6.

specificity in fact, within the meaning of Article 2.1(c) of the SCM Agreement, with regard to the 2003 Economic Stimulus Plan of Pennsylvania.[12] However, a single reference to "traditional industries, especially manufacturing," is not sufficient evidence of specificity in fact. Noting that there are steel production facilities in Pennsylvania does not constitute evidence that steel is a "favored" industry in Pennsylvania, nor that the steel industry was a focus of this stimulus plan.

14. Further, "[r]esources that allow our traditional industries, especially manufacturing, to access new technology to enhance their productivity" was only one focus of the 2003 Economic Stimulus Plan of Pennsylvania. The applicant's own evidence revealed that there were *six other focal points* of the plan. These included economic and community development projects; investments in rural, urban, and suburban sites; capital resources for small cities and communities; real estate and business development; and high-growth firms.[13]

15. Thus, there was not even sufficient evidence that the 2003 Economic Stimulus Plan of Pennsylvania focused solely on "resources that allow our traditional industries, especially manufacturing, to access new technology to enhance their productivity." The evidence demonstrated that the plan sought to serve a wide variety of economic sectors, industries, and firms. This is not sufficient evidence that the subsidy was used by a limited number of "certain enterprises" (as that term is defined in Article 2 of the SCM Agreement), was predominantly used by certain enterprises, was granted in disproportionately large amounts to certain enterprises, or that there was something in the manner in which discretion was exercised in granting the subsidy that indicated specificity in fact. In sum, China's reference to "traditional industries, especially manufacturing" is a distraction because, as was indicated by the evidence submitted by the applicant, such industries were not even the focal point of the plan.

16. China's suggestion that "evidence from the initial petition concerning pervasive government support to the steel industry"[14] is an adequate basis to meet the standard required by Article 11.2 is an attempt to substitute cobbled-together pieces of general information and assertion for genuine "sufficient evidence" of specificity in fact. First, the initial petition does not contain any information, or even argue, that, for example, the 2003 Economic Stimulus Plan was predominantly used by certain enterprises or industries (or groups thereof) or that certain enterprises or industries (or groups thereof) received disproportionately large amounts of any alleged subsidy under this plan. Moreover, adopting China's logic would allow an applicant to point to any general policy pronouncements, regardless of when they were made and how divorced they are from the separately alleged subsidies, as evidence of whether an alleged subsidy is specific. Reliance on such general information, disconnected from the alleged

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12 Exhibit CHN-5, pp. 27-28.

13 Exhibit CHN-8.

14 China First Written Submission, para. 55.

subsidies, cannot be a substitute for the requirement that an applicant provide sufficient evidence regarding each of the elements of an alleged subsidy.

17. Notably, the United States highlighted the inadequacies of this subsidy allegation to MOFCOM on August 17, 2009.[15] Nonetheless, MOFCOM initiated an investigation on this program shortly thereafter.[16] Under Article 11.3, no objective or unbiased investigating authority would have initiated an investigation based on the pure speculation contained in the application.

6. In what States do AK Steel and ATI produce grain oriented electrical steel ("GOES")?

18. AK Steel and ATI produce grain oriented electrical steel in Pennsylvania and Ohio.[17]

(b) Non-confidential summaries

(i) To both parties

8. In order to satisfy the obligations in Articles 12.4.1 of the SCM Agreement and 6.5.1 of the Agreement on Implementation of Article VI of GATT 1994 ("Anti-Dumping Agreement"), is it only the party that provides the confidential information that can furnish the non-confidential summary or is an investigating authority able to prepare the non-confidential summary?

19. Article 12.4.1 of the SCM Agreement obliges an investigating authority to "require" an "interested Member" or "interested party" to "furnish" adequate non-confidential summaries. Similarly, Article 6.5.1 of the AD Agreement also obliges an investigating authority to "require" an "interested party" to "furnish" adequate non-confidential summaries.[18] This suggests that the

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15 Exhibit US-29, pg. 7.

16 U.S. First Written Submission, para. 80.

17 Exhibit US-11 at 12 (identifying Butler Works in Pennsylvania and Zanesville Works in Ohio as the only AK Steel locations involved in the production of GOES); US-13 at 2-3 (explaining that AK Steel does not produce subject merchandise in Kentucky or Indiana); US-35 (excerpts from AK Steel's website describing the products produced at each of its facilities; US-36 (excerpts from ATI Allegheny Ludlum's website describing the products produced at each of its facilities).

18 *EC – Fasteners (AB)*, para. 549 ("Article 6.5.1 imposes an obligation on investigating authorities to ensure that parties to an investigation provide non-confidential summaries in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence."); *see also* EU Third Party Oral Statement, para. 10.

entity providing the information, not the investigating authority, must prepare the non-confidential summary. This is also logical from a practical standpoint, given that the party submitting the information is likely best placed to summarize it in a manner that ensures that confidential treatment of sensitive information is maintained.

9. Do the parties consider that a non-confidential summary must be labelled or identified as such, so that a reader can link the non-confidential summary with the information that has been redacted?

20. A non-confidential summary must "be in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence." Depending on the circumstances, if a non-confidential summary is not labeled or identified as such, so that a reader can link the non-confidential summary with the information that has been redacted, this fact could support the conclusion that the summary as presented does not meet the standard contained in Article 12.4.1 of the SCM Agreement.

21. In this case, the non-confidential summaries provided were labeled as such, but were entirely inadequate.[19] The petition itself demonstrates that the petitioner intended the purported non-confidential summaries contained in Part II of the petition to be linked with the information redacted. Page 2 of the petition states that "a non-confidential summary of the confidential information was provided along with this petition."[20] Part I of the petition directs the interested reader to consult Part II of the petition for the purported non-confidential summaries explaining the confidential content that has been redacted.[21] Part II, entitled "non-confidential summary," contains these purported non-confidential summaries.[22]

22. Even if one were to accept China's suggestion that general statements scattered throughout the petition, or what it characterizes as the "main point" of the petitioner, may be relied upon as sufficiently summarizing the confidential information,[23] the absence of a label or other identification linking these purported non-confidential summaries with the information provided would be a factor that undermines their sufficiency. In this case, it was not practicable for interested parties to piece together information from the record, no matter how remote or disconnected from the redacted information. China would require respondents to engage in

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19 Argentina Third Party Oral Statement, para. 7.

20 Exhibit US-2.

21 *See e.g.*, Exhibit US-2, pg. 4.

22 Exhibit US-2, pg. 79.

23 China First Written Submission, paras. 99-100.

guesswork to surmise an understanding of the substance of the confidential information. As noted in paragraph 5 of the U.S. closing statement, this is a highly speculative exercise.

(iii) To the United States

12. At paras. 93-128 of its first written submission, China identifies eight "items" of confidential information, for which it argues adequate non-confidential summaries were furnished. Aside from these eight categories, is there any other category of confidential information excluded from the petition to which the United States' claim under Article 12.4.1 of the SCM Agreement and Article 6.5.1 extends?

23. Paragraph 83 of the U.S. first written submission details the categories of confidential information, and presents the purported non-confidential summaries as they appeared in the section of the petition entitled "non-confidential summary." The eight "items" China references do not include the category of confidential information identified in the U.S. submission and entitled "Statistics and information about dumping by the United States." Regarding this category, China does not appear to contest the U.S. claim that China did not require an adequate non-confidential summary, thus breaching Article 12.4.1 of the SCM Agreement and 6.5.1 of the AD Agreement.

(c) Use of "facts available" to calculate the "all others" dumping and subsidy rates for unknown exporters

(i) To the United States

13. Are there any other producers of GOES in the United States, apart from AK Steel and ATI Allegheny Ludlum Corporation to which the "all others" dumping and subsidy rates could apply?

24. The United States is not aware of any U.S. producers/exporters exporting GOES to China during the period of investigation, other than AK Steel and ATI Allegheny Ludlum (though China would be in the best position to confirm whether this is in fact the case).[24] Nevertheless, the "all others" dumping rate of 64.8 percent and "all others" subsidy rate of 44.6 percent would apply to any new U.S. shipper of GOES to China.

[24] Exhibit US-34 (listing AK Steel and ATI Allegheny Ludlum are the only U.S. companies identified as producers of GOES).

(d) Use of "facts available" to calculate the subsidy rates in relation to the United States government procurement programmes

(i) To both parties

16. Does an investigating authority have unlimited discretion in determining what constitutes "necessary information" under Article 12.7 of the SCM Agreement?

25. Interpreting the identical language, the Panel in *Egypt – Rebar* indicated that the discretion to identify "necessary information" in the sense of Article 6.8 of the AD Agreement resided with the investigating authority "in the first instance."[25] However, it cannot be the case that anything and everything an investigating authority asks for is actually "necessary" just by virtue of being requested.

26. The language in Article 12.7 does not support an argument that the test is purely subjective. The text that was agreed is not "does not provide information that the authorities consider necessary." Rather, a panel may review whether investigating authority reasonably concluded that the information was necessary in the context of that particular investigation.

(iii) To the United States

23. At what point did the United States exporters become aware of the "theory of subsidization" underlying MOFCOM's request for information?

27. The United States is not able to speak for the two company respondents, but is able to provide the Panel with a summary of events showing the metamorphosis over time of the "theory of subsidization" for the alleged government procurement programs. A chronology of events providing additional detail is attached at Exhibit US-37.

28. The procurement allegations MOFCOM was investigating involved (a) research and development funds and (b) construction contracts for general infrastructure.[26] In the original questionnaire, MOFCOM asked for extensive data related to bids prepared by the respondent companies, the prices charged for the same goods that were the subject of these bids when sold to private parties, and quantity and value data for sales. Except for quantity and value data, MOFCOM's request was not limited to the POI.[27]

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25 *Egypt – Rebar,* para. 7.155.

26 Exhibit CHN-2, pp. 56, 79, 82; Exhibit US-11, pp. 19-20.

27 China First Written Submission, para. 147.

29. The U.S. producers informed MOFCOM in their responses filed August 10, 2009 that they did not bid on relevant government projects and had not supplied the subject merchandise to any government entity during the relevant period. Therefore, they had nothing to report regarding these allegations.[28]

30. MOFCOM deemed these responses incomplete and inaccurate, and on August 26, 2009 demanded that the respondents prove non-use of the alleged programs by providing detailed sales information for all products and all customers over the POI and the preceding 14 years in a revised submission.[29] At this point, MOFCOM may have hinted at a theory of subsidization.

31. The two U.S. respondent companies timely filed on September 9, 2009 revised versions of their questionnaire responses. For its part, AK Steel repeated that it had not participated in any government procurement, and provided as support for its statements a list of all customers for all products during the POI, demonstrating the absence of government purchases.[30] MOFCOM also asked about government procurement by the State of Pennsylvania in its "new" subsidy questionnaire. AK Steel timely filed its response to this questionnaire on September 21, 2009, stating again that it had not participated in any government procurement program and referring MOFCOM to the evidence offered in its September 9 revised original questionnaire response.[31]

32. MOFCOM issued numerous supplemental questionnaires to AK Steel during September, October, and November but did not ask any additional questions about government procurement.[32] After more than three months with no questions relating to the alleged procurement programs, MOFCOM issued its Preliminary Determination on December 10, 2009. MOFCOM indicated that the respondents had failed to cooperate in the investigation of the alleged procurement programs and based its decision for these programs on what it termed "facts available," finding that both companies sold all of their output to the government at a premium, including sales of non-subject merchandise to private companies making goods such as automobiles and cigarette lighters.[33]

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28 Exhibit US-11, pg. 22, Exhibit CHN-18, pg. 12.

29 Exhibit CHN-19, Exhibit CHN-20.

30 Exhibit US-14, pp. 25-26.

31 Exhibit US-8, pg. 17.

32 U.S. First Written Submission, para. 104.

33 Exhibit US-5, pg. 30.

33. MOFCOM extended the deadline for comments on its Preliminary Determination from December 25 (Christmas Day) to December 30, 2009. AK Steel timely filed comments including the detailed sales data for subject merchandise that it had previously submitted for the antidumping investigation.[34] MOFCOM refused to consider this information, however, and its findings regarding procurement remained unchanged in the Final Determination.

34. MOFCOM began verification of the antidumping and antisubsidy questionnaire responses of AK Steel on January 8, 2010, more than a week after the submission of the detailed sales data from the antidumping investigation filed in comments on the Preliminary Determination.[35]

(e) Article VI:2 of the GATT 1994

(i) To the United States

24. We refer to the United States' claim that the "all others" dumping rate calculated for unknown exporters was greater in amount than "could have permissibly been calculated in accordance with the provisions of the AD Agreement". Could the United States elaborate on the manner in which the margin for such unknown exporters could have permissibly been calculated?

35. As noted in the U.S. first written submission at paragraph 185, China impermissibly assigned an adverse facts available margin of 64.8 percent to all other unidentified and unexamined U.S. producers/exporters in this investigation. As a result of the adverse assumptions made in assigning that margin to those companies, the antidumping duty levied on their products was "greater in amount than the margin of dumping in respect of such products" which could permissibly have been calculated in accordance with the provisions of the AD Agreement.

36. In this investigation, the dumping rate for the unidentified, unknown exporters could have been calculated without resulting in margins "greater in amount than the margin of dumping in respect of such products" which could permissibly have been calculated in accordance with the provisions of the AD Agreement. MOFCOM had calculated actual dumping margins of 7.8 percent and 19.9 percent for the two U.S. companies that it individually investigated. An "all others" dumping rate based on one or both (whether as a simple average, weighted average or

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[34] Exhibit US-23.

[35] Exhibit US-24, Exhibit US-25.

otherwise[36]) of the dumping rates calculated for these companies could have been calculated and applied consistently with China's obligations under the WTO Agreements.

(g) Notice requirements under Articles 12.2.2 of the Anti-Dumping Agreement and 22.3 and 22.5 of the SCM Agreement

(i) To the United States

26. Does the United States' investigating authority disclose, in the public notice issued under Article 12.2.2 of the Anti-Dumping Agreement, the data and calculations used to establish the dumping margins?

37. While we are pleased to provide a brief summary of U.S. Department of Commerce ("Commerce") practice on this issue, the United States would nonetheless note that U.S. practice is not at issue in this dispute.

38. Commerce does not provide the data and calculations used to establish the dumping margins in the public notice issued under Article 12.2.2. Rather, the Department of Commerce makes the data and calculations available to the interested parties to the proceeding through a separate report, or memorandum, which may be issued to the parties or provided during a meeting, at the time of, or shortly after, issuance of the public notice. This memorandum generally is treated as business confidential, because the data and calculations use business confidential information. Generally, therefore, the data and calculations are released under "administrative protective order," which is the mechanism by which Commerce allows counsel for the interested parties to have access to all the business confidential information in a proceeding. Commerce provides the data and calculations at both the preliminary and final determination stage of a proceeding.

39. Certainly, not all investigating authorities need follow these exact same practices. However, at a minimum, an investigating authority is required to make available to the affected respondent party the data and calculations performed for the final determination. This is because the data and calculations are "relevant information on the matters of fact ... which have led to the imposition of final measures" within the meaning of Article 12.2.2. The data and calculations need not be provided in the public notice (which often may be impractical), but should be provided in a separate report to the affected respondent party.

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[36] The United States recognizes, however, that applying a weighted average of the two respondents' dumping rates as the all others dumping rate inadvertently could reveal the business confidential information of one of the two examined respondents. For example, if the basis for weight averaging the two rates was the sales volumes of the two respondents, then each respondent company, knowing its own sales volume, mathematically could calculate the other respondent's sales volume by using the all others weighted average.

27. What is the United States' response to China's argument at para. 222 of its first written submission that MOFCOM disclosed sufficient information to allow the United States exporters to replicate the authority's calculations?

40. MOFCOM did not disclose sufficient information to allow the U.S. exporters to replicate the authority's calculations. In paragraph 222 of its first written submission, China relies upon Exhibits CHN-25 and CHN-26 for the argument that the respondent exporters could replicate the calculations. These exhibits, of course, were not on the record of the underlying proceeding in the format now presented by China. The exhibits simply refer to the source documents and disclosures from the investigation.

41. Therefore, these exhibits portray a different picture than was before the U.S. exporters during the investigation, because they each combine into one document references to documents that were scattered throughout the investigation record. In any event, as discussed below, the source documents and disclosures referenced in these exhibits did not allow the exporters to replicate fully MOFCOM's calculations.

42. At most, these source documents and disclosures allowed the exporters to guess at or approximate the calculations. The disclosures only provided the starting prices or figures, MOFCOM's methodologies regarding adjustments, and the final figures. They did not provide the calculations performed by MOFCOM. China appears to be suggesting that because the respondent exporters could perform *their own* calculations, they were not prejudiced by MOFCOM's failure to provide the actual calculations that it performed.

43. Without access to the actual calculations performed, the exporters could not check MOFCOM's methodology and math for errors. As Japan pointed out in its third party oral statement, all calculations must be provided because even a tiny mistake could result in a serious distortion of the dumping margin.[37] As an example, Japan noted that "an authority might mistakenly treat the unit of measurement of data in pounds in the margin calculations, although the data actually were reported in kilograms."[38] Similarly, an investigating authority might mistakenly neglect to convert various expenses incurred in different markets to a common currency before deducting or adding those expenses in calculating normal value or export price. Such a mistake would not be apparent from the information provided by MOFCOM in this case. It is easy to envision other inadvertent errors, such as omitting a sale from the calculations, not deducting an expense that was intended to be deducted, or even simply misplacing a decimal point. Generally, without the actual calculations performed by the investigating authority, it is

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37 Japan Third Party Oral Statement, para. 3.

38 *Id.*

not possible to check the calculations against the methodological explanations given, to ensure that the authority has done what it explained it would do.

44. Clearly, the exporters in the present case did not believe they could fully replicate MOFCOM's calculations. As ATI explained to MOFCOM during the investigation, MOFCOM's failure to release its calculations denied ATI "the opportunity to review those calculations for mathematical errors and to provide meaningful comments on the methodology MOFCOM used to calculate dumping margins. . . ."[39]

28. We refer to para. 43 of the United States' oral statement, in which the United States claims that the "separate report" mentioned in Article 12.2.2 of the Anti-Dumping Agreement "need not be public". Could the United States elaborate on this argument with reference to footnote 23 of the Anti-Dumping Agreement.

45. The separate report mentioned in Article 12.2.2 need not be public if it contains business proprietary or confidential information. This is clear from the text of Article 12.2.2, which mandates "due regard being paid to the requirement for the protection of confidential information." The way to "make available through a separate report, all relevant information on the matters of fact ... which have led to the imposition of final measures," while paying "due regard" to "the requirement for the protection of confidential information" is to keep the separate report, or the information on matters of fact contained therein, confidential when necessary. In the context of this case, MOFCOM should have provided the final dumping calculations for AK Steel in a separate report to AK Steel, which could have been kept confidential, and done likewise for ATI.

46. Footnote 23 of the AD Agreement should be read in context with the requirement, just described, for the protection of confidential information. Footnote 23 indicates that an investigating authority should ensure that a "separate report" is readily available to the public, but this cannot outweigh the requirement for the protection of confidential information. Further, footnote 23 refers to situations in which authorities provide both "information" and "explanations" in a separate report, while the requirement in Article 12.2.2 is to provide relevant information on matters of fact – such as the dumping calculations – in a separate report.

29. If the Panel were to find that MOFCOM's use of "facts available" in calculating the "all others" subsidy and dumping rates for unknown exporters were inconsistent with Article 12.7 of the SCM Agreement or Article 6.8 and paragraph 1 of Annex II of the Anti-Dumping Agreement, would it be necessary for the Panel to proceed to examine whether, as a matter of procedure, adequate notice of this inconsistent decision were

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39 Exhibit US-32.

provided under Articles 22.3 of the SCM Agreement and 12.2.2 of the Anti-Dumping Agreement? Similarly, would it be necessary for the Panel to examine whether the "essential facts under consideration" were disclosed to the parties under Articles 6.9 of the Anti-Dumping Agreement and 12.8 of the SCM Agreement?

47. The U.S. claims with respect to Articles 22.3 of the SCM Agreement and 12.2.2 of the AD Agreement are independent claims of violation of the SCM and AD Agreements. The transparency obligations contained in these provisions are critical to the effective operation of the AD and SCM Agreements. Therefore, it would be appropriate for the Panel to proceed to examine these additional claims in the event that it were to agree with the U.S. claims regarding Article 12.7 of the SCM Agreement, or Article 6.8 and Annex II of the AD Agreement.

48. Likewise, the U.S. claims under Articles 12.8 of the SCM Agreement and 6.9 of the AD Agreement are independent claims of violation of the SCM and AD Agreements. These provisions also contain transparency obligations critical to the effective operation of the SCM and AD Agreement, and it would be appropriate for the Panel to proceed to examine them. The United States would also note that panel findings on these claims could play an important role in the implementation of any DSB recommendations and rulings and thus in helping to resolve the dispute by avoiding additional areas for dispute.

30. In relation to the United States' claim that MOFCOM did not provide adequate public notice of the rationale for the decision to apply "facts available" to calculate the "all others" subsidy rate, does the United States bring this claim only under Article 22.3 of the SCM Agreement, or Article 22.5 as well? The heading to section F of the United States' submission refers to both Articles 22.3 and 22.5, but the substance of the submission refers only to Article 22.3.

49. As noted in the U.S. first written submission at paragraph 68 and in the heading to section F, the United States brought this claim under both Article 22.3 and Article 22.5. The SCM Agreement requires that authorities provide more than cursory assertions to justify their decisions to impose definitive measures. Under Article 22.5 of the SCM Agreement:

> A public notice of conclusion or suspension of an investigation in the case of an affirmative determination providing for the imposition of a definitive duty or the acceptance of an undertaking shall contain, or otherwise make available through a separate report, all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures or the acceptance of an undertaking, due regard being paid to the requirement for the protection of confidential information. In particular, the notice or report shall contain the information described in paragraph 4, as well as the reasons for the acceptance or rejection of relevant arguments or claims made by interested Members and by the exporters and importers.

50. MOFCOM's final determination did not contain, or otherwise make available through a separate report, all relevant information on the matters of fact and law and reasons which led to the imposition of a 44.6 percent all others subsidy rate. We detailed in our first written submission MOFCOM's various failures at disclosing the essential facts which led to the all others rate, inconsistent with Article 12.8 of the SCM Agreement.[40] Likewise, MOFCOM's final determination was inadequate under Articles 22.3 and 22.5 of the SCM Agreement. With respect to the all others rate, the final determination consisted of a single sentence, which was virtually identical to the sentence in MOFCOM's disclosure: "For other U.S. companies who did not submit the questionnaire responses, the Investigating Authority made a determination on *Ad Valorem* subsidy rate according to the information submitted by the petitioner pursue to Article 21 of the *AD Regulation*."[41] MOFCOM failed to provide any rationale for its decision in the final determination to apply an all others rate apparently based upon the facts available. In particular, MOFCOM's final determination lacked information on:

- the facts that led MOFCOM to conclude that resorting to the use of the facts available was appropriate, including the actions by unknown, unidentified other companies that caused MOFCOM to conclude that the use of the facts available was justified;
- the facts and reasons that led MOFCOM to conclude that a 44.6 percent subsidy rate was an appropriate rate applicable to all other companies, especially in light of the fact that the subsidy rates for the two respondent companies were substantially lower;
- the facts underpinning the calculation of that 44.6 percent rate; and
- the details of the calculation itself.

51. China ignored its obligation to explain because MOFCOM did not provide any "relevant information on the matters of facts and law and reasons which led to" its decision in the final determination to apply facts available to all other U.S. producers/exporters of GOES.

52. MOFCOM's failure is particularly troublesome given that MOFCOM changed its calculation, and the basis for its calculation, of the "all others" subsidy rate from the Preliminary Determination to the Final Determination. In the Preliminary Determination, MOFCOM did not invoke facts available as the basis for the "all others" subsidy rate, and the preliminary rate was 12 percent. Upon changing its methodology in the Final Determination, MOFCOM made no attempt to provide the information on matters of fact and law and the reasons for its new approach.

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40 U.S. First Written Submission, paras. 142-153.

41 Exhibit US-28, pg. 49.

(h) Price effects analysis

(i) To both parties

31. Is a price undercutting analysis required under Articles 15.2 of the SCM Agreement and 3.2 of the Anti-Dumping Agreement? Please explain.

53. Article 3.1 of the AD Agreement states that "[a] determination of injury for purposes of Article VI of GATT 1994 shall be based on positive evidence and involve an objective examination of both (a) the volume of the dumped imports *and* the effect of the dumped imports on prices in the domestic market for like products, ..." (emphasis added). Article 15.1 of the SCM Agreement has the same language, except that it substitutes the term "subsidized imports" for "dumped imports." Consequently, Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement, by their express terms, require an authority to examine price effects when making an injury determination. These provisions also provide context for the more detailed requirements articulated in Articles 3.2 and 15.2 for the examination of price effects.[42]

54. Article 3.2 of the AD Agreement and Article 15.2 of the SCM Agreement do not specify how an authority is to frame its price effects findings. We do not disagree with the proposition that an authority can make a finding of significant price effects without finding significant underselling.

55. Article 3.2 of the AD Agreement states, however, that "the investigating authorities shall consider whether there has been a significant price undercutting by the dumped imports as compared with the price of a like product of the importing Member, or 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."[43] Based on this language, the Panel report in *EC – Salmon (Norway)*, stated that under Article 3.2 of the AD Agreement "the question of significant price undercutting must be considered."[44]

56. Other considerations similarly support the notion that examination of price undercutting – or at least the relative price levels of the domestically produced and imported merchandise – is essential to a complete analysis of price effects. The Agreements do not permit an authority to find merely that price depression or price suppression are occurring when imports are in the market. Instead, Articles 3.2 and 15.2 direct the authority to examine whether "the effect of such

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42 *Cf.* Vienna Convention on Interpretation of Treaties, Article 31(1).

43 Again, Article 15.2 of the SCM Agreement is worded identically, except that it substitutes the term "subsidized imports" for "dumped imports."

44 *EC – Salmon (Norway*), para. 7.638.

imports is otherwise to depress prices to a significant degree or prevent price increases, which otherwise would have occurred, to a significant degree." Examination of relative price levels of the domestically produced product and the imports under investigation is an important element in ascertaining whether the price depression or suppression is actually the effect of the imports, as opposed to some other factor.

57. Additionally, Article 3.4 of the AD Agreement and Article 15.4 of the SCM Agreement require an authority to examine all relevant economic factors, including "factors affecting domestic prices" in analyzing the impact of the imports under investigation. If the products are substitutes, the price of the imported articles under investigation may be a factor affecting domestic prices, depending in large measure on the respective price levels between the imported and domestically produced products and their relationship to one another. While the United States has not made a claim under Articles 3.4 and 15.4 in this dispute, we can see no basis for concluding that examination of relative price levels is required under the provisions of the AD and SCM Agreements concerning impact, but is not necessary under the provisions of the AD and SCM Agreements concerning price effects.

(ii) To the United States

32. If the Panel were to conclude that MOFCOM did not make a price undercutting finding, do the United States' concerns regarding the manner in which MOFCOM collected and examined its pricing information (see United States' first written submission, paras. 215-221) extend to MOFCOM's price suppression and price depression findings?

58. The concerns of the United States would remain for the same reasons expressed in our answer to Panel Question 31. Also, as explained below, examination of how MOFCOM collected and examined pricing information is critical in light of the manner in which it framed its price depression and price suppression findings.

59. While China argued in its first written submission and before the Panel that MOFCOM did not make a price undercutting finding, it did not dispute that comparisons between the prices for the imports under investigation and the domestically produced product played an important role in MOFCOM's price effects analysis. Indeed, in its opening statement at the first substantive meeting with the Panel, China emphasized that "[t]he large and increasing volume of subject imports suppressed domestic shipments, and this subject import volume (*which also happened to be at low prices*) prevented the domestic industry from taking advantage of its new capacity."[45]

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[45] China Opening Statement at the First Panel Meeting, para. 57 (emphasis added).

60. China's statement to the Panel understated the extent to which price comparisons were essential to MOFCOM's price depression and price suppression findings. In its price depression analysis, MOFCOM found that "a pricing policy aiming *at setting a price to a lower level than that of the domestic like product* was adopted when selling the product concerned in China market and that forced petitioner to lower the price of like products."[46] It also stated that "due to the impact of the large quantity of product concerned at a *low price*, the normal production and sales of the domestic industry in China was depressed and the sales price decreased."[47] Similarly, the purported "low price" strategy adopted by the importers under investigation was MOFCOM's stated reason for finding that the increasing ratio of costs to price during the latter portion of its period of investigation was the effect of the imports.[48] Thus, MOFCOM did not rely exclusively on import volume to explain the domestic industry's price declines or purported inability to recover increasing costs. Instead, it found that the "low prices" of the imports under investigation had the effect of depressing and suppressing prices of the domestically produced product.

61. Consequently, to comply with Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement MOFCOM needed to demonstrate that positive evidence supported the proposition that the imports actually were sold at "low prices." The same provisions of the AD and SCM Agreements further required MOFCOM to undertake any comparison between the "low prices" for the imports and the presumably higher prices for the domestically produced articles in an objective manner.

62. In its first written submission, the United States demonstrated that there is no positive evidence supporting any finding that the imports were priced below the levels of the domestically produced product.[49] In its first written submission, China did not challenge or even respond to this argument, other than incorrectly to contend that it is irrelevant. We continue to pursue these arguments in the context of our challenges to MOFCOM's findings of price depression and suppression.

63. Similarly, the U.S. first written submission demonstrates that any price comparisons that MOFCOM purported to conduct were not based on an objective examination.[50] China also did not challenge or respond to this argument. Because, in evaluating MOFCOM's conclusions on price depression and suppression, the Panel must consider whether MOFCOM's findings

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46 MOFCOM Final Determination, Exhibit CHN-16, sec. VI(III)(3) (emphasis added).

47 MOFCOM Final Determination, Exhibit CHN-16, sec. VI(IV)(1) (emphasis added).

48 MOFCOM Final Determination, Exhibit CHN-16, sec. VI(III)(3).

49 U.S. First Written Submission, paras. 211-214.

50 U.S. First Written Submission, paras. 215-221.

concerning "low" import prices are consistent with the AD and SCM Agreements, we continue to pursue our arguments that MOFCOM did not engage in an objective comparison of transaction prices.

TABLE OF EXHIBITS

US-34	Excerpt from *Iron & Steel Works of the World Directory 2010*
US-35	AK Steel: Facilities
US-36	ATI Allegheny Ludlum: Process and Plant Capabilities
US-37	Chronology of Events

TABLE OF CASES

Short Title	Full Case Title and Citation
EC – Fasteners (AB)	Appellate Body Report, *European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*, WT/DS397/AB/R, adopted 28 July 2011
EC – Salmon (Norway)	Panel Report, *European Communities – Anti-Dumping Measure on Farmed Salmon from Norway*, WT/DS337/R, adopted 15 January 2008, and Corr.1, DSR 2008:I, 3
Egypt – Rebar	Panel Report, *Egypt – Definitive Anti-Dumping Measures on Steel Rebar from Turkey*, WT/DS211/R, adopted 1 October 2002, DSR 2002:VII, 2667
Guatemala – Cement II	Panel Report, *Guatemala – Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico*, WT/DS156/R, adopted 17 November 2000, DSR 2000:XI, 5295
Mexico – Steel Pipes and Tubes	Panel Report, *Mexico – Anti-Dumping Duties on Steel Pipes and Tubes from Guatemala*, WT/DS331/R, adopted 24 July 2007, DSR 2007:IV, 1207
U.S. – Softwood Lumber V (Panel)	Panel Report, *United States – Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/R, adopted 31 August 2004, as modified by Appellate Body Report WT/DS264/AB/R, DSR 2004:V, 1937