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

**(DS414)**

# Executive Summary of the Opening Statement of the United States at the First Substantive Meeting of the Panel with the Parties

**September 22, 2011**

1. China's GOES investigation was conducted in a manner inconsistent with the AD and SCM Agreements. As a result, the ability of the United States and interested parties to understand the basis for China's determinations or to defend their interests was seriously impaired. Beyond the serious problems in how China conducted its investigation, the resulting determinations contain several fundamental flaws of reasoning that render them inconsistent with other obligations in the AD and SCM Agreements. This is particularly so with respect to China's injury determination, which is based on the most cursory of analysis and scant evidentiary support. In examining China's justifications for its measures in this case, it is useful to focus on what MOFCOM actually found as reflected in its determinations and disclosures, not on the *post-hoc* rationalizations contained in China's first written submission. As we discuss below, China's first written submission often ignores MOFCOM's actual findings or tries to rewrite them.

### A. The Initiation of the Countervailing Duty Investigation for Several Programs Breached Article 11 of the SCM Agreement

2. Several of the petitioners' subsidy allegations did not offer sufficient, or in some cases any, evidence of the existence, amount, and nature of the subsidy, but rather consisted of simple assertion, unsubstantiated by relevant evidence. With respect to these programs, MOFCOM failed to sufficiently review the accuracy and adequacy of the evidence in the application to determine whether there was sufficient evidence for the initiation of an investigation, and thus acted inconsistently with Article 11.3 of the SCM Agreement. In response to the U.S. claims, China has offered pure speculation and citations to irrelevant evidence, and has claimed repeatedly that generalized allegations of the existence of subsidies for steel cured the defects in the various allegations.

3. MOFCOM did not meet its obligation under Article 11.3 to review the accuracy and adequacy of the evidence in the petitioners' application for sufficiency. For example, it is not sufficient, as China suggests, for the "broader context" provided in an application to support a specific subsidy allegation that is deficient with respect to one of the three subsidy elements. Rather, the Article 11 standard is met when there is accurate and adequate evidence as to *each* of the three subsidy elements sufficient to justify initiation. With respect to each of the subsidy programs described in the U.S. first written submission, the evidence was insufficient to initiate.

4. The obligations in Article 11 exist for a reason: so that investigations, involving a significant potential burden to both companies and WTO Members, will not be initiated unless certain evidentiary requirements are met.[1] An improperly initiated investigation can cause burden regardless of the ultimate finding. China cannot dodge the requirements of Article 11 by suggesting that initiating an investigation of flawed subsidy allegations is harmless because it did not result in the imposition of countervailing duties. China's arguments should not obscure the fact that MOFCOM acted inconsistently with these requirements in initiating investigations of several subsidy allegations in this case.

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[1] *US – Carbon Steel (AB)*, para. 115.

### B. China Failed to Require Adequate Non-confidential Summaries of Confidential Information

5. China failed to meet the requirements of Article 12.4.1 of the SCM Agreement and Article 6.5.1 of the AD Agreement, as its investigating authority did not require adequate non-confidential summaries of confidential information contained in the petition, and there is no explanation on the record from the domestic interested parties as to why the information was not susceptible to summarization.

6. China contends that the section of the petition entitled "non-confidential summaries," which was quoted in full by the United States and discussed in the U.S. first written submission, does *not* contain the "non-confidential summaries," and that in fact Part I of the petition contains a non-confidential summary of confidential information in the petition. Second, in the alternative, it asserts that "exceptional circumstances" were present that justified the absence of non-confidential summaries. With regard to China's first theory, in suggesting that the Panel rely on Part I in assessing whether China complied with its obligations, China ignores the clear structure of the petition. Even setting this fact aside, Part I of the petition does not contain adequate non-confidential summaries.

7. As an alternative, China asserts that "exceptional circumstances" exist such that summarization was not possible. Notably, neither the petition nor the documents prepared by MOFCOM during the course of the proceeding ever asserted that summarization was not possible or otherwise justified the absence of meaningful non-confidential summaries. China's argument in this regard is nothing more than a *post hoc* rationalization to justify its failure to comply with SCM Agreement Article 12.4.1 and AD Agreement Article 6.5.1. However, such a a *post hoc* rationalization cannot satisfy the requirement in Articles 12.4.1 and 6.5.1 that "a statement of the reasons why summarization is not possible must be provided."

### C. China Breached Article 12.7 of the SCM Agreement Because Its Use of Facts Available Was Improper

8. MOFCOM's use of facts available was unjustified and punitive, and MOFCOM ignored necessary information provided by the U.S. companies. While China claims that the U.S. description of the facts is in error, a review of the evidence demonstrates the opposite: China's response relies on factual errors and mis-characterizations of the record.

9. While China repeatedly asserts that the respondents "refused" to respond to MOFCOM's questions and "seriously impeded" the investigation, a closer examination of the evidence demonstrates otherwise. First, in Part 3 of its initial questionnaire, MOFCOM asked for tables reflecting all government procurement "signed" within the POI and those "not performed within the POI." MOFCOM also asked for sales prices for the "involved" products in transactions with "private" purchasers. In Part 4, MOFCOM asked for tables showing the "[t]he quantity and

{value} of each product sold to each client … ."

10. In response, ATI indicated that it made no direct sales to the government. AK Steel pointed out that it did not sign any government procurement within the POI, pointed MOFCOM to the sales data submitted in the parallel AD proceeding, and offered a customer list showing that the government did not purchase GOES. Because AK Steel did not participate in any procurement activity during the POI, there were no "involved" products and thus no sales to private purchasers of the same products to report. In response to Part 4, which only relates to the POI, and which does not contain a proviso of "not limited to the subject merchandise," AK Steel referred MOFCOM to the sales data for subject merchandise provided in the parallel AD proceeding.

11. While China now describes this as a "refusal" to cooperate, in fact, MOFCOM invited such a response in its own questionnaire. Specifically, in Section II Item 3 of the questionnaire, MOFCOM states: "if the question does not apply to you, please write down explicitly 'this question does not apply to my company' and state the reasons."

12. China further alleges that after issuing its deficiency letter, the companies still refused to respond "in an acceptable form," and continued to argue that MOFCOM's questions were irrelevant. Yet, AK Steel did respond. In the deficiency letter, MOFCOM gave the respondents the opportunity to show inapplicability: "If your company was of the view that, regarding the product concerned and your company's other products, there was no purchase from the government or public body, or there was no transaction bound by the Buy America Act, it was your company who shall bear the burden of proof." In response, AK Steel attached a customer list to its revised questionnaire response showing that the government did not purchase any AK Steel products during the POI – including products unrelated to subject merchandise. ATI provided a customer list for subject merchandise. In its deficiency letter response, AK Steel explained that it was impossible to know what its customers did with its products.

13. In its preliminary determination, MOFCOM rejected the customer list because the list does not contain transaction data. However, the preliminary determination, issued on December 10, 2009, is the first instance where MOFCOM indicated that it was requiring transaction data independent of whether government procurement was involved. In response to MOFCOM's approach in the preliminary determination, AK Steel submitted the sales data for subject merchandise as an exhibit to its comments on the preliminary determination.

14. The companies cooperated, responded to MOFCOM's questionnaires, and to the extent they did not provide information it was because MOFCOM's own questionnaires did not require it. When MOFCOM finally decided to require such information at the preliminary determination stage, it did not give the companies an opportunity to submit it. AK Steel provided the data after the preliminary determination, but MOFCOM chose not to verify it.

15. China nonetheless complains that the companies' failure to provide transaction data prior to the verification denied MOFCOM "the ability to plan efficiently" for verification. To the extent that MOFCOM may have suffered any prejudice, however, this was simply the result of its own decision to allow respondents to opt not to provide the data if not relevant.

16. Perhaps in recognition of the plainly burdensome nature of MOFCOM's request, China now appears to be attempting to distance itself from MOFCOM's request for 15 years of sales data for all products, asserting that MOFCOM did not apply facts available because of the failure to provide 15 years of sales data. But China's assertions are belied by the facts: when it applied facts available, MOFCOM simply explained that the U.S. companies had failed to provide the requested sales data.

17. MOFCOM could have verified that AK Steel or ATI did not sell to any government entity at verification. When the course MOFCOM was taking became clear in the preliminary determination, AK Steel re-submitted the sales data, which was already in MOFCOM's possession.

18. Finally, there are no facts available on the record to support MOFCOM's conclusion that the respondents sold all of their output to the government. As explained in our first written submission, the only facts available on the record suggest that, at most, AK Steel could have sold 29% of its output to the government, as part of infrastructure and manufacturing sales.

19. The respondents responded to MOFCOM's requests to the best of their ability. The information actually submitted was verifiable, timely submitted, and usable without undue difficulty. MOFCOM appears to have concluded that because a company does not provide some information, or if the information provided does not perfectly fit the request to which it responds, MOFCOM can reject all information provided by the company.

### D. China Acted Inconsistently With Article 12.2.2 of the AD Agreement by Failing to Make Available the Final Dumping Calculations

20. Article 12.2.2 requires an investigating authority to "make available" "*all relevant information* on the matters of fact" that led to the imposition of final measures. If information is relevant, it must be made available – as evidenced by the use of the term "all" (of course, with due regard for the protection of confidential information). Few things are more relevant to the imposition of final duties than the calculations themselves, which are the means by which an investigating authority arrives at the final finding of dumping. Without calculations that indicate dumping, there would be no affirmative finding. "Information" is "[c]ommunication of the knowledge of some fact or occurrence" or "[k]nowledge or facts communicated about a particular subject, event, etc." Dumping calculations certainly are "facts" that should be "communicated" about the imposition of final measures. In short, the language of Article 12.2.2 requires an investigating authority to release its final calculations to the affected interested

parties.

21. China completely ignores the fact that, in addition to a "public notice," Article 12.2.2 also mentions a "separate report" as the vehicle for making available all relevant information on matters of fact and law. The "separate report" *need not* be public. These calculations can still be released to the relevant interested party. China should have fulfilled its obligation under Article 12.2.2 by releasing its calculations of AK Steel's dumping margin to AK Steel, and its calculations of ATI's dumping margin to ATI.

22. Release of the final dumping calculations to the interested parties is vital to those parties' ability to protect their interests. Parties should not be forced to guess at or approximate the methodology and data used by an investigating authority in its calculations, or piece the calculations together from different places in the record.

### E. MOFCOM's Failure to Provide Sufficient Information on the Findings and Conclusions of Law It Considered Material Constitutes a Breach of Article 22.3 of the SCM Agreement

23. MOFCOM failed to explain its benefit determination because it did not provide in the preliminary determination any rationale that competitive bidding under U.S. procurement laws does not result in an acceptable market price. The final subsidy determination regarding U.S. procurement laws is inconsistent with Article 22.3 because it merely repeats the flawed discussion contained in the preliminary determination.

24. Under Article 14(d) of the SCM Agreement, the authorities are to use market prices in the country of purchase unless they establish that those prices are so distorted that the market price is unusable. Article 22.3 thus requires the investigating authority to provide explanation on how it found that market prices resulting from the competitive bidding process were distorted. Nothing in MOFCOM's determination however explains why the admittedly competitive bidding process distorted the market.

### F. MOFCOM's Determination of the "All Others" AD and CVD Rates were Inconsistent with its Obligations under the SCM Agreement

25. The petition identified two U.S. exporters/producers of GOES: AK Steel and ATI. Notwithstanding the fact that neither the petitioner nor MOFCOM identified any other U.S. producers or exporters of GOES, China not only established an "all others" subsidy rate for the unidentified producers, but China established a rate more than two times higher than the highest rate for an investigated company based on the purported lack of cooperation of the unknown, unidentified companies. The "all others" antidumping rate was more than three times higher than the highest rate calculated for an investigated company.

26. As the Appellate Body has made clear in *Mexico – Rice*, an exporter must be given the opportunity to provide information required by an investigating authority before the latter resorts to facts available that can be adverse to the exporter's interests. An exporter that is unknown to the investigating authority is not notified of the information required, and thus is denied an opportunity to provide it.

27. China's mere placement of a petition in a reading room and publication of a notice do not constitute a meaningful opportunity for a company to provide information. Accordingly, an unidentified exporter cannot be said to have failed to cooperate by not having located the petition and/or the notice of initiation in this case.

### G. China Failed to Disclose the Essential Facts Regarding the Calculation of the "All Others" AD and CVD Rates

28. During the investigation, MOFCOM increased the all others subsidy rate from a preliminary rate of 12 percent to a final rate of 44.6 percent, justifying this increase by claiming it relied upon the "facts available." It did so without disclosing the essential facts forming the basis for its decision, contrary to Article 12.8 of the SCM Agreement.

29. MOFCOM increased the "all others" dumping rate from a preliminary rate of 25 percent to a final rate of 64.8 percent. MOFCOM's lone statement in the Final Disclosure regarding tis action was that the "all others" dumping rate was "based on transaction information of the respondents pursuant to Article 21 of the Antidumping Regulations." This disclosure is insufficient. Totally absent are any facts relating to the U.S. companies' refusing access to necessary information or significantly impeding the investigation, any facts relating to the actual calculation of the 64.8 percent rate or why that rate was appropriate given the much lower rates of the respondents, and any facts regarding the particular transaction information chosen.

30. China argues that it could not disclose the particular transaction information used without compromising the confidentiality of information supplied by the two respondent companies, but provides no explanation for why MOFCOM could not have publicly summarized the information used or at least identified the calculation methodology it employed. Disclosure of the essential facts is particularly important here, because it is difficult to understand how MOFCOM used the information of the two respondent companies and arrived at an all others dumping margin that is more than three times as high as the margin for one such company and eight times as high as the margin for the other company.

### H. China's Injury Determination is Inconsistent with China's WTO Obligations

31. Cumulated imports from Russia and the United States increased throughout the POI. But during most of this period, the Chinese GOES industry was prospering. The Chinese industry's output, sales quantities, sales revenues, employment, wages, prices and pre-tax profits all

increased during both 2007 and 2008.

32. It was only during the first quarter of 2009 that the Chinese industry began to experience some difficulties. In particular, the industry's profitability declined. The decline in profits, however, was not volume-related. The Chinese GOES industry showed double digit increases in sales quantities and revenues from the first quarter of 2008 to the first quarter of 2009. The market share of the Chinese industry actually increased during this period – by nearly the same amount as that of the subject imports. Instead, the decline in profits occurred because the increased quantity of sales during the first quarter of 2009 was being sold at lower prices.

33. Consequently, MOFCOM's affirmative determination could not have been, and was not, based solely or even principally on volume considerations, as China's first written submission suggests. MOFCOM's conclusion that the imports had significant price effects was essential to its affirmative determination.

34. In examining MOFCOM's injury determination, it is useful to focus on what MOFCOM actually found, notwithstanding the fact that in its first written submission China variously ignores MOFCOM's findings or tries to rewrite them. To start, it is useful to explore why MOFCOM found price depression. It was not solely because imports were increasing. Instead, the final determination states that price depression occurred "[b]ecause the sales of the product concerned were kept at a low price." In an attempt to support this finding, MOFCOM cited the petitioners' assertion that "a pricing policy aiming at setting the price down to a level lower than the price of the domestic like product was adopted by the producers of the product concerned." Thus, whether or not MOFCOM expressly found significant underselling, underselling was critical to its price depression finding.

35. This finding is pervasively flawed. First, it relies on facts MOFCOM never disclosed. China now asserts that MOFCOM "was considering" an argument that price depression began in "late" 2008, although it made no express finding to this effect. The only 2008 pricing information provided in the final determination is that domestic prices increased by 14.53 percent in 2008 – hardly evidence of price depression.

36. Additionally, MOFCOM admitted that during 2009, the imports under investigation were actually priced *higher* than the domestically produced product. Thus there is no positive evidence supporting the price depression finding for 2009. Moreover, the fact that the imports oversold the domestically produced product in 2009 indicates that the unspecified, unexplained "pricing strategies" materials on which MOFCOM relied for its finding of low import prices could not constitute positive evidence of actual price levels.

37. It is true that MOFCOM did not rely solely on price depression. It also asserted declines in 2008 and the first quarter of 2009 in "profits per unit." Here again MOFCOM failed to disclose essential facts in violation of Articles 6.9 and 12.8. China claims that costs rose faster

than revenues. But MOFCOM disclosed no information with respect to the industry's costs. MOFCOM additionally could have disclosed nonconfidential information about the types of costs that were rising, but instead disclosed nothing pertaining to the industry's cost levels.

38. MOFCOM also failed to address the pertinent substantive question under the Agreements: whether the dumped and subsidized imports served to prevent price increases, which otherwise would have occurred, to a significant degree. MOFCOM did not address this inquiry at all for the 2008 data. To fulfill its obligations under the Agreements, MOFCOM had to show that, because of the imports, prices for the domestic product would have increased even more in 2008 than they already did. Instead, MOFCOM assumed that, if imports were increasing, they must have caused the negative trends in per unit profits. An assumption is not positive evidence.

39. MOFCOM's findings of price suppression during the first quarter of 2009 must also fail. The price suppression findings for 2009 failed to reflect an objective examination, because MOFCOM evaluated the 2009 data in isolation from the earlier data. By contrast, an objective examination taking into account the entire POI would have revealed that there was not necessarily a correlation between rising import quantities and significant price suppression.

40. In its first written submission, China counters that the 2009 price suppression findings are justified because they reflect a continuation of 2008 trends. China's argument appears to follow from a passage in the final determination contending that "the price-cost differential declined continually." MOFCOM states that this was a result of the import underselling "strategy" that we have previously explained is contrary to the disclosed evidence. Thus, this finding is not supported by positive evidence. Moreover, because the 2008 price suppression findings are also unsupported by positive evidence, they cannot serve as the basis for the 2009 findings.

41. Because, as we explained, MOFCOM's price effects findings do not meet the requirements of the Agreements, the causal link required under Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement is absent.

42. Furthermore, the Agreements required MOFCOM not to attribute to dumped and subsidized imports injury caused by other known factors. There was at least one known factor other than imports under investigation that contributed to the domestic industry's decline in performance during the first quarter of 2009. This was the industry's huge increase in capacity. According to the preliminary determination, capacity was 80.13 percent higher in the first quarter of 2009 than in the first quarter of 2008. As a result, production skyrocketed during the first quarter of 2009, increasing far faster than demand. In fact, the increase in production was over 42 percentage points higher than the increase in demand. Inventories soared by 978.81 percent as a result. We explained in our first written submission why this inventory increase put pressure on the domestic industry's prices during the first quarter of 2009, why this contributed to the domestic industry's financial declines during that period, and why MOFCOM's analysis of the

effects of the inventory increase falls short of the requirements of the Agreements.

43. China's response to this claim is defective legally. China argues that an authority need only show that the subject imports made a substantial contribution to the domestic industry's material injury and that the effect of other factors was not "so dramatic that they severed any possible causal link between the subject imports and the condition of the domestic industry." China further suggests that the party opposing the imposition of measures has the obligation to provide evidence demonstrating that the effects of other causes was "dramatic."

44. The text of the Agreements does not support China's arguments. Articles 3.5 of the AD Agreement and 15.5 of the SCM Agreement place on the authority the responsibility to examine all relevant evidence concerning causes of injury other than the subject imports. The only obligation the text places on the parties is to identify "known" causes of injury. It is undisputed that a U.S. exporter brought to MOFCOM's attention that overproduction and inventory overhang contributed to the difficulties of the Chinese GOES industry.

45. Similarly, neither Article 3.5 nor 15.5 states that an authority is relieved from the responsibility of conducting a non-attribution analysis if other known factors have effects, but such effects are not "dramatic." Nor does China point to any Appellate Body or panel report supporting this interpretation. By contrast, under the principles articulated in the Appellate Body report in *US – Hot-Rolled Steel*, once overproduction and the consequent inventory overhang was identified as a known cause of injury, MOFCOM had the obligation either to demonstrate that this factor was not contributing to the domestic industry's injury, or to conduct a non-attribution analysis. MOFCOM did not purport to conduct a non-attribution analysis.

46. Instead, MOFCOM took the position that production growing far more rapidly than demand had no appreciable effect on the domestic industry. This finding defies common sense, and our first written submission extensively discusses the lack of positive evidence supporting MOFCOM's analysis. For the most part, China has not responded to our arguments, nor has it meaningfully disputed that an inventory overhang caused by excessive growth in capacity and production would likely put downward pressure on domestic prices. Instead, China asserts that the expanded capacity of the industry was less than domestic consumption. The accuracy of this assertion cannot be verified from any information MOFCOM disclosed. It is also unresponsive to the U.S. argument. Instead, it merely reflects an assumption that an industry that increases its capacity should be able to displace all imports in the market. The nature of this assumption is not intuitive, not explained by China, and not supported by any evidence disclosed. It cannot support MOFCOM's patently inadequate analysis of the increases in production and inventories.

47. China also argues in its first written submission that Chinese producers "did not produce more than the market could bear." Not even MOFCOM made such a finding, which is directly contradicted by the disclosed evidence. Far from showing restraint in production, Chinese producers used their additional capacity to increase production far beyond what the market

demanded, resulting in the large inventory overhang. Again, China's argument does not justify MOFCOM's failure to perform a nonattribution analysis.

48. We also note that Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement specifically require authorities to examine the volume and price of imports that are not dumped or subsidized in their analysis of causal link. MOFCOM's superficial analysis of imports from sources other than Russia and the United States, which is devoid of any meaningful data, does not satisfy these requirements.

49. Consequently MOFCOM did not satisfy its obligations under the Agreements to establish a causal link between the subject imports and any injury sustained by the domestic industry.

50. In its consideration of imports from countries other than Russia and the United States, MOFCOM also breached its obligations to disclose essential facts. China attempts to defend MOFCOM's failure to provide facts or analysis by asserting that no interested party made an argument concerning nonsubject imports. China's argument overlooks that the purpose of the obligation is to permit parties to defend their interests. Parties cannot be expected to raise arguments about information an authority never disclosed. And MOFCOM entirely failed to disclose nonsubject import quantity and value information.

51. Finally, in our first written submission we pointed out several instances where MOFCOM's findings concerning price effects, causal link, and nonsubject imports failed to satisfy Article 12.2.2 of the AD Agreement and Article 22.5 of the SCM Agreement. Rather than attempt to defend MOFCOM's inadequate findings and conclusions, China asserts that authorities need only provide whatever information that they deem material. China provides no support for this assertion. It cannot be reconciled with the language of these provisions, which require disclosure of "all relevant information on the matters of fact and law which have led to the imposition of final measures." Premising disclosure not on an objective basis of relevance, but on the authority's own concept of what is "material," would reduce this provision to a nullity.