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

(DS414)

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

September 15, 2011

1. Thank you Mr. Chairman, and members of the Panel, we appreciate this opportunity to appear before you today to provide further views on the reasons why the antidumping and countervailing duty measures imposed by China on grain oriented flat-rolled electrical steel (GOES) from the United States are inconsistent with WTO rules. Our intention today is not to repeat the statements we made in our first written submission. Rather, we would like to briefly summarize our main points and then address some of the points that China has made in its first written submission. We will also be pleased to respond to any questions you may have.

2. Mr. Chairman, the commitments contained in the AD and SCM Agreements that are at issue in this dispute are critical elements of those Agreements. As we described in our first written submission, from the beginning, China's GOES investigation was conducted in a manner inconsistent with the AD and SCM Agreements. China launched an impermissibly broad investigation given the meager evidence contained in the petition. It sought detailed information on companies' entire production lines including products unrelated to GOES, data on sales stretching back fifteen years, and information relating to laws and regulations that had no relation to the companies or product at issue. The United States and U.S. companies responded to over a dozen questionnaires. Then, despite companies' best efforts to comply with China's requests, China proceeded to apply adverse facts available. Throughout, the proceeding was marked by failures in transparency. China failed to require or provide adequate non-confidential summaries of key information supplied by petitioners and relied upon by China in its determination, and failed to disclose essential facts, contrary to its obligations. 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.

3. 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.

4. 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

5. Mr. Chairman, we would like to begin by discussing initiation. As the United States demonstrated in our first written submission, China acted inconsistently with Article 11 of the SCM Agreement in initiating its investigation with respect to several subsidy allegations in this case. Several of the petitioners' subsidy allegations, identified in paragraph 78 of our first written submission, 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.

6. As documented in our first written submission, with respect to several alleged subsidy programs, China initiated an investigation despite the fact that the petition did not contain the information required by Article 11.2.[1] For example, petitioners' allegation regarding the State of Indiana Steel Industry Advisory Service provides no evidence as to why there was a financial contribution.[2] China now argues that the petitioner was merely obligated to show that the program was "indicative" of a financial contribution and asserts that "if" the Commission undertook studies and analyses on behalf of the steel industry's interests and at its own expense, it "is quite plausibly" the government provision of goods or services.[3] In fact, however, the petitioner was obligated to provide a degree of *actual evidence* that the program provided a financial contribution. China's theory that the program was "indicative" of a financial contribution is nothing more than simple assertion. Yet, even if one were to accept this theory as plausible, the evidence provided in the application in no way supports it. Specifically, the document cited as evidence by the petitioners simply states that a commission was formed to "examine state and federal laws affecting the steel industry and to consider industry problems...."[4] Nothing in this statement indicates that the results of this examination would even be available to the steel industry or in any way provide a financial contribution to the steel industry. Yet China nonetheless decided to initiate an investigation of this program.

7. Similarly, in its allegation regarding the 2003 Economic Stimulus Plan of Pennsylvania, the petitioners provided no evidence that any alleged subsidies under the plan were specific to the steel industry or GOES producers, instead merely alleging – with no evidentiary support – that the steel industry was an important industry in Pennsylvania and noting that the plan would allow manufacturers, not limited to steel manufacturers, access to new technology.[5] Despite China's claims to the contrary, evidence of the steel industry's mere "presence in Pennsylvania," coupled with a single reference to "traditional industries" and generalized assertions regarding government support of the steel industry do not constitute "adequate" evidence of specificity for purposes of initiation.[6]

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[1] U.S. First Written Submission, para. 78.

[2] Exhibit US-2, at 49.

[3] China First Written Submission, para. 44.

[4] Exhibit US-31, at 3.

[5] Exhibit US-26, at 25-28.

[6] China First Written Submission, para. 56.

8. While the petitioners alleged subsidies from the Economic Recovery Tax Act of 1981, China acknowledges that the evidence indicated that this law expired in 1983, more than 20 years before the period of investigation.[7] The petitioner did not even allege that the benefit should be allocated over a period of time, as it notably did with other programs. In defense of its decision to initiate an investigation of this program, China now asserts that the mere *possibility* that the subsidy could have been allocated over time, and that the allocation period, which was never alleged in the first place, could have exceeded 20 years, supports its decision to initiate.[8] This sheer speculation does not constitute "adequate" evidence for purposes of initiation. China's response regarding its decision to initiate on alleged subsidies from the Tax Reform Act of 1986, based on "supporting" evidence consisting of data from more than 15 years before the period of investigation, is similarly unavailing.[9] Again, China points to no *actual evidence* before it to support the conclusion that the programs provided any benefit.

9. These are just some examples of the various defective subsidy allegations that MOFCOM accepted, which are described in our first written submission. In response, 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.[10] In the interest of time, we will respond to all of China's assertions fully in the U.S. second written submission.

10. We would, however, like to take a moment to address China's argument that the United States seeks to impose a different standard for initiation than what is actually required under Article 11, and China's charge that the United States would require "analysis" as opposed to "information" supporting an application for countervailing measures.[11] This argument is misleading. As we described in paragraph 78 of our first written submission, it was *evidence* that was lacking from the petitioners' application. Our first written submission discusses the lack of *evidence* with respect to each of the subsidy allegations; in fact, the word "analysis" does not appear at all in this section.

11. As we explain in our first written submission, 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

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[7] China First Written Submission, para. 38.

[8] China First Written Submission, para. 39.

[9] China First Written Submission, para. 40.

[10] *See, e.g.*, China First Written Submission, paras. 41, 48, 51, 55.

[11] *See, e.g.*, China First Written Submission, paras. 11, 22, 26, 33.

context" provided in an application to support a specific subsidy allegation that is deficient with respect to one of the three subsidy elements.[12] 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.

12. China notes that none of the specific subsidy allegations challenged by the United States ultimately resulted in findings of countervailable benefits.[13] This is immaterial. 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.[14] 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.

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

13. We would like to turn at this point to China's pervasive failure to require adequate non-confidential summaries of confidential information – a failure that impaired the U.S. and interested parties' ability to defend their interests throughout the course of the investigation.

14. Mr. Chairman, under Article 12.4.1 of the SCM Agreement and Article 6.5.1 of the AD Agreement, when an interested party claims that certain information must be treated as confidential, an investigating authority must require the party to provide adequate non-confidential summaries of the confidential information. If an interested party cannot adequately summarize the confidential information, an explanation of why the information was not susceptible to summarization must be provided to the investigating authorities.[15]

15. We demonstrated in our first written submission that China failed to meet these requirements, 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

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[12] China First Written Submission, para. 36.

[13] China First Written Submission, paras. 9, 68.

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

[15] *EC – Fasteners (AB)*, para. 544.

summarization.[16]

16. China makes two basic assertions in response. First, it 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.[17] Second, in the alternative, it asserts that "exceptional circumstances" were present that justified the absence of non-confidential summaries.[18]

17. With regard to China's first theory, it is quite simple. Part II of the petition is entitled "Non-confidential summary." Part I of the petition is entitled "Main Part of the Petition" and directs the interested reader to consult Part II of the petition for the purported non-confidential summaries, which are supposed to summarize the confidential information contained in Part I. 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.

18. Even setting this fact aside, Part I of the petition does not contain adequate non-confidential summaries. For the categories of confidential information identified, China simply points to general statements scattered throughout the petition addressing topics related to the confidential information, or refers to what it characterizes as the "main point" of the petitioner, and claims that these statements sufficiently summarize the confidential information.[19] However, these statements are inadequate. For example, with respect to the trend data China points to as allowing for a reasonable understanding of the substance of certain confidential information, China concedes that the trends provided are not labeled to indicate scale.[20] Without a sense of scale, it is impossible to get a reasonable understanding of the substance of the confidential information. Also, the year-by-year comparisons cited by China are inadequate.[21] As an example, an increase of "33%" could represent an increase from 2 to 3, 200 to 300, or 2 million to 3 million.

19. As an alternative, China asserts that "exceptional circumstances" exist such that summarization was not possible. Notably, neither the petition nor the documents prepared by

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[16] U.S. First Written Submission, paras. 81-87.

[17] China First Written Submission, paras. 90-91.

[18] China First Written Submission, paras. 133-140.

[19] China First Written Submission, paras. 99-100.

[20] China First Written Submission, paras. 100, 104, 118.

[21] China First Written Submission, paras. 111, 116, 119, 123, 124.

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

20. As the United States explained in its first written submission, MOFCOM's use of facts available was unjustified and punitive, and MOFCOM ignored necessary information provided by the U.S. companies.

21. 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. We will now briefly address some of these errors, with specific reference to the record of the case.

1. The companies did not refuse to respond to MOFCOM's questions beyond indicating that they did not sell subject merchandise to the government

22. While China repeatedly asserts that the respondents "refused" to respond to MOFCOM's questions[22] and "seriously impeded" the investigation,[23] a closer examination of the evidence demonstrates otherwise. China's highly selective account of the questionnaires and responses obscures several basic facts indicating both the extraordinarily burdensome requests made by MOFCOM and the fact the U.S. companies engaged with MOFCOM on its terms throughout the investigation.

23. First, in its initial questionnaire, at Part 3 of the government procurement section, MOFCOM asked for tables reflecting all government procurement "signed" within the POI and those "not performed within the POI," including specifically customer names, purchase dates, products, quantities, values, prices, payments, and contracts. Part 3 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 … ."[24]

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[22] China First Written Submission, para. 148.

[23] China First Written Submission, para. 171-173.

[24] China First Written Submission, para. 147.

24. In response, ATI indicated that it made no direct sales to the government.[25] AK Steel pointed out that it did not sign any government procurement within the POI. AK Steel provided this explanation to MOFCOM in its original and revised questionnaire responses, while also pointing MOFCOM to the sales data submitted in the parallel AD proceeding,[26] and offering a customer list showing that the government did not purchase GOES.[27] 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.[28]

25. 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."[29] Thus, MOFCOM itself gave companies a choice: either they could respond to the question or they could explain why the question does not apply. In the first questionnaires, the companies opted for the latter approach, simply following MOFCOM's instructions.

26. 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.[30] Yet, AK Steel did respond. In the deficiency letter, MOFCOM appears to request transaction data for government procurement, but if the request was not applicable, MOFCOM gave the respondents the opportunity to meet its burden of proof 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."[31]

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[25] China First Written Submission, para. 150.

[26] Exhibit US-11, at 21-22.

[27] Exhibit US-14, at 25.

[28] Exhibit US-14, at 26.

[29] Exhibit US-11, at 6. Exhibit US-14, at 6.

[30] China First Written Submission, para. 150.

[31] Exhibit CHN-19, at 3. Exhibit CHN-20, at 3.

27. 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.[32] ATI provided a customer list for subject merchandise.[33] In its deficiency letter response, AK Steel explained that it was impossible to know what its customers did with its products.[34]

28. In its preliminary determination, MOFCOM rejected the customer list because the list does not contain transaction data.[35] 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.[36]

29. At no point did the U.S. companies refuse to cooperate with the investigation. 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.

2. The companies did not refuse to provide transaction data as MOFCOM requested

30. China nonetheless complains that the companies' failure to provide transaction data prior to the verification denied MOFCOM "the ability to plan efficiently" for verification.[37] 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. If MOFCOM needed the data at the outset, it should have *required* it from the outset.

3. China's assertion that MOFCOM did not apply facts available because of the failure to provide 15 years of sales data is misleading

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[32] Exhibit US-14, at 25.

[33] Exhibit US-5, at 29.

[34] Exhibit US-13, at 3.

[35] Exhibit US-5, at 29.

[36] Exhibit US-23.

[37] China First Written Submission, para. 151.

31. China asserts that "nowhere in the final determination nor in the preliminary determination that preceded it did MOFCOM specify that 'facts available' was being applied for the companies' refusal to provide 15 years of sales data," and that MOFCOM's emphasis was on "the failure of the companies to provide POI data as requested in the initial questionnaire," as indicated by it calculating the subsidy rate based on one year of sales.[38]

32. 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. But China's assertions are belied by the facts. As our first written submission makes clear, MOFCOM requested 15 years of sales data for all products. In its original questionnaire, at Part 3, MOFCOM requested sales information for government procurement "not performed within the POI."[39] On page 17 of the new subsidy allegation questionnaire response, MOFCOM asks for sales data for all products during the POI and the prior 14 years.[40] Moreover, when it applied facts available, MOFCOM simply explained that the U.S. companies had failed to provide the requested sales data.

4. MOFCOM could have verified the information supplied but chose not to

33. MOFCOM could have verified that AK Steel or ATI did not sell to any government entity at verification. As reflected in our first written submission at paragraphs 93-95, this assumption was reasonable. 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. Indeed, the relevant sales data were already sitting on the other side of the examiner's desk.

5. There are no facts available on the record supporting MOFCOM's assumption that the U.S. companies sold all of their output to the government

34. As the U.S. first written submission explains, and as noted by several third parties in this dispute, under Article 12.7 of the SCM Agreement, an investigating authority may resort to facts available only in certain limited circumstances. If an investigating authority uses facts available, this application of facts available is also limited. Article 12.7 of the SCM Agreement does not

[38] China First Written Submission, para. 153.

[39] China First Written Submission, para. 147.

[40] Exhibit US-8.

authorize an investigating authority to apply facts available in a punitive manner to achieve pre-determined results.

35. The Appellate Body in *Mexico – Beef and Rice* discussed the requirements of Article 12.7 and the limitations it places on the application of facts available in countervailing duty investigations. Under Article 12.7, the use of facts available is permissible to fill in gaps in the information provided to the extent necessary to arrive at a conclusion as to subsidization and injury.[41] An investigating authority does not, however, possess unlimited discretion in the manner in which it chooses to use information.[42]

36. Article 12.7 does not permit an investigating authority to disregard all relevant information submitted by an interested party. Rather, the investigating authority should use relevant information provided by the respondent, even if such information is provided in a different form from that which was requested.[43]

37. The U.S. first written submission demonstrates that MOFCOM applied facts available in a punitive manner to calculate the subsidy rates for certain procurement programs. As occurs throughout its first written submission, China attempts to rewrite the record and distract the Panel from what actually occurred during the course of the investigation.

38. 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.[44] China responds by arguing that the annual report containing the 29 percent figure did not cover the POI, and the proposal to use the 29 percent figure for utilization purposes was submitted too late in the process.[45]

39. The reality is that, on the same page on which the annual report shows 29 percent sales figure for the infrastructure and manufacturing segment, the annual report states that 26 percent of the company's U.S. sales fell under the infrastructure and manufacturing segment in 2007.[46]

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[41] *Mexico – Beef and Rice (AB*), para. 293.

[42] *Mexico – Beef and Rice (AB)*, para. 294.

[43] *Mexico – Beef and Rice (AB)*, para. 292.

[44] U.S. First Written Submission, paras. 97-99.

[45] China First Written Submission, paras. 182-184.

[46] Exhibit US-9, at 4.

These figures demonstrate stability in the sales figures to this particular market segment over 24 months. It defies reason to suggest that the first two months of 2009 would be so drastically different from the preceding 24 months that MOFCOM would reject the figures entirely. Regarding China's assertion that the proposal to use the 29 percent figure was untimely filed, AK Steel submitted the annual report well in advance of verification. It proposed the use of the 29 percent figure from that report after seeing MOFCOM's unreasonable course in the preliminary determination.

40. As noted above, 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. China's approach is inconsistent with the SCM Agreement, and would have serious adverse consequences for all Members.

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

41. As the United States demonstrated in our first written submission, MOFCOM acted inconsistently with Article 12.2.2 of the AD Agreement by failing to make available to the respondents its final dumping calculations. The dumping calculations are "relevant information on the matters of fact ... which have led to the imposition of final measures" within the meaning of that Article; indeed, they are the mathematical basis for the imposition of the final measures and therefore are highly relevant. China's failure to release them, through a separate report, constitutes a violation of Article 12.2.2.

42. China argues that there is no express language in Article 12.2.2 mandating that an investigating authority release its calculations.[47] This simply is wrong. 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). China cannot argue that the dumping calculations are not "relevant." 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. Further, China cannot argue that the dumping calculations are not "information." "Information" is "[c]ommunication of the knowledge of some fact or occurrence" or "[k]nowledge or facts

[47] *See* China First Written Submission, paras. 203-206.

communicated about a particular subject, event, etc."[48] 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.

43. Moreover, contrary to China's claims,[49] the fact that Article 12.2.2 is titled "Public Notice and Explanation of Determinations" in no way means that business confidential calculations are not included within its scope. 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. Indeed, if it contains business confidential calculation data, it *should 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.

44. We note that China appears at times to suggest that it may have an obligation to disclose, but that the obligation is contained in Article 6.9 of the AD Agreement.[50] Our claim is that China was required to release the *final* dumping calculations to the interested parties. Article 6.9 pertains to disclosure of essential facts *before* a final determination. Article 12.2.2 is the Article that requires release of the final dumping calculations, because they are relevant information on matters of fact leading to the imposition of final measures.

45. 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. Yet this is what China would have the parties do, as evidenced by its reliance upon exhibits CHN-25 and CHN-26, which cite to several record documents as the sources for the inputs into the final calculations. These documents do not however satisfy the requirement contained in Article 12.2.2, which requires information to be contained in a public notice or a separate report. It is not sufficient for an investigating authority to rely upon information scattered throughout the record to meet its obligations under this Article.

46. Moreover, Exhibits CHN -25 and -26 simply summarize the information in the final determination and final disclosures, with references to some of the sources of the information provided by the respondent companies. They do not contain the mathematical calculations,

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[48] New Shorter Oxford English Dictionary, Clarendon Press, Oxford 1993, at 1364.

[49] China First Written Submission, paras. 207-208.

[50] China First Written Submission, paras. 216-220.

which any investigating authority must perform to arrive at individual dumping margins. Disclosure of these calculations would allow a respondent company to check the accuracy of an investigating authority's calculations for mathematical and methodological errors, because even the smallest discrepancy can have a significant impact in the outcome of an investigation (for example, when a dumping margin borders on *de minimis*).

47. One of the respondents in this case specifically urged MOFCOM to release the calculations, explaining that, otherwise, it was denied "the opportunity to review those calculations for mathematical errors."[51] The ability to check for errors is crucial, in the event that an interested party chooses to exercise its rights to judicial review under Article 13 of the AD Agreement, or in the event that a Member seeks WTO dispute settlement. Nor would it be particularly burdensome for MOFCOM to release the calculations, given that it had already performed them and used them as the basis for the outcome of the investigation. China's refusal to provide the final dumping calculations was inconsistent with Article 12.2.2.

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

48. Article 22.3 of the SCM Agreement requires that the public notice or report of the preliminary or final determination "set forth … in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities." In the context of subsidy determinations, the investigating authority's finding of a market price or a benchmark is a material issue to resolve in order to find the existence of benefit. The preliminary or final determination must provide explanation in sufficient detail on how the evidence on the record supports the market price or benchmark relied upon by the investigating authority.

49. The U.S. first written submission demonstrates that 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.

50. China's preliminary determination asserts that because bids by U.S. producers are afforded a 25% price cushion, and some foreign producers are exempted, the "competitive bidding does not reflect true market conditions."[52] China even argues that MOFCOM never

[51] U.S. First Written Submission, para. 114.

[52] China First Written Submission, paras. 229-230.

conceded that competitive bidding exists in the United States.[53] China claims that, in the final determination, "MOFCOM not only quantified the amount of foreign steel excluded from Buy American projects as part of U.S. consumption, but also quantified the price difference between North American prices and non-North American prices based on the submissions of AK Steel."[54]

51. There are a number of errors in these assertions. First, MOFCOM conceded that competitive bidding exists: in the quote cited by China, MOFCOM indicates: "the Investigating Authority found that, according to provisions in the Buy American Act and other regulations, *although there is competitive bidding process*…"[55] In addition to this factual error, the purported reasoning cited to by China does nothing to explain its *benefit* determination. All MOFCOM did was conclude that the U.S. price was higher than foreign prices,[56] and that some foreign producers are excluded from the competitive bidding process, leading to a distorted market.

52. 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" CVD Rate was Inconsistent with its Obligations under the SCM Agreement

53. The petition identified two U.S. exporters/producers of GOES: AK Steel and ATI.[57] 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.

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[53] China First Written Submission, para. 230.

[54] China First Written Submission, para. 234.

[55] China First Written Submission, para. 229 (quoting CHN-17, at 33-34). .

[56] China First Written Submission, para. 234.

[57] Petition, at pg. 6. (US-1)

54. China claims that any unidentified U.S. producers/exporters were properly notified by virtue of the fact that MOFCOM placed a copy of the public version of the petition in a reading room in Beijing and published the notice of initiation.[58]

55. As the Appellate Body has made clear,[59] 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.

56. 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. Thus, by applying adverse facts available to the unexamined, unidentified firms when it never sent them copies of the anti-subsidy questionnaire or took any other steps to ensure that they had received the notice that the SCM Agreement requires, China breached Article 12.7 of the SCM Agreement.

G. China's Determination of the "All Others" Rate in the Final Antidumping Duty Determination Is Inconsistent with the AD Agreement

57. As with the subsidy rate, notwithstanding the fact that neither petitioner nor MOFCOM identified any other U.S. producers or exporters of GOES, China applied an adverse facts available antidumping rate to unidentified U.S. producers/exporters of GOES. This "All Others" antidumping rate was more than three times higher than the highest rate calculated for an investigated company.

58. China again claims that it was permitted to apply adverse facts available because it placed the petition in a reading room in Beijing and published the notice of initiation on its website and received no responses. For the reasons described earlier, this is not a sufficient basis to deem unknown producers or exporters uncooperative.

59. China further claims that, while Article 6.10 of the AD Agreement limits the antidumping rate that can be applied to known producers/exporters that are not individually examined, there are no such limits placed on unknown producers/exporters.[60] Therefore, according to China, it was within its rights to base the rate on facts available, consistent with Article 6.8 and paragraph

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[58] China First Written Submission, para. 238.

[59] *Mexico – Rice (AB)*, paras. 258-264.

[60] China First Written Submission, para. 242.

7 of Annex II. This argument however overlooks the clear direction in Article 6.1 and paragraph 1 of Annex II to notify all interested parties of the information that is required of them and to provide them with ample opportunity to provide all relevant information. Annex II thus does not support the use of facts available in the circumstances described by China.

60. Moreover, China's argument overlooks the fact that Article 6.8 and paragraph 7 of Annex II address situations where a party does not cooperate and withholds information from the investigating authority. A failure to cooperate or active withholding of information cannot be found to have existed where there is no evidence that any other producer/exporter was in fact aware of the investigation or in fact aware of the specific information required of it for purposes of that investigation.

61. As with the "all others" subsidy rate, by applying adverse facts available to the unexamined firms when it never sent them copies of the antidumping questionnaire or took any other steps to ensure that they had received the notice that the AD Agreement requires, China breached Article 6.8 of the AD Agreement and paragraph 1 of Annex II.

H. China Failed to Disclose the Essential Facts Regarding the Calculation of the "All Others" Subsidy Rate

62. 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. These essential facts would have included the facts that led MOFCOM to conclude that "facts available" was warranted, the facts that led MOFCOM to conclude that a 44.6 percent subsidy rate was an appropriate rate, and the facts underlying the calculation of the rate. Without this disclosure, the United States was denied the ability to defend its interests, because it could not discern the factual basis for MOFCOM's increase in the all others subsidy rate.

63. Accordingly, the United States has demonstrated that China acted inconsistently with Article 12.8 of the SCM Agreement by not disclosing the essential facts forming the basis for its decision regarding final measures for "all other" U.S. companies.

I. China Failed to Disclose the Essential Facts Regarding the Calculation of the "All Others" Dumping Rate, Contrary to Article 6.9 of the AD Agreement

64. China also acted inconsistently with Article 6.9 of the AD Agreement by failing to disclose the essential facts forming the basis of the "all others" dumping rate. As with the subsidy rate, MOFCOM increased the "all others" dumping rate from a preliminary rate of 25 percent to a final rate of 64.8 percent. China justified its choice of this final rate as reliance on the "facts available."

65. However, prior to the final disclosure, China did not disclose the essential facts forming the basis for its decision. MOFCOM's lone statement in the Final Disclosure was that the margin for all other U.S. companies was "based on transaction information of the respondents pursuant to Article 21 of the Antidumping Regulations."[61] 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. Without disclosure of these types of facts, the United States was denied the ability to defend its interests, because it could not discern the factual basis for MOFCOM's increase in the all others dumping rate.

66. In response, China argues that it could not disclose the particular transaction information used without compromising the confidentiality of information supplied by the two respondent companies.[62] However, China 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. Moreover, MOFCOM's failure to disclose the essential facts goes beyond its failure regarding the transaction information; as just mentioned, MOFCOM also did not disclose the facts relating to its use of facts available and why 64.8 percent was a reasonable facts available rate. Having failed to do so, China acted inconsistently with Article 6.9 of the AD Agreement.

J. China's Injury Determination is Inconsistent with China's WTO Obligations

67. Finally, we'd like to turn to MOFCOM's determination that the Chinese industry producing GOES was materially injured by imports from Russia and the United States.

68. Cumulated imports from Russia and the United States increased throughout MOFCOM's period of investigation. But during most of this period, the Chinese GOES industry was prospering, not struggling. The information that MOFCOM disclosed indicated that output, sales quantities, sales revenues, employment, wages, and prices all increased during both 2007 and 2008. The industry's pre-tax profits increased both years as well.

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[61] U.S. First Written Submission, para. 173.

[62] China First Written Submission, para. 248.

69. It was only during the first quarter of 2009 – in other words, the last three months of a 39 month period of investigation – that the Chinese GOES industry began to experience some difficulties. In particular, the industry's profitability declined.

70. 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 imports from Russia and the United States. Instead, the decline in profits occurred because the increased quantity of sales during the first quarter of 2009 was being sold at lower prices.

71. 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.

72. 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."[63] 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."[64] Thus, whether or not MOFCOM expressly found significant underselling, underselling was critical to its price depression finding.

73. This finding is pervasively flawed. First, it relies on facts MOFCOM never disclosed. Prior to issuing its final determination, MOFCOM provided no information on the relative prices actually charged for the domestically produced and imported products. Because such information was critical to any analysis of whether imports were being sold at a "low" price, MOFCOM was obligated to disclose it under Article 6.9 of the AD Agreement and Article 12. 8 of the SCM Agreement. Its failure to do so breached the agreements.

74. 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. In addition, MOFCOM made absolutely no disclosure of prices during whatever period of time China considers to be "late" 2008. This too breaches Articles 6.9 and 12.8. Additionally, the final determination

[63] Exhibit CHN-16, at 58.

[64] Exhibit CHN-16, at 58.

provides no evidence to support any finding of price depression during 2008. 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. Because any 2008 price depression finding is not supported by positive evidence, it breaches Articles 3.1 and 3.2 of the AD Agreement and Articles 15.1 and 15.2 of the SCM Agreement.

75. Additionally, MOFCOM admitted for the first time in its final determination that during 2009, the imports under investigation were actually priced *higher* than the domestically produced product. They were not "kept at a low price." Thus there is no positive evidence supporting the price depression finding for 2009, either. 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.

76. 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."

77. 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 – not even the nonconfidential trend information it disclosed for other economic factors – with respect to the industry's costs. MOFCOM additionally could have disclosed nonconfidential information about the types of costs that were rising: were these raw materials costs, or were they factory costs caused by the Chinese industry's huge and unwarranted expansion that began in 2008? Instead, MOFCOM disclosed nothing whatsoever pertaining to the industry's cost levels.

78. MOFCOM also failed to address the pertinent substantive question under the AD and SCM Agreements. This is not simply whether there had been lower "per unit" profits. Instead, it is whether the dumped and subsidized imports served to prevent price increases, which otherwise would have occurred, to a significant degree.

79. 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 simply assumed that, if imports were increasing, they must have caused the negative trends in per unit profits. An assumption is not positive evidence. This is particularly true when there were other legitimate reasons for the industry's pricing decisions. An industry rationally may seek to maximize total revenues and profits by obtaining increased sales at lower prices. Indeed, this is precisely what happened to the Chinese GOES industry in 2008. But MOFCOM performed no examination of what motivated the industry's pricing behavior. As a consequence, MOFCOM's analysis of price suppression for 2008 does not reflect an objective examination of the data, nor is it supported by positive evidence.

80. As a consequence, MOFCOM's findings of price suppression during the first quarter of 2009 must fail as well. In our first written submission, we demonstrated that the price suppression findings for 2009 failed to reflect an objective examination, because MOFCOM evaluated the 2009 data in isolation from the earlier data it collected. By contrast, an objective examination taking into account the entire period of investigation would have revealed that there was not necessarily a correlation between rising import quantities and significant price suppression.

81. 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 and which China does not even attempt to defend. 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.

82. We would now like to turn to the issue of causal link. We've already explained how MOFCOM's price effects findings are critical to tying the imports to the injury that MOFCOM found. We've also explained how the price effects findings do not meet the requirements of the Agreements. Because the price effects findings fail, the causal link required under Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement is absent.

83. 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.

84. 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."[65]

[65] China First Written Submission, para. 352.

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."

85. 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 imports under investigation. The only obligation the text places on the parties is to identify "known" causes of injury, and 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.

86. 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 its interpretation of these provisions. By contrast, under the principles articulated in the Appellate Body report in *Hot-Rolled Steel*,[66] 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.

87. 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 does no more than assert 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 – whether they are fairly traded or unfairly traded. The nature of this assumption is not intuitive, is not explained by China, and is not supported by any evidence disclosed by MOFCOM. It cannot support MOFCOM's patently inadequate analysis of the increases in production and inventories.

88. 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.

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[66] *US – Hot-Rolled Steel (AB)*, para. 222.

89. 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.

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

91. In its consideration of imports from countries other than Russia and the United States, MOFCOM also breached the obligation under the Agreements 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 stated purpose of the obligation to disclose essential facts 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, although it was not confidential.

92. 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 the standards of 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 makes the remarkable assertion that authorities need only provide whatever information that they deem material, as though the language in Article 12.2.2 provides for a subjective standard, and that this subjective standard is somehow incorporated into Article 22.5 as a limitation.[67] 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.

K. Conclusion

93. Mr. Chairman, members of the Panel, this concludes the oral statement of the United States. Thank you for your attention. We would be pleased to receive any questions you may have.

[67] China First Written Submission, para. 319.