

*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 Second Substantive Meeting of the Panel with the Parties**

December 15, 2011

1. The United States appreciates this opportunity to provide further views on the reasons why China's antidumping (AD) and countervailing duty (CVD) measures on U.S. grain oriented flat-rolled electrical steel (GOES) are inconsistent with WTO rules. Our previous submissions and statements have addressed most of the arguments that China has made in response to our claims. In this statement, we will concentrate on those points that China made for the first time – or chose to re-emphasize – in its second written submission.

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

2. As the United States demonstrated in its previous submissions, China's decision to initiate a CVD investigation with respect to 11 programs was inconsistent with Article 11 of the SCM Agreement, because the application did not contain sufficient evidence to justify initiation of an investigation – and indeed, in many instances, contained no evidence at all for one or more elements of the subsidy claim. China's response is two fold: first, relying on panel reports addressing Article 5.2 of the AD Agreement (not Article 11 of the SCM Agreement), it asserts that it need not demonstrate that evidence was sufficient but rather merely that "raw information" was contained in the petition. Second, it attempts to rewrite the record in an effort to demonstrate that the evidence provided therein meets the standard China has invented.

3. Regarding China's first assertion, as noted in our previous submissions, China's reliance on panel reports interpreting the AD Agreement for its proposition that all that is needed is "raw information" is misplaced. First, the text of the two provisions is different. Whereas Article 5.2(iii) of the AD Agreement requires "information on prices ...", Article 11.2(iii) of the SCM Agreement requires "evidence with regard to the existence, amount and nature of the subsidy in question." This difference matters, because the language reflects the fact that the type of evidence that would merit initiation of a CVD investigation – evidence with regard to financial contribution, benefit, and specificity – is distinct from that required to initiate an AD investigation – e.g., "information on prices." The panel reports cited by China are simply not informative of the meaning of the SCM Agreement obligation at issue.

4. China also argues that Article 5.2(iii) of the AD Agreement specifies a precise type of evidence, while suggesting that Article 11.2(iii) of the SCM Agreement does not specify a precise type of evidence. Contrary to what China suggests, Article 11.2 is precise in what it requires. It makes clear that an application must contain "sufficient ... evidence with regard to the existence, amount and nature of the subsidy in question." Thus, Article 11.2 requires "sufficient evidence" with regard to the existence of a financial contribution and benefit, the amount of the benefit, and whether the subsidy is specific.

5. China attempts to distract the panel from the clear language of the SCM Agreement because when applied to the facts it leads to only one conclusion: The evidence contained in the application was insufficient to initiate a CVD investigation for several programs under Article 11 of the SCM Agreement. While China points to various documents to assert otherwise, and in its second written submission even claims that these documents were the type of information described by the United States as sufficient evidence, the facts demonstrate that this is simply not

the case.

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

6. In its second written submission, China suggests that the United States has “changed its focus” from the adequacy of the non-confidential summaries to “whether or not there was ‘a link’ between the non-confidential information and the redacted confidential information.” China misrepresents the U.S. position. The United States has consistently argued that the non-confidential summaries provided were labeled as such, but were entirely inadequate.

7. Our second written submission details various instances where China’s theory of what constitutes an adequate non-confidential summary would require respondents to engage in a fishing expedition to surmise an understanding of the confidential information. For instance, China attempts to rely on percentage changes provided more than 50 pages later in the petition to argue that the redacted information was somehow discoverable from other parts of the petition. Forcing respondents to engage in this highly speculative exercise fails to satisfy the relevant provisions.

8. China also asserts that the AD and SCM Agreements do not provide enough guidance for determining how best to comply with Article 12.4.1 of the SCM Agreement and Article 6.5.1 of the AD Agreement, and that therefore it is free to decide for itself what constitutes an adequate summary. In asserting that there is no guidance for applying Articles 12.4.1 and 6.5.1, China ignores the fact that previous panels and the Appellate Body have found sufficient guidance in Article 12.4.1 of the SCM Agreement and Article 6.5.1 of the AD Agreement to resolve questions regarding what qualifies as an adequate non-confidential summary and when adequate non-confidential summaries are not required. Insofar as China continues to pursue its exceptional circumstances argument, the fact is the applicants provided no explanation as to why there were exceptional circumstances that precluded more detailed summarization. The Appellate Body has held that a statement of reasons why summarization is not possible must be provided in the record. Without a statement on the record of reasons why a more detailed summarization was not possible, China cannot excuse the deficient non-confidential summaries contained in the application. For the above reasons, China breached Article 12.4.1 of the SCM Agreement and Article 6.5.1 of the AD Agreement.

C. China’s Resort to and Application of Facts Available is Inconsistent with Article 12.7 of the SCM Agreement

9. China continues to attempt to obscure the issues at hand in its second written submission. China asserts that the U.S. claim under Article 12.7 somehow fails because the United States has not brought a claim under GATT Article VI:3 or otherwise provided an Article VI:3 analysis of China’s request for data. There is no GATT Article VI:3 claim within the terms of reference of

this Panel. As the United States has made clear, it is challenging China’s decision to resort to facts available and its selection of a 100% utilization rate. China’s extensive comments regarding GATT Article VI:3 are not germane to that inquiry.

10. Although China claims that the “record speaks for itself”, throughout the proceeding China has sought to back away from the very specific instructions contained in its own questionnaires – largely ignoring its own instructions regarding how to respond to irrelevant or inapplicable questions in general and specifically with respect to the government procurement program, denying the over-broad and burdensome nature of its request (while simultaneously conceding that 93% of their request was irrelevant), and re-translating the questions at issue twice in an apparent attempt to somehow prove the clarity of their request. China claims that the quantity and value data it sought in question 4 of its questionnaire was the only information that would have allowed it to test the U.S. companies’ factual assertions and confirm the extent of utilization. This is a gross exaggeration. This information at best provided a roundabout way of confirming the extent of utilization. China itself notes that there was a more direct means of identifying sales transactions that likely were ultimately destined for use in a government project. Specifically, China states that it was likely that the customers in an indirect transaction would request manufacturer’s certificates certifying compliance with Buy American provisions. Yet China never asked for any such certificates.

11. Moreover, we note that China’s purported need for the requested quantity and value data was to prepare for verification. That is, according to China, the information was to be mined in order to develop a verification strategy. Given this, there was nothing preventing China from using the databases filed in the AD proceedings to develop its verification strategy. Yet China chose not to do so.

12. Finally, we note that China also claims that its selection of a 100% utilization rate was reasonable and “best reflected the ‘facts available’ on the record”, an assertion that strains credulity. First, China asserts that the United States conceded that the correct utilization rate was greater than zero. The United States is unaware of such a concession, and China’s only support for such a concession appears to be its own assertions in a previous submission. How China arrived at 100% as a reasonable rate remains a mystery. The application itself, the source of the 29% alternative proposed by one of the U.S. companies, did not support anything close to a 100% utilization rate. All other evidence on the record indicates that even this 29% figure would be adverse. Selecting a 100% utilization rate in light of the customer lists, the petition, the sales databases, and other record evidence was inconsistent with Article 12.7 of the SCM Agreement.

D. China Acted Inconsistently With Its Obligations Under Article 12.2.2 of the AD Agreement

13. China baldly asserts that the United States has pointed to no text in Article 12.2.2 obligating an investigating authority to make available the specific dumping calculations. To the

contrary, China simply has ignored the U.S. arguments on this point. China continues to argue that if any obligation to provide the final dumping calculations exists, it resides in Article 6.9 of the AD Agreement, not Article 12.2.2. Article 6.9, however, pertains to disclosure of the essential facts *before* a final determination. The U.S. claim, on the other hand, pertains to the actual *final* dumping calculations. The final dumping calculations performed by an investigating authority cannot be disclosed prior to the final determination.

14. Finally, China continues to claim that the respondents in the investigation were able to replicate and check the dumping calculations. The United States has already explained why China is wrong on this point, and China’s claim is undermined by the express request of ATI during the investigation that MOFCOM release its calculations so that ATI would have “the opportunity to review those calculations for mathematical errors and to provide meaningful comments on the methodology MOFCOM used to calculate dumping margins” More fundamentally, the obligation of an investigating authority under Article 12.2.2 exists even if the respondent companies are able to replicate some (or even all) of the authority’s calculations. Therefore, China acted inconsistently with Article 12.2.2 of the AD Agreement by failing to make available to the two respondent companies the final dumping calculations it performed.

E. The Injury Analysis in MOFCOM’s Final Determination was Inconsistent with China’s WTO Obligations

15. China’s attempts to rewrite MOFCOM’s injury determination are inconsistent with the nature of this dispute resolution process. The dispute resolution process concerns the findings the authority actually made, and during Panel proceedings Members may not offer new rationales or explanations to justify their findings. China’s argument that the MOFCOM injury determination can be justified on the basis of volume effects alone cannot be reconciled with the determination itself. MOFCOM’s injury determination relied heavily on price effects findings. If the price effects findings are inconsistent with Articles 3.1 and 3.2 of the AD Agreement and Articles 15.1 and 15.2 of the SCM Agreement, MOFCOM’s injury determination cannot stand.

16. Moreover, in an attempt to produce positive evidence to support its price effects findings, China’s most recent submissions to the Panel rely heavily on findings nowhere made in the MOFCOM determination and evidence never disclosed to the parties. China’s actions cannot be reconciled with the obligations of Articles 6.9 and 12.2.2 of the AD Agreement and Articles 12.8 and 22.5 of the SCM Agreement which require authorities to explain their findings and disclose pertinent non-confidential evidence to the parties. As we will explain, China repeatedly flouts this obligation.

17. A prime illustration of how China has tried to rewrite MOFCOM’s price effects analysis appears in paragraph 93 of its second written submission. There China asserts that “[t]he subject imports were gaining market share, and the domestic industry reacted with lower prices to stop the further loss of market share. These lower prices then led to the price depression and price

suppression that MOFCOM found.” This assertion is incorrect in at least four respects.

18. First, it conforms to no finding that MOFCOM actually made. As we have stated repeatedly during these proceedings, MOFCOM’s actual findings were that price depression and price suppression were caused by “low” prices of the imports under investigation. Thus MOFCOM’s “low price” finding purported to explain price declines during the first quarter of 2009, notwithstanding MOFCOM’s admission that the imports under investigation were priced higher than the domestically produced product. China has consistently declined to defend MOFCOM’s “low price” findings, which we have contended are inconsistent with Articles 3.1 and 3.2 of the AD Agreement and Articles 15.1 and 15.2 of the SCM Agreement.

19. Moreover, according to the argument that China has made in paragraph 93, the critical point at which prices for the domestically produced product began to fall was the fourth quarter of 2008. In paragraph 121 of its answers to the first set of panel questions, China points to information it asserts is in the MOFCOM record supporting this proposition. However, MOFCOM’s Final Determination supplied no data concerning quarterly pricing or price trends during 2008. It provided only annual average unit value data. The finding that MOFCOM actually made was that prices for domestically produced products followed the same trends as those of the imports under investigation. The only data the determination provided concerning the imports were annual average unit value data. MOFCOM’s findings concerning domestic pricing patterns cannot be deemed to refer to quarterly data that nowhere appear in the decision.

20. Second, even if MOFCOM had made the finding that China now attributes to it, it is clear that quarterly pricing data for 2008 is a critical element of MOFCOM’s analysis of price effects. But MOFCOM provided no quarterly pricing data in its Essential Facts Disclosure. Indeed, China did not provide the 2008 quarterly pricing data MOFCOM purportedly used until it submitted its answers to the first set of panel questions. This information, incidentally, indicates that the trend data can readily be disclosed in a non-confidential summary format. By not disclosing these essential facts to the parties during the MOFCOM investigation, China violated Article 6.9 of the AD Agreement and Article 12.8 of the SCM Agreement.

21. Third, even if MOFCOM can be deemed to have made a finding concerning quarterly price trends in 2008, it did not conduct the objective examination required by Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement. This is because pricing trends would be the only indicator on which MOFCOM would have performed a quarterly analysis for 2008. MOFCOM did not conduct a quarterly analysis of any other factor that would indicate whether price suppression or price depression was the effect of the imports under investigation, as required by Article 3.2 of the AD Agreement and Article 15.2 of the SCM Agreement. It did not conduct a quarterly examination of import volumes, and it did not conduct a quarterly examination of import prices.

22. Fourth, China’s attempted re-framing of MOFCOM’s price effects finding is still not

supported by positive evidence. According to China’s re-framing in paragraph 93 of its second written submission, increasing subject import market penetration required domestic producers to cut their prices in an effort to regain market share. However, the only time during MOFCOM’s period of investigation when the domestic industry lost market share was 2008. And during the bulk of 2008, the domestic industry was not cutting prices. Instead, the information China provided in paragraph 121 of its answers to the first set of panel questions – information, we reiterate, that MOFCOM never disclosed during its investigation – indicates that prices for domestically produced GOES increased throughout the first three quarters of 2008. Prices fell only in the fourth quarter, when the volume of the imports under investigation fell from prior quarterly peaks.

23. Furthermore, contrary to what China suggests in its second written submission, it is not correct that under Articles 3.2 and 15.2 the question is simply whether there is “price suppression” or “price depression” in the abstract. The language of those provisions is clear – the question concerns “the effect of” the imports. An examination of the “effect” of imports necessarily involves a causation analysis. The question is then whether imports have the effect of suppressing or depressing prices. Therefore, an investigating authority’s failure to establish a causal link between the imports and the price effects is relevant evidence of a breach of Articles 3.2 and 15.2. The cases cited by China for its theory that these articles do not have any causation aspect do not in fact support China’s theory. Rather, these cases involved the separate question of a non-attribution analysis. The causation analysis under Articles 3.2 and 15.2 is analytically distinct from a non-attribution analysis, and the EC – DRAMs panel report, cited by China, is fully consistent with the U.S. approach.

24. The only information in the record concerning quarterly import volumes, which is that in CHN-33 which we reformatted in US-41, indicates that the volume of imports under investigation increased most rapidly during the second and third quarters of 2008. These were the same quarters that, according to China, average unit values for domestically produced GOES peaked. By the fourth quarter of 2008, the quarterly volumes of imports under investigation had begun to decline. Thus, the record does not show that the Chinese industry was forced to cut prices to counter rising import volumes. When quarterly import volumes were reaching their peak, so were quarterly domestic average unit values.

25. Moreover, in attempting to attribute the falling average unit value levels during the fourth quarter of 2008 to the imports under investigation, MOFCOM overlooks other data in its record indicating why prices fell during this time. The ATI comments in CHN-31, whose discussion of pricing trends China has cited with approval, explain that raw materials prices for steel declined beginning in October 2008, and the prices for all types of steel – not merely GOES – declined. Indeed, the data in US-41 indicate that average unit values for both the imports under investigation and nonsubject imports declined in the fourth quarter of 2008. By focusing on per-unit profits, without any consideration of the cost components, MOFCOM had no basis to assess whether changes in per-unit profits were simply related to the start-up of Baosteel’s new plant.

26. There are additional evidentiary and logical flaws in the price effects analysis that China has presented to the Panel. MOFCOM's price suppression analysis assumed that the GOES industry faced the same cost structure in 2007 and 2008. It did not, because of the entry of a new producer in 2008. As we explained in our second written submission, new steel production facilities frequently face high costs. MOFCOM's failure to examine whether the entry of a new producer in China skewed any comparison of 2007 and 2008 cost data demonstrates a lack of objective examination.

27. China's current arguments on pricing proceed as if there were a self-evident correlation during MOFCOM's period of investigation between the volume of the imports under investigation, the domestic industry's market share, and the domestic industry's price levels. This is not the case. While subject import volumes rose throughout the period of investigation, during some periods – such as 2007 and the first quarter of 2009 – the domestic industry's market share rose, and at other times, such as 2008, it fell. Similarly, as the quarterly data for 2008 indicate, during certain periods when the imports under investigation were increasing their presence in the market, prices for the domestically produced product rose.

28. There is a more fundamental flaw with MOFCOM's stated reason for finding price effects. There is no correlation between "low" prices for the imports under investigation and the domestic industry's market share. We explained in our first written submission why what MOFCOM presented as a comparative analysis of pricing was not an objective analysis because it did not measure prices at all. MOFCOM combined data for all grades of GOES into a single value measure, and combined all annual transactions into a single price point. We also explained why China violated the obligation to disclose essential facts by not disclosing the non-confidential data it had collected concerning price comparisons. China has now attempted to rectify this omission far too late through the chart it provided on the first page of its November 25 submission to the Panel. (We note, however, that this chart does not provide data for the first quarter of 2009.) Under China's calculations, the largest difference between the value of the imports under investigation and the value of the domestically produced product occurred in 2007 – a year that the Chinese industry raised prices, increased profits by over 50 percent, and gained market share. Consequently, the record for the entire period of investigation does not indicate that lower values of the imports under investigation from 2006 to 2008 required the domestic industry to adjust its pricing to preserve market share.

29. With respect to the issue of causal link, China has repeatedly mischaracterized the U.S. arguments and misrepresented the record. In paragraph 109 of its second written submission, China references the "number of aspects of the causal link analysis that the United States has not challenged at all." This statement does not reflect the U.S. position that MOFCOM's price effects findings were essential to its causation analysis.

30. Further in paragraph 109, China makes the statement that "increasing volumes of dumped

and subsidized imports were taking significant market share away from the domestic industry, and this loss of volume was causing undisputed material injury to the domestic industry.” This statement does not reflect any finding that MOFCOM actually made. It also does not accurately characterize the record. The only period in which the domestic industry lost market share was 2008. During that year, multiple important indicators of industry performance were positive and many rose by double digit percentages. These included output, sales prices, sales revenues, employment, and wages. The industry’s pre-tax profit also rose in 2008. This hardly reflects “undisputed material injury.”

31. By contrast, during the first quarter of 2009, numerous indicators of domestic industry performance, including operating income, fell. But this could not have been due to loss of volume to the subject imports. The domestic industry’s sales quantities and market share were both higher during that period than they were during the first quarter of 2008. China’s inability to show any correlation either between import volume and domestic industry market share, or between the domestic industry’s market share and its performance, confirms why the price effects findings that we have challenged are essential to the causation analysis. The contrasts between 2008, when the domestic industry’s market share declined and its performance was strong, and the first quarter of 2009 when market share increased and performance deteriorated, indicates that the record does not support the notion that maintaining market share was critical to the condition of the domestic industry.

32. China similarly confuses both the record and the U.S. argument with respect to the issue of non-attribution. Our argument is straightforward: there is no positive evidence supporting MOFCOM’s finding that the imports under investigation were the cause of the domestic industry’s difficulties during the latter portion of the period of investigation. Specifically, any objective examination of the record would have indicated that the domestic industry’s sharp increases in capacity after 2008 resulted in excessive production and inventory overhangs which in turn led to the domestic industry’s price and profitability declines. In light of this, the third sentence of Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement required MOFCOM to engage in a non-attribution analysis to ensure it did not attribute to the imports under investigation any injury attributable to other causes. China’s failure to conduct any such analysis consequently violated the agreements.

33. China has used a variety of strategies to avoid responding to our arguments. In its first written submission and at the first panel meeting, it contended that MOFCOM was not required to engage in a non-attribution analysis because the United States had not established that causes other than subject imports had “dramatic” effects. As we explained in our second written submission, nothing in the agreements provides that a non-attribution analysis is required only when factors other than subject imports are having “dramatic” effects. Moreover, the agreements place upon the authority, not the parties challenging imposition of duties, the responsibility to assess the effects of other known causes of injury.

34. In its second written submission, China changed its approach and argued that the overproduction and resulting inventory overhang was not a “known” cause of injury because the only arguments submitted to it concerned excess capacity. This argument is baseless. We observe initially that, in its comments on the preliminary determination that appear at CHN-31, ATI references “the supply-demand relation” several times as an alternate cause of injury. Thus, the asserted cause of injury was not merely a change in capacity, but a change in the amount supplied – in other words, excess production. The petitioners clearly understood this, because their response to the ATI comments in CHN-32 directly, albeit inaccurately, referenced the industry’s production levels. Moreover, any possible ambiguity in ATI’s comments was rectified by the comments of the U.S. Government. As MOFCOM acknowledged at page 72 of its Final Determination, the United States argued that “the more likely cause of any problems experienced by the Chinese producers is the enormous increase in inventories due to the domestic industry’s incorrect assessment of demand.” Thus, MOFCOM was well aware that excessive production and inventory overhangs were being asserted as an alternative cause of injury.

35. In its November 25 response to the Panel, China attempts to provide a factual basis for MOFCOM’s findings. It has not succeeded. We observe initially that China disclosed critical nonconfidential trend data – most notably concerning capacity utilization levels and the level of the increase in capacity – for the first time in that response. While China apparently now believes that such data are necessary for an understanding of the MOFCOM determination, MOFCOM never disclosed these data to the parties. This provides yet another instance of China’s violation of its obligations under Article 6.9 of the AD Agreement and Article 12.8 of the SCM Agreement.

36. China’s response does not in fact provide positive evidence to support MOFCOM’s findings concerning the effects of causes of injury other than the imports under investigation. While we hope to provide a complete written response, we can now summarize why. First, the information China has submitted confirms that the capacity increase was far greater than warranted by increases in domestic demand. China states that there was an average consumption growth of 20 percent per year. Capacity, however, more than doubled between 2006 and 2008.

37. Second, the capacity increase was large not only in relative terms, but also in absolute terms. This can be illustrated by the confidential data China provided comparing the percentage of Chinese demand the domestic industry could supply at the conclusion of the period of investigation with the percentage it could supply at the beginning of the period. Given the magnitude of this increase, the only way in which the Chinese industry could have obtained full capacity utilization was by displacing the overwhelming majority of both subject and nonsubject imports from the market. China has not provided – and we cannot discern – any economic basis for the proposition that any capacity increase by a domestic industry is reasonable as long as total domestic industry capacity does not exceed national demand.

38. Third, it was not merely capacity, but also production that increased far more quickly than

demand. China did not provide the specific confidential data that the Panel requested concerning demand, capacity, production, and inventories. Nevertheless, we have been able to estimate some data for demand, capacity, and production for 2008 by combining the limited confidential data China did provide with the nonsubject import data for 2008 in US-41. Based on our estimates, the record indicates that even if the volume of imports under investigation had not increased by a single ton in 2008, there still would have been substantial domestic industry overproduction – and consequently an inventory overhang – that year.

39. Moreover, China's November 25 submission conspicuously fails to provide any confidential data concerning the first quarter of 2009. Information in MOFCOM's Essential Facts Disclosure, however, indicates that compared to the first quarter of 2008, production increased by 55.23 percent while demand only increased by 12.46 percent. The Chinese industry's decision to increase production by far more than the increase in demand during the first quarter of 2009 cannot be attributed to the industry losing market share to low-priced imports under investigation, inasmuch as the domestic industry gained market share during this period and the imports under investigation were priced higher than the domestically produced product. The Chinese producers' flooding the market with excess production remains the only plausible explanation for the sharp decline.

40. Finally, China has not justified its failure either to discuss in its determination or disclose to the parties during the course of the MOFCOM investigation information about the volume and prices of nonsubject imports. We have explained in our written submissions how China's inactions in this regard violate Articles 6.9 and 12.2.2 of the AD Agreement and Articles 12.8 and 22.5 of the SCM Agreement. China asserts that MOFCOM did not need to provide any discussion of nonsubject imports because no party raised an argument concerning the issue. But parties could not defend their interests and assert arguments because MOFCOM did not disclose – and indeed, China has continued to fail to disclose – the public data on which it relied. The available data in the record that we have provided in US-41 demonstrate that there is no basis for China's suggestion that nonsubject imports were irrelevant to the injury analysis. Instead, during 2008 – the year China has characterized as critical to the MOFCOM pricing analysis – nonsubject imports had a greater volume and lower average unit values than the imports under investigation.