CHINA – COUNTERVAILING AND ANTI-DUMPING DUTIES ON GRAIN ORIENTED FLAT-ROLLED ELECTRICAL STEEL FROM THE UNITED STATES (DS414)

EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION OF THE UNITED STATES OF AMERICA

June 15, 2011

I. Introduction

1. In this dispute, the United States is challenging various aspects of the definitive antidumping and countervailing duty measures that the Government of the People's Republic of China ("China") has adopted with respect to imports of grain oriented flat-rolled electrical steel ("GOES") from the United States. Several aspects of these measures are inconsistent with China's obligations under the General Agreement on Tariffs and Trade 1994 ("GATT 1994"), the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("AD Agreement"), and the Agreement on Subsidies and Countervailing Measures ("SCM Agreement").

2. Transparency and due process commitments are important elements of the AD and SCM Agreements. From the very outset, China's conduct of the GOES investigation raised serious transparency and due process concerns. Following China's wide-ranging investigation, in which it requested detailed information on companies' entire production lines including products unrelated to GOES, data on sales stretching back fifteen years, and on laws and regulations that had no relation to the companies or product at issue, and after both the United States and U.S. companies provided over a dozen questionnaire responses, the serious due process and transparency problems evident from the beginning of the proceeding became even more apparent as China began issuing its determinations. These due process and transparency problems impaired the ability of the United States and interested parties to understand the basis for China's determinations or to defend their interests.

II. Factual Background

A. The Imposition of Duties on U.S. Imports

1. The Petition

3. On April 27,2009, two Chinese steel producers, Wuhan Iron and Steel (Group) Corporation and Baosteel Group Corporation, filed a petition with China's Ministry of Commerce ("MOFCOM") requesting relief under China's AD and CVD laws on behalf of China's domestic GOES industry. The petitioners alleged that U.S. producers of GOES, in particular AK Steel Corporation ("AK Steel") and ATI Allegheny Ludlum Corporation ("ATI"), had engaged in injurious dumping and benefitted from various countervailable subsidies.[1]

4. Regarding subsidies, the petitioners alleged that 27 federal and state laws provided countervailable subsidies to the U.S. companies. Among the laws challenged were several federal procurement statutes. Regarding the dumping allegations, petitioners estimated a dumping margin for GOES imports from the United States of 25%. The petition alleged that imports of GOES from the United States and Russia caused and threatened injury to the Chinese industry. Citing China's AD regulations, the petitioners argued that a cumulative assessment of injury should be performed, which would collectively take into consideration GOES imports from the United States and Russia. The petition then alleged price undercutting, price

[1] The petition also alleged that Russian producers of GOES engaged in injurious dumping.

depression, and price suppression caused by the imports.

5. To support virtually their allegations, the petitioners purportedly relied on a wide variety of data and information. Virtually none of this information was disclosed, however, because the petitioners sought and obtained from MOFCOM confidential treatment for nine broad categories of data and information that it claimed was confidential.

6. On June 1, 2009, MOFCOM initiated the anti-dumping, countervailing duty, and injury investigations. For the anti-dumping and countervailing duty proceedings, MOFCOM set a period of investigation from March 1, 2008 to February 28, 2009, and for injury, MOFCOM set the period of investigation from January 1, 2006 to March 31, 2009.

2. Subsidy Questionnaires and New Allegations

7. On June 26, 2009, MOFCOM issued initial subsidy questionnaires to AK Steel and ATI, as well as to the United States. MOFCOM asked the United States for purchase data relating to GOES during the period of investigation. The results of a search of the federal procurement database showed that GOES was not purchased by the U.S. government.

8. In the subsidy questionnaires issued to AK Steel and ATI, MOFCOM demanded volumes of information unrelated to the subject merchandise. For example, MOFCOM demanded that AK Steel provide detailed transaction data for billions of dollars in transactions involving non-subject merchandise – products that are neither inputs for GOES nor substitutable for GOES. Because of the volumes of information requested, neither AK Steel nor ATI could fulfill all of the requests made in the CVD proceeding. In addition, and in connection with demands for all sales data for all products, AK Steel referenced the fact that it had already submitted detailed sales data for GOES in the parallel antidumping proceeding, and asked MOFCOM to review that data for purposes of the CVD, since China's antidumping laws and regulations do not provide for separate investigative records.

9. The U.S. companies further demonstrated that they did not sell any GOES to any government entity. In addition to referring MOFCOM to detailed sales data for GOES, AK Steel provided MOFCOM customer lists for all products showing that no sales were made to the government. ATI provided customer lists for the subject merchandise.

10. On July 20, 2009, the petitioners filed new subsidy allegations regarding various federal and state laws. Despite serious deficiencies pertaining to these allegations, on August 19, 2009, MOFCOM initiated an investigation covering five programs.

11. After filing its initial questionnaire response on August 10, 2009, in a span of just eight weeks, AK Steel received and responded to five lengthy supplemental questionnaires issued by MOFCOM in the CVD investigation. On September 9, 2009, AK Steel noted the considerable burden resulting from MOFCOM's investigation, and stressed its willingness to cooperate. AK

Steel responded to all of MOFCOM's requests.

3. Preliminary Determination

12. On December 20, 2009, MOFCOM published the preliminary determination. Regarding the government procurement statutes, MOFCOM applied what it termed facts available and calculated a subsidy rate of 11.7% for AK Steel and 12% for ATI. MOFCOM asserted that it applied facts available to the U.S. companies because it determined that the U.S. companies did not cooperate in its investigation. MOFCOM specifically cited U.S. companies' failure to provide data on all sales of all steel products.

13. Regarding its benefit determination for the federal procurement statutes, MOFCOM concluded that competitive bidding under the procurement statutes does not result in a valid market price. While conceding that competitive bidding exists, MOFCOM nonetheless concluded, without explaining it conclusion, that the qualification criteria for bid participants prevented the price from reflecting true market conditions.

14. MOFCOM calculated preliminary dumping margins of 10.7% for AK Steel, 19.9% for ATI, and 25% for all others. The only explanation MOFCOM provided regarding how it calculated the all others rate was a single sentence in its report. MOFCOM provided no further explanation of its calculation of the all others dumping rate, and it did not disclose the information forming the basis for the calculation of this rate. The all others subsidy rate in the preliminary determination was 12%.

4. On-Site Verification

15. Between January 5, 2010 and January 13, 2010, MOFCOM conducted an on-site verification of each of the two U.S. companies subject to individual investigation. The detailed sales data for GOES and customer lists for all products submitted by AK Steel and detailed GOES sales data submitted by ATI before the verification were usable for the determination of the subsidy rate because the data showed records for all sales, as well as the absence of sales to the government. MOFCOM could have used these data, in conjunction with the information supplied by the United States from its procurement database, to determine that GOES was not purchased by the U.S. government under any federal procurement programs. Because the detailed sales data for GOES and customer lists for all products submitted by AK Steel provided a basis for MOFCOM to determine the level of sales to government entities, the U.S. companies requested that MOFCOM verify the customer lists submitted before the preliminary determination was issued. Despite this request, MOFCOM did not verify the customer lists in the CVD proceeding.

5. Disclosure Documents

a. Factual Disclosure on Dumping Margin and Subsidy Rate

16. Prior to issuing the Final Determination for the antidumping and countervailing duty investigations, MOFCOM released its Final Disclosure, in which it revealed that it had nearly quadrupled the all others subsidy rate to 44.6 percent. As with the Preliminary Determination, the Final Disclosure provided only one sentence referring to its CVD regulations to explain the source of the all others subsidy rate. MOFCOM did not disclose the facts that led it to conclude that the use of facts available was justified for all other U.S. companies. It also did not disclose the facts that led it to conclude that 44.6 percent was a justifiable rate or the calculations performed to determine this rate. Also in the Final Disclosure, MOFCOM revealed that it was increasing the all others dumping rate to 64.8 percent. Again, MOFCOM simply provided a vague reference to China's antidumping law, and beyond that offered not a single piece of information regarding how the rate was calculated.

b. Injury Disclosure

17. On March 5, 2010, the Industry Injury Investigation Bureau of MOFCOM issued a document titled "Basic Facts Based on Which the Industry Injury Determination of the Antidumping Investigation into GOES Imports from the United States and Russia and the CVD Investigation into GOES Imports from the United States was Made" ("Injury Disclosure Document").

18. The Injury Disclosure Document provided some basic information about the volume of the imports under investigation, as well as trend information concerning the condition of the domestic industry. Nevertheless, with respect to an issue that was critical to the subsequent injury determination – pricing – MOFCOM disclosed strikingly few facts**.**

19. What MOFCOM characterized as "pricing" data in a section entitled "Price of the Subject Merchandise" were in fact average unit value data for transactions derived from Customs statistics. MOFCOM combined average unit value data for products imported from the United States and Russia, notwithstanding the fact that separate data for each country could be derived from the Customs statistics. MOFCOM also decided to use only one annual observation for calendar years 2006, 2007, and 2008. Consequently, in a three and one-quarter year period of investigation concerning products from two countries, MOFCOM reported – and apparently relied upon – only four observations of average unit values for the imports under investigation. In short, MOFCOM's disclosure included *no information* concerning actual prices charged for *any product* in any commercial transaction.

20. MOFCOM did not state how it generated any information on the pricing of the domestically produced product. The minimal information disclosed concerning pricing trends suggests that, as with the imports, MOFCOM relied on only four pricing observations for domestically produced products.

21. Another issue central to the final determination was price suppression and the Chinese producers' purported inability to recover increasing costs. While the Injury Disclosure

Document provided some information concerning trends in sales revenue and profits before tax, it disclosed nothing concerning the level, trends, or composition of the domestic industry's costs.

22. On causation, MOFCOM disclosed that the Chinese industry's capacity increased by over 50 percent in 2008, and was 80 percent higher in the first quarter of 2009 than during the first quarter of 2008. The large capacity increases facilitated substantial increases in production. These increases in production outstripped even robust increases in demand – particularly so in the first quarter of 2009.

6. Final Determination

a. Subsidy and Dumping Findings

23. On April 10, 2010, MOFCOM issued the final determination for the antidumping and countervailing duty investigations. MOFCOM applied a dumping margin of 7.8% to AK Steel, and 19.9% to ATI.

24. For the subsidy rate, MOFCOM continued to use what it termed facts available to calculate subsidy rates for the federal procurement statutes because the respondents did not provide 15 years of detailed sales data for non-subject merchandise. To calculate the amount of the subsidy purportedly benefitting GOES products, MOFCOM, relying on facts available, assumed that AK Steel and ATI sold only carbon steel, and sold *all* of their output to the government, despite the fact that the record demonstrated there were no sales of GOES to the government, AK Steel did not sell any product to any government entity during the POI, and only a limited amount of non-GOES AK Steel and ATI products could even as a theoretical matter have been purchased in connection with alleged government procurement. Without any analysis, MOFCOM determined that U.S. carbon steel prices were 25% above prices for foreign products**.** MOFCOM calculated subsidy rates for the federal procurement statutes indicating that GOES from AK Steel benefitted from subsidies at the rate of 11.918% and GOES from ATI benefitted at the rate of 11.65%.

25. Regarding the procurement statutes, MOFCOM also concluded that the prices obtained through the competitive bidding process provided for under U.S. law do not reflect real market prices. In doing so, MOFCOM dismissed the position of the United States that procurement in the United States occurs under competitive bidding conditions and that foreign companies may compete for bids. Repeating its position in the preliminary determination, MOFCOM simply stated that the prices generated by competitive bidding do not reflect market prices.

26. Ignoring U.S. comments explaining the flaws in the all others subsidy rate calculation, filed in response to the disclosure document, MOFCOM, in the final determination, imposed a final all others subsidy rate of 44.6 percent. Again, at no time prior to the final determination did MOFCOM disclose to the United States or other interested parties the essential facts under consideration that formed the basis for the near quadrupling of the all others subsidy rate, other than stating that the rate was based on information from the petitioners pursuant to China's CVD

regulations. MOFCOM's explanation did not change from the preliminary determination and disclosure document to the final determination.

27. In the final determination, MOFCOM calculated an all others dumping rate of 64.8%, 332% higher than that in its preliminary determination. It did so despite the fact that the dumping rates it calculated for the two respondents, AK Steel and ATI, were substantially lower that 64.8 percent – that is, 7.8 percent and 19.9 percent, respectively. Again, MOFCOM's only explanation was that it relied upon its Anti-Dumping Regulation. The Final Determination contains no other explanation of how MOFCOM calculated the rate, the data it relied on, or why an increase from 25% was warranted for other U.S. producers/exporters that it did not examine.

b. Injury Findings

28. In its final determination, MOFCOM found that China' GOES industry sustained material injury and there was a causal link between the dumped imports of GOES from Russia and the dumped and subsidized imports of GOES from the United States and this injury. A critical aspect of the causation analysis concerned the purportedly significant price effects of the imports under investigation.

29. MOFCOM repeatedly stated that the importers had a "strategy" of charging "low prices." One critical finding at the beginning of the section is that "[t]he contracts and original records from the price formulation process provided by petitioners showed that the subject merchandise adopted a pricing strategy of selling at a price lower than Chinese like products in the Chinese domestic market. Because subject merchandise was kept at a low price, and the import volume of subject merchandise increased greatly since 2008, domestic producers had to lower their prices to keep market share." MOFCOM failed to specify the nature of these contracts or records, or summarize their content in the Final Determination. As previously discussed, the Injury Disclosure Document contained no information concerning actual prices charged for any product in any commercial transaction. It also provided no information about these contracts or records. Both the Russian and U.S. parties argued to MOFCOM that their prices were not in fact lower than the prices charged by the domestic producers. MOFCOM rejected these arguments at the end of its pricing discussion, in language almost identical to its "low price strategy" finding quoted above, providing no greater detail as to the nature or application of the policy.

30. While the Injury Disclosure Document provided no comparisons of prices of domestic and imported products, there was one such comparison in the Final Determination. MOFCOM revealed for the first time, in its response to the disclosure comments, that "the Investigating Authority did not conclude that the price of the imported subject merchandise was lower than the price of the domestic like product in Q1 of 2009." The Final Determination, however, contained no specific comparisons of prices of the imported and domestically produced product during the remaining period of investigation – calendar years 2006 through 2008.

31. As previously stated, notwithstanding the foregoing, MOFCOM found that the imports

under investigation had price-depressing effects. In particular, it found that domestic producers had to "lower their prices to keep market share" in response to the "pricing strategy" of the imports under investigation.

32. MOFCOM also found that the imports under investigation had price-suppressing effects. It found that, because of the imports under investigation, domestic producers were not able to recover rising costs in the first quarter of 2009. MOFCOM first found that, during 2008 and the first quarter of 2009, imports increased more quickly than domestic demand. MOFCOM then found that the increased market penetration of the imports under investigation caused declines in the domestic industry's capacity utilization and increases in its inventories in 2008 and the first quarter of 2009.

33. MOFCOM next repeated the price effects findings from the injury disclosure, and concluded that the subject imports, because of their purported underselling and purportedly significant price-depressing and -suppressing effects, "result[ed] in sharp decline[s] in the profitability of the domestic industry." MOFCOM cited as other adverse effects declines in sales revenues, profits, return on investments, and employment-related factors during the first quarter of 2009.

34. MOFCOM further purportedly examined whether other factors caused injury to the domestic industry. In every instance, it found that the other factors caused no injury. Thus it found that GOES imports from countries other than Russia and the United States were not a cause of injury. This discussion, which was the sole discussion in the Final Determination concerning imports from sources other than the United States and Russia, provided no empirical data concerning imports from nonsubject countries. Nor did MOFCOM include any information about imports from nonsubject countries in its Injury Disclosure Document.

35. Finally, MOFCOM responded to the U.S. comments that the Chinese industry's decisions to expand capacity and production were a likely alternative cause of injury. The United States argued before MOFCOM that the sharp increase in inventories caused by the domestic industry's overexpansion was an alternative cause of injury. MOFCOM rejected these arguments and concluded that the domestic industry's sharp increases in capacity, production, and inventories were not a cause of any injury to the domestic industry.

III. Legal Argument

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

36. MOFCOM's initiation of the countervailing duty investigation was inconsistent with Article 11 of the SCM Agreement. An application to initiate a CVD investigation must include sufficient evidence of financial contribution, benefit, and specificity to satisfy the requirements of Article 11.2. For several allegations contained in the petition, the programs established under the

laws and alleged to provide countervailable subsidies either were no longer in effect and could no longer provide benefits to the U.S. companies; or the petitioners did not offer evidence of specificity; or the petitioners did not offer evidence of a financial contribution. Therefore, the petition failed to meet the requirements of Article 11.2.

37. In addition, to satisfy the requirements of Article 11.3, an investigating authority must objectively assess the accuracy and adequacy of the evidence contained in the petition before initiating an investigation. MOFCOM, however, failed to examine the accuracy and adequacy of the evidence with respect to several alleged subsidies. Regarding several of the supposed subsidies at issue, an objective investigating authority would not have initiated an investigation based on the petition's unsupported allegations.

B. MOFCOM Failed to Require Adequate Non-Confidential Summaries, Breaching Article 12.4.1 of the SCM Agreement and Article 6.5.1 of the AD Agreement

38. China breached Article 12.4.1 of the SCM Agreement and Article 6.5.1 of the AD Agreement because it failed to require non-confidential summaries of allegedly confidential information. The only purported non-confidential summaries are contained in the petition; no summaries of confidential information are contained in the preliminary determination, disclosure documents, nor final determination. Further, the purported non-confidential summaries in the petition are not in fact summaries. Instead, the petition only provides requests for confidential treatment of data and information. It does not summarize the information in a manner permitting a reasonable understanding of the substance of the data and information treated as confidential.

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

39. China breached Article 12.7 of the SCM Agreement because its use of facts available was improper. MOFCOM ignored necessary information provided by the U.S. companies. The U.S. companies provided this necessary information within a reasonable period of time, and they did not impede the investigation. MOFCOM's use of facts available was unjustified and punitive.

D. MOFCOM Failed to Make Available the Calculations It Performed to Arrive at the Dumping Margins, Inconsistent with Article 12.2.2 of the AD Agreement

40. China breached Article 12.2.2 of the AD Agreement because it failed to make available to AK Steel and ATI the calculations used to determine these companies' final dumping margins. The dumping calculations are "relevant information on the matters of fact" that led to the imposition of definitive measures. Accordingly, MOFCOM was required to make them available, but it did not do so.

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

41. MOFCOM failed to adequately explain its findings and conclusions supporting its determinations that the competitive bidding process under the U.S. government procurement statutes at issue does not result in prices that reflect market conditions. These findings and conclusions were material to its finding of benefit in its subsidy investigation. MOFCOM failed to explain its novel benefit theory in the preliminary and final determinations. Therefore, China acted inconsistently with Article 22.3 of the SCM Agreement.

F. MOFCOM's Determination of the "All Others" CVD Rate was Inconsistent with Articles 12.7, 12.8, 22.3, and 22.5 of the SCM Agreement

42. MOFCOM, without explanation, applied countervailing duties based on facts available to other U.S. exporters/producers of GOES that were not named in the petition and were never sent a questionnaire. MOFCOM never notified a single producer other than those identified in the petition of the existence of the investigation, the information that would be required of them, or the consequences of not fully complying with MOFCOM's requests. MOFCOM compounded the impact of its application of facts available by providing no detail in its Final Determination and final disclosure documents with regard to the findings that led to its application of facts available. As a result of this lack of disclosure, the United States and other U.S. companies were deprived of any opportunity to defend their interests with respect to this issue. Thus, China acted inconsistently with Articles 12.7, 12.8, 22.3, and 22.5 of the SCM Agreement.

G. MOFCOM's Determination of the All others rate in the Final Antidumping Duty Determination Is Inconsistent with Article 6.8, 6.9, 12.2, and 12.2.2 of the Antidumping Agreement

43. As with the application of countervailing duties to other U.S. exporters/producers of GOES that were not named in the petition and were never sent a questionnaire, MOFCOM appears to have applied a facts available dumping margin to other U.S. producers/exporters of GOES despite never notifying a single producer other than those identified in the petition of the existence of the investigation, the information that would be required of them, or the consequences of not fully complying with MOFCOM's requests. In so doing, MOFCOM did not disclose the essential facts and conclusions of law that led it to this result. MOFCOM provided no detail in its Final Determination and final disclosure documents with regard to the findings that led to its application of facts available. As a result of this lack of disclosure, the United States and other U.S. companies were deprived of any opportunity to defend their interests with respect to this issue. Consequently, China acted inconsistently with Articles 6.8, 6.9, 12.2, and 12.2.2 of the AD Agreement.

H. China's Conduct of the GOES Investigation Breached Article 1 of the AD

Agreement

44. Because China's conduct of the GOES investigation breached numerous other provisions of the AD Agreement, China also breached Article 1.

I. China Breached Article VI:2 of GATT 1994 By Levying an Antidumping Duty Greater Than the Margin of Dumping

45. China impermissibly assigned an adverse facts available margin to other U.S. producers/exporters that China did not examine in this investigation. As a result of the adverse assumptions made in assigning that margin to those companies, the antidumping duty levied on their products was "greater in amount than the margin of dumping in respect of such products", which could permissibly have been calculated in accordance with the provisions of the AD Agreement. Because the duties China levied on these "all others" companies were, and continue to be, greater in amount than the appropriate margin of dumping, China violated Article VI:2 of GATT 1994.

J. The Price Effects Analysis in MOFCOM's Final Determination was Inconsistent with China's WTO Obligations

46. MOFCOM's price effects analysis in its injury determination was fundamentally flawed in many respects. MOFCOM failed to disclose essential facts supporting is price effects analysis. MOFCOM's price effects analysis was also not based on positive evidence. In conducting its price effects analysis, MOFCOM did not engage in an objective examination of the evidence, nor did MOFCOM offer an adequate explanation for its price effects findings. China therefore acted inconsistently with Articles 3.1, 3.2 , 6.9, and 12.2.2 of the AD Agreement, and Articles 12.8, 15.1, 15.2, and 22.5 of the SCM Agreement

K. The Causation Analysis in MOFCOM's Final Determination is Inconsistent with China's WTO Obligations

47. MOFCOM's causation analysis in its injury determination was similarly deficient. MOFCOM failed to disclose facts supporting its causation analysis. The causation analysis was not supported by positive evidence and was not based on an objective examination of the evidence. MOFCOM also failed to communicate an adequate explanation for its causation findings. Therefore, China acted inconsistently with Articles 3.1, 3.5, 6.9, and 12.2.2 of the AD Agreement, and Articles 12.8, 15.1, 15.5, and 22.5 of the SCM Agreement.

L. China's Conduct of the GOES Investigation Breached Article 10 of the SCM Agreement

48. Because China's conduct of the GOES investigation breached numerous other provisions of the SCM Agreement, China also breached Article 10.