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

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

October 19, 2011

I. Introduction

1. China's responses to the U.S. claims fail to address the substance of the U.S. arguments. 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 provided by China for purposes of this dispute. As we discuss below, China's first written submission often ignores MOFCOM's actual findings or tries to rewrite them. In some instances, China seeks to justify its measures by referring instead to alleged U.S. practice. In other instances, China has replied with broad assertions that the AD and SCM Agreements create no obligations with respect to the issues that the United States has raised, and that China is free to do whatever it chooses. China is incorrect. The AD and SCM Agreements do place relevant obligations on China, and China has failed to rebut the U.S. *prima facie* case that China has breached these obligations.

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

A. China's interpretation of Article 11 of the SCM Agreement is erroneous

2. While there are parallels between SCM Agreement Article 11 and AD Agreement Article 5, it is important to note the textual differences between Article 5.2 of the AD Agreement and Article 11.2 of the SCM Agreement. Thus, China's reliance in its first written submission on panel reports interpreting the AD Agreement for its propositions that all that is needed is "the inclusion of raw information," and that information need not be linked with allegations, is misplaced in the context of the SCM Agreement. In contrast to the low standard advocated by China, the text of the SCM Agreement makes clear that what is required is *sufficient evidence*.

B. The Application Presented Insufficient or No Evidence Indicating a Countervailable Subsidy for Several Programs

3. As explained in the U.S. first written submission, the evidence provided in the application in support of applicants' claims with respect to several programs was nonexistent or otherwise not sufficient to support initiation. While China asserts that initiation of the countervailing duty investigation was consistent with Article 11 of the SCM Agreement, for each alleged subsidy, the petition contained serious gaps that would have prevented any reasonable investigating authority from concluding that the evidence provided was sufficient to support initiation.

C. No Unbiased or Objective Investigating Authority Would Have Initiated an Investigation under SCM Agreement Article 11.3 Based on the Conjecture Contained in the Application

4. Instead of carefully examining the application and accompanying evidence, MOFCOM merely accepted the applicants' allegations as is, or initiated an investigation based on sheer speculation regarding the "possibility" of a subsidy, apparently intending to bolster the otherwise deficient application after initiating its investigation.

5. Regarding the Medicare Prescription Drug, Improvement and Modernization Act of 2003, for instance, it is clear that MOFCOM made no attempt to analyze the information provided by applicants to determine whether there was a sufficient basis to support initiation. Regarding the Economic Recovery Tax Act of 1981, Tax Reform Act of 1986, and Clean Air Act allegations, instead of carefully reviewing the evidence provided by applicants to determine whether it was sufficient to support the claims made in the application, MOFCOM simply accepted applicants' assertions that a program that was terminated in the 1980s could continue to provide benefits during the POI. With respect to the Indiana Steel Industry Advisory Service, and Steel Import Stabilization Act of 1984, MOFCOM initiated an investigation on the basis of nothing more than pure speculation.

6. MOFCOM's decision to initiate an investigation into the electricity, coal, natural gas, the 2003 Economic Stimulus Plan of Pennsylvania, and Pennsylvania's Alternative Energy Funding programs serve as particularly egregious examples of MOFCOM's cavalier approach to initiation. Despite the clear deficiencies in the petition, and a submission by the United States highlighting the inadequacies of these allegations, MOFCOM initiated an investigation of these programs. In each of the instances, by initiating an investigation based on the "simple assertion, unsubstantiated by relevant evidence" contained in the application, China breached Article 11.3.

III. 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

A. China's submissions reflect a fundamental misunderstanding of Article 12.4.1 of the SCM Agreement and Article 6.5.1 of the AD Agreement

7. China appears to suggest in its submissions that it need only require "adequate" non-confidential summaries if an interested party objects to the manner in which confidential information is summarized. Yet, whether an interested party objects during the proceeding to the adequacy of a summary is irrelevant to the question of whether the summaries were in fact adequate. The obligation to require adequate non-confidential summaries applies regardless of whether an interested party objects to their adequacy during the proceeding. The obligations contained in SCM Article 12.4.1 and AD Agreement Article 6.5.1 rest with China, not interested parties.

8. China's response reflects the mistaken view that its obligation to ensure that the interested parties furnish adequate non-confidential summaries during the course of the investigation may be excused if it is able to point to some subsequent "non-confidential analysis" contained in its own determinations that provides some indication of the confidential information submitted by the interested party. To adequately defend their interests, parties must have access to adequate non-confidential summaries *during* the course of the investigation, not after the investigating authority has drawn conclusions based on the submitted information. *Ex post facto* "non-confidential analysis" is beside the point. Once the determination is made, the parties' ability to defend their interests has been compromised.

9. China's assertion that the agreements do not provide sufficiently detailed guidance on the requirement to furnish adequate non-confidential summaries is belied by the text of the provisions themselves, as well as how the provisions have been applied. In *Mexico – Olive Oil*, for instance, the panel emphasized that a public version of a document where confidential information has simply been redacted is unlikely to qualify as an adequate non-confidential summary. What is required by Article 12.4.1 are adequate non-confidential *summaries*.

10. Regarding China's claims of exceptional circumstances, as noted in our oral statement, neither the petition nor the documents prepared by MOFCOM during the course of the investigation ever asserted that summarization was not possible or otherwise justified the absence of meaningful non-confidential summaries. China's *post-hoc* rationalizations that exceptional circumstances existed justifying the inadequate non-confidential summaries should therefore be rejected.

B. The Purported Non-confidential Summaries Contained in Part II of the Petition are Inadequate

11. The application itself demonstrates that the applicants intended the purported non-confidential summaries contained in Part II of the application to be linked with the information redacted. Yet the purported non-confidential summaries were inadequate. Setting aside the fact that Part II in fact contains the purported non-confidential summaries, for each category of confidential information, the application was inadequate as it contained no summary at all, or contained unlabelled trend lines, or year-over-year percentage changes without the necessary context of absolute values and without any justification from the applicants why there were exceptional circumstances that precluded more detailed summarization.

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

A. China's Portrayal of the Facts Is Misleading and Contradicted by the Record

12. While China repeatedly asserts that the respondents "refused" to respond to MOFCOM's questions and "seriously impeded" the investigation, a closer examination of the evidence demonstrates otherwise. 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 AK Steel provided the data after the preliminary determination (data that were already in the hands of the investigators), MOFCOM chose not to either verify it or use the information to develop a verification plan.

13. Similarly, China's assertion that MOFCOM did not request 15 years of sales data for federal-level procurement is misleading. In its original questionnaire, MOFCOM requested sales

information for government procurement "not performed within the POI," or according to China's third re-translation of MOFCOM's questions on this topic, procurement "signed within the POI as well as those for which performance has started but remained unfulfilled by the end of the POI." 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, for both state- and federal-level procurement laws: "Please provide, during the POI and the 14 years before the POI, the sales situation of all the products under the influence of Pennsylvania Steel Products Procurement Act *and purchasing American goods clause of other Acts* ." The only other procurement Acts alleged in the questionnaires issued at that time are federal procurement laws.

14. It is also important for the Panel to consider that China has acknowledged in paragraph 154 of its first written submission, and in paragraphs 68-72 of its answers to the Panel's questions, that 14/15 (93.3 percent) of the sales data MOFCOM requested for the alleged procurement program was not necessary. While MOFCOM's desire for the sensitive competitive information appeared to be unlimited, according to the explanation in paragraph 67 of China's Responses to the Panel's questions, its request was motivated by curiosity, rather than necessity.

15. In addition, 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 percent of its output to the government, as part of infrastructure and manufacturing sales. The 29 percent sales figure for infrastructure and manufacturing sales comes from AK Steel's audited financial statements and annual report.

16. Notwithstanding MOFCOM's apparent concern that this percentage may not have held true for the entire POI, which did not correspond to a calendar year, the annual report shows that 26 percent of the company's U.S. sales fell under the infrastructure and manufacturing segment in 2007. 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, and a review of AK Steel's later financial reporting would demonstrate that they were not. Regarding China's assertion that the proposal to use the 29 percent figure was untimely filed, AK Steel's annual report was actually contained in the Application. AK Steel proposed the use of the 29 percent figure from that report after seeing MOFCOM's unreasonable course in the preliminary determination.

17. Furthermore, MOFCOM could have verified that AK Steel or ATI did not sell to any government entity at verification. The 29 percent figure rejected by MOFCOM as the maximum possible percentage of AK Steel sales that could have been relevant to the alleged procurement programs, which focused on research and development funds and construction contracts for infrastructure, was provided in the Application before MOFCOM required AK Steel to translate into Chinese and re-submit the same document in the deficiency letter issued to AK Steel on August 26, 2009. Thus, this information was before MOFCOM well before verification began.

18. Notably, MOFCOM does not have standard timetables or schedules for events in antidumping and countervailing duty investigations. Any purported difficulty analyzing the GOES transactional data timely provided in comments on the Preliminary Determination is a product of MOFCOM's own scheduling, which was not based on any statutory or regulatory requirements but rather the agency's own assessment of when events should take place. It was unreasonable to schedule verification on a timeline that would allegedly make it difficult for MOFCOM to verify data that was timely submitted by AK Steel in response to the Preliminary Determination.

B. China's Claim that the U.S. Companies Seriously Impeded the Investigation Is Not Credible

19. Given the various additional means that MOFCOM had at its disposal to evaluate the U.S. companies' claims with respect to utilization of the government procurement programs and MOFCOM's failure to make use of any of them, China's claim of that the U.S. companies seriously impeded the investigation simply are not credible. Moreover, China's argument that MOFOCOM could review such summary data to uncover "anomalous transactions" makes no sense. As outlined above, MOFCOM's questionnaire did not request transaction-specific data in the absence of any procurement-related sales; it had only requested a "tabulation of all domestic sales by product … including quantity, value, and customer." Such data would not provide the information necessary to perform the analysis China purports it intended to perform.

V. 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

20. China does not deny that MOFCOM failed to provide to each U.S. company the actual, final dumping calculations that it performed for that company. Rather, it claims that there is no obligation to do so under Article 12.2.2, and that the U.S. exporters in this investigation were able to replicate MOFCOM's calculations. China's arguments are without merit.

21. Article 12.2.2 requires that if information on matters of fact that led to the imposition of final measures is relevant, then it must be made available, with due regard paid to the protection of confidential information. China argues that the language of Article 12.2.2 does not mandate the release of the final dumping calculations, but China's argument is contradicted by the text. Article 12.2.2 provides that the investigating authority's final determination must contain "or otherwise make available through a separate report, all relevant information on the matters of fact ... which have led to the imposition of final measures ...." As the United States has demonstrated, the calculations employed by an investigating authority to determine dumping margins, and the data underlying the authority's calculations, constitute "relevant information on the matters of fact ... which have led to the imposition of final measures" within the meaning of Article 12.2.2.

22. The theme running through China's arguments is that Article 12.2 pertains only to

"public notice" and to "explanation," but China disregards the fact that Article 12.2.2 mentions the possibility of a "separate report" in addition to a "public notice," and the fact that Article 12.2.2 itself does not even use the word "explanation." China delves into the particular provisions of Article 12.2; if anything, however, these other provisions support the U.S. position, not China's. China's assertion that the two exporters were able to replicate the dumping calculations on their own is unavailing. Even if the exporters were in fact able to replicate the calculations, this would not relieve China of its obligation under Article 12.2.2 to make available the actual dumping calculations that its investigating authority performed.

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

23. 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. MOFCOM's flawed logic appears to be based on the assumption that any government involvement in a market leads to a distorted market with prices that are unusable as a benchmark price. Prior reports of the Appellate Body interpreting Article 14(d) directly contradict MOFCOM in this regard. Regarding MOFCOM's benefit determination, 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.

VII. MOFCOM's Determination of the "All Others" CVD Rate was Inconsistent with Articles 12.7 and 12.8

24. The fact that MOFCOM provided notice to the U.S. Government, AK Steel, and ATI is irrelevant to the question of the WTO-consistency of China's application of facts available to companies subject to the 44.6% "all others" subsidy rate. Likewise, placing a copy of the petition in a reading room and publishing notices of initiation is not sufficient to justify the application of facts available. China now acknowledges that "there are no other U.S. producers" of GOES. This begs the question of what basis China had to apply adverse facts available to nonexistent entities for failure to cooperate.

25. Without notice of the investigation and the information required of interested parties subject to the investigation, the unidentified, unknown (indeed non-existent) other U.S. producers/exporters cannot be said to have refused access to the required information, or otherwise failed to provide access to the information within a reasonable period as required under Article 12.7 when read in the context of Article 12.1 before resort to facts available. Neither can such producers/exporters be said to have significantly impeded an investigation of which they were unaware.

26. China acknowledges that many of the programs were "found by MOFCOM not to confer countervailable subsidies on the two known respondents." Nonetheless, China's "all others"

calculation appears to include non-countervailable programs representing over one-half the 44.6 percent "all others" rate. China argues that it discharged its obligations under Article 12.8 to inform the interested parties "of the essential facts under consideration" which formed the basis of the "all others" calculation in time for the parties to defend themselves through a single sentence in final determination. However, absent from this sentence are any facts that led MOFCOM to conclude that resorting to facts available was appropriate or any facts that led MOFCOM to determine that a 44.6 percent CVD rate was appropriate to apply to the unknown, unidentified companies.

27. That the United States may have been able to divine some of the essential facts through guesswork from the information provided is of no consequence here. The burden is on China to disclose the essential facts, not on the United States to guess at them. Moreover, putting that aside, the facts that led China to determine that nonexistent companies that were not subject to the investigation nevertheless could be deemed non-cooperative for not having registered to participate in this investigation remains a mystery to the United States. China does not even attempt to demonstrate that MOFCOM disclosed the essential facts under consideration regarding its calculation of the "all others" subsidy rate.

VIII. MOFCOM Acted Inconsistently with Article 6.9 of the AD Agreement by Failing to Disclose the Essential Facts Under Consideration Regarding Its Calculation of the "All Others" Dumping Rate

28. As with the U.S. claim regarding the CVD "all others" rate, the issue before the Panel is whether a single sentence is sufficient disclosure under Article 6.9. It plainly is not. China's defense appears to be that MOFCOM could not disclose the essential facts under consideration because doing so would have revealed the business confidential information of the responding companies. However, China does not explain why MOFCOM failed to disclose the facts forming the basis for its decision to apply the facts available in the first place. These facts would not be confidential to the two responding companies, and would include the actions by all other U.S. companies that indicated to MOFCOM that these companies refused access to, or otherwise did not provide, necessary information within a reasonable period, or that they significantly impeded the investigation. Further, China provides no explanation for why MOFCOM could not have publicly summarized the information used or at least identified the calculation methodology it employed.

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

A. Price Effects and Underselling Findings were Critical to MOFCOM's Analysis

29. For the most part China has failed to respond to the arguments of the United States in its first written submission describing how MOFCOM's price effects analysis fails to satisfy WTO

requirements. China variously ignores the U.S. arguments, mistakenly claims that they are irrelevant, or attempts to defend the MOFCOM analysis by recasting it.

30. China improperly mischaracterizes MOFCOM's price effects analysis (i) by suggesting, without citing anything from the final determination, that MOFCOM's price effects findings were unnecessary to support its injury determination and by arguing that MOFCOM did not need to make findings on underselling, and did not do so, and (ii) by arguing that it was not obliged to undertake *any* analysis comparing domestic prices with those of the subject imports.

31. The United States explained at length why the conclusions that MOFCOM reached concerning price comparisons were not supported by positive evidence, did not reflect an objective examination, and consequently were inconsistent with Articles 3.1 and 3.2 of the AD Agreement and Articles 15.1 and 15.2 of the SCM Agreement. China does not challenge or even respond to this U.S. argument, other than mistakenly to contend that it is irrelevant because MOFCOM made no findings whatsoever on comparative prices. In so doing, China has essentially conceded that there is no positive evidence to support a finding that prices for the imports under investigation were lower than prices for the domestically produced product at any time during the period of investigation.

B. MOFCOM's Findings of Price Depression are Inconsistent with AD Agreement Articles 3.1 and 3.2 and SCM Agreement Articles 15.1 and 15.2

32. Contrary to China's current argument, MOFCOM did not rely exclusively on import volume to explain the domestic industry's price declines. Instead, it stated that the imports caused price depression because of their low prices, notwithstanding China's repeated statements that MOFCOM did not conduct a "price undercutting" analysis. We have previously demonstrated that there is no positive evidence supporting any finding that the imports were priced below the levels of the domestic product, and that any such findings could not have resulted from an objective examination. China has not attempted to rebut these claims.

33. China criticizes the United States for overlooking price depression that supposedly occurred in "late" 2008. MOFCOM, however, never made a finding that price depression occurred in 2008. Even accepting *arguendo* China's contention, any finding of price depression during "late" 2008 would not reflect an objective examination. China now argues that MOFCOM conducted a quarterly analysis for domestic price levels during 2008. MOFCOM's use of quarterly data for 2008 only for the purpose of examining domestic price levels "was selective and provided only a part the picture" of what might have caused any pricing declines in the fourth quarter. It was not consistent with of an objective examination of the data.

C. MOFCOM's Findings of Price Suppression Are Inconsistent With Articles 3.1 and 3.2 of the AD Agreement and Articles 15.1 and 15.2 of the SCM Agreement

34. China's arguments defending MOFCOM's findings of price suppression in 2008 fail to address the defects in the analysis MOFCOM conducted. Materials China introduced to the Panel in connection with the first written submission raise serious questions about whether MOFCOM's analysis of changes in the "price-cost differential" was objective.

35. MOFCOM's stated reason for finding that the increasing ratio of costs to sales revenues in the first quarter of 2009 was the effect of the subject imports was the purported "low price" strategy adopted by the importers under investigation. As we have explained, there is no positive evidence that the imports followed a "low price" policy and China does not even attempt to defend this finding.

D. MOFCOM's Failure to Disclose Facts Critical to Its Price Effects Analysis Breaches Article 6.9 of the AD Agreement and Article 15.8 of the SCM Agreement

36. China does not dispute that MOFCOM failed to disclose several pieces of information critical to its price effects analysis, as we demonstrated in our first written submission. China contends that the failure to disclose this information does not violate Article 6.9 of the AD Agreement and Article 15.8 of the SCM Agreement because the facts not disclosed either were not "essential" or were confidential. China's arguments are without merit.

E. MOFCOM's Measures Were Based on Cursory and Unsupported Findings Concerning Price Effects and are Inconsistent with Article 12.2.2 of the AD Agreement and Article 22.5 of the SCM Agreement

37. China's attempts to justify why the conclusory assertions in MOFCOM's Final Determination about the "strategies" purportedly used by importers to charge "low prices" for their products satisfy the provisions of Article 12.2.2 of the AD Agreement and Article 22.5 of the SCM Agreement are without merit. Indeed, China's inability to identify what findings MOFCOM made and where it made them underscore how its action are inconsistent with the Agreements.

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

A. MOFCOM's Examination of Causal Link is Inconsistent With Articles 3.1 and 3.5 of the AD Agreement and Articles 15.1 and 15.5 of the SCM Agreement

38. China's argument that the price effects analysis was unnecessary to MOFCOM's conclusion of causal link cannot withstand even casual scrutiny. As we explained, the price effects findings were an essential element of MOFCOM's causal link analysis. Because MOFCOM's analysis of price effects does not satisfy the requirements of the AD and SCM

Agreements, China has failed to demonstrate that dumped or subsidized imports are causing injury, as required by Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement.

39. China raises similarly unpersuasive arguments concerning MOFCOM's examination of the Chinese industry's rapid expansion, the industry's increasing production at a rate far greater than the increase in domestic demand, and the consequent inventory overhang that placed downward pressure on prices. China's response to the U.S. argument that it violated Articles 3.1 and 3.5 of the AD Agreement and Articles 15.1 and 15.5 of the SCM Agreement by failing to perform a non-attribution analysis evinces a complete misunderstanding of these provisions.

B. MOFCOM's Failure to Disclose Information Concerning Non-Subject Imports is Inconsistent with Article 6.9 of the AD Agreement and Article 15.5 of the SCM Agreement

40. China does not seriously dispute that neither MOFCOM's Preliminary Determination nor its Essential Facts Disclosure contained any information about the volume and prices of imports of GOES from sources other than Russia and the United States. Nor does China seriously dispute that information concerning the volume and prices of imports from such sources is an essential element of the analysis of causation. Indeed, both Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement identify the volume and prices of imports that are fairly traded as elements that are relevant, and should be examined, in the causation analysis.

41. While China does argue that certain information about trends in market share for nonsubject imports can be inferred from MOFCOM's Preliminary Determination, this is neither responsive nor relevant to the U.S. claim. Information about market share trends is simply not the information about volume or prices that Articles 3.5 and 15.5 direct an authority to examine.

C. MOFCOM's Cursory and Fact-Free Analysis of Non-Subject Imports is Inconsistent with Article 12.2.2 of the AD Agreement and Article 22.5 of the SCM Agreement

42. China's sole response to the U.S. claim that MOFCOM's analysis of nonsubject imports was inconsistent with Article 12.2.2 of the AD Agreement and Article 22.5 of the SCM Agreement because it was devoid of information is the statement that nonsubject import market share increased only modestly in 2008. MOFCOM made no such finding. The finding MOFCOM did make, which is that nonsubject imports "continued to drop," does not appear to be consistent with China's current contention. The divergence between China's proffered justification for the finding that nonsubject imports were not a cause of injury to the domestic GOES industry and MOFCOM's stated justification indicates that the actual basis for the finding remains unclear. The Final Determination therefore does not contain "all relevant information on the matters of fact and law" which led MOFCOM to conclude that nonsubject imports were not causing injury to the Chinese GOES industry.