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

(DS414)

FIRST WRITTEN SUBMISSION OF

THE PEOPLE'S REPUBLIC OF CHINA

EXECUTIVE SUMMARY

JULY 22, 2011

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A. The Petition And Initiation Thereof Were Consistent With Articles 11.2 and 11.3 Of The SCM Agreement

1. In the underlying anti-subsidy proceeding, the applicants presented hundreds of pages of factual information relating to financial contribution, benefit, and specificity in support of their subsidy allegations. The information provided was that information reasonably available to the applicants. MOFCOM examined the allegations and accompanying factual information, and determined that although certain allegations did not warrant initiation of an investigation, there was a sufficient evidentiary basis to initiate on several other allegations. MOFCOM conducted an investigation of the allegations at issue. (Ultimately, none of the allegations at issue under this U.S. claim were determined to have provided countervailable benefits to the respondents.)

2. The U.S. claims merely reflect disapproval of the allegations found in the applications rather than a critique of the factual information supporting the allegations. Indeed, the United States is far too quick to assert without any evaluation that "the petition did not contain any evidence" of one or more elements of an actionable subsidy, when in fact such evidence existed, leaving in doubt whether the United States has advanced a *prima facie* case under Article 11

3. What the United States seeks is a different standard for applications than that found in Article 11 of the SCM Agreement, requiring a level of information, analysis, and disclosure simply not required by that provision. The consistent theme of prior panels in addressing this requirement is that applicants need only submit enough <u>evidence</u> to justify an <u>investigation</u>, and need not analyze that evidence or justify the ultimate conclusion. First, WTO dispute settlement panels have found that the initiation standard presents a relatively low threshold for applicants. Second, an application is sufficient if limited to providing relevant information; analysis is not a prerequisite. Third, an applicant is not required to provide within its application an exhaustive compendium of all relevant information reasonably available to it. The real question is whether the application contained sufficient <u>information</u> on the matters specified in Article 11, and by that standard whether initiation of the allegations at issue was proper. The evidence on the record of the proceeding, largely unaddressed by the United States in its claim, demonstrates that both the contents of the petition and initiation were proper.

4. China submits that the United States has failed to engage in a serious evaluation of the evidence that accompanied the application at issue. Because of that failure, the United States has failed to establish a *prima facie* case that the application was inconsistent with Article 11.2. Its entire case with respect to 11 separate allegations is confined to 11 perfunctory paragraphs that, to one extent or another, simply assert that "the petition did not contain any evidence" of one or more elements of an actionable subsidy. The United States made absolutely no reference to the information that accompanied the application with respect to many of the challenged allegations, when in fact each allegation was accompanied by specific documentary information beyond the assertions contained in the allegation itself. For the programs where the United States actually mentioned accompanying evidence, it was only in passing with no serious critique of the information.

B. MOFCOM's Treatment Of Confidential Information Was Fully Consistent With The Requirements Of Article 6.5.1 Of The AD Agreement and Article 12.4.1 Of The SCM Agreement

5. Article 6.5.1 and Article 12.4.1 do not require complete or perfect disclosure. They require only that a non-confidential summary – the public version of a document -- be in "sufficient detail" to permit a "reasonable understanding" of the "substance" of the information. These provisions seek to strike a balance between the interests of the interested parties submitting confidential information and the interests of the other interested parties to be reasonably informed. Nonetheless, the text of the provisions recognizes that the balance must favor the submitter of confidential information, where summaries cannot adequately protect confidential information. The non-confidential summaries in the public version of the petition more than met this standard.

6. The U.S. argument focuses entirely on the statements made in part II of the petition, but completely ignores the non-confidential summaries provided in part I of the petition. Given the United States failure even to address the non-confidential summaries actually provided, China believes the United States has not made out a *prima facie* case of its claim. The fact that the Appendices do not repeat non-confidential summaries provided in the narrative of the public version of the petition does not create a violation of Article 6.5.1 or Article 12.4.1. One can have a "reasonable understanding" of the key issues and facts by reading the entire public version of the petition and there is no obligation on the authorities to require interested parties to repeat a non-confidential summary that has already been provided.

7. To the extent the Panel finds that adequate non-confidential summaries on any particular issues were not provided in the underlying proceeding, China believes that the central issue shifts to whether or not China dealt with the exceptional circumstances of this investigation properly in view of Article 6.5 and 6.5.1 and the so-called "due process" rights of the interested parties. The exceptional circumstance of having only two respondent companies in China permitted the authorities to invoke the "exceptional circumstance" provision of Articles 6.5.1 and 12.4.1 of the AD and SCM Agreements respectively in order to protect the confidentiality of the information submitted. Because the information was limited to two companies, the information provided was not susceptible to a more traditional confidential summary which aggregates the information from multiple companies, thereby protecting the confidentiality of individual company information.

C. MOFCOM's Application Of Facts Available In Determining The Subsidy Margin For The Government Purchase Of Goods Program Was Consistent With Article 12.7

8. In the underlying investigation MOFCOM made direct requests to the company respondents regarding information on all steel sales in the context of the government purchase of goods program. The respondents refused to respond to MOFCOM's requests in their initial questionnaire responses. After consulting and providing written guidance to both AK Steel and ATI on the matter, MOFCOM gave both companies ample opportunity to correct their responses. The companies again refused. In response, China declined to verify

the deficient, untimely and unusable information provided, and instead applied "facts available" to both companies, finding that 100% of sales took place under the program. On the basis of these facts, the United States now argues that China improperly applied "facts available" in consideration of the government purchase of goods program. Looking to the language of Article 12.7 and guidance derived from parallel language under Article 6 of the AD Agreement, the United States claims that MOFCOM impermissibly ignored "necessary information" provided by the company respondents in the case.

9. China notes that the U.S. "facts available" claims appear rooted in a substantive disagreement over China's analysis of subsidy issues, but any substantive disagreement the United States has over China's theory of subsidization and methodological choices with respect to the government purchase of goods program is not before this Panel. The Panel must evaluate the U.S. claim in light of China's approach to what it deemed to be necessary information, <u>not</u> in light of U.S. arguments about what should have been sufficient information. Properly framed, it is evident that MOFCOM's application of "facts available" was consistent with Article 12.7. The companies did not provide timely responses, did not cooperate to the best of their ability, and seriously impeded the investigation even when they knew as of the preliminary determination that MOFCOM was considering a 100% utilization option.

10. MOFCOM knew the correct utilization of the program was more than zero. MOFCOM also had a reasonable basis to believe the correct utilization was more than the 29% alternative offered by AK Steel, since AK Steel had refused to provide requested information. Indeed, this alternative was filed on <u>the same day</u> – December 30, 2010 as the final AK Steel effort belatedly to respond to the MOFCOM request for information. Yet even at this late date, AK Steel still did not respond properly, and provided transaction data only for a subset of the customers that had been previously identified. Indeed, AK Steel did no more than submit data that it had readily available for months. So instead of making a good faith effort finally to respond to the request, AK Steel yet again decided it could pick and choose how and whether to respond. On the other hand, MOFCOM had no information with which it could determine some alternative more than the AK alternative but less than 100% utilization, again in large part due to the refusal of ATI and AK Steel to provide complete information. MOFCOM's effort to elicit more complete cooperation had failed, and the facts to determine the actual level of utilization had still been withheld by the U.S. respondents. Thus, MOFCOM reasonably relied on the 100% figure, consistent with Article 12.7 of the SCM Agreement.

11. Respondents who willfully and strategically create a factual void during the course of an investigation should not be allowed to benefit from that non-cooperation under Article 12.7 of the SCM Agreement. To allow such an outcome would undermine the entire purpose of the investigation and allow respondents to manipulate the process by withholding unfavorable information in a calculated manner.

D. MOFCOM's Disclosure of Its Determination of the Margins of Dumping Was Consistent With the Requirements of Article 12.2.2

12. There is no language in Article 12.2.2 that supports the U.S. contention that this provision requires authorities to provide respondents with the actual calculation of the margins of dumping. Article 12 is focused on providing an "explanation" of determinations;

sufficient detail in this context would indicate that the disclosure be sufficient to constitute an adequate explanation of the authority's findings and conclusions, and what facts and law were relied upon in reaching such conclusions and findings. This is not a mandate to require full disclosure of all facts used to calculate the margins of dumping, but rather a more limited requirement to ensure an understanding of the methodology, facts used, and the results obtained with respect to the margins of dumping. All that is necessary is to provide interested parties to an investigation or review notice of determinations made by the authorities and an explanation of the determinations.

13. It is questionable whether the United States complaint regarding the disclosure of the actual numbers used and the actual calculations performed in the determination of the margins of dumping properly even lies under Article 12.2.2, which addresses final determinations, or Article 6.9 which addresses the disclosure of the essential facts forming the basis of the decision to apply definitive measures. Nevertheless, even if the United States were basing its complaint on Article 6.9, the language of the Article makes clear that its object and purposes is to provide the "essential facts" to enable interested parties "to defend their interests," not to provide the detailed facts demonstrating the calculation of the margin of dumping. Moreover, even if Article 6.9 were properly before the Panel, the disclosure provided in Article 6.9 does not add to that required under Article 12.

14. Notwithstanding the absence of any requirement that the details of the calculation of the margins of dumping be disclosed, the disclosure by China in the instant investigation was sufficient to allow respondents to replicate the authority's calculation. China provides in Exhibits CHN-25 and CHN-26 tables listing each element of the calculation of normal value and export price or constructed export price used to calculate the margins of dumping for each of the two U.S. respondents, drawn from the source documents of the proceeding. Each respondent could go to the source information and reconstruct the exact calculation performed by MOFCOM to determine the margins of dumping. Thus, the respondents were in a position to check the accuracy of the MOFCOM calculation, and it is evident from comments filed by ATI during the proceeding that it clearly understood what information MOFCOM was using. Thus, the U.S. claim is without merit.

E. MOFCOM Provided Sufficient Detail On Its Findings Of The Lack Of A Competitive Bidding Process Under The Government Purchase Of Goods Program

15. Using record facts, MOFCOM's preliminary and final determinations plainly set forth why participation restrictions on foreign steel and price preferences afforded to U.S. steel resulted in prices that did not reflect competitive, market conditions under the government purchase of goods program.

16. Article 22.3 of the SCM Agreement establishes notification requirements at the preliminary and final stages of investigation with respect to those issues of fact and law considered material by the investigating authorities. Notifications, in "sufficient detail," should be provided in the preliminary and final determinations, or through a separate report. The object and purpose of the provision is to provide transparency and afford affected parties a reasonable understanding of the facts and analysis underlying an authority's determinations.

Both the preliminary and final determinations issued by MOFCOM accomplished exactly this objective, contrary to U.S. claims.

17. In the preliminary determination, MOFCOM explained all the elements that led to its conclusion that bidding under the government purchases of goods program did not reflect market pricing. Contrary to U.S. claims, it also directly addressed arguments made by the United States that no benefits were conferred on any manufacturers of goods. Specifically, the preliminary determination noted: (1) bids by U.S. producers are afforded a 25% price cushion over competing foreign prices, thus "competitive bidding" is really closed bidding among U.S. producers at artificial start prices; (2) to the extent foreign suppliers are exempted from the 25% price preference for U.S. products under the Government Procurement Agreements, others remain subject to that restriction, with certain states prohibiting any foreign participation and expressly limiting competition to U.S.-made steel; and (3) because of these features, the price obtained through this so-called "competitive bidding does not reflect true market conditions."

18. In the final determination, MOFCOM's explanation expanded upon that offered in the preliminary determination. MOFCOM not only quantified the amount of foreign steel excluded from Buy American projects as part of U.S. consumption, but also quantified the price difference between North American prices and non-North American prices based on the submissions of AK Steel. As discussed in the final determination, what that factual information showed is that the prices of excluded products were lower than the North American price. Finally, MOFCOM presented evidence from verification noting the extremely limited use of foreign products within Buy American projects. Combined with what was already explained about price preferences and general exclusions, this information confirmed the lack of a competitive market, and a market that was otherwise weighted toward higher priced U.S. steel.

F. MOFCOM's Determination Of The "All Others" CVD Rate Was Consistent With Articles 12.7 And 12.8 Of The SCM Agreement

19. In the underlying investigation, MOFCOM provided direct notice to the participating respondents, including the U.S. Government, AK Steel, and ATI. It also placed a copy of the received petition in its public reading room and published public notices of initiation. To MOFCOM's knowledge, notice was thereby given to each known interested party as defined by Article 12.9 of the SCM Agreement of the implications of initiation and the consequences for failing to cooperate with the investigation.

20. In terms of the facts selected by MOFCOM in calculating the "all others" CVD rate, as indicated in the final determination, MOFCOM relied upon information provided by the petitioner. Notice and thereby disclosure was given to all known producers/exporters. With respect to disclosure of the facts upon which the all others rate was based, the final determination disclosed that it was based upon information provided by the petitioners. Specifically, the final determination stated: "{f}or other U.S. companies who did not register nor submit the questionnaire responses, the Investigating Authority made a determination on ad valorem subsidy rate based on the information submitted by the petitioner pursuant to Article 21 of the Regulations on Countervailing Measures." There was little mystery to which information this statement referred, and the United States appears to have readily

identified the source from the record based on that statement. The information provided the facts and calculations upon which the all others rate based.

G. MOFCOM's Determination Of The "All Others" AD Rate

21. In the underlying GOES investigation, MOFCOM followed the general rule set forth in Article 6.10 of the AD Agreement which establishes that authorities "shall, as a rule, determine an individual margin of dumping for each known exporter or producer concerned of the product under investigation." Since MOFCOM conducted an individual examination of the margins of dumping of each known exporter/producer, the rule for determining the margin of dumping for non-individually examined exporters/producers in Article 9.4 of the AD Agreement does not apply in determining an "all others" rate. Neither Article 6.10 nor any other provision of the AD Agreement addresses the issue of the treatment of exporters/producers that are not "known" to the authority and cannot, therefore, be individually examined.

22. Pursuant to MOFCOM's notification to all producers/exporters consistent with Article 6.1 of the AD Agreement, China determined that the most relevant provision of the AD Agreement to address the issue of the antidumping rate for unknown and unresponsive exporters/producers was Article 6.8 of the AD Agreement which addresses the treatment of interested parties who do not provide the "necessary information" required by the authority. In applying Article 6.8, the authority based its margin of dumping on paragraph 7 of Annex II. This was done since an "all others" rate based on the rate applied to one or both of the cooperating respondents, would provide no incentive for unknown companies to make themselves known and participate in the investigation. Thus, the application of Article 6.8 and the last sentence of paragraph 7 of Annex II were intended to encourage realization of the objectives of Article 6.10, namely to enable China to follow the general rule of determining margins of dumping for each individual producer/exporter.

23. In the preliminary determination, the margins of dumping used for the "all others" rate was based on the margins alleged and contained in the petition. However, because the information on which the final determination of the "all others" rate was based was confidential information of one of the responding companies, the actual information used to determine this rate could not be disclosed without breaching the confidentiality of the information used. Thus, the explanation was necessarily general in nature. The failure to disclose the details of the calculation of the "all others" rate had no effect on the ability of parties to defend their interests. So long as the "all others" rate is based on record evidence, it is not clear that in the situation where parties do not cooperate that the authority's discretion is limited.

H. MOFCOM's Investigation Did Not Breach Article 1 Of The AD Agreement

24. In the sections above, China has addressed in full each of the United States' substantive claims concerning China's alleged breaches of the AD Agreement. To the extent China has addressed all of the substantive claims raised by the United States and acted consistently with its obligations under the AD Agreement, the United States' Article 1 claim lacks merit and should be set aside.

I. China's AD Measure Did Not Breach Article VI:2 Of GATT 1994

25. The United States claims that the circumstances surrounding China's assignment of the "all others" rate in the underlying proceeding breached Article VI:2 of GATT 1994. China has addressed the United States substantive arguments with respect to the "all others" AD margin. We refer the Panel to the discussion above in Section G.

J. MOFCOM Properly Analyzed the Adverse Price Effects from the Subject Imports

26. At the outset, it is important to note the MOFCOM findings not being challenged by the United States. The United States has made no challenge to the MOFCOM findings of adverse volume effects. The United States has also made no challenge to the MOFCOM findings regarding cumulation, which means that subject imports from both the United States and Russia must be considered together and the behavior of the U.S. producers themselves (individually or together) is not legally relevant to the analysis. Finally, the United States has made no challenge to the MOFCOM findings of material injury. The U.S. challenges are limited to the price effects, and the causal link.

27. The U.S. arguments focus heavily on price undercutting findings that MOFCOM did not make, and largely misstate and mischaracterize the price suppression and price depression analysis that MOFCOM did make. MOFCOM properly found that in the face of an increasing volume of subject imports that gained significant market share, domestic prices began to show the effects of price suppression and depression during 2008, and those effects continued and worsened in early 2009. The record provides strong positive evidence for the MOFCOM findings of price suppression and depression during 2008 and 2009, evidence that was not challenged at all during the administrative proceedings before MOFCOM and evidence that the United States has not effectively challenged in its submission to this Panel.

28. MOFCOM did not make specific price undercutting findings, nor was it under any legal obligation to do so, contrary to U.S. arguments. The texts of Article 3.2 and Article 15.2 -- through the key term "or" -- make clear that price undercutting is simply one alternative methodology that the authorities may consider as part of evaluating price effects. This interpretation is reinforced by the term "otherwise" that the United States left out of its quote from these texts – "whether the effect of such imports is otherwise to depress prices to a significant degree or prevent price increases." (emphasis added) Both the use of "or" and the use of "otherwise" confirm that price undercutting is optional, not mandatory. This interpretation has been adopted by other panels.

29. MOFCOM also disclosed all of the "essential facts" as required by Article 6.9 and Article 12.8. This disclosure occurred in two key documents. First, MOFCOM presented a Preliminary Determination on 10 December 2009, which included extensive discussion of injury issues in general, and pricing issues in particular. Second, MOFCOM also presented a Final Injury Disclosures on 7 March 2010, which presented the essential facts and provided initial responses to those arguments that had been made so far during the administrative proceedings. These two documents contained all of the "essential facts" on which China ultimately relied in its Final Determination.

30. In making its disclosure argument, the United States has completely ignored the authority's obligation to protect the confidentiality of information. The United States cites to the procedural requirement to disclose, but conveniently overlooks the fact that this obligation occurs in the context of the parallel requirement to protect the confidentiality of proprietary information. This requirement can be seen in Article 6.5 and Article 12.4, which discuss the obligation to protect confidentiality. This requirement can also been seen in Article 12.2.2 and Article 22.5, which discuss the obligation of disclosure, but with "… due regard being paid to the requirements for protection of confidential information." On balance, the United States has not identified any specific piece of information that was both an "essential fact" and could be disclosed while maintaining confidentiality. Such a failure has often been the basis for dismissing such claims as not stating a *prima facie* case.

31. Beyond complaining about the disclosure of "essential facts," the United States also complains about the "reasons" provided by MOFCOM. Contrary to the U.S. argument, MOFCOM has provided the "relevant information" and "reasons" required by Article 12.2.2 and Article 22.5. The authority's obligation is not to address every detail of every argument raised by the parties, in the specific terms provided by those parties. MOFCOM developed its response that the growing volume of subject imports in 2008 and early 2009 caused price suppression and price depression in those years. That complete explanation of its "reasons" satisfies the obligations of Article 12.2.2 and Article 22.5.

32. Overall, China believes that its analysis of adverse price effects fully complied with the substantive and procedural requirements of the relevant Agreements. If the Panel were to disagree, China asks the Panel to confirm MOFCOM's overall finding of causation was still proper. Since MOFCOM based its analysis of causation on both volume effects and price effects, those price effects can support an overall finding of causation, even if they might not have been sufficient to justify finding a causal link on their own. U.S. arguments to the contrary are without merit, resting on an incorrect assumption that the WTO agreements "require an authority to undertake a price effects analysis." Article 3.1 and Article 15.1 require only two findings: an initial finding about volume/price effects, and then a finding about the "consequent impact" of those effects. An authority can thus "examine" both the volume and price effects, but ultimately decide to base its decision on whatever balance of volume effects and price effects appropriate in a specific case, and the "consequent impact" of those subject imports. The United States has not challenged the MOFCOM findings of volume effects, nor has the United States challenged the MOFCOM findings of material injury. If the Panel agrees that MOFCOM has properly established a causal link between that subject imports and the condition of the domestic industry, that should be sufficient even if the price effects analysis alone would not have supported a finding of causal link.

K. MOFCOM Properly Analyzed The Ways In Which Subject Imports Caused The Material Injury Suffered By The Domestic Industry

33. On causal link, the United States presents only a single paragraph discussing causal link more generally, and that paragraph simply refers back to the U.S. arguments about price effects. The United States seems to believe that the absence of price effects automatically established the lack of a WTO consistent causal link. Legally, the United States is wrong. Adverse price effects alone are not a "necessary element" of the causal link. The U.S. argument also conveniently ignores the extent to which MOFCOM based its analysis on both

the volume effects and the price effects. MOFCOM never considered the price effects in isolation; they were part of any overall analysis that the increasing volumes of low priced subject imports were causing material injury to the Chinese industry. The United States has thus failed to demonstrate any inconsistency between MOFCOM's analysis and the requirements of Article 3.1 and Article 15.1 to find a causal relationship between subject imports and the condition of the domestic industry.

34. With respect to non-attribution, the primary U.S. argument is a challenge based on a single "other cause" of injury -- the expansion of Chinese capacity -- that the United States believes was not adequately addressed, and somehow severed by itself the causal link that MOFCOM had found. In making its argument, China notes that the United States ignores the degree of discretion authorities have to address alternative causes. Article 3.5 and Article 15.5 do not specify any particular methodology, and thus leave authorities with discretion as to how best to ensure a genuine causal link, even given the effects of other causes. The United States also mischaracterizes the nature of the legal obligation. The issue is not whether increases in capacity "could not have contributed" to the injury. MOFCOM need not disprove any possible effect of any other known factor that might also be affecting the domestic industry. Rather, the issue is whether subject imports contributed sufficiently to the adverse condition of the domestic industry, and whether the effect of the other factor was so dramatic as to nullify that contribution by subject imports, and thus sever the causal link.

35. The burden is on the United States as the complaining party to establish a *prima facie* case that the effects of increased domestic capacity were so dramatic that they severed any possible causal link between the subject imports and the condition of the domestic industry. The United States has failed to meet that burden. It reduces to a single other factor and a series of failed efforts to attack the reasons given by MOFCOM for finding that capacity expansion did not sever the causal link. But the respondents below provided no evidence for the U.S. theory, and the logic presented ultimately failed. The record before MOFCOM demonstrated that:

- Production capacity increased, but never exceeded total Chinese consumption.

- Even though the domestic industry added capacity, it did not actually use all of that new capacity and instead capacity utilization rates fell.

- Subject imports increased sharply in 2008 (up 61 percent) and early 2009 (up 24 percent), were growing faster than the overall market, and were gaining market share.

- The large and increasing volume of subject imports suppressed domestic shipments, and this subject import volume (which also happened to be at low prices) prevented the domestic industry from taking advantage of its new capacity.

Based on these facts, MOFCOM properly dismissed the possibility that the expansion of domestic capacity severed the causal link that MOFCOM had found.

36. Finally with respect to the issue of non-subject imports, China disclosed the "essential facts" of the case. The Preliminary Determination identified "products imported from other countries" as an "other factor" being analyzed, and noted that subject imports were capturing a larger share of the total imports. This provided both notice that China was addressing non-subject imports, and that subject imports were gaining share of total imports. Other parts of the notice also addressed non-subject imports.

37. Having made this basic point in the Preliminary Determination, the interested parties made no further arguments on this issue. They could have developed information publicly – as the United States concedes in fn 295 of its submission – but did not do so. Having provided the "essential facts," and having received no arguments on this point, China did not need to develop this issue further in the absence of arguments from the parties.

38. Finally, the U.S. argument that MOFCOM did not provide any "factual substantiation" for its conclusions, is just wrong. The demonstration that non-subject imports gained only 0.09 percentage points of market share is factual substantiation. Moreover, MOFCOM provided more than adequate discussion of this issue in light of the failure by the parties to use the publicly available information to develop any arguments on this point.

L. China's Obligations Under Article 10 Of The SCM Agreement

39. The United States claims that China breached its obligations under Article 10 of the SCM Agreement based on its substantive arguments under various other provisions of the Agreement and GATT 1994. To the extent China's has demonstrated that its actions are consistent with the provisions of Article VI of GATT 1994 and the terms of the SCM Agreement as raised by the United States, this U.S. Article 10 claim should be rejected.