CHINA – ANTI-DUMPING AND COUNTERVAILING DUTY MEASURES ON BROILER PRODUCTS FROM THE UNITED STATES

(DS427)

CLOSING STATEMENT OF THE UNITED STATES OF AMERICA AT THE SECOND SUBSTANTIVE MEETING OF THE PANEL WITH THE PARTIES

December 5, 2012

1. Mr. Chairman, Members of the Panel, the U.S. delegation thanks you and the Secretariat staff for your efforts during this panel meeting and throughout this proceeding. In light of the extensive submissions and statements that the parties have provided, we will be brief in our closing statement today.

2. I want to begin where the parties respectively started yesterday in their opening statements. China began by arguing that this dispute concerns an attempt by United States to impose its own practices on other investigating authorities. That view is China's alone. None of the third parties in this dispute have concurred in that assessment. To the contrary, they take issue with the positions articulated by China. That is no surprise. We are not asking for MOFCOM to do what the United States does; we are asking China to do what the WTO Agreement requires. That brings us to where the United States started: the WTO Agreement requires us to determine first whether MOFCOM properly established the facts, and second, whether it evaluated those facts in an objective and unbiased manner. Here, there are no facts established by MOFCOM, just the *post hoc* arguments proffered by China in this dispute.

Procedural Claims

3. We begin by discussing the procedural claims. With respect to the hearing claim, the United States has shown it requested a hearing and that the request was summarily denied. China's only defense – a purported telephone call to the Petitioner – is not in the record and is thus not an established fact that should be evaluated.

4. When it comes to the disclosure of calculations, the United States has demonstrated that the calculations and underlying data are material and important to the authority's findings. Without them, a decision on the definitive measures would not have been possible. China argues that MOFCOM did not have to make life easy for the respondents. But that has no bearing on whether it complied with its obligations – other than perhaps to suggest a lack of objectivity.

5. In respect to non-confidential summaries, the United States has demonstrated that for various pieces of information withheld in the Petition on confidentiality grounds, there is no non-confidential summary. There is no reason a person would know the text China cites now was intended to serve as a non-confidential summary, and in any event, the purported summaries are inadequate as they are conclusory and do not provide a reasonable understanding of the deleted information.

Anti-dumping and Countervailing Duty Determinations

6. MOFCOM's failure to establish and evaluate the facts extends to its anti-dumping and countervailing duty determinations. With respect to the issue of cost-allocation, China advanced today that it wants a value based allocation to look at all sales. But if that is what they want, then why did MOFCOM adopt a weight-based allocation? There is no consideration in any of MOFCOM's determinations as to the merits of its methodology as opposed to using the U.S. respondents' own records – or as we noted today, some of the alternative allocations proffered by the respondents.

7. China has advanced that it satisfied its obligation to consider "all available evidence" and that it can be inferred by the fact that MOFCOM requested information from respondents. As we noted, the Appellate Body in *Softwood Lumber V* noted that the obligations in Article 2.2.1.1 are not satisfied by simply taking note or receipt of evidence. And that is what MOFCOM did here. And I submit you know that for at least two reasons. First, after claiming that all of respondents' evidence concerned propriety with GAAP, China offers now that it is unknown whether U.S. respondents' records are even GAAP consistent. Second, and just as critically, MOFCOM never followed up regarding the concerns that China proffers in these proceedings. The obligation in Article 2.2.1.1 includes arriving at a "proper" allocation. If MOFCOM truly had the concerns it expressed in this dispute, then one would have expected it to engage the respondents to ensure its allocation was truly "proper." In short, the *sine qua non* that China needed to present are explanations by MOFCOM – *from the investigations* – for (1) why it rejected U.S. respondents' kept costs and (2) how it determined its allocation is proper. China cannot do so.

8. With respect to the numerator-denominator mismatch, the United States has explained why the numerator includes a benefit for non-subject merchandise. MOFCOM argues the respondents did not answer its questionnaires properly, but that does not change the fact that the calculation is still wrong or that the solution proffered by the respondents and the United States is still viable.

9. With respect to freezer fees, the United States has explained how MOFCOM failed to conduct a fair comparison between Keystone's export price and normal value.

Injury Claims

10. China fares no better with respect to the injury claims. In respect to defining the domestic industry, MOFCOM made no effort to identify producers beyond those listed in the petition. It also provided no real avenue for other producers to be included in the definition. By defining the domestic industry to include only the Petitioner, MOFCOM's injury analysis was limited to those producers most likely to exhibit injury, biasing that result, in violation of China's WTO obligations.

11. In respect to price effects, China's argument regarding levels of trade and product mix bears no resemblance to MOFCOM's decision – MOFCOM explicitly said it did not have to consider product mix. Instead, MOFCOM said it made an adjustment to account for levels of trade, but did not. China's attempt to rebut the U.S. case consists of post hoc explanations reflected nowhere in the record – but even these explanations fail to rebut the U.S. showing that MOFCOM compared prices that were not comparable.

12. As the Appellate Body found in *GOES*, an investigating authority is obligated to ensure the comparability of the pricing data. MOFCOM did not do so here and China's arguments fail to detract from our demonstration that the prices MOFCOM compared were not comparable due to differences in level of trade and product mix.

13. With respect to impact, we demonstrated in our Second Written Submission that MOFCOM failed to demonstrate impact during the period of investigation because MOFCOM's analysis was based on a faulty assessment of capacity utilization and inventories and did not take into account that the domestic industry performance improved during the bulk of the increase in subject imports.

14. Finally, regarding causation, we showed that MOFCOM failed to demonstrate causation by ignoring these same trends of improving performance, including the gain in market share by the domestic industry, and by relying on MOFCOM's flawed price analysis.

Conclusion

15. To close, I want to note one last thing. China has often expressed outrage claiming we mischaracterize the facts. Again, we disagree. The situation is simply that there are no facts by MOFCOM to mischaracterize – simply China's *post hoc* arguments. That is not only outrageous, but also inconsistent with the WTO Agreement.