

August 27, 2012
GROSS oral hearing
US statement
as delivered

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

(DS414)

ORAL STATEMENT OF THE UNITED STATES OF AMERICA

August 27, 2012

1. Good morning, Mister Chairman and members of the Division. On behalf of the United States, we would like to thank you for the opportunity to appear before you today.

2. **We would emphasize that* China's appeal is a narrow one. The Panel in this dispute upheld each of the U.S. claims under the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("AD Agreement" or "ADA") and the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement" or "SCM") concerning the injury determination of China's Ministry of Commerce ("MOFCOM").¹ China has not appealed, for example, the Panel's conclusions that, as a result of MOFCOM's inadequate price effects and causation analysis, China breached its obligations under Articles 3.1 and 3.5 of the AD Agreement and Articles 15.1 and 15.5 of the SCM Agreement and its disclosure and public notice requirements relating to MOFCOM's analysis.

3. Instead, China's appeal centers around the Panel's interpretation and application of Article 3.2 of the AD Agreement and Article 15.2 of the SCM Agreement. China then makes consequential arguments with respect to Articles 6.9 and 12.2.2 of the AD Agreement and Articles 12.8 and 22.5 of the SCM Agreement.

4. In its appeal, China seeks to persuade the Appellate Body to join it in re-writing the text of those provisions to remove references to "the effect of such imports." China contends that repeated references to the "low prices" of imports in MOFCOM's Final Determination are essentially irrelevant, and it criticizes the Panel for reading MOFCOM's decision exactly as MOFCOM wrote it. China also complains about findings the Panel never made and mischaracterizes those that the Panel did make. However, the Panel findings at issue are not in

¹ Panel Report, paras. 7.475 - 7.675.

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error, and these findings should be upheld.

5. Today, we will first discuss the proper interpretation of Articles 3.2 of the ADA and 15.2 of the SCM Agreement, then address the specific claims by China with respect to the Panel’s analysis of MOFCOM’s Final Determination, including China’s appeal under Article 11 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (“DSU”), and finally address China’s appeal regarding its transparency obligations.

I. The Panel Correctly Interpreted the Text of Article 3.2 of the AD Agreement and Article 15.2 of the SCM Agreement

6. The Panel properly concluded that the phrase “effect of such imports,” as used in Articles 3.2 of the AD Agreement and 15.2 of the SCM Agreement, requires an authority to assess whether any identified price depression or suppression is caused by dumped or subsidized imports.

7. The Panel’s interpretation of this phrase is fully consistent with the dictionary definition of the word “effect,” which is “[s]omething accomplished, caused or produced, a result, a consequence.”² *china used the term “consequence” in its opening statement just now.* The fact that some event is an “effect” means that it has a “cause,” and that it is the “result” or “consequence” of some other factor.

8. Articles 3.2 and 15.2 state that the authority must consider the “*effect of such imports*” on prices in the market and whether the “*effect of such imports* is otherwise to depress prices to a significant degree or prevent price increases, which otherwise would have occurred, to a

² The New Shorter Oxford English Dictionary (English) (1993); see *US – Upland Cotton (AB)*, para. 435.

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significant degree.”³ Given this language, it is clear that the text of the Articles explicitly connects a cause – that is dumped or subsidized imports – to any identified price suppression or depression, as the Panel correctly concluded:⁴

merely showing the existence of significant price depression does not suffice for the purposes of Article 3.2 of the Anti-Dumping Agreement and Article 15.2 of the SCM Agreement. An authority must also show that the price depression is an effect of the subject imports.⁵

This conclusion follows directly from the plain language used in Articles 3.2 and 15.2.

9. To counter the Panel’s straightforward interpretation, China offers its own strained interpretation that reads the word “effect” as though it were not followed by the phrase “of such imports” – as though the drafters of these Articles intended the phrase to be surplusage.

According to China, “Articles 3.2 and 15.2 do not impose *any* obligation to find *any* relationship between subject imports and the observed adverse price effects.”⁶ China’s interpretation simply cannot be reconciled with the text of the Articles.

10. China’s reliance on the causation requirements of Articles 3.5 and 15.5 fails to support its interpretation. Even a cursory reading of Articles 3 and 15 of the AD and SCM Agreements makes clear that Articles 3.5 and 15.5 do not contain the *only* causation obligations in the injury provisions of the Agreements as China suggests. Indeed, Articles 3.1 and 15.1 each contain a

³ AD Agreement, Art. 3.2 (emphasis added); SCM Agreement, Art. 15.2 (emphasis added).

⁴ Panel Report, paras. 7.519-7.522.

⁵ Panel Report, para. 7.521.

⁶ China Appellant Submission, para. 116 (emphasis added).

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causation requirement when they establish the overarching obligation to base any injury determination on “the consequent impact of these imports on domestic producers of such products.” Subsequent provisions then help implement this overarching obligation. For example, Articles 3.2 and 15.2 require consideration of whether imports have specific price effects, Articles 3.4 and 15.4 then require an examination of the impact of the imports, and Articles 3.5 and 15.5 then specify what is required to be demonstrated in terms of the effects of the imports, including the specific obligation for an investigating authority to examine and consider the injurious effects of any other known factor. In other words, these provisions all relate to causation and all work together to guide any determination of injury.

11. China’s approach would divorce Articles 3.2 and 15.2 (and by extension 3.4 and 15.4) from the analysis called for under Articles 3.1 and 15.1. This is contrary to the plain text of these provisions and ignores the way in which these provisions are mutually supportive.

II. The Panel Properly Interpreted MOFCOM’s Price Effects Analysis

12. The Panel appropriately found that MOFCOM’s “low price” findings were an important component of its pricing findings, that MOFCOM had not based these findings on “positive evidence” or performed an “objective examination” of these issues, and that China therefore breached its obligations under Articles 3.1 and 3.2 of the AD Agreement and Articles 15.1 and 15.2 of the SCM Agreement.

13. In the Final Determination, MOFCOM repeatedly linked the price depression and price

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suppression it found to exist in the market to the “low prices” of the imports under investigation.⁷

Consequently, the Panel correctly found that MOFCOM’s “low price” findings were an important component of its price effects analysis, and appropriately reviewed the sufficiency of MOFCOM’s “low price” findings under Articles 3.1 and 3.2 of the AD Agreement and 15.1 and 15.2 of the SCM Agreement.

14. Despite MOFCOM having directly linked price depression and price suppression to “low prices” in no fewer than *six* instances in the Final Determination, and having linked “low prices” to the material injury purportedly sustained by China’s domestic industry in no fewer than *five* additional instances, China asserts on appeal that, in fact, this emphasis on the “low” price of imports was not an important part of MOFCOM’s pricing findings in the Final Determination.

15. The Panel expressly considered China’s argument that MOFCOM’s price effects findings were based on considerations other than the “low prices” of dumped and subsidized imports. The Panel rejected this argument, noting that it was not consistent with MOFCOM’s repeated reliance in its Final Determination on the “low prices” of the dumped and subsidized imports. The Panel found that China had conceded that MOFCOM had relied on the existence of price undercutting,⁸ a factual finding that China has not appealed under Article 11 of the DSU. The Panel also correctly pointed out that it was not evident that MOFCOM’s “low prices” finding was such an unimportant factor in the analysis that the Panel could uphold MOFCOM’s analysis on other grounds. China’s appeal based on its challenge to these findings fails. Similarly,

⁷ See, e.g., Final Determination, CHN-16, at 58-65.

⁸ Panel Report, para. 7.530.

*** CHECK AGAINST DELIVERY ***

China's Article 11 of the DSU appeal fails since the Panel fully discharged its duty under Article 11 of the DSU by evaluating the final determination as written.

III. The Panel Did Not Require Particular Methodologies

16. China's claim that the Panel's findings under Article 3.2 of the AD Agreement and Article 15.2 of the SCM Agreement required China to use certain pricing methodologies is baseless. The United States never claimed and the Panel did not find that an investigating authority is required by Articles 3.2 and 15.2 to use specific methodologies to conduct its price effects analysis.

17. The Panel did find however that any methodology used by China must comport with the requirement to be based on positive evidence and an objective assessment under Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement. In this regard, the Panel found that certain pricing findings made by MOFCOM were not supported by "positive evidence" and did not reflect an "objective examination" in the circumstances of the investigation of grain oriented flat-rolled electrical steel ("GOES"). As the Panel reasonably found, the annual average unit values ("AUVs") relied on by MOFCOM were not the sort of "objective" and "positive" evidence that an investigating authority could use to establish whether subject imports were priced lower than domestic prices, given that the AUV's were inaccurate, imprecise, and otherwise unreliable.

IV. MOFCOM Failed to Disclose Essential Facts as Required under Articles 6.9 of the AD Agreement and 12.8 of the SCM Agreement

18. The Panel properly concluded that MOFCOM's failure to disclose the essential facts

*** CHECK AGAINST DELIVERY ***

underlying MOFCOM’s finding of “low” subject import prices was inconsistent with Article 6.9 of the AD Agreement and Article 12.8 of the SCM Agreement.⁹ These articles require investigating authorities, before a final determination is made, to “inform all interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures” and call on them to provide “[s]uch disclosure . . . in sufficient time for the parties to defend their interests.”¹⁰

19. China’s appeal here depends on its appeal concerning Articles 3.2 and 15.2, and for the reasons explained earlier and in the U.S. appellee submission, that appeal fails.

20. China also argues that, even if the Appellate Body were to find that the Panel correctly imposed an obligation to find some causal relationship between subject imports and adverse price effects, MOFCOM still met its obligation to disclose essential facts. According to China, this is because “the essential fact that MOFCOM ultimately relied upon in its Final Determination was the fact that the importers were *attempting* to charge lower prices.”¹¹ This argument simply does not accord with the language of MOFCOM’s determination or with China’s representations to the Panel. The Panel correctly recognized that MOFCOM’s “conclusion regarding the ‘low price’ of subject imports was repeatedly referenced throughout its determination” and that it “formed an essential part of the reasoning MOFCOM used to support its price suppression and price depression findings.”¹²

⁹ Panel Report, para. 7.575.

¹⁰ AD Agreement, Article 6.9; *see also* SCM Agreement, Article 12.8.

¹¹ China Appellant Submission, para. 218.

¹² Panel Report, para. 7.569.

*** CHECK AGAINST DELIVERY ***

21. In any event, the Panel properly found that MOFCOM's vague references to "low price strategies" did not constitute an adequate disclosure of essential facts to support MOFCOM's price effects finding. As the Panel explained: "[i]n order to allow the respondents to defend their interests, a summary of the essential facts supporting the finding of a low price strategy was required, rather than merely stating the conclusion that such a strategy existed."¹³ The Panel correctly recognized that Articles 6.9 and 12.8 require disclosure of "facts," and not merely conclusory assertions. Such facts indeed existed, and when China belatedly disclosed them during the Panel proceeding, the United States was able successfully to challenge the relevance of these facts to MOFCOM's price depression finding.¹⁴

22. China takes further issue with the Panel's observation that the margins of underselling over the 2006-2008 period (revealed by China for the first time in its Second Written Submission to the Panel) were essential facts that should have been disclosed. China contends that these were "never facts that 'form the basis of the decision' to impose measures."¹⁵ As noted above, MOFCOM repeatedly referred in its final determination to the "low price" of subject imports. China's current claim that "{t}he facts about prices of subject imports relative to domestic prices were never 'essential' to MOFCOM's discussion of price effects"¹⁶ is simply at odds with the language of the MOFCOM Final Determination. It is China, and not the Panel, that seeks to rewrite the MOFCOM Final Determination.

¹³ Panel Report, para. 7.573.

¹⁴ *Id.*

¹⁵ China Appellant Submission, para. 220.

¹⁶ China Appellant Submission, para. 216.

*** CHECK AGAINST DELIVERY ***

23. Nor is there any merit to China’s argument that the Panel improperly focused its analysis on the pricing policy of exporters, and that it ignored decreasing import prices and increasing import volume.¹⁷ This is just another attempt by China to rewrite MOFCOM’s decision.

V. **The Panel Properly Found that MOFCOM’s Failure to Include in its Determination Information Material to the Price Effects Analysis Violated Article 12.2.2 of the AD Agreement and Article 22.5 of the SCM Agreement**

24. Finally, with respect to the Panel’s findings regarding Article 12.2.2 of the AD Agreement and 22.5 of the SCM Agreement, China again erroneously contends that the Panel’s purported conclusions relating to Articles 3.2 and 15.2 led it to make consequent errors on these procedural claims. For the reasons explained earlier and in the U.S. appellee submission, the underlying appeal with respect to Articles 3.2 and 15.2 fails and consequently so does China’s appeal with respect to Articles 12.2.2 and 22.5.

25. China also complains that the Panel focused on the absence of any disclosure “not just about the existence of price undercutting . . . but also the specific magnitude of the price undercutting.”¹⁸ China misconstrues the Panel’s reasoning. The Panel did not fault MOFCOM for failing to disclose specific margins of underselling *per se*. Rather, the Panel referred to the existence of these margins (which China disclosed in its Second Written Submission) to illustrate that “MOFCOM had before it information on the prices of subject imports and the prices of the domestic product and undertook a comparative analysis of this information.”¹⁹ The Panel then

¹⁷ China Appellant Submission, para. 221.

¹⁸ China Appellant Submission, para. 226.

¹⁹ Panel Report, para. 7.591.

*** CHECK AGAINST DELIVERY ***

noted that “the final determination did not include any indication that a comparative analysis of prices had been performed or provide the factual information arising from the comparison.”²⁰

Indeed, MOFCOM’s Final Determination disclosed no meaningful information comparing the prices of domestically produced merchandise and the imports under investigation, or identifying how the “pricing strategies” of the importers affected the prices that they charged *vis a vis* the domestically produced merchandise.

26. China also attempts to draw attention away from MOFCOM’s failure to give public notice by pointing to the disclosure of other elements which were purportedly relevant to MOFCOM’s pricing analysis, such as the pricing policy of importers.²¹ Putting aside the purported adequacy of this disclosure, it is no substitute for disclosure of information regarding the existence of “low” import prices. The Panel correctly recognized that MOFCOM’s findings regarding the “low price” of subject imports was an essential part of MOFCOM’s reasoning and, accordingly, should have been disclosed.

27. As with the arguments regarding Articles 6.9 and 12.8, China’s contentions that the relative prices of subject imports and the domestic product were “never one of the ‘matters of fact’ that led to the imposition of final measures,”²² or that they were not considered material by MOFCOM,²³ are simply implausible in light of MOFCOM’s repeated references in its Final Determination to the “low prices” of subject imports.

²⁰ Panel Report, para. 7.591.

²¹ China Appellant Submission, para. 229.

²² China Appellant Submission, para. 230.

²³ China Appellant Submission, para. 231.

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VI. Conclusion

28. ^{In conclusion,} It is noteworthy that throughout China's Appellant Submission, China refers to the lack of specificity and detail in MOFCOM's Final Determination as though this were a positive aspect and argues that this lack of disclosure and explanation means that the Determination is shielded from a finding of inconsistency. In so doing, China attempts to turn what are significant failings of the Final Determination into virtues. However, this does not comport with China's obligations under the AD and SCM Agreements. The Panel was correct to find China in breach and China's appeal is in error.
29. Thank you. We look forward to answering your questions.

